Opinion No. 55-6265

August 26, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Clarence L. Forsling, Chief Tax Commissioner, State Capitol Building, Santa Fe, New Mexico

In your letter of August 11, 1955, you request our opinion upon the following question:

"Is it illegal for the taxing authorities for various school districts in New Mexico to cause taxes to be levied on property within such school districts and then budget them and allocate a portion of the proceeds of such taxes to municipalities located in such school district for the use of such municipalities?"

It has been the practice of some school districts in New Mexico, for many years to levy a 4 1/2 mill direct charge levy upon all property located in the school district including that located in municipal corporations in said school district. The towns have made no levy. The school districts have budgeted and have paid to the towns an amount substantially equal to that which would have been raised within the municipal limits if the town had made a 2 1/4 mill levy therein. Such payments have been variously nominated as payments in lieu of ad valorem taxes and as payments for services on behalf of the city. The problem has arisen as to whether this method of handling the direct charge funds can legally be continued. It poses two questions:

1. Can the full 4 1/2 mill levy legally be made by the school district to the exclusion of the town with the approval of the State Budget Auditor and the State Tax Commission if:

A. The town waives the levy;

or

B. The town does not waive the levy.

2. Assuming the validity of the levy by the school district, is the school district authorized by law to make payments to the city, how ever such payment may be called so long as it is budgeted and approved by the Tax Commission and the State Budget Auditor?

Article 8 of Section 2 of the New Mexico Constitution limits all levies upon real or personal property except special levies and levies for the payment of public debt to 20 mills annually on the fixed valuation. The state levies 5 1/2 mills for state purposes. This levy is made under Article 8, Section 2 of the Constitution which permits a levy of not exceeding 4 mills for state purposes other than institutional and a maximum levy of 10 mills for all state purposes. The 5 1/2 mill levy by the state is limited under the provisions of Section 72-4-11 N.M.S.A., 1953 Compilation. This section of the statute

also limits the levy for county purposes other than school to 5 mills. It provides for a general levy of 5 mills for general school purposes and leaves 4 1/2 mills to be assessed by the school district and by the municipality for the direct charge budget of the school district and for municipal purposes. We have found no statute which fixes the division of this 4 1/2 mills as between the school district and a municipality which might lie within the school district. Cities are authorized by the provisions of Section 72-4-1 N.M.S.A., 1953 Compilation, to make a levy on taxable property in accordance with the laws of the state. This levy is required to conform to and be within the budget estimates which have been approved by the State Tax Commission and are required to be within the rate of levy provided by law. Section 73-7-21 N.M.S.A., 1953 Compilation, authorizes a special school district levy in each school district for the purpose of direct charges, except interest and sinking fund, of not exceeding 5 mills. The State Tax Commission is charged with the duty of approving municipal and school district budgets or revising, amending and correcting the same and certifying the tax to be levied to the County Commissioners. Section 72-4-4 N.M.S.A., 1953 Compilation.

We are of the opinion that while cities, towns and villages and school districts may make a levy of not exceeding 5 mills upon taxable valuation of the property in the respective taxing district, the State Tax Commission has the final authority on the matter. It is obvious that each such taxing district cannot levy a full 5 mill levy in a situation where there are only 4 1/2 mills left for levy by both the taxing districts after the requirements for state and county wide purposes have been met. It is our opinion that the State Tax Commission, having the final authority in the matter of local budgets, has the power to permit the levy of the 4 1/2 mills by either taxing entities, i.e., the school district or the municipality, and has the final authority to divide such levy between said entities in accordance with approved budgets upon the basis of need. It is doubtful that the local authority has the power to make the levy or to waive the levy as a practical matter. In the end analysis the responsibility is that of the State Tax Commission. This power cannot be arbitrarily exercised by the Tax Commission, but must be bottomed upon good and sufficient cause or reason and upon approved budget items. As a practical matter, in cases where agreement could be made between the school district and the municipality in respect to a division of the 4 1/2 mills, the Tax Commission would probably approve such an agreement if budget items appeared to be necessary in an amount which would require an equal division of the levy. On the other hand, we believe that the Tax Commission could hold that all or any part of the levy could be made by either of the taxing districts upon the basis of need, for as we construe the broad scope of our Budget Act and the powers granted by the State Tax Commission, we conclude that no taxing district such as a school district or a municipality would have the right or power to levy a tax that was not approved by the State Tax Commission based upon budgeted items. We, therefore, conclude that the State Tax Commission can allocate all or any part of the levy to either of the taxing districts. Authority upon the subject is sparse. The nearest authoritative decision we have found is the case of **State vs. Greer** 111 P. 2d 178 (1941 Okla.). In that case the Greer County Excise Board was required by law to apportion a maximum 10 mill tax levy between the county, the school district and the municipality. They made the allocation of 10 mills to the county and 5 mills to the school district to the exclusion of the City of Mangum. A mandamus action was

