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Taxation -- Refunds -- Limitations Of Actions

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eventually destroy the whole minimum price structure. And, since the Fair Trade Act applies solely to commodities "in free and open competition with commodities of the same general class,"[19] selling the product to the retailer only on condition that he sign a minimum price contract would be equally ineffective. He could simply refuse and buy the same product from a rival producer. Neither could all producers combine together to force minimum price contracts on the retailers, for this would constitute a "horizontal" agreement in restraint of trade and would subject them to the penalties of the anti-trust laws.[20] And, as a matter of fact, the Florida Supreme Court has indicated, without ever having had occasion to decide the question, that it might consider even *voluntary* fair trade agreements invalid, as representing a denial of the principle that "all shall stand equal before the law."[21]

Assuredly therefore, with such a solid array of judicial precedent and opinion mitigating against it, the Florida Fair Trade Act is, for all practical purposes, no longer of any effect in this state.

David Edward Emanuel.

TAXATION—REFUNDS—LIMITATIONS OF ACTIONS

Plaintiff brought an original mandamus proceeding to recover use taxes paid under a Florida statute[1] which subsequently was judicially determined to be unconstitutional.[2] Plaintiff bases his right to recovery on another statute[3] which authorizes the comptroller to make such a refund ". . . if the claim be filed within one year after the right to such refund shall have accrued . . . ." This action was begun less than one year after the original statute was declared unconstitutional, and more than two years after the last payment of the tax. *Held*, that the right to refund accrued at time of payment of taxes, not at the time the statute was determined to be invalid; and the refund claim, not having been filed within one year from such accrual, was barred. *State* ex rel. *Victor Chemical Works v. Gay, Comptroller*, 74 So.2d 560 (Fla. 1954).

One of the most controversial subjects in the field of taxation is that of tax refunds. About the only point upon which most courts agree is that there can be no recovery for illegal taxes voluntarily paid, in the

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19. FLA. STAT., § 541.03(1) (1953).
20. Jayne v. Loder, 149 Fed. 21 (3rd Cir. 1906).
21. Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371, 376 (Fla. 1949) (Concurring opinion by Barns, J.).
1. FLA. LAWS 1949, c. 26319.
2. Thompson v. Intercounty Tel. & Tel. Co., 62 So.2d 16 (Fla. 1952).
3. FLA. STAT. § 215.26 (1943).

absence of state authorization through a valid[4] statute.[5] The right to refund is so dependent upon the authorizing statute, that, if the statute is repealed while refund actions are pending, the actions are terminated and the right to recovery no longer exists.[6] The general rule with regard to taxes paid under an unconstitutional statute is that the payment is voluntary,[7] and the taxpayer is precluded from recovery in the absence of an authorizing refund statute.[8]

Since statutory authorization is an integral part of the right to a refund, the right granted thereunder must be exercised in the manner provided by the statute,[9] and when the statute conditions the right on the bringing of an action within a certain time from the date of payment, the court can not entertain an action brought after that time.[10] When no time limit is specified in the refund statute, the statute of limitations generally runs from the time the taxes are paid, and is not postponed until the legality of the tax has been judicially determined,[11] or until the taxpayer discovers that the assessment, levy or collection is illegal.[12]

In the event of uncertainty in the terms of a statute concerning tax refunds, some courts hold that such statutes are remedial and must be liberally construed;[13] whereas others hold that such statutes are in derogation of the common law and must be strictly construed.[14] In the case of *Bonwit Teller and Co. v. United States*,[15] the United States Supreme Court said that a statute permitting recovery of an overpayment of taxes should be liberally construed in favor of the taxpayer to give the relief the statute was intended to provide. The rule of construction of tax statutes in Florida is aptly stated in *Walgreen Drug Stores v. Lee*[16] which related that it is a "well settled rule of tax statute construction that, if the text of the act does not reveal with certainty the intent of the Legislature and it is susceptible of two meanings, that meaning most favorable to the taxpayers should be adopted."

