

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. _____

December 22, 1987

SUBJECT: Taxation and Revenue - Refunds and Recovery
Of Taxes Paid The State.

SYLLABI: 1. It is the opinion of this office that the time period set forth in Section 12-47-440 may be reduced, lengthened or the section repealed in its entirety, provided the same does not eliminate the right to maintain the action by those persons that have a pending refund claim that was submitted under the statute.

2. In the absence of a reasonable basis for classifying persons paying excise taxes and fees different from others paying other taxes, a statute that grants greater or lesser rights to maintain actions to recover those taxes would be suspect and should be avoided.

3. The procedure set forth in Section 38-1-110 is substantially the same as that provided by Sections 12-47-210 and 12-47-220 and is an available remedy for the recovery of taxes paid the various county treasurers and the South Carolina Tax Commission.

4. All persons with standing would be granted similar rights by the courts when proceeding under the same statutory authority to recover taxes alleged to have been wrongfully paid.

TO: Senator James M. Waddell, Jr.
Senatorial District No. 46

FROM: Joe L. Allen, Jr. *JAL*
Chief Deputy Attorney General

QUESTION: 1(a). Can the three (3) year period in Section 12-47-440 be reduced to one year?

1(b). If so, could the one (1) year statute of limitations be applicable to all suits filed after a given date of January 1, 1988?

1(c). Alternatively, could Section 12-47-440 be amended to reduce the three (3) year period to one (1) year in cases of only excise taxes or fees?

2. Could the same procedure in Section 38-1-110 be made applicable to all excise taxes and fees collected by the state?

3. In terms of refund exposure and how a court fashions relief, does it make any difference that a statute specifies the industry as the taxpayer or that it is merely acting as a collector of taxes from the ultimate consumer?

DISCUSSION: A refund of taxes is a matter that rests with the discretion of the General Assembly.

"A refund of taxes is solely a matter of governmental grace, . . . , and any person seeking such relief must bring himself clearly within the terms of the statute authorizing same." Asmer v. Livingston, 225 S.C. 341, 82 S.E.2d 465 and Guaranty Bank & Trust Co. v. South Carolina Tax Commission, 254 S.C. 82, 173 S.E.2d 367.

QUESTIONS I(a) and (b): The three year period set forth in Section 12-47-440 could by legislative act be reduced to a one year period or any other time period the General Assembly should in its wisdom elect to choose. It could repeal the section in its entirety. The only problem would be in attempting to reduce the time period for cases already commenced. This would in most probability impair a vested right and run afoul of constitutional protections.

In Dunham v. Davis, 229 S.C. 29, 91 S.E.2d 716, the court stated:

"Legislature may, without any violation of constitutional provisions, change periods prescribed as limitation to actions, either by extending or reducing the periods previously prescribed, as well in reference to antecedent as to subsequent contracts"

The above was also stated in Stoddard v. Owings, 42 S.C. 88, 20 S.E.26. The court in reference thereto, stated in

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United States Rubber Co. v. McManus, 211 S.C. 342, 45 S.E.2d 335 as follows:

"The only restriction upon the exercise of this power is that the legislature cannot remove a bar which has already become complete, and that no new limitations shall be made to affect existing claims without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by a new enactment."

CONCLUSION: Questions (a) and (b): It is the opinion of this office that the time period set forth in Section 12-47-440 may be reduced, lengthened or the section repealed in its entirety, provided the same does not eliminate the right to maintain the actions by those persons that have a pending refund claim that was submitted under the statute.

QUESTION 1(c): In the absence of justifying facts the classification would be suspect. The United States Supreme Court in Backus v. Fort St. Union Depot Co., 169 U.S. 557, 18 S.Ct. 445 (1898), held that:

"An act of the legislature which in terms gave to one individual certain rights, and denied to another similarly situated the same rights, might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

In 16 Am.Jur.2d, Constitutional Law, Section 791, p. 932, it is stated that:

". . . The equal protection of the laws guaranteed by this amendment in respect of legal proceedings does not require that every person in the land shall possess the same rights and privileges as every other person, and hence does not forbid proper and reasonable classifications in the field of court proceedings."

CONCLUSIONS: In the absence of a reasonable basis for classifying persons paying excise taxes and fees different

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from others paying other taxes, a statute that grants greater or lesser rights to maintain actions to recover those taxes would be suspect and should be avoided.

QUESTION 2: The procedure set forth in Section 38-1-110 is substantially the same as that provided by Sections 12-47-210 and 12-47-220. The procedure is now in force and effect, Section 12-47-440 merely gives an additional remedy.

CONCLUSION: The procedure set forth in Section 38-1-110 is substantially the same as that provided by Section 12-47-210 and 12-47-220 and is an available remedy for the recovery of taxes paid the various county treasurers and the South Carolina Tax Commission.

QUESTION 3: In Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254, the court affirmed the rule that the persons with standing to recover taxes was the taxpayer. There the University was the collector of the tax and thus had no standing to recover the same. In Shasta Beverages v. South Carolina Tax Commission, 310 S.E.2d 655 (1983), the bottler was the taxpayer. To that extent, it makes a difference as to who is the taxpayer. In terms of rights under same statute to persons with standing, however, there is no difference in treatment by the courts.

CONCLUSION: All persons with standing would be granted similar rights by the courts when proceeding under the same statutory authority to recover taxes alleged to have been wrongfully paid.

JLAJR/jws