

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

QUESTION:

Must the municipality comply with the provisions of Me. Rev. Stat. Ann., Tit. 12, §§ 4701-4709 (Supp. 1967)?

ANSWER:

Yes. Sections 4701-4709 apply in terms to municipalities. The municipality in question will have to receive clearance from the Wetlands Control Board and from the officers of the municipality where the proposed drainage will take place prior to actual operation.

ROBERT G. FULLER, JR.
Assistant Attorney General

March 14, 1968
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Allowances to Retail Gasoline Dealers for Shrinkage Losses

FACTS:

The State Tax Assessor has received refund applications for shrinkage or loss by evaporation, in good order, from two retail gasoline dealers who presently owe the State of Maine sums as licensed dealers under the Use Fuel Act. In one case, the dealer owes both tax and penalties, the total amount exceeding the amount of the refund claim; in the other case, the dealer owes penalties only in an amount less than the refund claim.

There is no general statutory provision permitting off-setting amounts due the State from refunds.

QUESTION:

May the State Tax Assessor apply the amount of refund to which the applicant would otherwise be entitled, to the amount of tax and/or penalty due the State by the applicant, before paying the balance, if any, to the applicant?

LAW:

. . . any retail dealer shall be entitled to a refund for tax paid on account of shrinkage or loss by evaporation of motor fuel. The procedure for such refund shall be as follows:

The conditions of subsections 1 to 3 having been fully complied with, the Tax Assessor shall calculate the amount of the refund due on such application and shall certify such amount and the name of the person entitled to the refund to the Treasurer of State. The Treasurer of State shall thereupon make such certified refund from said road taxes." Title 36 M.R.S.A. § 2906.

ANSWER:

No.

REASON:

The above applicants are licensed as Use Fuel Dealers. They have submitted reports stating the number of gallons of fuel received, sold, and used in the State by them during the preceding calendar months on forms furnished by the State Tax Assessor as directed by Title 36 M.R.S.A. § 3035. Thus, the respective amounts of Use Fuel Tax owed are liquidated. The refunds owed to these retail gasoline dealers are also liquidated.

Since we are dealing with liquidated amounts, one due and one payable, we must determine whether or not the State of Maine could set-off or counterclaim the use fuel taxes due against the refund due.

Generally, neither the State nor the debtor-taxpayer may set-off amounts owed against those due.

“Taxes are not the subject of set-off either on behalf of the State or municipality for which they are imposed, or of the collector, or on behalf of the person taxed, as against such State, municipality or collector.” *Cooley on Taxation*, 45th Ed., Section 22. (See also 80 C.J.S. *Set-Off and Counterclaim* § 47).

Nevertheless, set-off is often specifically permitted by statute:

“In an action for taxes, set-off of an indebtedness of the State or municipality to the tax debtor will not be allowed, the statutes of set-off being construed in the light of public policy as not allowing the remedy in proceeding for this purpose unless expressly authorized. . . However, a set-off against taxes may be allowed by statute, in the absence of a constitutional prohibition. . . ” 80 C.J.S. *Set-Off and Counterclaim*, Section 20.

One should note that counterclaims for unpaid taxes are specifically authorized to cities and towns by Title 14 M.R.S.A. § 5901. However, as regards the issue presented here, the State has been given no specific or general statutory right to set-off the amount of tax owed to the State.

The case of *Drummond, et al vs. Maine Employment Security Commission*, 157 Me. 404, 410, although not on point, does indicate that refund provisions are strictly construed by courts: “The results arrived at in this opinion are predicated on the established law in this State that taxes voluntarily paid cannot be refunded unless the statute so provides.”

The Court quotes from 84 C.J.S., *Taxation*, § 632a(1):

“. . . In the absence of statutory authority, no executive or administrative officer or board has power to refund taxes; and, if the power, is given to him or it by law, it must be strictly followed.”

In view of the above, the refund must be paid, if otherwise in conformity with the statutory provisions. The amounts due from the taxpayer should be enforced through the customary procedure.

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Assistant Attorney General