

OPINION
65-335

December 17, 1965 (OPINION)

Mr. Lloyd Omdahl

Tax Commissioner

RE: Taxation - Abatement and Refund Application - Filing

This is in reply to your request of an opinion on the following questions:

1. When a property taxpayer pays a property tax to the county treasurer on locally assessed property and then applies for an abatement and refund of the taxes on any of the grounds specified in section 57-23-04, does the board of county commissioners have authority to act upon the application if it was not filed with the county auditor pursuant to section 57-23-05 until after November first of the year in which the taxes would have become delinquent if they had not been paid?

2. Referring further to question No. 1, does it make any difference whether the taxes were voluntarily paid or paid under written protest pursuant to section 57-20-20?"

You also state that for purposes of answering the foregoing questions it is to be assumed that the grounds for abatement and refund are based on the provisions of section 57-23-04 of the North Dakota Century Code.

In providing some background to the provisions of section 57-23-04, you illustrate that said section was copied from a similar South Dakota statute by this state in *Security National Bank v. Twinde*, 52 S.D. 352, 217 N.W. 542, held that a refund could be made only if the taxes were paid under written protest, unless the claim for refund was under section 6813, which is the statute which was adopted by North Dakota and is now section 57-23-04 of the North Dakota Century Code. It should be noted that the decision merely ruled on the question whether or not a written protest was a prerequisite to a successful claim for abatement and refund. The Court did not rule on the question whether or not application had to be filed within a certain time.

As to your first question, it is noted that section 57-23-03 was adopted in 1943, some considerable time after the enactment of section 57-23-04, although a similar provision was initially enacted in 1931 by Chapter 276(1)(7) which was repealed by Chapter 269 of the 1941 Session Laws. It became a substantial part of our laws pertaining to abatement and refund of taxes. This section now provides as follows:

57-23-03. ABATEMENT OF INVALID, INEQUITABLE, OR UNJUST

ASSESSMENTS. When the board of county commissioners is satisfied beyond a doubt that the assessment of real or personal property described in an application for abatement is invalid, inequitable, or unjust, the board, if application is filed on or before the first day of November in the year in which such taxes become delinquent may abate any part thereof in excess of a just, fair, and equitable assessment if such application for correction complies with requirements of this chapter. Any person aggrieved by any decision of said board of county commissioners may appeal to the district court in the manner provided by law.

An application for refund of taxes paid with respect to any part of an assessment abated under this section shall be granted regardless of whether or not such taxes were paid under protest, oral or written." (Underscoring ours.)

The portion double underscored initially read, "* * * *complies with requirements of chapter 276 of the 1931 Session Laws." This is sufficient indication that the Legislature intended for said section to apply to the provisions of Chapter 276 of the 1931 Session Laws. Chapter 276 of the 1931 Session Laws, of course, is the source from which the present law exists and is section 57-23-04 of the North Dakota Century Code.

The North Dakota Supreme Court in *Vetter v. Benson*, 81 N.W.2d. 758, held that section 57-23-03 is a statute of limitation with which an applicant for abatement of taxes must comply. The mere fact that section 57-23-03 concerns itself primarily with abatement of taxes and does not specifically mention refunds is not adequate grounds for concluding that said section does not apply to refunds. The process involved in securing a refund necessarily first involves the process of abatement. Thus in order to effect a refund, a successful abatement must first be accomplished. If the application for abatement is barred by statute, it necessarily follows that a refund is also barred.

The decision of the North Dakota Supreme Court was reaffirmed in *Rice v. Board of County Commissioners of Benson County*, 135 N.W.2d. 597. Significantly, the question in the *Rice* case involved a question whether or not the property should have been taxed and came squarely within the provisions of section 57-23-04. The Court held that the provisions of section 57-23-03 applied. It should also be noted that section 57-23-03 as now existing was adopted sometime after the provisions of section 57-23-04 had been enacted. The subject matter of section 57-23-03 pertains to the subject matter contained in section 57-23-04. These sections are clearly *para materia*.

It is also noted that section 57-23-04 in the opening paragraph contains the following: "* * * * "upon application, as in this chapter provided the board of county commissioners * * * *." (Underscoring ours.) This language coupled with the language of section 57-23-03, which now uses the term "complies with requirements of this chapter" strongly indicates that these two sections are to be construed together and support each other.

In direct response to your first question, it is our opinion that the

Board of County Commissioners have authority to act upon an application involving the abatement and refund of taxes under the provisions of section 57-23-04 if said application is filed within the time specified in section 57-23-03. Said application must be in conformity with the provisions of section 57-23-05, but before it may be heard before the county commissioners it must have been filed before the first day of November in the year which such taxes become delinquent, as provided for in section 57-23-03.

As to your second question, it is observed that neither section 57-23-03, 57-23-04 or 57-23-05 as appearing in the permanent portion of the North Dakota Century Code (1960) required as a prerequisite that taxes be paid under protest before an application could be filed. However, in 1963 the Legislature by Chapter 375 amended section 57-23-03 by including the following language: "An application for refund of taxes paid with respect to any part of an assessment abated under this section shall be granted only if such taxes were paid under protest as provided by section 57-20-20 and by compliance with the other provisions of that section." This was the law when the North Dakota Supreme Court decided the case of Rice v. Board of County Commissioners of Benson County, supra. The specific reference to section 57-20-20 clearly indicates that the Legislature intended section 57-23-03 to apply not only in a technical sense to abatement of taxes but also to refund of taxes paid. Significantly, the Legislature in 1965 by Chapter 398 again amended section 57-23-03 to provide as follows: "An application for refund to taxes paid with respect to any part of an assessment abated under this section shall be granted regardless of whether or not such taxes were paid under protest, oral or written." This language again clearly illustrates that the provisions of section 57-23-03 applies to both abatement and refund of taxes paid.

In response to your second question, it is our opinion that it is not necessary that taxes be paid under protest as provided for in section 57-20-20 before application for abatement and refund can be made. This, however, does not mean that the provisions of section 57-20-20 are vitiated or negated; the provisions of said section are still operative for basis of seeking relief on other grounds not mentioned in Chapter 57-23, particularly for the purpose of eliminating any penalty or interest that might occur if the taxes were not paid.

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