STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calender years

1965 - 1966

sunken logs from Great Ponds and streams.

QUESTION:

To whom do sunken logs in Great Ponds and streams belong?

ANSWER:

See opinion.

OPINION:

The law of lost goods is applicable to sunken logs. The law in Maine, as stated in *Lawrence v. Buck,* 62 Maine 275, is that lost goods, as against all persons but the original owner and those deriving title under him, belong to the first finder who does such acts as indicate an intention to take possession of them. The owner of the land upon which the lost goods are found does not have title to them.

The provisions of 33 M.R.S.A. 1051, also seem applicable. This statute provides that whoever finds lost goods of a value of $3.00 or more shall, if the owner is unknown, within 7 days give notice thereof to the clerk of the town where the goods were found, and that if the value is $10.00 or more, the finder must, in addition, publish notice thereof in a newspaper.

While the chapter heading of 38 M.R.S.A. 971 is entitled "Floating Timber", such a heading is not to be considered as affecting the meaning of the law itself. This section provides that whoever takes, without the consent of the owner, any log suitable to be sawed, *lying in* any river or pond, forfeits for every such log $20.00, one-half for the State and one-half for the complainant. I have underscored the words "lying in", since a court could interpret them to refer to logs lying on the bottom of a pond or stream.

The conclusion then is that, subject to the statutory restrictions above mentioned, the person who salvages sunken logs would own them as against all but the original owner and those deriving title under him.

LEON V. WALKER, JR.
Assistant Attorney General

June 1, 1965
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Sales Tax Credit for Price Adjustments on Purchases of Electrical Equipment

FACTS:

Because of the threat of or existence of anti-trust litigation, some Maine public utilities have received monies as a result of price adjustments made by certain of their suppliers.

The utilities have received payments aggregating approximately $75,000 over a one-year period. The adjustments represent purchases during the period 1956 through 1960; in other words, purchases made from five to nine years ago. Requests have been

made by the utilities for sales tax credits or refunds based on such adjustments. The requests are made under the provisions of Title 36 M.R.S.A. § 2011.

ISSUES:

1. Can a refund be allowed at this date because of overpayment of sales tax with respect to transactions occurring more than two years ago, where the taxpayer within the past two years has received price adjustments on prior transactions.

2. Where an audit has been made and an assessment covering the period has become final under the law, can a taxpayer be allowed a refund for an overpayment occurring within the audit period if the request, is seasonable under section 2011, and if the taxpayer can show that he was not aware of the overpayment until after the assessment had become final.

LAW:

> "Upon written application by the taxpayer, if the tax assessor determines that any tax, interest or penalty has been paid more than once, or has been erroneously or illegally collected or computed, the tax assessor shall certify to the State Controller the amount collected in excess of the amount that was legally due, of whom it was collected or by whom paid and the same shall be credited by the tax assessor on any taxes then due from the retailer under this chapter, and the balance shall be refunded to the retailer or user, for his successors, administrators, executors or assigns, but no credit or refund shall be allowed after two years from the date of overpayment unless written petition therefore, setting forth the grounds upon which the refund is claimed, shall have been filed with the tax assessor within that period. The tax assessor shall also have the right to cancel or abate any tax which has been illegally levied. Nothing shall authorize the taxpayer or anyone in his behalf, to apply for a refund of any amount assessed if the assessment has become final as provided in section 1957 . . ." Title 36 M.R.S.A. § 2011.

REASONS:

Question No. 1.

Generally speaking, taxes which have been illegally assessed and voluntarily paid cannot be recovered after payment. See Creamer v. Breman, 91 Me. 508 and Drummond et al. v. Maine Employment Security Commission, 157 Me. 404.

However, the State has the power to authorize a refund of taxes paid. This authorization must find its birth in a valid statute. *Although the Legislature has no power to compel the refund of taxes legally collected, it may prescribe the limitations and conditions on which a refund may be had.* See Drummond et al. v. Maine Employment Security Commission, supra.

It is also clear that a taxpayer seeking a refund must bring himself within the provisions of the refund statute; see Drummond et al. v. Maine Employment Security Commission and 51 Am. Jur. Taxation § 1179. The statutory provision would require that an "overpayment" be made and that the refund application be submitted within two years from the date of "overpayment."

We must first define the word overpayment.

The United States Supreme Court in the case of Jones v. Liberty Glass Company, 332

U.S. 524, has stated that the word overpayment means any payment in excess of that which was properly due. It is further indicated that such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law and that the error may be committed by the taxpayer or by the revenue agents. This decision also states that whatever the reason, payment of more than is rightfully due is what characterizes an overpayment. See also 5th Third Union Trust Co. v. Glander (Ohio 1946) 68 N.E. 2d 394. Ohio Bell Telephone v. Evatt, 51 N.E. 2d 718 and Stiner v. Nelson, 309 F. 2d 19.

