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Income Tax Refunds in Wisconsin

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INCOME TAX REFUNDS IN WISCONSIN

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THE right of a taxpayer in the State of Wisconsin to recover income taxes illegally assessed or levied was always somewhat dubious, and the manner of procedure even more so. Although the tax is admittedly illegally levied and collected, the State of Wisconsin seeks every opportunity and uses every device to prevent the recovery of the tax which it collected unlawfully. The State takes the position that the burden is entirely upon the taxpayer to prevent the State from collecting any illegal tax, but after payment the State is not bound to repay such tax.

Numerous attempts, which met with great opposition and little success, have been made by taxpayers under the statutes and under the common law to recover illegal taxes.

EFFECT OF SECTION 1164, NEW SECTION 74.73.

Recovery of taxes has been attempted under Section 1164, new 74.73. The Income Tax Act in Wisconsin became effective January 1, 1931. This act contained no specific provision for refund of any taxes illegally collected or assessed; consequently, the Income Tax Act, itself, not making any provision for the refund, one sought for other remedies in the law. An old statute enacted in 1878 as Section 1164, new 74.73, provided as follows:

RECOVERY OF ILLEGAL TAXES; LIMITATION. "Any person aggrieved by the levy and collection of any unlawful tax assessed against him may file a claim therefor against the town, city, or village, whether incorporated under general law or special charter, which collected such tax in the manner prescribed by law for filing claims in other cases, and if it shall appear that the tax for which such claim was filed or any part thereof is unlawful and that all conditions prescribed by law for the recovery of illegal taxes have been complied with, the proper town board, village board, or common council of any city, whether incorporated under general law or special charter, may allow and the proper town, city, or village treasurer shall pay such person the amount of such claim found to be illegal and excessive. If any town, city or village shall fail or refuse to allow such claim, the claimant may have and maintain an action against the same for the recovery of all money so unlawfully levied and collected of him. Every such claim shall be filed; and every action to recover any money so paid shall be brought *within one year* after such payment and not thereafter."

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The foregoing statute raised issues that to this day remain unsettled. It provided a method of recovering any unlawful tax collected by a city, town or village. It did not specifically state whether it meant an income tax, real estate tax, occupational tax, or any other tax. It merely stated any unlawful tax. The statute provided that a claim for such unlawful tax should be made against the city or village, and further provided, that if such claim was not allowed, the claimant *may* have and maintain an action against the town, city, or village for the recovery of all money so unlawfully levied and collected of him. The statute provided that every action to recover any money so paid shall be brought within one year after such payment and not thereafter. It left the questions as to whether or not the claim must be filed, how long the city may have to consider the claim, and also whether or not the action must be brought after the city refused to allow the claim. In view of the statutory provision that the action must be commenced within one year after the tax is paid, it would then seem that regardless of whether or not the municipality has or has not allowed the claim, the action should be brought before the year elapses after the date of payment.

The first case, wherein a taxpayer attempted to recover illegal income taxes collected, is the case of Montreal Mining Company v. State, 155 Wis. 245, decided on December 9, 1913. In that case the plaintiff, a Wisconsin corporation, brought an action against the State in the Circuit Court of Dane County to recover the tax. The Defendant's demurrer to the complaint was sustained. The Court held that a taxpayer could not bring an action against the state to recover income taxes, but stated that there was no reason why an action could not be maintained for the recovery of income taxes under Section 1164 of the laws of 1913. The Income Tax Act did not provide any remedy to recover any illegal income taxes paid. Although Section 1164 did not refer to income taxes and was enacted before the Income Tax Act, the Court held, nevertheless, that the statute was broad enough to permit a recovery of income taxes, apparently reasoning that income tax was only one of the many taxes.

Therefore, according to this case, a taxpayer cannot sue the *State* for any illegal taxes collected, and the only remedy the taxpayer has is the one created by Section 1164. If the taxpayer has any action at all, it must be predicated upon that statute. However, the case did not decide whether taxes under that Section meant income taxes; consequently, the only point that was settled in the Montreal Mining Company case was that a taxpayer could not sue the *State* for any illegal taxes, but must bring suit against the city, village, or town that collected the taxes.

EFFECT OF SECTIONS 1087m-18 AND 1087m-19.

The next case affecting tax refunds was that of Horlick v. Town of Mt. Pleasant, 161 Wis. 366. In this case the taxpayer filed a tax return showing certain taxable income. The Board of Review increased the taxable income. The taxpayer did not follow his remedy as provided in Section 1087m-18, which required protest to the Board of Review, but permitted the tax to be assessed and paid the *revised* tax under protest. The taxpayer then brought an action to recover the tax paid under protest on the ground that it was illegally collected. The State contended that the taxpayer could not successfully maintain an action to recover the tax for the reason that he failed to comply with Sections 1987m-18 and 1087m-19. These sections provided a method of protesting any proposed illegal assessment. Section 1087m-18 provided that, unless a taxpayer resorts to the remedies given to him under the income tax law, he shall forever be barred from questioning the assessment. The sections the State relied upon are:

SECTION 1087m-18, NEW 71.14. EXCLUSIVE ORIGINAL JURISDICTION. "No person subject to assessment by the county assessor shall be allowed in any action or proceeding to question any assessment of income, unless objections thereto shall first have been presented to the county board of review in good faith and full disclosure made under oath of any and all income of such party liable to assessment."

SECTION 1087m-19, NEW 71.15 (1). "Any person dissatisfied with any determination of the county board of review may appeal within twenty days to the state tax commission, to whom a copy of the record of the board shall be certified, together with all evidence or a copy thereof relating to such assessment."

However, the court held that a taxpayer under the statutes had *two* remedies. One was to proceed under the income tax statutes, before paying the tax, which gave him the right to appear before the board and then to appeal to the tax commission and then to the court; the other was to pay the tax and sue to recover under Section 1164 (74.73) of the statutes. The court in sustaining the lower court in overruling the demurrer said as follows, at page 369:

"The appeal to the state tax commission provided in Section 1087m-19 (71.15) is permissive merely. The language of the Section contains no intimation that unless it is taken there can be no redress in the courts. in the very preceding section the legislature has spoken on the subject of conditions precedent to the right to maintain an action. If the permissive appeal to the tax commission had been thought to be one, it is strange that no direction to that effect was made when the subject was fresh in the minds of the lawmakers. Of course, the language granting the right of appeal could not be mandatory. If it were it would compel an aggrieved taxpayer to take an appeal whether or not

he wanted further to insist upon objection. This the legislature naturally did not wish to do, so the language used had to be permissive in form and the word 'may' suitably expressed the ideas. The word 'must' was clearly an improper word to use. So no particular force can be given to the mere permissive form of the language used in providing for the appeal. But the fact that no suggestion was made in the language granting it, that the appeal was a condition precedent to the right to maintain an action in court is highly significant when it is borne in mind that the section giving the right to appeal follows the one providing for a condition precedent. Such omission must be held to indicate a legislative intent that an action may be maintained without taking an appeal."

