REQUEST FOR BOARD ACTION

HENDERSON COUNTY

BOARD OF COMMISSIONERS

MEETING DATE: **3 August 2015**

SUBJECT: **Remission of interest and penalties on erroneous tax bill**

PRESENTER: **Charles Russell Burrell/Stan Duncan**

ATTACHMENT(S): **Application**
N.C. Gen. Stat. §105-381

SUMMARY OF REQUEST:

Two small parcels which are common property of the subdivision Meadows at Lewis Creek subdivision were erroneously listed for the tax years 2008 to the present in the name of the subdivision developer. As a result, *ad valorem* property tax bills were submitted to the wrong entity for these parcels.

The tax and land records for these parcels have been corrected. As no application for previous and current tax years for exemption have been made, the subdivision homeowners' association has agreed to pay the taxes owed on these parcels for the years in question, but seek remission of interest, penalties and other costs beyond the taxes owed.

A copy of N.C. Gen. Stat. §105-381(a)(1)a., the statute empowering the Board to act in such a circumstance ("tax imposed through clerical error"), is attached.

County staff will be present and prepared if requested to give further information on this matter.

BOARD ACTION REQUESTED:

Determination that the taxpayer (the homeowners' association) has a valid defense to the interest, penalties and other costs beyond the taxes owed for the years in question on the parcels in question, and release of any claim for such amounts.

If the Board is so inclined, the following motion is suggested:

I move that the Board find that the taxpayer has a valid defense to all amounts beyond the taxes owed for the years in question, and that the Board release the taxpayer from such amounts.

Henderson County

Application for Remission of Late/Non-Listing Penalties

(Please Print or Type)

Name of Applicant(s)
(This should be ***all*** legal owners of the property in question, or their attorney(s)-in-fact.)

Meadows at Lewis Creek Homeowners Association INC

Property Identification
(The property should be identified by the County's Parcel Identification Number, available from the Tax Assessor's Office.)

Parcels 1012383 and 1012384

Tax Year(s) in Question
(This should be a listing of the year(s) for which penalties for late listing or non-listing were assessed.)

2010, 2011, 2012, 2013, 2014

Taxes Claimed Due
(The taxes (***NOT*** penalties OR interest) due the County for each year in question should be set out here. Please set out the specific amount for each year.)

Please see the attached spreadsheet.

Interest Claimed Due
(The interest (***NOT*** taxes or penalties) due the County for each year in question should be set out here. Please set out the specific amount for each year.)

Please see the attached spreadsheet.

Penalties Claimed Due
(The penalties (***NOT*** taxes or interest) due the County for each year in question should be set out here. Please set out the specific amount for each year.)

Please see the attached spreadsheet.

I am counting the ADVERTISING costs as penalties.

Reason Why Penalties Should be Remitted or Forgiven

(Set out here, in detail, why it would be unfair for the County to collect the full amount claimed, and the amount you allege to be reasonable.)

Basically, this situation is due to a tax imposed through clerical error and has resulted in erroneous tax bills for a period of 5 years.

Let me explain:
Our HOA recently discovered, quite accidentally, that 2 of the 3 common areas in our neighborhood were still in the name of the developer, NR Properties. In researching the situation and contacting Mark Searles/NR Properties, we found out that the property taxes on those 2 small parcels had not been paid for the past 5 years. He had legally turned them over to the HOA in a Deed dated, 12/31/07. Next we had him check with his attorney, but after closer examination, we found that the problem appeared to be an error on Henderson County's part. On the 10th of July, I went into the Land Records Office and explained the situation to Andy Bartley. He researched the deeds and found that there had been a recording error. Andy promptly made the corrections and notified us of his findings.

Our HOA had been totally unaware of this situation until this month. We were receiving a property tax bill (Parcel 9972435) and were paying it promptly. No one knew that it did not include all common areas. Now we are faced with 5 years of bills along with interest penalties. Parcels 1012383 and 1012384 are the common sections of land I am referring to in our neighborhood. The total that is owed is a relatively small amount, just under $400.00. However, our small non-profit HOA budgets carefully with only a small surplus. This extra amount is a hardship for us at this time.

