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August 7, 1980

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ARIZONA ATTORNEY GENERAL

INTERAGENCY

Mr. J. Elliott Hibbs, Director
Arizona Department of Revenue
State Capitol - West Wing
Phoenix, Arizona 85007

RE: 180-144 (R80-179)

Dear Mr. Hibbs:

The specific question you have presented is whether the Department of Revenue may approve the refunding of taxes which have been erroneously overpaid without protest for the 1979-80 tax year by Yavapai County Class 5 property taxpayers, pursuant to A.R.S. § 11-505.

To begin with, the facts, as disclosed in correspondence between the Department of Revenue and the Yavapai County Board of Supervisors as well as in discussions with personnel in the Yavapai County Attorney's Office, reveal that an overcollection of property taxes on Class 5 properties for the 1979-80 tax year occurred. The cause of the overcollection was a misapplication by the Yavapai County authorities of the tax reduction factor authorized by Chapter 153, Laws 1979. ^{1/}

After discovery of the error, the Yavapai County Board of Supervisors initiated procedures whereby the overpaid taxes would be refunded to all affected Class 5 taxpayers, the chosen mechanism being A.R.S. § 11-505. That statute provides:

A. The board of supervisors, subject to the prior approval of the department of revenue, may authorize the county treasurer to refund to any taxpayer or his agent, any overpayments of real or personal property taxes resulting from an error in billing such taxes or any duplicate payments of real or personal property taxes provided a claim for such refund is made by the taxpayer or his agent within three years from the date of such duplicate payment or overpayment.

1. Instead of applying the reduction factor to the "assessed valuation as required under the law, the County authorities applied the factor to "adjusted assessed valuation", which latter valuation is defined as the assessed valuation divided by 1.15. See, Laws 1979, Ch. 153, § 6. The result of this misapplication was that each Class 5 taxpayer's tax reduction was 15% less than it should have been.

B. The treasurer shall be entitled to credit for such refunds in the next accounting after such repayment with each of the political subdivisions and the state to which such overpayment or duplicate payment may have been transmitted in the event he had previously transmitted such overpayment or duplicate payment or payments to any of the political subdivisions of the state or to the state.

This statute authorizes refunds where the Board of Supervisors and Department of Revenue agree that there has been an overpayment resulting from "... an error in billing such taxes ...", if a claim for refund is made within three years of the overpayment.

While we think the situation at hand may properly be considered an error in billing, we note that A.R.S. § 11-506 may also be deemed applicable. That statute provides:

If all, or a part of a property tax has been paid on an erroneous assessment after such assessment is verified by the property and special tax division of the department of revenue, the county board of supervisors shall direct the county treasurer to grant a refund to the taxpayer, to the extent of the tax paid pursuant to such erroneous assessment after correcting the tax roll, provided the taxpayer submits a claim therefor to the county treasurer within three years after the payment of such tax. Such claim shall be processed in the same manner and subject to the provisions as provided in § 11-505.

If, indeed, the overpayment constitutes one made upon an "... erroneous assessment ...," this statute is the appropriate vehicle. In this regard, since the valuation, levy and assessment functions are interrelated steps intended by the Legislature to culminate in the payment of the correct amount of tax -- no more and no less -- by any particular taxpayer, the application of A.R.S. § 11-506, treating the misapplication of the reduction factor as an erroneous assessment, is also reasonable.

However, regardless of whether the overpayment is considered to be due to a billing error or mistaken assessment, we think that both A.R.S. §§ 11-505 and 11-506 are remedial in nature ^{2/} and that the Legislature intended to provide a mechanism whereby taxes which the county, the state, and the taxpayer all agree were erroneously collected, can be refunded.

2. We note that A.R.S. § 11-505 is permissive, whereas A.R.S. § 11-506 mandates a refund.

The fact that the taxes in question were not paid under protest may create a general objection to their refund, the broad rule being that taxes not paid under protest, even where illegally assessed, cannot be recovered. See, e.g., Glendale Union High School District v. Peoria School District No. 11, 55 Ariz. 151, 99 P.2d 482 (1940); Maricopa County v. Arizona Citrus Land Co., 55 Ariz. 234, 100 P.2d 587 (1940).

An examination, however, of A.R.S. §§ 11-505 and 11-506, as well as A.R.S. § 42-405, ^{3/} reveals no statutory requirement of payment of the taxes under protest as a condition precedent to entitlement to a refund, particularly where the taxing authority agrees that a refund is appropriate. See Ariz. Atty. Gen. Op. 174-20.

In point of fact, both A.R.S. §§ 11-505 and 11-506 contemplate refunds in fact situations where usually, if not invariably, the taxpayer will have no reason to believe that his tax bill or the assessment is irregular in the first place. Where there is no reason to suspect that the tax bill or the assessment is in error, if either A.R.S. § 11-505 or § 11-506 is construed as requiring payment under protest first, the legislative objective will not only be thwarted, but potential questions of constitutional proportions, including due process and equal protection considerations, might well be generated. To require payment under protest as a condition precedent to the operation of these statutes would also be plainly counterproductive as it would encourage all taxpayers to always pay their taxes under protest upon the contingency that at some future date, an error or irregularity in the billing or assessment process would be discovered. Surely the Legislature could not have intended this.

Accordingly, we perceive of no problem in the Department of Revenue approving the proposed refund, on the authority of either A.R.S. § 11-505 or § 11-506.

Sincerely,



BOB CORBIN
Attorney General

BC/pc

3. A.R.S. § 42-405 authorizes the correction of omissions, errors or defects in the assessment role by the county assessor or county treasurer with prior approval by the Department of Revenue or the County Board of Supervisors.