Of course, while there seems to be some weight to the argument used by the Supreme Court, their conclusion in this case is contrary to Section 1087m-18 (71.14) and is difficult to reconcile with the unequivocal language of the statute. Compliance with this statute seems to be a mandatory condition precedent to the right of an action to recover, although the Supreme Court seems to ignore it. Notwithstanding, the fact that there was no dispute that the tax was erroneously and unlawfully collected, the State sought to defeat every attempt to recover any income tax so paid.

Effect of Section 1087m-22 (71.18)

At the same term that the case of Horlick v. Town of Mt. Pleasant was decided, the case of Field v. City of Milwaukee, 161 Wis. 393, was before the court in which another defence was interposed.

In the Field case, the recovery of income taxes, illegally assessed and collected, was sought under Section 1164 (74.73) of the statutes. The State contested the recovery claiming that Section 1087m-22 (71.18) was not complied with.

Section 1087m-22, New 71.18, Subsection 4. "All laws not in conflict with the provisions of this act, relating to the assessment, collection and payment of taxes on personal property, the correction of errors in assessment and tax rolls, the compromise or cancellation of illegal taxes and the refund of moneys paid thereon, shall be applicable to the income tax herein provided for; but no town or village board or common council, nor the county officers specified in section 75.60, *shall compromise or cancel any income tax or any part thereof or refund any moneys paid thereon without the written approval of the assessor of incomes who made the assessment or of the tax commission in the case of assessments made by it,* specifying the defect in the assessment or tax proceeding and the amount of taxable income which should have been assessed and the amount of the taxes justly changeable thereto."

The State contended that Section 1087m-22 (71.18) barred recovery for the reason it provided that no town or village board or common council, nor county officers, shall comprise or cancel any income taxes or any part thereof or refund any moneys without the written approval of the assessor of incomes, who made the assessment, or the tax commission, etc. In the instant case an application was made to the assessor of incomes and the state tax commission, which was refused, and an action was commenced. The court held that Section 1087m-22 (71.18) would not supersede Section 1164 (74.73) and in so holding used the following language at page 395:

"Where a statutory remedy is provided for the enforcement of a common-law right without expressly or by a necessary inference interfering with the freedom to resort to the old remedy, the new one is cumulative unless the court, on ground of public policies, sees fit to make its activity in that field more or less contingent upon the new remedy being exhausted. That is the logic of State ex rel. Superior v. Duluth St. R. Co., supra. We are unable to discover any clear legislative attempt to make the statutory remedy in question exclusive. Moreover the point is expressly ruled in respondent's favor in Horlick v. Mount Pleasant, ante, p. 366, 154 N. W. 375. It was there held that Section 1087m-18 prescribes the condition precedent to the right to bring an action as this, and that the specification thereof, by a familiar rule of construction, indicates that the legislative purpose was to make that the sole condition. Such condition was satisfied in this case."

It will therefore be observed that, notwithstanding any other statutes in force at that time or any other condition, the taxpayer may bring a suit to recover illegal taxes paid under Section 1164 (74.73). In this particular case the record does not show whether or not his taxes were paid under protest, and the court in deciding that the taxpayer could bring an action does not mention any requirement with reference to payment under protest.

Apparent Misinterpretation of the Horlick Case.

It is to be observed that the language the court uses in its reasoning does not sustain its view in the Horlick case. In the Field case, they state that Section 1087m-18 (71.14) prescribes a condition precedent to the right to bring an action for recovery citing Horlick v. Mt. Pleasant. Examination discloses that the Horlick case *did not* so hold. In the Horlick case they held that Section 1087m-18, although it attempts to provide a condition precedent to bringing an action for recovery of any taxes, to-wit: that a taxpayer must appear before the board according to the statute, nevertheless they hold a taxpayer can bring an action to recover tax after it was paid *without* following the procedure required

under Section 1087m-22 (71.18). Therefore, although the Field case laid down the principle that one can bring an action to recover taxes under Section 1164 (74.73) regardless of a provision of Section 1087m-22 (71.18), it, nevertheless, confuses the decision in Horlick v. Mt. Pleasant.

Upon reading the Horlick v. Mt. Pleasant case, supra, it seems that an action can be brought to recover taxes illegally collected without following the statutory requirements of Section 1087m-18. However, in the Field case, the court states that in the Horlick case they held that Section 1087m-18 prescribes a condition precedent to the right to bring an action to recover a tax, although the result reached in the Horlick case was that Section 1087m-18 had no bearing upon the right to recover an illegal tax. Reading the two sections together, we are still at a loss as to whether or not Section 1087m-18 does or does not affect the right to recover a tax illegally paid and collected, although in both cases they permitted recovery. The only point settled in the Field case was that although Section 71.18, subsection 4, provides that no tax shall be compromised, cancelled or refunded without written approval, the taxpayer is not prevented from suing and recovering under Section 1164. Therefore, without specifically so saying, this decision invalidated a certain portion of that statute.

Necessity of Payment Under Protest.

Must a tax be paid under protest in order to permit recovery? Although Section 1164 gives a taxpayer the right to recover taxes illegally assessed, paid or collected, it does not require or provide that the taxes sought to be recovered must have been originally paid under protest. Nevertheless, cases seem to hold the contrary in some instances notwithstanding the statutes. The case of State ex rel. Marshall & Ilsley Bank v. Leuch, 155 Wis. 499, holds that the voluntary payment of a tax waives all right to bring an action to recover it or to question its legality. The court used the following language on page 500 in so deciding:

"It is very well settled that by the voluntary payment of a tax all right to bring action to recover it back or question its legality is waived. The principle is a salutary one. It tends to quiet disputes, diminish litigation, and relieve from embarrassment the transaction of public business. If a person could, without any coercion, fraud, or mistake of fact, pay a tax without objection and afterwards demand his money back and successfully maintain an action to recover it because he forgot at the time of payment that he proposed to contest the tax or because he did not know the legal effect of a voluntary payment, the door would be opened wide for actions to recover back payments made

voluntarily, but subsequently repented of. We decline to open that door."

While the reasoning of the court appears logical and for the benefit of public welfare, it seems repugnant to the right of a taxpayer, especially where his rights are derived of and through a statute. The rights to recover income taxes or other taxes illegally paid emanates through the statute, Section 1164. There is no requirement in that statute that the tax must be paid under protest, and no such requirement should be read into the law.

We are at a loss to see why the principle laid down in the Marshall & Ilsley Bank case should apply. Section 1164 does not require or mention anything about payment under protest. One is further constrained to disagree with the holding in the Marshall & Ilsley Bank case in view of the Horlick and Field cases where the court clearly held that no other section of the law could affect the right of a taxpayer to sue and recover under Section 1164. Recovery depended only upon compliance with Section 1164, namely, that the tax should have been illegally collected.