The mistake was not Mr. Searles, not his attorneys, and the HOA had no knowledge of it. Bills were sent to the wrong place, and we had no clue that the bills even existed. Any advertisements did not come to our attention, for they were listed under NR Properties. The mistake was on the county's part for not recording the deed properly; all 3 parcels should have been put in our name. (Instead of just 1) We totally understand that mistakes happen, and when they do, they simply need to be corrected. We are hopeful that since this was an innocent mistake and not of our doing, that the interest & penalties could be removed from our bill for the 2 parcels.

Submitted by Cyndi Connolly, HOA Secretary

Mr. Russ Burrell looked into this matter for us and explained it quite clearly:

•The 2007 deed (book 1346, page 37, Henderson County Registry) did indeed convey all three tracts of common area to your HOA. For ease of reference, those are parcels 9972435 (the area inside the circle of Lewis Creek Drive), 1012384 (the area between lots 5 and 7) and 1012383 (the area between lot 1 and North Ridge Road.

•Originally, only 9972435 was noted on County records as HOA property.

•As to 9972435, the HOA has paid the property taxes on this parcel ($282.95 total for the years 2008-2014).

• The incorrect notation as to the ownership of the other two parcels (which should have been listed as HOA property, but was not) was, as you noted, corrected by Andy Bartley in the Land Records office. The two parcels which were listed in other than the HOA name after 2007 are now correctly listed on GIS (and therefore on future tax listings) as property of your HOA.

•Under the Machinery Act, which is what the legislature calls the property tax system in North Carolina, the Assessor has no power to "fix" the problem caused by the incorrect listing of the property in a name other than the HOA.

• However, the Board of Commissioners has the power to "remedy . . . a tax imposed through clerical error" which result in erroneous tax bills. This power is granted in N.C. Gen. Stat. §105-381 (copy attached).

Our HOA is respectfully requesting that the interest (Total $77.47) along with the cost of the Advertisements ($74) be waived. That would leave us with a bill of $234.32. If granted, we will certainly pay promptly. I will personally deliver a check to the tax office!

THANK YOU FOR YOUR TIME AND CONSIDERATION!

(You may attach additional sheets if necessary.)

Instructions: After completing the above, please bring this document, with all attachments, to the Office of the Tax Assessor for Henderson County. There they will review this document to insure that the amounts of taxes, interest and penalties shown is the same as indicated on their records. The Assessor will then transmit this document, and any comments which they wish to add, to the County Attorney for presentation to the Board of Commissioners. A copy of any comments from the Assessor will be forwarded to you. You should keep a copy of this for your records.

I certify under penalty of perjury that all statements made herein are true to the best of my knowledge, information and belief.

Cynthia Connolly

HOA Secretary of the Meadows at Lewis Creek HOA

Cynthia Connolly

Applicant's signature

Applicant's Printed Name

Date: 07/20/2015

Applicant mailing address: 34 Lewis Creek Drive
Hendersonville. NC 28792

The Meadows at Lewis Creek HOA
Common Areas

Parcel #	Year of Tax Bill	TAXES-HENDERSON COUNTY & EDNEYVILLE FIRE	Advertisements	Interest as of 7/17/2015	Current Amount Due
1012383	2010	13.68	15	11.78	$40.46
1012383	2011	12.79	6	6.08	$24.87
1012383	2012	12.79	6	4.39	$23.18
1012383	2013	12.79	5	2.54	$20.33
1012383	2014	12.79	5	1.02	$18.81
Totals for 1012383		**$64.84**	**$37**	**$25.81**	**$127.65 Total**
1012384	2010	35.56	15	21.07	$71.63
1012384	2011	33.48	6	13.01	$52.49
1012384	2012	33.48	6	9.46	$48.94
1012384	2013	33.48	5	5.75	$44.23
1012384	2014	33.48	5	2.37	$40.85
Totals for 2012384		**$169.48**	**$37**	**$51.66**	**$258.14 Total**
Final Totals		**$234.32**	**$74**	**$77.47**	**$385.79**

N.C. Gen. Stat. § 105-381

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > ***CHAPTER 105. TAXATION*** > ***SUBCHAPTER 02 . LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY*** > ***ARTICLE 27. REFUNDS AND REMEDIES***

§ 105-381. Taxpayer's remedies

(a) Statement of Defense. -- Any taxpayer asserting a valid defense to the enforcement of the collection of a tax assessed upon his property shall proceed as hereinafter provided.

