

## Remedies for Unconstitutional or Otherwise Judicially Invalidated Taxes

### Policy Position

**Position:** *A taxing authority has a constitutional and ethical obligation to provide both procedural and financial relief to all taxpayers subject to unconstitutional or otherwise invalid taxes and to provide plain, efficient, and consistent rules on which taxpayers can rely in obtaining such relief.*

**Explanation:** A taxpayer confronted with a tax that it deems violates state or federal constitutional protections or other legal requirements or rules—such as protection from taxes that discriminate against interstate commerce, prohibitions on taxes which restrict free speech, or violations of single subject rules for state budget legislation—may be faced with punitive consequences if the taxpayer fails to pay the questioned tax when due. These punitive consequences include loss of the right to challenge the tax, significant financial penalties, and the loss of the right to do business in the taxing jurisdiction. As a result, many taxpayers pay a potentially unconstitutional or otherwise invalid tax prior to challenging the legality of the tax. Even when such obvious punitive measures are not imposed by a taxing jurisdiction, a taxpayer may still choose to pay the tax and challenge it in a refund action rather than through a challenge to an assessment if a taxing jurisdiction imposed impediments to assessment challenges not found in a refund action, such as high interest rates on past due taxes or procedural hurdles not applied in refund actions. Thus, when a tax is declared by a court to be unconstitutional or otherwise invalid, it is common for many affected taxpayers to have already paid the tax at issue. The Due Process Clause of the United States Constitution and the ethical obligations of government require that taxing jurisdictions provide clear procedural and financial remedies to ensure that taxpayers subject to improper exaction of taxes are protected.

A fundamental precept of the Due Process Clause is that a government cannot exact property—such as money in the form of taxes—without offering a fair procedure. A fair procedure requires that a taxpayer improperly deprived of its property through the payment of a tax later found to be unconstitutional or otherwise invalid must have an opportunity to be heard and such opportunity must result in a fair substantive remedy should the taxpayer’s challenge prevail. In all cases, a fair procedure requires both the rules for bringing a challenge and the financial remedies available to the taxpayer should it succeed to be understood at the time the tax becomes due.

- *A fair opportunity to be heard* requires that: a) the taxing jurisdiction provides clear forums and rules under which a taxpayer may bring its challenge and a taxpayer may rely absolutely on the jurisdiction’s offered forums and rules; b) the taxing jurisdiction does not retroactively impose new rules for obtaining relief, such as new record-keeping requirements, that did not exist at the time the tax was imposed; and c) the taxing jurisdiction avoids procedural maneuvering and delays intended to prolong the final outcome or to increase the taxpayer’s costs or otherwise frustrate the taxpayer.
- *A fair substantive remedy* requires: a) an actual cash refund (with interest) to taxpayers for taxes paid under laws found invalid; b) a refund/cancellation of assessment based solely on what the taxpayer’s liability would have been in the hypothetical situation in which the unconstitutional or invalid provision had never existed and the taxpayer had acted accordingly with the burden on the taxing authority to prove that any tax would have been imposed; and c) that, in the case of a facially discriminatory tax (except for taxes separately billed to another party) the taxpayer will not be required to prove it bore the actual economic burden of a tax. A fair substantive remedy also includes the right for a taxpayer to recover attorneys’ fees and other costs associated with challenging the tax. A fair substantive remedy must be provided to all taxpayers for taxes paid under laws found invalid, regardless of whether the taxpayer knows or suspects the law is invalid prior to it being found to be invalid.