However, we are not satisfied that payment under protest was a settled principle. We find that the court did not strictly follow its rule laid down in Marshall & Ilsley Bank v. Leuch, supra. In the case of State ex rel. Pabst Brewing Company v. Kotecki, 163 Wis. 101, the taxpayer paid a personal property tax twice, due to a mistake of the tax records. Suit was brought under Section 1164 for recovery of same. Naturally, the defense relied upon Marshall & Ilsley Bank v. Leuch, supra, as authority to prevent recovery, claiming that the tax was paid voluntarily and not under protest. The court allowed the taxpayer to recover, stating that the taxpayer, not knowing of the error, did not pay voluntarily.

In a number of cases, involving both income tax and other taxes, it was held that a tax must be paid under protest in order to allow recovery.

Babcock v. The City of Fond du Lac, 58 Wis. 230;
A. H. Strange Co. v. City of Merrill, 134 Wis. 514;
Judd v. Town of Fox Lake, 28 Wis. 583;
Roehl v. City of Milwaukee, 141 Wis. 341;
Duluth Log Company v. Town of Hawthorne, 139 Wis. 170.

Instead of following these cases, especially the Marshall & Ilsley Bank case, and settling the question of payment under protest, they disturbed this issue in the Pabst Brewing Company case and raised a new question as to what is meant by voluntary payment.

Although the cases of State ex rel. Marshall & Ilsley Bank and the Pabst Brewing Company held that taxes to be recovered must be paid under protest without specifically holding that they applied to income taxes, and although the Pabst Brewing Company case does not definitely lay down the rule as to what constitutes protest, the law still is unsettled in Wisconsin as to whether or not the recovery of illegal income taxes paid is conditioned upon the payment of taxes under protest. In the case of Lewis v. City of Racine, 179 Wis. 210, while the taxpayer could not recover on the merits of the case, "although there is no indication whether or not the tax was paid under protest," the court still held that he had a right to bring an action and said nothing with reference to the payment of taxes under protest.

As late as 1923 the question of whether or not it was absolutely necessary to pay taxes under protest to entitle a recovery is unsettled. Thus, after considering the cases and statutes they appear to hold as follows:

1. That taxpayer cannot sue the *State* to recover any taxes. Montreal Mining Company v. State, 155 Wis. 245.
2. That the voluntary payment of a tax waives all right to bring action to recover it or to question its legality. Marshall & Illsley Bank v. Leuch, 155 Wis. 499.
3. That a taxpayer is not required to follow his remedy under Section 1087m-18, which requires protest to the Board of Review in order to recover any illegal taxes paid under the income tax law. Horlick v. Town of Mt. Pleasant, 161 Wis. 366.
4. That regardless of the provision under Section 71.18, Subsection 4, of the 1925 Statutes, which provides that no tax shall be compromised, cancelled, or refunded without the written approval of the taxing authorities who made the assessment, a taxpayer can recover illegal taxes paid. Field v. City of Milwaukee, 161 Wis. 393.
5. That the paying of taxes through an error does not constitute voluntary payment, (thereby raising the question as to what constitutes payment under protest). State ex rel. Pabst Brewing Company v. Kotecki, 163 Wis. 101.

Rights and Remedies Under Section 71.26.

In 1925, which is subsequent to the decisions in the above cases, the legislature adopted Section 71.26, which was made part of the Income Tax Act, and gave the taxpayer a right to recover illegal income taxes collected. Section 71.26 provides as follows:

Proceeding to Recover Excessive Tax. "Any person aggrieved by the levy and collection in cash of any unlawful or excessive income tax assessed against or imposed upon him under the laws of this state may file a claim therefor against the town, city or village, whether

incorporated under general law or special charter in which such tax was payable, in the manner prescribed by law for filing claims in other cases, whether such tax was voluntarily paid or not, and if it shall appear that the tax for which such claim was filed, or any part thereof, is unlawful or excessive the proper town board, village board, or common council in the case of cities shall allow and the proper town, city or village treasurer shall pay such person the amount of such claim found to be illegal or excessive; provided, that in case of claims for refund of illegal or excessive income taxes the conditions prescribed by subsection (6)-4 of Section 71.18 of the statutes shall have been complied with. If any town, city or village shall fail or refuse to allow such claim, the claimant may have and maintain an action against the same for the recovery of all money so unlawfully levied and collected of him. Every such claim shall be filed *within two years* and every action to recover any money so paid be brought *within three years* from the date of such payment and not thereafter."

Here we have a refund provision incorporated in the Income Tax Act, apparently enacted for the purpose of granting the right and prescribing the method of obtaining a refund of taxes unlawfully assessed or collected by the town, city or village. It would seem that the legislature was motivated to adopt this section to settle the confusion which arose from the various cases decided and the various positions adopted by the State to prevent the taxpayer from obtaining such refunds which were lawfully due him, and which the taxing authorities unlawfully extracted. However, upon examination of this statute, we find that it raised several new questions. The statute provided that to recover an excessive tax a claim *may* be filed therefor against the city, town, or village. It further provided, that if any town, city or village shall fail or refuse to allow such claim, the claimant *may* have and maintain an action against same for the recovery of money so unlawfully levied and collected of him. It further provided:

"That every such claim shall be filed within two years and any action to recover any money so paid be brought within three years of such payment and not thereafter."

The questions raised by this statute in the writer's opinion are as follows:

1. Is it compulsory to file a claim inasmuch as the statute says "may" and not "must?"
2. In event that the claim is not filed within two years after payment, does it bar the right to recover by an action?
3. Is the right to maintain an action to be predicated upon the failure or refusal to allow the claim?
4. If it is compulsory to file a claim, how long has the city, town or village to decide whether it will refuse or allow such claim?

It will, therefore, be observed that although the legislature attempted to straighten out the questions and inconsistencies under the decisions, it opened up new questions and left the taxpayer in a bemuddled and confused situation as to his rights and remedies under the law with reference to recovering any unlawful taxes. Unfortunately, these questions were never decided, as this section was repealed before the Supreme Court had an opportunity to consider any cases brought under it.

In view of the repeal, it would appear that the questions raised above are not pertinent. These questions, however, assumed pertinence when, even after the repeal, the taxing authorities still rely on this statute in denying claims.

Enactment of 1927 Refund Provision.

In 1927 it was apparent that the refund status in the State of Wisconsin was in such a bemuddled condition that it was necessary to create, by legislative act, a method whereby the taxpayer could obtain any unlawful taxes paid. Accordingly, therefore, the legislature adopted new statutes, repealed and changed existing statutes affecting the income tax law, so that there remained the following statutes which were pertinent to, and affected the right of refund of illegal taxes in the State of Wisconsin. These sections are set forth for the purpose of facilitating the following of the discussion.[1]

The Straus Case and Its Interpretation of the 1927 Refund Section.

The first case to consider and construe the 1927 Act as affecting the right of refund was Straus v. Wisconsin Tax Commission, 201 Wis. 470. The facts in this case are that on January 30, 1925, the taxpayer paid under protest an additional, admittedly illegal, income tax for the year 1923. However, no protest was made to or hearing had before the Milwaukee County Income Tax Board of Review.

To recover under the 1927 refund section, it would appear that there are only two requirements.

1. That the taxable year involving the refund should be open to audit (examination of records and the right to assess additional taxes).