(1) For the purpose of this subsection, a valid defense shall include the following:

a. A tax imposed through clerical error;

b. An illegal tax;

c. A tax levied for an illegal purpose.

(2) If a tax has not been paid, the taxpayer may make a demand for the release of the tax claim by submitting to the governing body of the taxing unit a written statement of his defense to payment or enforcement of the tax and a request for release of the tax at any time prior to payment of the tax.

(3) If a tax has been paid, the taxpayer, at any time within five years after said tax first became due or within six months from the date of payment of such tax, whichever is the later date, may make a demand for a refund of the tax paid by submitting to the governing body of the taxing unit a written statement of his defense and a request for refund thereof.

(b) Action of Governing Body. -- Upon receiving a taxpayer's written statement of defense and request for release or refund, the governing body of the taxing unit shall within 90 days after receipt of such request determine whether the taxpayer has a valid defense to the tax imposed or any part thereof and shall either release or refund that portion of the amount that is determined to be in excess of the correct tax liability or notify the taxpayer in writing that no release or refund will be made. The governing body may, by resolution, delegate its authority to determine requests for a release or refund of tax of less than one hundred dollars ($ 100.00) to the finance officer, manager, or attorney of the taxing unit. A finance officer, manager, or attorney to whom this authority is delegated shall monthly report to the governing body the actions taken by him on requests for release or refund. All actions taken by the governing body or finance officer, manager, or attorney on requests for release or refund shall be recorded in the minutes of the governing body. If a release is granted or refund made, the tax collector shall be credited with the amount released or refunded in his annual settlement.

(c) Suit for Recovery of Property Taxes. --

(1) Request for Release before Payment. -- If within 90 days after receiving a taxpayer's request for release of an unpaid tax claim under (a) above, the governing body of the taxing unit has failed to grant the release, has notified the taxpayer that no release will be granted, or has taken no action on the request, the taxpayer shall pay the tax. He may then within three years from the date of payment bring a civil action against the taxing unit for the amount claimed.

(2) Request for Refund. -- If within 90 days after receiving a taxpayer's request for refund under (a) above, the governing body has failed to refund the full amount requested by the taxpayer, has notified the taxpayer that no refund will be made, or has taken no action on the request, the taxpayer may bring a civil action against the taxing unit for the amount claimed. Such action may be brought at any time within three years from the expiration of the period in which the governing body is required to act.

(d) Civil Actions. -- Civil actions brought pursuant to subsection (c) above shall be brought in the appropriate division of the general court of justice of the county in which the taxing unit is located. If, upon the trial, it is determined

that the tax or any part of it was illegal or levied for an illegal purpose, or excessive as the result of a clerical error, judgment shall be rendered therefor with interest thereon at six percent (6%) per annum, plus costs, and the judgment shall be collected as in other civil actions.

History

1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979; 1971, c. 806, s. 1; 1973, c. 564, s. 3; 1977, c. 946, s. 2; 1985, c. 150, s. 1; 1987, c. 127.

Annotations

Notes

LOCAL MODIFICATION. --Forsyth: 1981 (Reg. Sess., 1982), c. 1154; 1985, c. 150, s. 2.

PROPERTY AFFECTED BY ALAMANCE/ORANGE COUNTY BOUNDARY CHANGES. --Session Laws *2011-88, s. 5(a)*-(d), provides: "(a) Any properties affected by S.L. 2010-61 or this act and which are subject to taxation under *G.S. 105-274* and which were taxed by both the Alamance County and Orange County taxing authorities on or after January 1, 2007, are hereby granted the following relief:

"(1) Property owners of any such dually taxed properties may, pursuant to the terms of *G.S. 105-381*, demand refund and/or release of taxes paid to the county from which their property, or portion thereof, was transitioned.

"(2) Any claim for relief pursuant to this section and under the terms of *G.S. 105-381* may be made for taxes assessed January 1, 2007, through December 31, 2011. All such claims for relief must be made in writing to the county from which the affected property was transitioned on or before February 28, 2012. Should a claim for relief pursuant to this section not be made by February 28, 2012, such claim is waived, and no further relief shall be granted pursuant to this or any other act. Alamance County and Orange County shall not grant refunds or releases pursuant to this section for any claims made after February 28, 2012, and are released from all liability, and no court action shall be maintained for any such claims made for any act or failure to act pursuant to this section.

"(b) The provisions of this section shall apply only to properties transitioned or reassigned from one county to the other, in whole or in part, by the resurveys of individual qualifying properties pursuant to S.L. 2010-61 and this act.

"(c) For purposes of this section only, the term 'property owner' shall include any builder or developer that paid property taxes on real property to both counties and subsequently sold said property or that as part of an escrow agreement in which the buyer of such property paid taxes to one county and the builder or developer who sold the property paid taxes on the same piece of property to the adjoining county.

"(d) The taxing authorities of Alamance County and Orange County shall notify property owners affected by this section of the terms of this section within 30 days after this act becomes law. Such notice shall be by United States mail at the mailing address to which any tax bills were previously submitted. No other notice is or shall be required."

The purpose of Session Laws 2010-61, referred to in subsections 5(a) and (b) of Session Laws 2011-88, was to clarify or reestablish the boundary between Alamance County and Orange County. For a fuller explanation, see the Editor's notes under *G.S. 153A-18*.

Session Laws *2012-108, s. 5(a)*-(d), provides: "(a) Any properties affected by S.L. 2010-61 or this act and that are subject to taxation under *G.S. 105-274* and that were taxed by both the Alamance County and Orange County taxing authorities on or after January 1, 2007, are hereby granted the following relief:

"(1) Property owners of any such dually taxed properties may, pursuant to the terms of *G.S. 105-381*, demand refund and/or release of taxes paid to the county from which their property, or portion thereof, was transitioned.

"(2) Any claim for relief pursuant to this section and under the terms of *G.S. 105-381* may be made for taxes assessed January 1, 2007, through December 31, 2012. All such claims for relief must be made in writing to the county from which the affected property was transitioned on or before February 28, 2013. Should a claim for relief pursuant to this section not be made by February 28, 2013, such claim is waived and no further relief shall be granted pursuant to this or any other act. Alamance County and Orange County shall not grant refunds or releases pursuant to this section for any claims made after February 28, 2013, and are released from all liability, and no court action shall be maintained for any such claims made

for any act or failure to act pursuant to this section.

"(b) The provisions of this section shall apply only to properties transitioned or reassigned from one county to the other, in whole or in part, by the resurveys of individual qualifying properties pursuant to S.L. 2010-61 and this act.

"(c) For purposes of this section only, the term 'property owner' shall include any builder or developer that paid property taxes on real property to both counties and subsequently sold said property or that, as part of an escrow agreement in which the buyer of such property paid taxes to one county and the builder or developer who sold the property, paid taxes on the same piece of property to the adjoining county.

"(d) The taxing authorities of Alamance County and Orange County shall notify property owners affected by this section of the terms of this section within 30 days of this act becoming law. Such notice shall be by United States mail at the mailing address to which any tax bills were previously submitted. No other notice is or shall be required."

EDITOR'S NOTE. --

Session Laws *2006-72, s. 1*, provides: "A taxing unit's governing body may by resolution provide that, notwithstanding the provisions of *G.S. 105-360* regarding the due date and accrual of interest, *G.S. 105-380* and *G.S. 105-381* regarding the release, refund, and compromise of taxes, and *G.S. 160A-58.10* regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and payable on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set out in the resolution. To the extent property taxes are due and payable pursuant to a resolution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in *G.S. 105-360*. A resolution adopted pursuant to this act applies only to taxes for the partial fiscal year October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws *2006-72, s. 2*, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under *G.S. 160A-58.10* and *G.S. 105-360* with respect to those taxes are delayed to the same extent."

Case Notes

I. GENERAL CONSIDERATION.
II. DEMAND.
III. INJUNCTIONS.

I. GENERAL CONSIDERATION.

EDITOR'S NOTE. --Many of the cases cited below were decided under former similar provisions.

CONSTITUTIONALITY OF PROVISIONS. --See *Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).*

JURISDICTION WHICH *G.S. 105-290* CONFERS UPON STATE BOARD OF ASSESSMENT (NOW PROPERTY TAX COMMISSION) IS NOT EXCLUSIVE. The provisions of this section are still open to a taxpayer if he prefers them. *In re Pilot Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).*

TAXPAYERS IN NORTH CAROLINA HAVE AN ALTERNATIVE TO ADMINISTRATIVE REVIEW. They can seek judicial review of an assessment directly in superior or district court by paying taxes and then bringing a suit against the taxing unit for recovery of taxes paid. In order to have such an action, the taxpayer must first have filed a written statement of a valid defense to the tax with the governing body of the taxing unit and a request for release or refund of the tax. A valid defense is either that: (1) the tax was imposed through clerical error, (2) the tax was an "illegal tax," or (3) the tax was levied for an illegal purpose. Within 90 days of receiving the taxpayer's statement and request, the governing body of

the taxing unit must act. If it denies the request or does not act within that time, then the taxpayer may bring a civil suit, provided he has paid the taxes assessed. The trial court will allow recovery of the taxes if it finds that one or more of the defenses exists. *Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984),* cert. denied, *313 N.C. 508, 329 S.E.2d 392 (1985).*

COMMISSION'S DECISIONS SUBJECT TO JUDICIAL REVIEW. --The administrative decisions of the State Board of Assessment (now Property Tax Commission) are always subject to review by the superior court. Under both *G.S. 105-290* and this section, if either the taxpayer or the taxing authority wants judicial review, it is available. *In re Pilot Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).*

CLERICAL ERROR. --The meaning of clerical error in this section is not ambiguous and applies only to transcription errors. *Ammons v. County of Wake, 127 N.C. App. 426, 490 S.E.2d 569 (1997),* cert. denied, *347 N.C. 670, 500 S.E.2d 84 (1998).*

To qualify as a clerical error, the mistake must ordinarily be apparent on the face of the instrument and a clerical error must be unintended. *Ammons v. County of Wake, 127 N.C. App. 426, 490 S.E.2d 569 (1997),* cert. denied, *347 N.C. 670, 500 S.E.2d 84 (1998).*

CLERICAL ERROR NOT SHOWN. --Assessor's allegedly inaccurate assertion that plaintiffs' property failed to qualify for present use value taxation did not constitute clerical error. *Ammons v. County of Wake, 127 N.C. App. 426, 490 S.E.2d 569 (1997),* cert. denied, *347 N.C. 670, 500 S.E.2d 84 (1998).*

ORDINARILY, SOVEREIGN MAY NOT BE DENIED OR DELAYED IN ENFORCEMENT OF ITS RIGHT TO COLLECT REVENUE upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State government. If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. And if the statute provides an administrative remedy, he must first exhaust that remedy before resorting to the courts for relief. Moreover, as broad and comprehensive as it is, even the Declaratory Judgment Act does not supersede the rule or provide an additional or concurrent remedy. *Bragg Dev. Co. v. Braxton, 239 N.C. 427, 79 S.E.2d 918 (1954).*

SECTION NOT TO PRECLUDE COUNTERCLAIM. --This section provides a mechanism by which a taxpayer can sue a taxing unit and prevent foreclosure without impeding the collection of tax revenue needed. It should not be applied to preclude a counterclaim in a foreclosure proceeding. *Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996),* modified on other grounds, *346 N.C. 265, 485 S.E.2d 618 (1997).*

ADEQUATE REMEDY AT LAW. --Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. *Henrietta Mills v. Rutherford County, 281 U.S. 121, 50 S. Ct. 270, 74 L. Ed. 737 (1930); Fox v. Board of Comm'rs, 244 N.C. 497, 94 S.E.2d 482 (1956).*

EXCLUSIVENESS OF STATUTORY REMEDY. --The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. *Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Wilson v. Green, 135 N.C. 343, 47 S.E. 469 (1904).*

