

# MAINE STATE LEGISLATURE

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Taxation Pollution Control Facilities

36 M.R.S.A. 2011

36 M.R.S.A. 1760

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To: Thomas S. Squiers, Director  
State Tax Division

From: Stephen C. Clarkin, Assistant Attorney General  
Bureau of Taxation

Subject: Sales and Use Tax Refunds for Pollution  
Control Facilities; Period of Limitations

FACTS:

In your opinion request, you have described a problem which exists with respect to applications for refund of sales and use taxes paid for materials used in the construction of pollution control facilities which are exempt under 36 M.R.S.A. Sec. 1760. Pursuant to that section, no exemption is recognized until such time as the pollution control facility is certified as such by the Board of Environmental Protection. Normally, certification is not obtained until some time after construction has begun and, in many instances, it is not obtained until construction has been completed or nearly completed. Prior to certification, therefore, all purchases of material for use in the construction of the facility are subject to tax.

Ordinarily, a taxpayer may apply for a refund of any taxes paid prior to certification. The Sales and Use Tax Law, however, prohibits the allowance of any refund after two years ". . . from the date of overpayment . . ." 36 M.R.S.A. Sec. 2011 This two year period may well elapse between the time the taxes are paid and the time the Board certifies the facility. The taxpayer, therefore, may find that he is foreclosed from seeking a refund of taxes paid for materials used in the construction of an exempt facility.

QUESTION PRESENTED:

Whether the overpayment referred to in Section 2011 occurs at the time the taxes are paid or at the time of certification.

ANSWER:

The overpayment referred to in Section 2011 occurs at the time of certification.

REASONING:

36 M.R.S.A. Sec. 2011 provides, in pertinent part, as follows:

Sec. 2011 Overpayment; refunds

"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 what was legally due [for credit or refund] but no such credit or refund shall be allowed after 2 years from the date of overpayment unless written petition therefor . . . shall have been filed with the State Tax Assessor within that period."

From an examination of the statute as a whole, it appears that the word "overpayment" derives meaning from its context. As a prerequisite to the allowance of a refund, the State Tax Assessor must determine that the statutory criteria have been satisfied, i.e., that the tax has been ". . . paid more than once, or has been erroneously or illegally collected or computed . . ." Where these criteria are satisfied, an overpayment has been made. Conversely, no "overpayment" exists where these criteria are not satisfied.

The significance of this interrelationship for purposes of resolving the present question is evident. Prior to the certification of a pollution control facility by the Board of Environmental Protection, the payment or collection of tax for material used in its construction is neither "erroneous" nor "illegal". Under 36 M.R.S.A. Sec. 1760, no exemption exists until certification is made. Until that time, payment or collection is not only proper but required under the Sales and Use Tax Law. Consequently, as payment of the tax cannot be considered to be "erroneous" prior to certification, "overpayment" should not be regarded as having occurred before that time.

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This construction is not only consistent with the statutory language but also comports with sound policy considerations. Before certification of a pollution control facility, no claim for refund could possibly be filed upon the grounds that there has been an erroneous or illegal payment or collection of the tax. In addition, no authority exists for the filing of a contingent refund claim predicated upon the possible action of the Board in certifying the project. Under these circumstances, if the date of overpayment were construed to mean the date of actual payment, even the most diligent taxpayer would be powerless to preclude the two year period of limitations from expiring. In view of the Board's frequent practice of withholding certification pending completion of the facility, the period would invariably expire in the case of a long term construction project. To deny the taxpayer a refund in such a situation would appear to be patently unjust. Fundamental fairness, therefore, militates in favor of construing the statute in this fashion.

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