Opinion No. 62-111

August 27, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General J. E. Gallegos, Assistant Attorney General

TO: Mr. Luis L. Fernandez, Chief, Local Government Div. Department of Finance and Administration, Santa Fe, New Mexico.

QUESTION

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Are the boards of county commissioners of the various counties authorized to make a special tax levy to pay judgments against the county rendered in proceeding for condemnation of highway right-of-way?

CONCLUSION

Yes.

OPINION

ANALYSIS

At the outset, we point out that this question is presented by the Local Government Division of the Department of Finance and Administration because the duty is upon the Chief of that division to certify tax levies made by boards of county commissioners, § 72-4-4, N.M.S.A., 1953 Compilation. See AG Opinion No. 57-168, July 12, 1957.

The question arises because an obligation to acquire rights-of-way for public roads rests upon the county wherein the road is located. §§ 55-2-28, 55-3-12, N.M.S.A., 1953 Compilation. In the case of roads in the primary system and federal aid interstate system, the cost of right-of-way is paid out of the state road fund up to a set figure arrived at by a board of appraisers, but all compensation to the landowner over the appraisal figure is the obligation of the county. § 55-2-22.1 (2), N.M.S.A., 1953 Compilation. In the acquisition of right-of-way for secondary roads, the entire responsibility is on the county. See AG Opinion No. 59-82, July 28, 1959 for full discussion.

We are informed of many outstanding judgments against the counties rendered in condemnation proceedings. Most of these result from cases where the award, arrived at either by settlement or verdict, was in excess of the figure set by the board of appraisers. The counties are faced on one hand with these judgments drawing six percent per annum interest, and on the other, with no money in their county road and

bridge fund to pay them. The boards of county commissioners, therefore, propose to raise the funds to pay the judgments, or the county's share of the judgments, by causing a special levy to be made on the taxable property within their respective counties.

The making of such a levy meets with two obstacles. One of these is the assessment limit for counties in § 72-4-11, N.M.S.A., 1953 Compilation which reads in pertinent part:

"The maximum rate of tax 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;** Provided, however, that a tax not exceeding two (2) mills on the dollar of the assessed valuation of all property subject to taxation in this state may be levied for the construction and maintenance of state highways, which said two (2) mills levy shall not be within the state or county limitations heretofore fixed . . ." (Emphasis supplied)

The other is the overall limit on assessment of taxable property contained in Art. VIII, § 2 of the New Mexico Constitution:

". . . Provided, however, that taxes levied upon real or personal tangible property for all purposes, except special levies on specific classes of property and except necessary levies for public debt, **shall not exceed twenty mills annually on each dollar of the assessed valuation thereof . . ."** (Emphasis supplied).

We observe that a special levy by almost any county in the state will result in the total levy on the property in the county to exceed five (5) mills for county purposes and twenty (20) mills for all purposes.

The problem of the statutory limitation of five mills for each county has already been resolved by the New Mexico Supreme Court in **In Re Atchison T. & S. F. Ry. Co.'s Taxes,** 41 N.M. 9, 63 P. 2d. 345. That case held that § 72-4-11, supra, (then 1929 Comp. § 141-1001), did not preclude a special tax levy for satisfaction of a judgment rendered against a board of county commissioners in condemnation proceeding brought for the acquisition of rights-of-way for state highway. The court, replying on **Barker v. State,** 39 N.M. 434, 49 P. 2d. 246, reasoned that the judgments for which the levy was made represented involuntary liabilities imposed by law which were fixed in actions classified as ex delicto as distinguished from actions ex contractu. The authority for the levy was found to reside in § 15 - 45 - 4, N.M.S.A., 1953 Compilation (then 1929 Comp. § 33-3704). That statute is an embodiment of New Mexico Cons. Art. VIII, § 7 and provides:

"JUDGMENT AGAINST COUNTY -- Tax Levy. -- When a judgment shall be rendered against any board of county commissioners of any county, or against any county officer in an action prosecuted by or against him in his official name, where the same shall be paid by the county, no execution shall issue upon said judgment, but the same shall be levied and paid by tax as other county charges, and when so collected shall be paid by

the county treasurer to the person to whom the same shall be adjudged, upon delivery of a proper voucher therefor."

The proviso in § 72-4-11, supra, exempting from the limitation of five (5) mills "a tax not exceeding two (2) mills on the dollar of the assessed valuation of all property subject to taxation in this state," for construction of highways was eliminated from consideration in the **In Re A.T. & S.F. Ry's Taxes** case, supra, as it is from this opinion. The proviso plainly contemplates a statewide levy made by the state and not a county levy.

In **State ex rel. Martin v. Harris,** 45 N.M. 335, 115 P. 2d. 80, the Principle was affirmed that the statutory five (5) mill limit on the county power to levy will not shield a county from a forced levy to satisfy a judgment rendered in an action sounding in tort.

We now turn to the problem of the overall 20 mill constitutional limitation.

It is clear that the aforementioned New Mexico decisions dealing with authority to levy in excess of the statutory limitation did not directly pass on the question of a levy in excess of the constitutional limitation. In fact, an attempt was made in **State v. Harris,** at 339, supra, to argue the issue but the Supreme Court found the question to be not properly presented for review. Nonetheless, we think certain conclusions logically and necessarily follow from those cases on statutory limitation.

The reasoning behind tax limit laws and behind permitting a levy in excess of the limit is well stated, as follows, in **Barker v. State,** supra, at 436:

". . . That such statutes have reference to the ordinary municipal expenditures incurred in carrying on business, enacted 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; has been the view expressed by the great majority of decisions where the question was an issue."

And in **In re A. T. & S. F. Ry.'s Taxes,** supra, at 14, in discussing condemnation judgments in particular:

". . . Certainly the obligations levied for are not contractual. As obviously they are involuntary. They represent no part of the ordinary current expenses incurred in carrying on the county business, to curb waste and extravagance in which, we said in the Barker Case, this and other similar statutory limitations have been enacted."

We fail to see how the reasoning applied in those cases where a statutory limit was involved is anything but squarely applicable to the question here.

One of the verities of New Mexico government is that the taxing bodies -- the state, counties, municipalities, etc. -- annually cause a levy up to the twenty (20) mill level for ordinary operating expenses. Thus, any special levy by any taxing body will make the

total levy over 20 mills. This being so, the authority of the counties to make a levy in excess of the statutory limit is meaningless unless the constitutional limit can also be exceeded. And in fact, the power to levy to satisfy a judgment of the type in question appears to actually be a mandatory duty on the board of county commissioners. In **Barker v. State,** supra, the issuance by the trial court of a writ of mandamus to compel the levy of a tax to satisfy a judgment was affirmed. In addition, the language of § 15-45-4, supra, previously quoted in full, is directive. It says that when there is a judgment against the county "the same **shall be levied** and paid by tax" (Emphasis added). One cannot logically say that this authority and duty to levy exists and then conclude that the twenty (20) mill constitutional limitation is applicable.

Authority exists that the exceptions made to tax limitations for the satisfying of obligations sounding in tort apply equally to constitutional limits as well as statutory one. Anno. 94 ALR 937. With that authority we agree. We are compelled to the conclusion by the rationale of the **Barker, In re A. T. & S. F. Ry's Taxes,** and **Harris** cases, supra. It is also the only conclusion that in practical application can make those decisions meaningful.

Therefore, it is our opinion that the overall millage limit in N.M. Cons. Art. VIII, § 2, does not apply to a county levy to raise funds to pay judgments against the county resulting from condemnation of highway rights-of-way. The boards of county commissioners are authorized to cause a special levy for that purpose.