

Opinion No. 57-168

July 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M. Rosenthal,
Assistant Attorney General

TO: Mr. F. Wayne Laws, Chief Tax Commissioner, N.M. State Tax Commission, Santa Fe, New Mexico

QUESTIONS

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Can the City of Santa Fe be allowed to use a portion of the millage now being levied throughout the state for state purposes, and if it can be allowed, which state agency, if any, has the power and authority to make this distribution of the twenty (20) mills set up by the Constitution?

CONCLUSION

The City of Santa Fe may be permitted an increase in its millage up to the limit permitted by § 72-4-11, N.M.S.A., 1953 Comp., (five mills) provided the total millage levied does not exceed the constitutional limitation of twenty (20) mills. The State Tax Commission, responsible for the levy for state purpose, has authority, in its discretion, to make the increase possible to the extent empowered by law (5.55 mills) - the Local Government Division of the Department of Finance and Administration, responsible for certifying the budget to the County Commissioners, has discretionary authority to make an increase possible on the levies within its jurisdiction pursuant to Chapter 250, Laws of 1957, subject to constitutional and statutory limitations.

OPINION

ANALYSIS

Article 8, § 2, of the New Mexico Constitution, provides that the tax rate "shall not exceed twenty (20) mills annually on each dollar."

Section 72-4-11, N.M.S.A., 1953 Comp., provides, in part

". . . the maximum rate of tax to be levied for city . . . purposes and uses shall not exceed five mills on the dollar."

The above limitations apply to all that follows, whether or not specifically referred to in each instance. Further, this opinion should be read in conjunction with the contents of the inquiry from the State Tax Commission dated June 26, 1957, with which was

enclosed a letter from the City of Santa Fe, dated June 20, 1957, in which the necessitous circumstances of the City of Santa Fe are enumerated -- an enumeration applying with equal verity to almost all of the cities of the State.

Section 72-4-3, N.M.S.A., 1953 Comp., provides:

"It shall be the duty of the State Tax Commission to make and order the levy of all **necessary state taxes**, and to certify the rates thereof to the Board of County Commissioners of each and every county on or before the first Monday in September of each year." (Underlining ours.)

There is nothing in this authorization that **requires** the State Tax Commission to make the maximum levy permissible for state taxes. Quite the contrary, the Statute specifically uses the word "necessary" - and the plain implication is that no unnecessary levy shall be imposed. Inasmuch as the State of New Mexico has consistently shown a surplus of general fund for a period well in excess of fifteen (15) years, it would appear obvious that other than "necessary" state levies are being imposed. By thus "filling the vacuum" of constitutionally leviable millage, the State Tax Commission has made it impossible for the cities of New Mexico to render services necessary and desirable to be performed by the cities - during the same period that the State of New Mexico has shown a surplus, the cities have been compelled to curtail all services, - police, fire, maintenance, etc.

If the State Tax Commission intends to collect the maximum levyable tax in each and every year, regardless of what is "necessary", then it would appear that the Legislature would have mandated this procedure instead of leaving to the investigatory powers and discretion the determination of the amount of tax "necessary" for state purposes.

In its own discretion, the State Tax Commission may adjust the state-wide tax for state purposes, thereby leaving available to all the cities, including Santa Fe, the millage differential between the state's actual needs and the millage heretofore automatically imposed.

This subject is by no means a novel one. Attorney General's Opinion No. 6265, issued August 26, 1955, less than two years ago, directed to the attention of the State Tax Commission, specifically supports the view that, as budgetary authority, the State Tax Commission is "the final authority" in allocating levies on the basis of need. A further quotation from this opinion:

"This power can not be arbitrarily exercised by the State Tax Commission, but must be bottomed upon good and sufficient cause or reason, and upon approved budget items."

Your letter lists the division of the millage "by long custom and acquiescence." Inasmuch as maximum millage enumerated in § 72-4-11 and elsewhere is considerable more than double the millage permitted by Article 8, § 2 of the Constitution, the authority to vary individual millage is plain, unequivocal, and even necessary. No vested right in millage distribution by a state or political subdivision is specified or implied in common

or statutory law. Sections 72-6-12 (8), 72-4-2, 72-4-4, prior to the passage of Chapter 250, Laws of 1957, vested budgetary authority in the State Tax Commission - and the first cited Section authorized the State Tax Commission to certify the budgets of political subdivisions (including counties, municipalities, school districts or "any other district having the power of taxation") to the boards of county commissioners of the several counties Hence, prior to Chapter 250, Laws 1957, the State Tax Commission had the authority and responsibility to make any amendments, revisions, corrections it deemed advisable, considering the complex of factors involved. While Chapter 250, Laws of 1957, does not in any wise affect the authorities vested in the State Tax Commission to levy for state purposes, it does change the responsibility as regards the enumerated political subdivisions. The authority of Sections 72-4-2 and 72-4-4 is specifically vested in the Local Government Division of the Department of Finance and Administration, and while Section 72-6-12 (8) is not denoted an amended statute, the precise wording used therein is covered in Section 2 of Chapter 250, and Section 72-6-12 (8) is thereby necessarily amended or repealed by specification or implication, as the case may be.

Hence, with reference to budgets and certification of levies, the Local Government Division of the Department of Finance and Administration now has the former State Tax Commission function with reference to political subdivision taxation. The Local Government Division of the Department of Finance and Administration, pursuant to Chapter 250, Laws of 1957, now has the authority to make adjustments in the various budgets and certifications for the purpose of distributing the millage where it is most needed. For emphasis, we wish to repeat that this changeover does not apply to state purposes millage.

The Local Government Division of the Department of Finance and Administration may certify a levy for cities including relinquished state purpose millage, or millage taken from some other source.

Therefore, in their respective provinces, both the State Tax Commission and the Local Government Division of the Department of Finance and Administration may make possible an increase of millage for the cities of New Mexico.