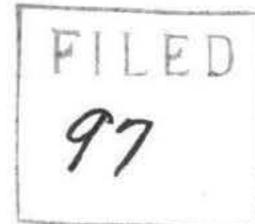


TAXATION: It is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of Sections 1, 2 and 3 of Senate Bill No. 39, 75th General Assembly, (Section 139.031, V.A.M.S.) and the county court is not empowered to take administrative action authorizing the collector to refund such taxes. Section 4 of Senate Bill No. 39 authorizes refund by the collector of any real or tangible personal property tax mistakenly or erroneously paid.

February 10, 1970

OPINION NO. 97

Honorable Urban C. Bergbauer, Jr.
Prosecuting Attorney
Iron County Court House
Ironton, Missouri 63650



Dear Mr. Bergbauer:

This official opinion is rendered in response to the request contained in your recent letter relative to Senate Bill No. 39, 75th General Assembly.

The question raised by your letter is as follows:

"Is it mandatory under Section 139.031, Vernon's Annotated Missouri Statutes, that the taxpayer file his petition for the recovery of the amount protested in the Circuit Court when it is agreed by the Collector and other county officials that the rate of levy certified by the school district should be reduced or may the County Court take administrative action to authorize the Collector to refund such taxes that were paid under protest?"

Section 139.031, V.A.M.S. is contained in Senate Bill No. 39, 75th General Assembly and adds to Chapter 139 of the Revised Statutes of Missouri relating to "Payment and Collection of Current Taxes" a new section authorizing the payment of taxes under protest and providing certain new procedures for the recovery of taxes.

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The language of the new law pertinent to the present inquiry is as follows:

"Section 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the Director of Revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based, and shall further cite any law, statute, or facts on which he relies in protesting the whole or any part of such taxes.

"Section 2. The collector shall disburse to the proper official all portions of taxes not so protested, and he shall impound in a separate fund all portions of such taxes which are so protested. Every taxpayer protesting the payment of taxes, within ninety days after filing his protest, shall commence an action against the collector by filing a petition for the recovery of the amount protested in the Circuit Court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the Circuit Court for the recovery of the taxes protested within the time herein prescribed, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, as hereinabove provided." (Emphasis supplied).

"Section 3. Trial of the action in the Circuit Court shall be in the manner prescribed for non-jury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest or to authorize the collector to release and disburse all or any part of the impounded taxes. Either party to the proceedings may appeal the determination of the Circuit Court.

"Section 4. All county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The County Court, or other appropriate body or official,

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shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise."

Although the language of this law is ambiguous, it is apparent that provision is made for two separate tax recovery procedures, one relating to errors in payment covered by Section 4, and the other relating to illegality on grounds other than mistake or error in payment set forth in Sections 1, 2 and 3. This is borne out by the language used. Section 1 refers to "any taxes assessed" and allows a taxpayer to contest the tax if the statutory procedures are followed. However, Section 4 refers to tax "mistakenly or erroneously paid" and provides a different procedure for recovering taxes in this category.

The legislature has recognized the fact that while a tax may be legally assessed, errors or mistakes in payment will and do occur as, for example, double payment of the same tax. In these cases it was considered unnecessary to resort to litigation where the error is acknowledged by the tax collecting officials. Thus, Section 4 authorizes a refund of taxes in this category by administrative determination. The fact that the authors of this Bill were mindful of this is illustrated by the language of Section 4 of Senate Bill No. 39 as originally introduced and before amendment. In pertinent part the original bill stated:

"Section 4. Any collector of taxes who collects any tax from a taxpayer who previously had paid the same tax to the collector shall refund the duplicate payment * * * "

It is our view that these sections are mutually exclusive. If this were not the case, the provisions relating to payment under protest, impounding of funds and determination by litigation in court would be meaningless.

Therefore, if the case involves taxes objected to for reasons other than error or mistake in payment, it is governed by Sections 1, 2 and 3 of the Bill. According to these, the collector "shall" impound in a separate fund all taxes paid under protest. Also, every taxpayer protesting the payment of taxes, within ninety days after filing his protest, "shall" commence an action against the collector by filing a petition in the circuit court. The funds so impounded are to be held until an appropriate order of the circuit court has been entered which (1), directs a refund of all or part of such money to the taxpayer, or (2), authorizes the collector to release and disburse such money to the appropriate taxing authority. In the event no legal action is begun within ninety days after filing the protest, the collector shall disburse the impounded money to the proper official.

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The statute does not provide any administrative procedure for refunding tax money impounded in the separate fund as required by Section 2 of the Bill. Furthermore, we find no other law of this State granting such authority to collectors or other county officials.

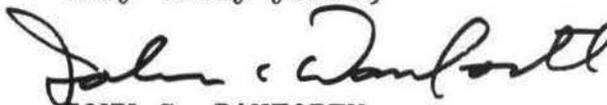
The language employed by the legislature in Section 2 of Senate Bill No. 39 clearly indicates it was the intent of that body to make the impounding of tax money and the filing of suit in the circuit court to enforce refund mandatory. The word "shall" is exclusively used in reference to these procedures. The courts of this State have uniformly held that statutes which use the word "shall" and set forth the results from a failure to comply, are mandatory statutes. State ex rel. Taylor v. Wade, 231 S.W.2d 179 (S.Ct.1959); State ex rel. Stevens v. Wurdeman, 246 S.W.189, 295 Mo.566.

CONCLUSION

Therefore, it is the opinion of this office that it is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of Sections 1, 2 and 3 of Senate Bill No. 39, 75th General Assembly, (Section 139.031, V.A.M.S.) and the county court is not empowered to take administrative action authorizing the collector to refund such taxes. Section 4 of Senate Bill No. 39 authorizes refund by the collector of any real or tangible personal property tax mistakenly or erroneously paid.

The foregoing opinion which I hereby approve was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General