Where a corporation, under Session Laws 1925, c. 102, submitted its report to the Department of Revenue, and the Department in accordance with the statute certified to the register of deeds of the county where the property was situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the Department was to file exceptions with the Department in accordance with the statute, with the right of appeal from the Department upon a hearing by it, and the corporation could not pay the tax under protest and seek to recover it under the provisions of this section. *Garysburg Mfg. Co. v. Board of Comm'rs, 196 N.C. 744, 147 S.E. 284,* appeal dismissed, *280 U.S. 520, 50 S. Ct. 67, 74 L. Ed. 589 (1929).*

ASSUMPSIT FOR MONEY HAD AND RECEIVED DOES NOT LIE to recover improperly listed taxables. *Huggins v. Hinson, 61 N.C. 126 (1867).*

Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. *Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).*

WHERE A TOWN ORDINANCE IMPOSES A LICENSE TAX UPON THOSE SELLING AT WHOLESALE OR PEDDLING therein, and provides that its violation is punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. *Loose-Wiles Biscuit Co. v. Town of Sanford, 200 N.C. 467, 157 S.E. 432 (1931).*

COMPLIANCE WITH THIS SECTION IS PREREQUISITE TO RIGHT OF ACTION FOR RECOVERY OF TAXES or any part thereof. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. *Middleton v. Wilmington, B. & S.R.R., 224 N.C. 309, 30 S.E.2d 42 (1944).*

PARTY SEEKING RELIEF UNDER (C)(2) MUST ASSERT VALID DEFENSE. --A party seeking relief under subdivision (c)(2) of this section must assert a valid defense, as that term is defined in subdivision (a)(1) of this section, in their initial statement to the governing body of the taxing unit as a prerequisite to the later filing of a civil action. *Kinro, Inc. v. Randolph County, 108 N.C. App. 334, 423 S.E.2d 513 (1992).*

PAYMENT UNDER PROTEST. --Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. *Carstarphen v. Town of Plymouth, 186 N.C. 90, 118 S.E. 905 (1923); Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).* See also *State v. Snipes, 161 N.C. 242, 76 S.E. 243 (1912).*

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. *Southeastern Express Co. v. City of Charlotte, 186 N.C. 668, 120 S.E. 475 (1923).*

PAYMENT OF TAX BUT NOT ATTORNEY'S FEES PREREQUISITE. --Payment of tax, even an allegedly illegal tax, is a prerequisite for filing suit under this statute; however, payment of attorney's fees not assessed by the court was not a prerequisite. *Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996),* modified on other grounds, *346 N.C. 265, 485 S.E.2d 618 (1997).*

RIGHT TO SUE. --Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the State and county taxes. *Brunswick-Balke-Collender Co. v. County of Mecklenburg, 181 N.C. 386, 107 S.E. 317 (1921).*

RIGHT TO APPEAL. --Superior court did not err in dismissing a taxpayer's petition for writ of mandamus directing a county tax administrator to report the facts to the board of county commissioners in order that the board could make a decision as to whether the taxpayer received notice of changes in the valuation of its property because the taxpayer failed to timely challenge the change in valuation of the property before the county board of equalization and review, and thus lost its right to appeal; taxpayer also chose not to pursue the second means of redress available to it by paying the taxes and then bringing a suit in the trial court for its recovery under *G.S. 105-381*, but instead the taxpayer filed a petition for writ of mandamus in the superior court. *Villages at Red Bridge, LLC v. Weisner, 209 N.C. App. 604, 704 S.E.2d 925 (2011),* review denied, *2011 N.C. LEXIS 441 (N.C. 2011).*

DISTINCTION BETWEEN AN ERRONEOUS TAX AND AN ILLEGAL OR INVALID TAX is recognized by this section and North Carolina case law. *Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).*

ILLEGAL OR INVALID TAX RESULTS WHEN TAXING BODY SEEKS TO IMPOSE TAX WITHOUT AUTHORITY, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. *Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968); Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972),* rev'd on other grounds, *282 N.C. 559, 194 S.E.2d 129 (1973).*

A tax or assessment is invalid or illegal only when the taxing body lacks the authority to impose the tax, as where the rate is unconstitutional or the subject is exempt from taxation. *Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972),* rev'd on other grounds, *282 N.C. 559, 194 S.E.2d 129 (1973).*

BURDEN ON TAXPAYER. --Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. *Norfolk-Southern R.R. v. Board of Comm'rs, 188 N.C. 265, 124 S.E. 560 (1924).*

STATUTE INAPPLICABLE TO SERVICE CHARGES AND FEES. --Landfill fees, like sewer service charges, are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the landfill. Therefore, the statute is inapplicable to landfill fees and campground owners did not preserve their right to challenge payment of county landfill fees by writing that they paid the fees under protest on their check to the county. *Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711 (2004),* appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, *358 N.C. 545, 599 S.E.2d 409 (2004).*

APPLIED in

Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260 (1980).

