

## Opinion No. 61-43

May 24, 1961

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

**TO:** Dan Sosa, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

### QUESTION

#### QUESTIONS

1. Can the two-mill levy for courthouse repair and maintenance permitted by Section 15-47-5, N.M.S.A., 1953 Compilation, be levied in addition to the five-mill maximum levy for all county purposes and uses as provided by Section 72-4-11, N.M.S.A., 1953 Compilation?
2. For tax levy purposes, can the county place property purchased by it on the tax rolls (at a value equal to the purchase price) when it is necessary to purchase property for county use and no funds are available at the time and the county is already taxing the maximum mill levy permitted under Section 72-4-11, N.M.S.A., 1953 Compilation?

#### CONCLUSIONS

1. No.
2. No.

### OPINION

#### ANALYSIS

Section 72-4-11, N.M.S.A., 1953 Compilation, provides that "The maximum rate of tax to be levied for all county purposes and uses, excepting special school levies, general school tax levies, and **special levies on specific classes of property** shall not exceed five (5) mills on the dollar." (Emphasis supplied).

The tax provided in Section 15-47-5, N.M.S.A., 1953 Compilation, for the repair of county courthouses and county jails is a special levy. It is noted that the statute itself denominates the levy as a "special tax." However, since the tax levy authorized by this section is imposed on all taxable property in the county, it does not meet the requirement that the tax be levied on "specific classes of property." Hence the levy for repair and maintenance of court-houses and jails cannot be made **in addition** to the maximum levy permitted for all county purposes and uses.

Your second question involves the legality of a procedure whereby the county would, for tax levy purposes, place property purchased by it on the tax rolls (at a value equal to the purchase price) when it became necessary for the county to purchase property for county use, no funds being available, and the county was, at that time, already taxing the maximum levy permitted under Section 72-4-11, N.M.S.A., 1953 Compilation.

Assuming there is an administrative procedure whereby this could be achieved, it is the opinion of this office that such action is not legal.

As you know, county property is exempt from taxation. Article VIII, Section 3, New Mexico Constitution. And it seems quite clear that the New Mexico Statutes relative to revenue and taxation (72-1-1, et seq., N.M.S.A., 1953 Compilation) contemplate that exempt property if placed on the tax rolls at all, is placed there only for purposes of record. Such exempt property is not included in determining whether the county is taxing at the statutory maximum. In this connection, it is to be noted that under the provisions of Section 72-2-41, N.M.S.A., 1953 Compilation, the assessor prepares a certificate as to the total assessed valuation of taxable property in the county.

As we envisage the proposed procedure, the result would be to increase the total assessed valuation of property in the county by the inclusion on the tax rolls of the cost of property purchased by the county. Since at that point the county would no longer be taxing the total property at the five-mill maximum, the taxes on all of the taxable property would then be increased. In our opinion this is doing indirectly what cannot be done directly.

The purpose under-lying the enactment of constitutional and statutory maximum levies was to "protect the public against extravagance and waste where expenditures are discretionary, and not as to items definitely fixed by law and not specifically included, or judgments for torts, or like items over which the officials of municipalities have no control . . ." **Barker v. State**, 39 N.M., 434, 436, 49 P. 2d 246.

While recognizing that the officials of Dona Ana County have no such intention, the proposed procedure could, if sanctioned by an avenue whereby constitutional and statutory maximum tax levies could be evaded. A municipality or county could purchase various and sundry property, place such property on the tax rolls at the purchase price, and in this manner raise the taxes on all taxable property in the county.

The procedure which is proposed is analogous to the question of whether a county may levy a special tax to pay a condemnation judgment, since as I understand it, Dona Ana County and the seller were simply going to agree on a price rather than going through the formal procedure of condemnation.

The landmark case on this matter in New Mexico is **In re Atchison, T. & S.F. Ry., Co's. Taxes in Eddy County**, 41 N.M. 963 P. 2d 345. The levy involved was a special one made for the purpose of satisfying two judgments rendered against the Board of County Commissioners of Eddy County in condemnation proceedings instituted for the purpose

of acquiring rights of way for a state highway. The county in condemning the property in question was not acting voluntarily but under the compulsion of a statute requiring counties to obtain and pay for state highways. See **Summerford v. Board of Commissioners of Dona Ana County**, 35 N.M. 374, 298 P. 2d 410.

The fact that, from the county's standpoint, the transaction was involuntary appears to have weighed heavily with the Court in the Atchison case wherein the special levy was upheld. The opinion states as follows on page 13:

"We thus have before us a case **where not only do the judgments for which the levy was ordered represent involuntary liabilities** imposed by law but liabilities fixed in actions classified of necessity as ex delicto as distinguished from actions ex contractu." (Emphasis supplied)

At another place in the opinion (P. 14), the Court made it clear that it was "emphasizing the involuntary character of the obligation."

Should Dona Ana County proceed via the condemnation route, it would appear to us that the county would be voluntarily incurring the obligation, and thus the case could not fall within the exception spelled out in the Atchison case.

Inasmuch as we feel that a special tax levy to satisfy a condemnation judgment would be precluded in the particular situation posed, it is not necessary to discuss any possible ramifications of the Bateman Act. See **In re Atchison, T. & S. F. Ry., Co's., Taxes in Eddy County**, supra.

Since your inquiry indicates that Dona Ana County does not wish to resort to general obligation bonds, it might be that the County Assessor may want to study carefully the assessed valuation of the taxable property in the county to determine whether it is "adequately and uniformly valued . . . for purposes of taxation." Section 72-2-10.2, N.M.S.A., 1953 Compilation (P.S.).

I trust this answers the questions presented.