2. That the assessment has not become final and conclusive under Sections 71.12, 71.13, 71.14, 71.15 or 71.16 (which provide for appeal).

On May 11, 1928, the taxpayer, pursuant to Section 71.17 of the Wisconsin Statutes of 1927, filed a claim for refund with the income

[1] The Sections referred to, namely 71.11, 71.12, 71.14, 71.15, 71.16, 71.17 and 74.13, 1927 Statutes, will be found in a footnote at the end of this article.

tax assessor. This claim was denied. The assessor was subsequently upheld by the Income Tax Board of Review, the Tax Commission, and the Circuit Court of Milwaukee County. The case was then appealed to the Wisconsin State Supreme Court. Since the tax was admittedly illegally assessed and collected, the only question for consideration was whether or not the claim of the taxpayer was timely.

The fact that the taxpayer did not appear before the Income Tax Board of Review and protest was not fatal to his right for refund, as has been decided in Strange v. Merrill, 134 Wis. 514; Horlick v. Mt. Pleasant, 161 Wis. 366; Lewis v. Racine, 179 Wis. 210; Hand Knit Hosiery Company v. Wisconsin Tax Commission, 195 Wis. 226. Since failure to protest to the Board of Review does not bar recovery, the only question is: Does the taxpayer come within the 1927 Statute so that he can recover? According to the facts it would appear that the taxpayer does come within the statute and should recover. However, the Supreme Court denied recovery in this case for the reason that:

the taxpayer lost his right of refund *before* the enactment of the 1927 Statute and, therefore, could not enforce his claim *now* as the 1927 Statutes did not revive his claim.

The court's opinion on this point is found on page 472 and reads as follows:

"The tax was paid in January, *1925*. At that time sub. (1) of sec. 74.73 of the Statutes of 1923 provided that *claims* for refunds must be filed and action to question the tax brought *within one year* from the date of its payment. This year would have expired in January, 1926. But *before the expiration* of that year sec. 71.26 of the Statutes of 1925 *extended* the time for filing claims to *two years* from the date when the tax was paid, thus extending the time within which the appellant could file his claim to January, 1927, "and not thereafter," to quote the words of that statute. It thus appears that appellant had lost all right to question this additional tax before his claim was filed in May, 1928. (Italics ours.)

"But appellant asserts that, by the enactment of sec. 71.17 of the Statutes of 1927 by ch. 539, Laws of 1927, the legislature has revived his right to question the additional income tax assessed in 1924. The fact that ch. 539. Laws of 1927, *repealed* sec. 71.26 of the Statutes of 1925, does not evidence a legislative *intent* to remove the bar that had rendered the assessment here in question final and conclusive under the provisions of that statute before it was repealed." (Italics ours.)

We are not so sure that the construction placed upon this section by the court is correct. Considering that Section 71.17 of the 1927 Statutes was a remedial statute, we are inclined to believe that it was

retroactive, and if so, it was intended to, and did remove the bar of the 1925 Statutes. Remedial statutes are generally, and where possible, construed to be retroactive. In the case of State ex rel. Davis & Starr Lumber Co. v. Pors, 107 Wis. 420, the court held at pages 427 and 428 as follows:

"This doctrine (prospective construction in statutes only) is not understood to apply to remedial statutes, which may be of a retrospective nature, provided that they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations."

In the same case the court quoted from Cooley on Taxation, second edition, page 293:

"A remedial provision may well be presumed to have been intended to reach back for the purposes of justice."

The general rule is that remedial statutes are to be construed liberally and be retroactive.

State ex rel. Davis & Starr Lumber Company v. Pors, 107 Wis. 420;
Reed v. City of Madison, 162 Wis. 94;
Kieckhefer v. Cary, County Clerk, 186 Wis. 613;
C. M. & St. Paul Railway v. Railroad Commission, 187 Wis. 380;
Dancy Drainage District, 190 Wis. 327;
Home Investment Company v. Emerson, 153 Wis. 1.

In the Straus case we find that the court said on page 473 as follows:

"The legislature could doubtless raise the bar of the statute. The question is, has it done so by the passage of the act of 1927. The act contained no express statement of such an intent. The court finds nothing in the act that discloses an attempt to give Section 71.17 of the Statutes of 1927 retroactive effect."

We can not agree with the statement of the court, as the reading of the statute clearly shows in our opinion that the contrary is true. The statute does not only evidence a retroactive intent, but it is so worded that it clearly and unequivocally expresses a retroactive effect. Section 71.17 of the 1927 laws created a *new remedy* for the taxpayer. It created a section permitting the taxpayer to obtain a refund. Such provision never appeared in the tax statutes prior to the enactment of the 1927 laws. It provided a new and exclusive remedy for the obtaining of refunds

and credits. There is only one prerequisite necessary to gain the advantage of Section 71.17 and that is, that the year for which the refund is claimed must be open to audit under Section 71.11 of the 1927 Statutes. (Under the latter, Section 71.11 of the 1927 Statutes, it will be seen that only *certain years* are open to audit, and it naturally follows that *these are the years* meant that are referred to in Section 71.17 of the 1927 Statutes.) Also Section 71.11 (5) provides for, and refers to years prior to the enactment of the 1927 Statutes. Reference to these years, naturally, must be construed to mean that there was an intent on the part of the legislature to affect those years. If those years are affected by the statute, and those years being prior to the enactment of this statute, the logical conclusion is that it was the intent of the legislature that this section should apply retroactively. This section very plainly provides as to when assessments may be made and states that on or before July 1, 1929, additional assessments may be made for a period within seven years of the close of the period covered by the income tax return. This section further provides, that additional assessments may be made prior to July 1, 1929, for any year subsequent to January 1, 1922. It is therefore obvious that this section not only applies to 1927 and years subsequent thereto, but also to the years *prior* to the enactment of the 1927 statute. In further analyzing this section, we find that it provides for additional assessments to be made on and after July 1, 1929, for a period of four years after the close of the tax period. Therefore, Section 71.17, which the court states is not retroactive, provides for additional assessments for years subsequent to January 1, 1925. It will therefore be seen that this section must have been intended *to be* and *is* retroactive. To hold that the statute is prospective and not retroactive is untenable in view of the years that it affects. To hold that this section is not retroactive leaves the section without any meaning, and it has no purpose in the act. It is obvious that this section was inserted in the act for some intended purpose. The apparent purpose is, that it was the intent of the legislature that this section should affect retroactively as well as prospectively.

We find also on page 473 of the opinion as follows:

"Ch. 539, Laws of 1927, was a revision of the income tax laws, which looked to the future, not to the past."