instituted by the City of Mangum to compel the Excise Board to allow an ad valorem tax levy. We believe the broad powers conferred upon the State Tax Commission in New Mexico include within their scope the powers conferred upon the County Excise Boards under the Oklahoma statute. The Supreme Court of Oklahoma held that the court had no power to determine what part of the 15 mill levy could be allocated to each of the subdivisions. They indicated it might be possible for the court to interfere and direct an allowance of some portion of the tax to the city if it clearly appeared the allocation denying the city any portion of the tax was arbitrary, inequitable and unjust. Such a situation not appearing, it was their opinion that the Excise Board had the right to allot the whole levy to the county and to the school district even though there was a statute which permitted the city to make a 2 mill levy for library purposes which they were attempting to do.

If it be assumed that the State Tax Commission has the power to award the full 5 mill levy to the school district to the exclusion of the municipality, either by express waiver of the municipality or otherwise, can the school district in such event make a payment to the town in substantially the amount of the levy? The powers which are conferred on the Educational Budget Auditor and the State Tax Commission in New Mexico with reference to the expenditure of these funds is quite broad. The local budget commission and the Educational Budget Auditor approve the school budget based on Section 73-7-6, N.M.S.A., 1953 Compilation, insofar as the direct charge budget is involved. This direct charge budget must be approved by the State Tax Commission. The scope of items which may be budgeted under Division 13 is almost unlimited. That division permits budgeting for "other items necessary for operation of schools approved by the State Educational Budget Auditor and local budget commission". It could be asserted that in those situations in school districts in which the additional direct levy funds were required for the reasonably necessary operation of the school district, the budget auditor with the approval of the Tax Commission would have the right to permit the budgeting of any funds which reasonably provided for the operation of the schools. The argument against such a position would be that operation, as therein used, means the direct operational costs of the school and would not include a payment which would permit the school to receive a larger portion of the tax funds. The phrase cannot be so definitely limited as many of the purposes for which budget items are charged under 13 are not direct operational expenses. The school district under a properly budgeted item in this section would quite likely have the right to pay to the city the expenses necessarily incurred by the city in additional traffic patrols around the schools requested by the school districts, or to reimburse the city for city equipment or other city facilities used by the school district. Many other similar items could be cited. Unquestionably under Section 14 of the direct charge budget entitled "donations to public libraries" the school would have the right to make payment to the city from such a direct charge levy of expenses incurred by the city in the operation of public libraries, if municipally owned.

The constitutional provision which prohibits the use of public funds for private purposes or as donations, etc., would not be restrictive of the use of funds for the purpose of the above items, so long as it could fairly be said the additional funds received by such procedure were reasonably necessary to the operation of the schools under budgets

approved by the State Educational Budget Auditor, the local school budget commission, and the State Tax Commission. We doubt the validity of a budget item denominated "in lieu of ad valorem taxes," as the same is not an item reasonably necessary to the operation of the schools.

It certainly appears to us the tax levy can legally be authorized to be made by the school district alone, either with or without the consent of the town. It is probable under **Asplund vs. Hannett,** 31 N.M. 641, that the legality of the payment by the school district under § 73-7-6 (13) N.M.S.A., 1953 Compilation, could be attacked by a taxpayer, but such an attack would not in our opinion be successful if it were established that the payment to the city was directly or indirectly a reasonably necessary contribution to the operation of the schools or was clearly within authorized budget items. In light of the fact that the levy can legally be made and that at least a substantial portion of the money received can be paid to the municipality, it would appear that the procedure should not be stricken down in the absence of judicial construction in light of the fact it has been practiced for more than fifteen years and has not been attacked.

By: Walter R. Kegel

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