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Taxation—Recovery of Taxes Paid Under Mistake of Law

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Petitioner in *New Yorker v. Gerosa*[44] was unable to factually distinguish the *Western Livestock* decision, and the dismissal of its claim was affirmed. The only reasonable basis for distinction would be the fact that one of the reasons for the decision in the *Western Livestock* case was that a tax on the taxpayer's activity could not be levied elsewhere.[45] In the instant case, the Court, in accepting the finding of the Comptroller of New York City, admitted that the gross receipts could in part be subjected to taxation elsewhere. This is evidenced by the fact that the tax here involved was imposed on advertising receipts, less those received from the Chicago branch office of the petitioner.[46] Nevertheless, this is not to admit that the sale of advertising is now considered in New York as interstate commerce, but rather a recognition that petitioner carried on local activity in two separate cities located in different states, and that each city could properly tax the amount of gross receipts allocable to advertising activity within that particular city. The Court correctly rejected the attempts of petitioner to recover the funds paid, and maintained the position found acceptable to the Supreme Court where advertising receipts are involved. The sale of advertising space, and the receipt of advertising receipts is a purely local activity, subject to a municipal tax on said receipts.

Recovery Of Taxes Paid Under Mistake Of Law

Despite the statutory admonition that "when relief against mistake is sought . . . relief shall not be denied merely because the mistake is one of law rather than fact,"[47] Lord Ellenborough's famous dictum in *Bilbie v. Lumley*[48] still influences New York law.

Without statutory provision to the contrary, taxes cannot be recovered unless paid under protest or involuntarily.[49] Payments under mistake of fact has long been classed as involuntary[50] but no relief has been given for mistake of law,[51] often for little more reason than that given by Lord Ellenborough.[52]

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44. *Supra*, note 41.
45. See note 42 *supra*, at 260.
46. 3 N.Y.2d at 471, 165 N.Y.S2d at 471.
47. N.Y. CIV. PRAC. ACT §112-f.
48. 2 East 469, 102 Eng. Rep. 248 (1802), wherein Lord Ellenborough said:
> . . . [E]very man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried.

49. Adrico Realty Corp. v. New York, 250 N.Y. 29, 164 N.E. 732 (1928).
50. Mutual Life Insurance Co. v. New York, 144 N.Y. 494, 39 N.E. 386 (1895); Brooklyn, Q. C. & S. R. Co. v. New York, 224 App. Div. 659, 229 N.Y. Supp. 9 (2d Dep't 1928), *aff'd*, 250 N.Y. 542, 166 N.E. 317 (1929).
51. Sanford v. New York, 33 Barb. 147 (N.Y. 1860); New York v. New Rochelle, 36 N.Y. Supp. 211 (2d Dep't 1895).
52. *Cf.* Adrico Realty Corp. v. New York, *supra* note 49, per Crane, J.:
> . . . [The taxpayer] . . . may be charged with a knowledge of the law, but not with knowledge of those facts which, being disputed, must ultimately be decided by a court.

It was not until 1942 that the legislature afforded relief for mistake of law in section 112-f of the Civil Practice Act, even though similar provisions were proposed by the Commissioners of the Code, in 1865.[53] However other states which did adopt these, did not extend them to the tax refund situation.[54] The Law Revision Commission, while commenting on the limiting effect of the decisions in these jurisdictions, did not take a clear position one way or the other.[55]

The recent case of *Mercury Machine Import. Corp. v. City of New York*,[56] however, foreclosed the possibility that section 112-f will alter past decisions in respect to tax refunds. There, after a New York City gross receipts tax[57] was declared unconstitutional as applied to interstate business, several companies who paid the tax without protest sought refunds, principally on the ground of mistake. Holding the mistake to be one of law, the Court refused to apply section 112-f as not being appropriate here in view of the exigencies of governmental finance.

It would seem that the fact that protest was made has little bearing on the question of whether the tax was properly or improperly assessed. Those who are well informed will file a precautionary protest against any tax which has not yet proven itself in the courts as a matter of course, while those not so well advised may forfeit their just claim. Thus the claimant's right hinges on a mere technicality rather than substantive justice, a result which necessarily recommends the abolition of the requirement of protest such as was done by the federal government as long ago as 1924.[58]

53. NINTH REPORT OF THE COMMISSIONERS OF THE CODE OF CIVIL PROCEDURE TO THE LEGISLATURE (1865).
54. Wingerter v. San Francisco, 134 Cal. 547, 66 Pac. 730 (1901); Chrysler Light and Power Co. v. Belfield, 58 N.D. 33, 224 N.W. 871 (1929).
55. ANNUAL REPORT OF THE LAW REVISION COMMISSION, 1942, p. 49.
56. 3 N.Y.2d 418, 165 N.Y.S.2d 517 (1957).
57. NEW YORK CITY ADMINISTRATIVE CODE §B46-1.0.
58. The federal government has so dispensed with the necessity of protest. 43 STAT. 343 (1924), 26 U.S.C. §7422(b) (1954). See Moore Ice Creame Co. v. Rose, 289 U.S. 373 (1936).