The majority of the court in the instant case considered the question of accrual as unambiguous, and therefore saw no necessity for further

4. People *ex rel.* City of Highland Park v. McKibben, 380 Ill. 447, 44 N.E.2d 449 (1942).
5. Curry v. Johnston, 242 Ala. 319, 6 So.2d 397 (1942); Mississippi Cent. R.R. Co. v. City of Hattiesburg, 163 Miss. 311, 141 So. 897 (1932); Piedmont Memorial Hospital v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).
6. Southern Service Co. v. Los Angeles County, 15 Cal. 2d 1, 97 P.2d 963 (1940).
7. Richardson Lubricating Co. v. Kinney, 337 Ill. 122, 168 N.E. 886 (1929).
8. Chesebrough v. United States, 192 U.S. 253 (1904); Carr v. Memphis, 22 F.2d 678 (6th Cir. 1927); Standard Oil Co. v. Bollinger, 337 Ill. 353, 169 N.E. 236 (1930).
9. *Re* Morris Blatt *et al.*, 41 N.M. 269, 67 P.2d 293 (1937).
10. *Ibid.*
11. Leslie v. City of Dallas, 172 S.W.2d 777 (Tex. Civ. App. 1942).
12. Covington v. Voskotter, 80 Ky. 219 (1882); Leslie v. City of Dallas, 172 S.W.2d 777 (Tex. Civ. App. 1942).
13. San Joaquin Ginning Co. v. McColgan, 20 Cal. 2d 254, 125 P.2d 36 (1942).
14. Arrot v. Allegheny County, 328 Pa. 293, 194 Atl. 910 (1937).
15. 283 U.S. 258 (1931).
16. 158 Fla. 260, 28 So.2d 535 (1946).

investigation into legislative intent. The dissent, on the other hand, considered the statute too indefinite and reached its conclusion strictly on the basis of construction of an ambiguous tax statute. The majority relied heavily on the case of *State* ex rel. *Tampa Electric Co. v. Gay*[17] in which the facts were similar to those of the instant case. There the court held that the taxpayer's rights were barred by the time limitation set forth in the same statute with which we are here concerned. The dissent in the instant case dismisses the *Tampa Electric* case by pointing out that in that decision the right of the taxpayer grew out of the judicial construction of a valid statute, and not from the determination that the taxing statute was unconstitutional. The dissent relies upon *Walgreen Drug Store Co. v. Lee*[18] and what it considers the obvious intent of the lawmaking body.

It appears that the taxpayer was dealt with rather harshly in the instant case. It does not seem logical that the legislature, having envisaged a situation such as this, would have intended the right to refund to accrue as of the date of payment, but rather when the statute was declared unconstitutional. Plaintiff paid the tax willingly, and thus could not bring an action for a refund until he was given statutory authorization, unless he brought an action to attack the constitutionality of the statute. Is this not a harsh requirement to be imposed upon any law-abiding citizen?

Herbert Jay Cohen.

TORT—INVASION OF RIGHT TO PRIVACY—TELEPHONE MONITORING

Plaintiff subscriber sought to recover damages for alleged invasion of her privacy resulting from the monitoring of her private telephone conversations by the defendant telephone company who suspected plaintiff was using such telephone for business purposes. *Held*, that no invasion of privacy resulted since plaintiff suffered no damages, secrecy had been maintained and there had been no publication except to her. *Schmukler v. Ohio Bell Telephone Co.*, 116 N.E. 2d 819 (Ohio 1953).

The recognition of the personal right to privacy is comparatively new in the law of torts,[1] and is not a subject covered by any of the old commentators of the law. Relief in early cases was always based on established theories of breach of confidence or trust,[2] breach of contract,[3]

17. 40 So.2d 225 (Fla. 1949).
18. See note 16, *supra*.

1. 4 Harv. L. Rev. 193 (1890). The doctrine of the law of privacy, as such, was first advanced in this country in an article written by Louis D. Brandeis and Samuel D. Warren. This was the first United States comment advancing that we ought to recognize it as a personal right and not one of property only.

2. Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (which led to enactment of a statutory right of privacy).

3. Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918).