It is doubtful whether the entire act was of such a nature that it only looked to the future and not the past. The logical conclusion is that this section looked both to the future and to the past. It is apparent that the revision and the enactment of this statute was for the purpose of *rectifying certain injustices in the past* and present

statutes. One needs to go no further than subsection 4 of Section 71.11, which provides that additional normal taxes may be made upon income received by any person in 1920, 1921, 1922 and 1923 or corresponding fiscal years, only to the extent that the income tax exceeds the personal property tax assessed in the year in which the income is first assessable, provided such personal property tax is actually paid in cash. How it can be said that this section did not look into the past and did not affect the past years is beyond the comprehension of this writer. It certainly can not be said that this section had no retroactive effect. Prior to the enactment of this section, *additional* taxes for the years of 1920 and 1923 inclusive were assessed without giving proper credit for the unused personal property tax, regardless of whether or not the personal property tax of the particular year was larger than the income tax. This section was enacted for the purpose of remedying such inequities. The intent is not only retroactive because it affects the years mentioned, but also because the personal property offset privilege was no longer in effect in 1927, and this section affects only years prior to the enactment of the 1927 Statute.

Effect of Section 71.17 (2) and (3).

Does Section 71.17 (2) and (3) apply retroactively? It would appear not. We find further on page 473 of the opinion as follows:

"In the absence of some expression of a legislative intent to toll the running of the statute which had made the assessment here in question final and conclusive before sec. 71.17 of the Statutes of 1927 was passed, it must be held that the refunds referred to in sub. (2) and (3) of sec. 71.17 of the 1927 Statutes are for taxes based on assessments that have not become final and conclusive either under that section of the statutes or *under the statutes in force prior to the enactment of sec. 71.17 of the Statutes of 1927.*" (Italics ours.)

Undoubtedly it was intended by subsection (2) and (3) of Section 71.17 to bar refunds on any assessment which had become final and conclusive under the provisions of Sections 71.12, 71.13, 71.14, 71.15, and 71.16. It was apparently the intent of the statute that there should be only one hearing on the taxability of any particular income. The legislature apparently intended, that once a hearing was had under these sections and the issue finally determined, that the taxpayer could not have the matter reheard and brought up for reconsideration again by the process of filing a claim for refund. The logical construction of this section is that if under the 1927 Act a hearing is had, under Sections 71.12 to 71.16 inclusive, and it has once become final and conclusive, the matter is settled and no further hearing may be had on

same. However, there is nothing in the statutes, either expressly or impliedly, which shows *an intent* on the part of the legislature to bar any refunds that may have become final and conclusive under any other statutes prior to the statute enacted in 1927. The 1927 Statute merely refers to assessments which have become final and conclusive under the *1927 Statutes.* We believe that where there is a reference in a statute to any section, and that the said section can be found in the statutes, it refers to the section of the statute to which the reference is made and not to any other statute. It cannot be said that this statute applies retroactively in view of the established rule of construction of statutes. It has been held that a statute is not to be retroactively construed, unless it appears by its terms to be intended as such. State v. Atwood, 11 Wis. 441; Butler v. City of Milwaukee, 15 Wis. 546; State ex rel. Davis & Starr Lumber Co. v. Pors,.107 Wis. 420. The statute in question certainly does not express such an intent. Therefore, it must be concluded that it is not retroactive nor was it intended to be so.

It is very doubtful that subsections (2) and (3) of Section 71.17 of the 1927 Statutes would bar the right to recovery, even though *they had become final and conclusive under the 1927 Statutes.* We are influenced in so concluding by the holding in Field v. Milwaukee, 161 Wis. 393, which held that the right to recover unlawful taxes could not be affected by any statute other than Section 74.73, and also, by the dictum in the opinion of the Straus case, which says:

"The question whether a taxpayer may still proceed by suit at common law to recover the tax is not involved in this case, because the appellant has chosen to file his claim under the statute."

So, although the court has decided that Section 71.17, sub. (2) and (3) bar the taxpayer the right to recover under this statute, it seems to infer at least that the question of whether a taxpayer may resort to a common law remedy would not in all probability be affected by these statutes.

The decision in the Straus case has controverted the purpose of the 1927 Refund Statute. The holding in the case has construed this statute, which is obviously a remedial one strictly and against the very intended purposes of the statute, and also against the established rules of construction. The fundamental rules of construction of statutes that require a remedial statute to be liberally construed was violated and ignored. The decision construed the statutes contrary to the intention of the legislature, thereby *depriving* the taxpayer of all rights and remedies that apparently the legislature *gave* and intended to give. The holding in the Straus case has not cleared nor satisfactorily interpreted the intent of the statutes. Possibly the only conclusion that can be accepted

from the decision is that a taxpayer whose claim for refund has been outlawed prior to the enactment of the 1927 Statutes could not expect to have allowed a claim for refund under the 1927 Statutes. However, the case did not decide whether or not, if the taxpayer's claim had *not been outlawed prior* to the enactment of the 1927 Statutes, the taxpayer could recover taxes *paid prior* to the enactment of the 1927 statutes. At the time that the Straus case was brought before the court, it was important and imperative that the particular statute under view should be properly construed so that it would establish a precedent for the filing of claims in the future. The statute was of great importance, as it controlled and governed controversies under which hundreds and thousands of taxpayers in the State of Wisconsin would be affected. The court, however, did not see fit to establish precedent. Out of the entire decision there can be only one of justifiable reason possible for denying the claim, and that is on the ground that it was *outlawed prior* to the enactment of the 1927 Statutes. It is still, nevertheless, questionable whether the 1927 Statutes did not impliedly, if not expressly, revive the claim. One is led to believe that the claim was *automatically revived* when the statute provided for what years refunds could be had, and that the taxpayer's claim came under the year that was provided in the statute. That the Straus case did not finally settle the law under this section is evidenced by the fact that the tax commission has adopted a policy with regard to refunds, which is in a measure *contrary* to the result arrived at in the Straus case. Also, that there are now pending before the courts of Wisconsin, claims for refunds in which issues have been raised under the 1927 Act that could have been but were not decided in the Straus case.

Therefore, the enactment of the 1927 Statute, which was apparently for the purpose of settling the right of taxpayers with reference to refunds, accomplished the contrary. Rather than a clarification of the situation, the result was more confusion, more issues, and more contentions, which up to the present time have not been settled. As further evidence of the fact that the Straus case did not assist in determining the rights or effects of the refund section of 1927, we wish to mention a case[2] where a claim was filed for the refund of taxes after the decision in the Straus case. In that particular case the tax was paid in February, 1927, or about six months before the enactment of the 1927 Statutes. At the time the 1927 Statute was enacted, the right to recover the taxes paid *was not* outlawed. As a matter of fact, had the 1927 Statutes not been re-enacted and the 1925 Statutes allowed to remain on the books, the taxpayer *would have had until February, 1930,* to file a claim and commence a suit to recover the

[2] Name withheld pending final decision in court.

taxes in question. A claim for the refund of the taxes was filed in March, 1929, and was denied for several reasons.

1. That since the assessment of taxes was made under the Statute of 1925, the right to refund must be governed by the Statutes of 1925. However, they lose sight of the fact that the 1925 Statute was repealed by the 1927 Statute without a saving clause. The rule is that where a statute is repealed, and there is no saving clause, it loses its effect at the date of repealing.

Dillon v. Linder, 36 Wis. 344;
Farrell v. Drees, 41 Wis. 186;
Graham v. C. M. & St. Paul Railway Co., 53 Wis. 473.

2. The claim is further denied by authority of Section 71.14 of the 1925 Statutes, which provides for an exclusive, original jurisdiction. Notwithstanding the fact that the court has held in Field v. Milwaukee, 161 Wis. 393, that this section would not bar the right to recovery, the tax commission, nevertheless, still uses this as authority to deny the taxpayer recovery.

3. Another reason for denying the claim is that the tax in question became final and conclusive under section 71.17, and as authority for such conclusion the case of Straus v. Wisconsin Tax Commission is cited. Even if the holding in the Straus case is correct, it does not apply in the instant case. For in the Straus case they held that Section 71.17 meant that the refund would be barred on any item of income which became final and conclusive either under the 1927 Statutes or under any other statutes. However, the Tax Commission loses sight of the fact that the refund here did not become final and conclusive under the 1925 Statute for the reason that the taxpayer had a right to sue for a refund up to 1930, which was subsequent to the date of filing his claim for refund.

The case referred to here is now pending before the Supreme Court for final decision, and it is hoped that the holdings in the case will throw some light upon the income tax status in the State of Wisconsin that will enable a taxpayer to once and for all determine his rights, liabilities, and remedies under these statutes.

To further complicate the situation, we find that the tax commission, under date of August 25, 1931, issued a ruling (see page 15234, Prentice-Hall - Wis. State Tax Service) that they will allow refunds on any years that are open to audit, except on such items that shall have become final and conclusive under Section 71.17 of the 1927 Act. After denying the claim for refund in the case referred to upon the reasons stated, the Wisconsin Tax Commission issued a ruling under

date of August 25, 1931, in reference to income tax refunds wherein it takes a position which, in our opinion, is contrary to its decision in the previous case, and also contrary to the holding in the Straus case. The Wisconsin Tax Commission now takes the position that it will allow refunds for any year that is open to audit. It justifies its position by quoting Section 71.17, sub. (2) which states as follows:

"No refund shall be made and no credit shall be allowed for taxes paid on income for the years not open to audit under Section 71.11."

Its ruling states further:

"Stated affirmatively, refunds and credits are allowable for taxes on income that is open to audit under said section."

The Tax Commission takes the exact position that was taken by the taxpayer in the Straus case which was overruled by the Supreme Court. To quote from the ruling, we find the Tax Commission stating as follows:

"We believe that if it was the legislative intent to depart from an established, equitable and just policy of keeping the assessment period and the refund period coextensive the legislature would have especially provided for such departure."

However, the Tax Commission, not losing sight of Straus v. Wisconsin Tax Commission, 201 Wis. 470, apparently feeling that this case is not exactly in accordance with its ruling, justifies its position by stating that the Straus case held that the taxpayer could not recover because the claim was outlawed prior to the enactment of the 1927 Statutes. While we believe that the Wisconsin Tax Commission has finally accepted a view more in accordance with the original intent of the legislature, we can not help but feel that it is contrary to the holding in the Straus case. According to the Straus case, the court would not entertain the idea that the only requisite for obtaining a refund was that the year in question should be open to audit. They held in that case that if the assessment became final and conclusive, either under a prior or under the 1927 Statute, that the refund would be forever barred.

In conclusion, we feel that we have not heard the last with reference to income tax refunds in the State of Wisconsin. Despite the fact that the tax commission has adopted a policy more in line with the apparent intent and spirit of the Refund Law, it is doubtful whether their position is justifiable in view of the Straus case. We also feel that the right, remedy, and procedure with reference to obtaining

refunds in the State of Wisconsin are now probably in a more chaotic condition than before the 1927 Statute was enacted. The enactment of the 1927 Statute created additional controversies and left the question very much unsettled. We feel that under the present situation, cases and statutes, interpretations and rulings, the refund status can not be definitely and clearly established. This can only be accomplished by the enactment of new statutes repealing the old statutes, so that the present decisions under the existing statutes will be of no effect. By new statutes we mean such that will definitely establish a right and clearly prescribe a method by which a taxpayer can obtain a refund in the State of Wisconsin for taxes which the State has collected from him and unlawfully retained.

71.11 FIELD INVESTIGATION. (1) Whenever in the judgment of the tax commission or assessor of incomes it is deemed advisable to verify any return directly from the books and records of any person, or from any other sources of information, the tax commission or assessor of incomes may direct any return to be so verified.

(2) For the purpose of ascertaining the correctness of any return or for the purpose of making a determination of the taxable income of any person, the tax commission or assessor of incomes shall have power to examine or cause to be examined by any agent or representative designated by it, any books, papers, records or memoranda bearing on the income of such person, and may require the attendance of any person having knowledge in the premises, and may take testimony and require proof material for their information. Upon such information as it may be able to discover, the tax commission or the assessor of incomes shall determine the true amount of income received during the year or years under investigation.

(3) If it shall appear upon such investigation that a person has been over or under-assessed, or that no assessment has been made when one should have been made, the tax commission or assessor of incomes shall make a correct assessment in the manner provided in section 71.10.

(4) Assessment of additional normal income taxes may be made upon the income of any person received in the year 1920, 1921, 1922 and 1923, or corresponding fiscal years, only to the extent that the income tax exclusive of interest on the corrected total income exceeds the personal property tax assessed in the year in which the income was first assessable, provided such personal property tax was actually paid in cash.

(5) Additional assessments and corrections of assessments may be made of income of any taxpayer if such corrections are made within seven years after the close of the period covered by the income tax return, provided that after July 1, 1929, additional assessments or corrections and assessments may be made if such assessments and corrections are made within four years after the close of the period covered by the income tax return, but if no return is filed for any of the years since January 1, 1911, income of such years may be assessed when discovered.

17.12 NOTICE AND HEARING. No additional assessment by office audit or field investigation shall be placed upon the assessment roll without notice in writing to the taxpayer giving him an opportunity to be heard in relation thereto. Such notice shall be served as a circuit court summons or by registered mail. Any person feeling aggrieved by such assessment shall be entitled to a hearing before the tax commission in the case of corporations or the county board of review in the case of persons other than corporations, if within twenty days after receiving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to such assessment. If no request for such hearing is so made, such assessment shall be final and conclusive. If a

request for hearing is made the taxpayer shall be heard by the tax commission or the board of reviews as the case may be and after such hearing the tax commission or the board of review shall render its decision regarding such assessment.

71.14 EXCLUSIVE ORIGINAL JURISDICTION. No person against whom an assessment of income tax has been made shall be allowed in any action or proceeding either as plaintiff or defendant to question any assessment of income, unless written objections thereto shall first have been presented in good faith to the tax commission in all cases of assessment made by such commission or to the county board of review in case of all assessments made by assessors of income, and full disclosure made under oath of any and all income of such party liable to assessment, and unless such person shall have availed himself of the remedies provided in section 71.12.

71.15 APPEALS TO TAX COMMISSION BY PERSONS OTHER THAN CORPORATIONS. (1) Any person, including the assessor of incomes, dissatisfied with any determination of the county board of review may appeal within twenty days after the date of such determination to the tax commission, to whom a copy of the record of the board shall be certified, together with all evidence or a copy thereof, relating to such assessment. A copy of the notice of appeal shall be served upon the tax commission.

(2) The tax commission shall review such assessments from the record thus submitted, and shall make necessary corrections and certify its conclusion to the county clerk, who shall duly notify the person liable for the taxes, and the assessor of incomes shall enter the corrected assessment on the assessment roll and certify the proper tax in the same manner as other income taxes are certified.

71.16 EXCLUSIVE REMEDY FOR COURT REVIEW OF ANY INCOME TAX ASSESSMENT MADE, CORRECTED OR CONFIRMED; PAYMENT OF TAXES WHEN APPEAL TO COURT IS TAKEN. (1) The provisions for appeal provided in this section shall be the sole and exclusive remedy for court review of any assessment of income or surtaxes made, corrected or confirmed.

(2) No person against whom any assessment of income or surtaxes has been made, corrected or confirmed shall be allowed in any action or proceeding either as plaintiff or defendant to contest any such assessment unless such person shall first have availed himself of the remedies provided by sections 71.12, 71.14 and 71.15.

(3) Appeals by corporations shall be taken to the circuit court for Dane county, and appeals by persons other than corporations shall be taken to the circuit court of the county before whose income tax board of review the hearing on the assessment was held.

(4) Such appeal shall be taken within thirty days after written notice of the decision of the tax commission has been given to the taxpayer by registered mail.

(5) Such appeal may be taken in the case of corporations by serving a notice of appeal and a copy thereof on the tax commission. In case of appeals by persons other than corporations such notice shall be served on the county clerk, a copy thereof on the assessor of incomes; and two copies thereof shall be mailed to the office of the tax commission at Madison, Wisconsin. Every such notice of appeal shall recite the order, or decision from which such appeal is taken, and shall clearly specify the objections to such assessment, order or decision to be considered on such appeal; such notice of appeal shall also recite in a clear and concise manner the assignments of error alleged by the appellant to have been committed by the tax commission or the county board of review in determining the tax liability of the appellant, together with a clear and concise statement of the facts upon which the appellant relies as constituting the basis of said appeal and of the propositions of law involved.

(6) Within thirty days after the service of such notice or appeal, the tax commission or the county clerk shall return to said court the original, or a certified or photostatic copy of all documents, papers, evidence, statements and exhibits on file in the matter and of all testimony taken therein.

(7) Within thirty days after service of such notice of appeal, the appellant shall serve upon the tax commission, and in the case of persons other than cor-

porations, also upon the assessor of incomes, a brief in support of the objections to such assessment, and shall at the same time file a copy thereof with the clerk of the court wherein said appeal is pending. Within sixty days after the service of the appellant's brief the tax commission shall serve an answer upon the appellant or the counsel for the appellant, to the objections raised on such appeal, together with a brief in support of such answer and assessment; and upon the service and filing of such answer and brief, the appeal shall be regarded as at issue.

(8) Said appeal may thereupon be brought on for hearing by either party upon the record made before the tax commission or the county board of review and not otherwise, on ten days' notice to the other, subject, however, to the provisions of law for a change of the place of trial, or the calling in of another judge to preside at such hearing. Upon such hearing the court shall disregard any irregularity, informality or omission not affecting the legal groundwork of the tax, and shall enter an order confirming such assessment and directing judgment in accordance with the terms of said order, unless it shall appear that such assessment was otherwise in whole or in part illegal, and in all actions and proceedings to contest the validity of any such assessment, the proceedings of the tax commission and the county board of review shall be presumed to be legal, and the determination of the tax commission or the county board of review shall not be impaired, vitiated or set aside upon any grounds not affecting the legal groundwork of the tax. If the court shall find that such assessment is in whole or in part illegal, disregarding any irregularity, informality or omission, as hereinbefore provided, it shall direct the tax commission, in the case of assessments made by it and the assessor of incomes, in the case of assessments made by him, to make such corrections in the assessment as it may in its decision order, and upon the return of the record, the tax commission or assessor of incomes, as the case may be, shall immediately proceed to correct the assessment in accordance with the decision of the court. Thereupon the court, upon eight days written notice to the adverse party, shall enter judgment in accordance with its decision and such corrected assessment. It shall be the duty of the clerk of any court rendering a decision affecting an income tax assessment to transmit promptly, without charge, two copies of such decision to the tax commission.

(9) Either party may appeal to the supreme court within twenty days after the entry of such judgment in the manner provided for other appeals from the judgment of a circuit court, and all such appeals shall be placed on the calendar of the supreme court, and brought to a hearing in the same manner as other state cases on such calendar. If no such appeal be taken within such period the clerk of the court shall forthwith certify such fact to the tax commission and shall return the record to the tax commission in case of assessments made by it and to the county clerk in case of assessments made by the assessor of incomes.

(10) The attorney-general shall appear for the tax commission in all courts, except that in cases involving appeals of persons other than corporations, the district attorney shall appear with the attorney-general.

(11) As soon as the appellant shall have served notice of appeal to the circuit court on the parties provided by this section, the tax commission, in case of assessments made by it and the assessor of incomes in case of assessments made by him, shall notify the county treasurer to whom the tax was certified for collection, of the pendency of the appeal; and such notice shall stay all collection proceedings until final determination of the appeal, but shall not operate to stay the delinquent penalty and interest on unpaid amounts as provided in subsections (12) and (13) of this section.

(12) (a) Any person who shall contest an assessment in court shall state in his notice of appeal what portion if any of the tax is admitted to be legally assessable and correct. The tax commission or the assessor of incomes, as the case may be, shall apportion the tax so admitted to the various counties when an apportionment is necessary, and shall file a certificate of such apportionment with the circuit court in which the case is pending, and shall serve a copy thereof on the appellant or his attorney by registered mail. The tax commission or the assessor of incomes, as the case may be, shall then certify to each county treasurer the portion of such tax attributable to the local taxing districts within his county as provided in section 71.18, and such tax shall be divided as provided in section 71.19, within thirty days after payment. Within five days after the receipt

of the certificate of apportionment the appellant shall pay to each county treasurer the apportioned amount of the admitted tax certified to him for collection. Any such payment shall be considered an admission of the legality of the tax thus paid, and such tax so paid cannot be recovered in the pending appeal or in any other action or proceeding. The county treasurer shall not accept payment of any tax included in a contested assessment unless he shall have receeived proper certificate for the collection of such tax.

(b) Any part of an income tax assessment which is contested in any appeal in court, which the court after hearing shall order to be paid, shall be considered as a delinquent tax from the date on which it would have vecome delinquent under section 71.10 if such appeal had not been taken, and any such tax so ordered to be paid shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one per cent per month from the date of such delinquency until paid.

(13) After final decision and return of the record to the tax commission or the county clerk, the tax commission or the assessor of incomes as the case may be, shall notify the county treasurer of the amount of the taxes as determined by the court, and such county treasurer shall proceed to collect the taxes in the same manner as other delinquent taxes are collected.

(14) Any party who shall heretofore have commenced an action for review of an income tax assessment in the circuit court for Dane county, which action is now pending either in said circuit court or in the supreme court of this state, and who shall have paid to the court the whole amount of the tax assessed, may at its option:

(a) Allow said payment to remain with the circuit court for said Dane county pending the final determination of said action, in which event said taxes shall not be considered delinquent from and after the date of the payment to the court. After final decision and return of the record to the tax commission the court shall upon the certificate of the tax commission refund to the taxpayer the amount of the excess tax paid, if any, together with any interest which may have been earned on the excess tax while on deposit with said court and shall pay the balance, together with any interest that may have·been earned thereon, to th county treasurers named in such certificate. The tax commission shall then certify to each county treasurer the portion of such taxes attributable to the local taxing districts wihin his county as provided in section 71.18, and such taxes shall be divided as provided in section 71.19 within thirty days after payment, or

(b) Said party may petition the court for, and procure an order from said court directing the clerk thereof to refund to such petitioner the whole amount of the taxes so paid to said court by said petitioner, together with any interesf that may have been earned on said amount while on deposit with said court, provided that the amount of taxes, finally determined as legally due and included in the amount so refunded upon the court's order, shall be considered as a delinquent tax from the date on which it would have become delinquent if the action had not been commenced and the money had not been so paid, and the amount of the taxes legally due and so refunded shall be subject to a penalty of two per cent of the tax, and interest at the rate of one per cent per month from the date on which it would have become delinquent until the date on which it is finally paid. After final decision and return of the record to the tax commission, the tax commission shall notify the county treasurer of the amount of the taxes as determined by the court, and such county treasurer shall proceed to collect the taxes in the same manner as other delinquent taxes are collected, or

(c) Said party may petition the court for, and procure an order from the court directing the clerk of said court to pay over to the proper county treasurer as set forth in the petition, such portion of the taxes assessed as he shall in his petition admit to be legally assessable, and the tax commission shall apportion the amount of the tax so paid as provided in section 71.18. Any such payment shall be considered an admission of the legality of the taxes thus paid, and such taxes so paid cannot be recovered in any action or proceeding by the person paying the same, and the amount of the taxes so paid shall not be considered delinquent. The balance of the taxes on deposit in said court may be refunded to said petitioner or may be left with said circuit court. Any amount of the taxes legally due and so refunded to the petitioner shall be subject to such pen-

alties and interest on delinquent taxes as are provided in paragraph (b) of this subsection, and shall be collected in the manner provided by such paragraph. Any amount of the tax left with the court in accordance with the provisions of this paragraph after final determination shall be paid over to the party or parties entitled thereto in the manner and as provided in paragraph (a) of this subsection.

71.17 REFUNDS AND CREDITS. (1) The provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person shall be allowed to bring any action or proceeding whatever for the recovery of such taxes other than is provided in this section.

(2) No refund shall be made and no credit shall be allowed for taxes overpaid on income for the years not open to audit under section 71.11.

(3) No refund shall be made and no credit shall be allowed on any item of income or deduction, assessed as a result of an office audit, the assessment of which shall have become final and conclusive under the provisions of sections 71.12, 71.13, 71.14, 71.15 or 71.16; and no refund shall be made and no credit shall be allowed for any year, the income of which was assessed as a result of a field audit, and which assessment has become final and conclusive under the provisions of section 71.12, 71.13, 71.14, 71.15 or 71.16.

(4) It shall not be necessary for any person to file a claim for refund or credit after such refund or credit has been certified on the tax roll.

(5) Every claim for refund or credit of income or surtaxes shall be filed with the tax commission in case of assessments made by it, and with the assessor of incomes in case of assessments made by him, and such claims shall set forth specifically and explain in detail the reasons for and the basis of such claim. After such claim has been filed it shall be considered and acted upon in the same manner as are additional assessments made under sections 71.10 and 71.11, and if any portion of such claim is disallowed the person filing the same shall have the same right of hearing as is provided in section 71.12. If after hearing as provided in section 71.12 any portion of the claim is disallowed and the person filing the same shall have availed himself of the remedies provided in sections 71.14 and 71.15. such person shall have the right of appeal to the court but only as provided in section 71.16.

(6) No action or proceeding whatsoever shall be brought against any town, village, city or county or the treasurer thereof for the recovery, refund or credit of any income or surtaxes; except in case any county treasuer shall neglect or refuse for a period of sixty days to refund any overpayment of normal income tax so certified on the income tax roll, the taxpayer may maintain an action to collect the overpayment against the county so neglecting or refusing to refund such overpayment, without filing a claim for refund with such county, provided that such action shall be commenced within one year after the certification of such overpayment on the tax roll.

(7) If the tax commission or assessor of incomes shall fail or neglect to act on any claim for refund or credit within one year after the receipt thereof, such neglect shall have the effect of allowing such claim and the tax commission or assessor of incomes shall certify such refund or credit.

74.73 RECOVERY OF ILLEGAL TAXES; LIMITATION. (1) Any person aggrieved by the levy and collection of any unlawful tax assessed against him may file a claim therefor against the town, city, or village, whether incorporated under general law or special charter, which collected such tax in the manner prescribed by law for filing claims in other cases, and if it shall appear that the tax for which such claim was filed or any part thereof is unlawful and that all conditions prescribed by law for the recovery of illegal taxes have been complied with, the proper town board, village board, or common council of any city, whether incorporated under general law or special charter, may allow and the proper town, city, or village treasurer shall pay such person the amount of such claim found to be illegal and excessive. If any town, city, or village shall fail or refuse to allow such claim, the claimant may have and maintain an action against the same for the recovery of all money so unlawfully levied and collected of him.

Every such claim shall be filed; and every action to recover any money so paid shall be brought within one year after such payment and not thereafter.

(2) In case any such town, city or village shall have paid such claim or any judgment recovered thereon after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, shall have paid any necessary expenses in defense of such action, such town, city or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury and the county's and state's proportionate share of the taxable costs and expenses of suit, as the case may be; and the county treasurer shall also be allowed by the state treasurer the amount of state tax so illegally collected and the state's proportionate share of such taxable costs and expenses of suit and paid in his settlement with the state treasurer next after the payment of such claim or the collection of such judgment. If any part of such unlawful tax shall have been paid over to any school district before the payment of such claim or judgment, such town shall charge the same to such district with the proportionate share of the taxable costs and expenses of suit, and the town clerk shall add the same to the taxes of such school district in the next annual tax; provided, however, that no claim shall be allowed and no action shall be maintained under the provisions of this section unless it shall appear that the plaintiff has paid more than his equitable share of such taxes.

(3) If any person shall within the time provided by law have paid an occupational tax upon any personal property, and by mistake of the assessing officer such person shall also have paid another tax assessed unlawfully against said property for state or municipal purposes during such period, such person may file a claim therefor and maintain an action for the recovery of all money so unlawfully levied and collected of him as provided in subsection (1) of this section, and every such claim shall be filed and every action to recover any money so paid shall be brought within six years after such payment and not thereafter.