CITED in

Raintree Corp. v. City of Charlotte, 49 N.C. App. 391, 271 S.E.2d 524 (1980); MAO/Pines Assocs. v. New Hanover County Bd. of Equalization, 116 N.C. App. 551, 449 S.E.2d 196 (1994); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, *519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997); State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875 (2000).*

II. DEMAND.

DEMAND FOR REFUND REQUIRED. --The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within the prescribed time after payment, and it was held in *Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891),* and *Teeter v. Wallace, 138 N.C. 264, 50 S.E. 701 (1905),* that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. *Blackwell v. City of Gastonia, 181 N.C. 378, 107 S.E. 218 (1921).*

The requirement of making a demand within the prescribed time is mandatory. *Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891).*

IT MUST ALSO BE MADE IN WRITING. Bristol v. Commissioners of Morganton, 125 N.C. 365, 34 S.E. 512 (1899).

REQUIREMENT OF DEMAND IS NOT CONFINED TO CLAIM FOR REFUNDING ANY PARTICULAR TAX OR TAXES alleged to be invalid on any particular account. *Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891).*

ALLEGING DEMAND. --A complaint which fails to allege that the demand was made within the prescribed time is insufficient on demurrer. *Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891).* See *Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).*

III. INJUNCTIONS.

WHEN INJUNCTION WILL LIE. --Injunction will lie when the tax or assessment is itself invalid or illegal. *Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968); Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972),* rev'd on other grounds, *282 N.C. 559, 194 S.E.2d 129 (1973).*

An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. *Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903); Sherrod v. Dawson, 154 N.C. 525, 70 S.E. 739 (1911).*

The remedy of injunction is available to a taxpayer when a tax levy or assessment, or some part thereof, is challenged on the ground (1) the tax or assessment is itself illegal or invalid, or (2) for an illegal or unauthorized purpose. *Wynn v. Trustees of Charlotte Community College Sys., 255 N.C. 594, 122 S.E.2d 404 (1961).*

The equitable remedy of injunction is proper where it is contended that the taxing body is without authority to impose the tax because of a constitutional exemption. *Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972),* rev'd on other grounds, *282 N.C. 559, 194 S.E.2d 129 (1973).*

Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (see *Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903)*) to test the validity of a tax. *Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).*

ONLY COLLECTION OF TAX WILL BE ENJOINED, until the merits of the controversy can be determined. *North Carolina R.R. v. Commissioners of Alamance, 82 N.C. 259 (1880).*

FAILURE TO GIVE TAXPAYER NOTICE. --An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess such property. *Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).*

SPECIAL ASSESSMENT FOR IMPROVEMENTS. --Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. *Marion v. Town of Pilot Mt., 170 N.C. 118, 87 S.E. 53 (1915).*

LEVY FOR SCHOOL PURPOSES. --Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to the suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. *Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).*

PARTIES TO SUIT FOR INJUNCTION. --The sheriff (tax collector) is the proper party defendant to a suit to enjoin the collection of taxes, but the commissioners may make themselves parties if they think the rights of the county require it. *Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).*

NECESSARY ALLEGATIONS. --In order to enjoin the collection of taxes on land, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected. *Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).*

INJUNCTION GRANTED. --For case in which injunctive relief against the collection of taxes was granted, see *Barber v. Town of Benson, 200 N.C. 683, 158 S.E. 245 (1931).*

PORTION OF LEVY ENJOINED. --The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. *Southern Ry. v. Board of Comm'rs, 148 N.C. 220, 61 S.E. 690 (1908).*

Research References & Practice Aids

LEGAL PERIODICALS. --

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).