Because of the conclusion reached herein it is not necessary to conside the question of whether the factual situation did in fact involve *overpayment* of tax since if the requests were not seasonable the question is moot. Therefore, it is assumed that an overpayment was made.

The particular question here is when did the overpayment occur?

The facts indicate that the actual payment of the tax took place beyond the two-year period of limitations.

The further question that presents itself is whether the statute begins to run from the date of payment of the tax or the date when the taxpayer ascertained that there was an overpayment.

The general rule is stated as follows:

> "The time allowed for bringing the action is generally fixed by statute . . . As the cause of action accrues from the time of payment, the statute of limitations begins to run from that time, even though the illegality may not then have been known." The Law of Taxation, Cooley, § 1304 (see cases cited).

Some states, for example Ohio, provide that a refund petition must be filed within a certain date from the date it was ascertained that the assessment or payment was illegal or erroneous. The Ohio Supreme Court in the case of Phoenix Amusement Company v. Glander (Ohio 1947), 76 N.E. 2d 605, has held that this language means actual knowledge obtained by the vendor or taxpayer of such illegality or error.

The Maine Legislature has not spoken, as has the legislature of Ohio in indicating that knowledge was a prerequisite to the running of the statute of limitations. The Maine statute only requires that a petition for refund be made within two years from the date of overpayment. Too, the general rule indicates that knowledge is not a factor in the consideration of the application of the statute.

There are no Maine cases strictly in point on this question although the case of Tantish v. Szendy, 158 Me. 228 is helpful in explaining the rationale for and the interpretation of such a statute.

The court said in that case that the Maine Legislature had, over the years, established different periods of limitation in different types of cases. It explained the reasons therefor in the following language:

> "The statutes noted illustrate the concern of the legislature for appropriate limitations upon access to the courts."

This case was concerned with a malpractice action which was required to be brought: ". . . within two years after the cause of action accrues."

The Maine court held that the cause of action accrued when a wrongful action was committed and not when the damage was discovered or reasonably should have been discovered.

Considering the rationale of our court in interpreting a similar statute in the Tantish case, we must conclude that since there was no legislative expression of a requirement of knowledge in the statute under consideration, the two-year limitation commences to run at the actual time of payment of the tax rather than at the time when the taxpayer

determined that it was overpaid. This conclusion also finds support in the general rule stated herein.

Question No. 2.

It is clear that under the statute that this question must be answered in the negative.

Under normal circumstances, i.e., when no assessment of the tax has been made which has become final, the taxpayer has two years from the date of overpayment to apply for a refund.

However, if an assessment has been made within the two-year period covering in part an alleged overpayment and the assessment has become final the taxpayer cannot utilize the provisions of section 2011.

The legislature has taken such a situation out of the operation of the two-year period of limitation by providing as follows:

> "Nothing shall authorize the taxpayer, or anyone in his behalf, to apply for a refund of any amount assessed when the assessment has become final as provided in section 1957." Title 36 M.R.S.A. § 2011.

In other words, if an assessment has been made and has become final the two-year statute does not apply; if no assessment of the tax in question has been made and the taxpayer has voluntarily reported and paid it, the two-year period applies and commences to run from the date of payment of the tax.

It is possible that a further question could arise, if for example, the taxpayer paid the tax initially after it was required to be due – the question being should the two-year period begin to run from the time the tax was actually due or when it was paid. However, since the facts here do not indicate such a question, it is not answered.

JON R. DOYLE
Assistant Attorney General

June 9, 1965
Education

Keith L. Crockett, Secretary-Treasurer
Maine School Building Authority

Grants for Water Pollution Control on M.S.B.A. Property.

FACTS:

With the assistance of the Maine School Building Authority, the Town of Windham has recently completed the construction of a new high school. *20 M.R.S.A. § 3501-3517.* The Windham town officials filed an application with the Federal Government seeking a Federal grant to help defray the cost of a sewage disposal plant for the project. Federal funds were forwarded directly to the town officials, and evidently set aside by them to help defray the cost of the first lease payment due the Authority. Federal auditors are now questioning the legality of the Town's application for the grant inasmuch as the land and buildings are owned by the Authority. The auditors contend that the Authority should have been the applicant; should have received the funds; and should have made them a part of the total funds for the project.

QUESTIONS:

Your memorandum poses four questions: