

## **Opinion No. 68-75**

July 19, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. Clay Buchanan Acting Director Legislative Finance Committee Capitol Building  
Santa Fe, N. M. 87501

### **QUESTION**

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The following questions are directed to the County Income Surtax Law which was enacted during the 1968 Special Session of the Legislature as Senate Floor Substitute for Senate Bill No. 2.

1. Must voter registration books be used at an election held pursuant to the County Income Surtax Law?
2. Must voter registration books be closed for 30 days prior to an election held pursuant to the County Income Surtax Law?
3. Must voting machines be used?
4. If voting machines must be used, what kind of timing is necessary by way of waiting after the primary election to clear the machines?
5. How long after an election held pursuant to the County Income Surtax Law must voting machines be left intact before they can be reset for purposes of the general election?
6. What would be the effect of an election contest or recount in the primary election with reference to timing, and what would be the effect of a recount request in an election held pursuant to the County Income Surtax Law on timing?
7. In an election held pursuant to the County Income Surtax Law, must every voting division be used that is used in a general election?
8. Since there is a reference in the County Income Surtax Law to primary elections:
  - A. May registered independent voters vote in a county Income Surtax Election?
  - B. If registered independent voters are not allowed to vote in such an election, would the law be constitutional?

## CONCLUSIONS

1. No.
2. No.
3. Yes.
4. See analysis.
5. See analysis.
6. See Analysis.
7. Yes.
8. A. Yes.  
B. Question is moot.

## OPINION

### {\*120} ANALYSIS

The County Income Surtax Law, which was enacted during the 1968 Special Session of the Legislature as Senate Floor Substitute for Senate Bill No. 2 will become effective on August 22, 1968. After the effective date of this act, the members of all local school boards headquartered within a county may adopt a resolution to impose a county income surtax up to a maximum of fifty percent of the income tax imposed by the Income Tax Act. However, before a resolution is adopted the local board, if only one board is headquartered within the County, or boards of education must hold a public hearing on the question of the resolution. Notice of this hearing must be given once each week for two consecutive weeks, the last publication occurring at least five days prior to the hearing. If a resolution is adopted by the school board or school boards, an election must be held and a majority of the qualified electors residing in the county must vote in favor of the resolution before it becomes effective. Section 2 C of the county income surtax act provides for the election as follows:

"No resolution imposing the tax shall go into effect until after an election is held and a **majority of the qualified electors** residing in the county voting on the question vote in favor of imposing the surtax. The resolution submitted to the electors for approval shall be the same resolution as that approved by the school board or boards after public hearing and approved in form by the commissioner of revenue. The board of county commissioners shall provide at the expense of the school district or districts, for an election on the question {\*121} of imposing the surtax within sixty days after the day the board or boards of education pass the resolution. **Any election held pursuant to this**

**section shall be conducted and canvassed in the same manner as any primary election."** (Emphasis added)

With this preliminary discussion in mind we now turn to the questions presented to this Office.

Questions 1, 2 and 8 are all closely related and will therefore be answered together. In question 8 we are asked if independent voters may vote. As will be seen below, it is our opinion that independent voters may vote in a County Income Surtax Election. It will be noted that Section 2 C quoted above provides that an election under the County Income Surtax Law is to be conducted and canvassed in the same manner as any primary election. Section 3-11-10, N.M.S.A., 1953 Compilation provides that only qualified registered electors of the state belonging to a political party may vote in a primary election. If we were to follow the provisions of the Primary Election Code in determining the qualifications of voters, it would mean only democrats and republicans could vote in a County Income Surtax Election. However, we do not believe that the legislature intended that the qualifications of voters be determined by the Primary Election Code. Rather we believe that the legislature intended that the first sentence of Section 2 C be controlling in determining who may vote in a county income surtax election. That sentence provides that qualified electors residing in the county may vote in a county income surtax election. Article VII, Section 1 of the New Mexico Constitution, as amended November 7, 1967, defines a "qualified voter" as follows:

"Every citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons, and persons convicted of a felonious or infamous crime unless restored to political rights, shall be qualified to vote at all elections for public officers."

Article VII, Section 1 further provides that the legislature has the power to require the registration of qualified electors as a requisite for voting. The legislature, when enacting the county income surtax act, did not require voters to be registered in order to vote. In **Johnston v. Board of Education of Portales**, 65 N.M. 147, 333 P.2d 1051 (1959) the New Mexico Supreme Court held that unless the legislature required that an individual be registered to vote in a school bond election, registration was not necessary for a qualified elector to vote in such an election. It is our opinion that the rule set forth in the **Johnston** decision is controlling here. Since the legislature did not require qualified electors to be registered, registration is not necessary for a qualified elector to vote in a county income surtax election. Since voters need not be registered to vote in a county income surtax election, voter registration books need not be used at such an election. The answer to the first question is therefore no. In answer to the second question, since it will not be necessary to use voter registration books at a county income surtax election, such books need not be closed 30 days prior to the election.

Next we are asked if voting machines must be used in a county income surtax election. We have already pointed out that such an election is to be conducted and canvassed in

the same manner as any primary election. The "Compulsory Voting Machine Act", Sections 3-4-27 through 3-4-33, N.M.S.A., 1953 Compilation makes it mandatory that voting machines be used in all primary elections. It is our opinion that the provisions { \*122 } of the Compulsory Voting Machine Act must be complied with in conducting a county income surtax election and therefore voting machines must be used.

The next three questions are related to the timing of the primary election, a county income surtax election and finally the general election, and will therefore be dealt with as one question. Primary elections are held on the last Tuesday in August of each even-numbered year. Section 3-11-14.1, N.M.S.A., 1953 Compilation. This year the primary election will be held on August 27, 1968. As we pointed out above, voting machines must be used at this election. The question then arises as to how long the voting machines must remain sealed after the Primary Election of August 27, 1968. The Compulsory Voting Machine Act provides that voting machines shall remain locked for a period of 31 days after an election other than a municipal election. See Section 3-4-21, N.M.S.A., 1953 Compilation. Voting machines may be opened before the expiration of the 31 day period upon an order of a district court judge in the county if he finds that it is unlikely that an election contest will develop. However, because of provisions in the Primary Election Code relating to canvassing and recounts, it will be seen below that voting machines cannot be opened and reset for at least 25 days even with a court order.

Section 3-11-22, N.M.S.A., 1953 Compilation relates to both county and state canvassing of the Primary Election. This section provides that within 15 days after the primary election the state canvassing board issues certificates of nomination. See Section 3-11-22, N.M.S.A., 1953 Compilation. A recount may then be demanded by any state candidate within 10 days after issuance of the certificates of nomination. See Section 3-11-33, N.M.S.A., 1953 Compilation. Thus even with a court order the earliest the voting machines could be opened and reset for the next election would be September 21, 1968. Without a court order the voting machines would become available for the next election on September 28, 1968. If there is an election contest the voting machines might not be available until sometime after September 28, 1968.

If a county income surtax election were to be held on October 7, 1968, allowing one week for the voting machines to be reset for such an election after the machines are opened on September 28, 1968, the voting machines would have to remain locked until November 7, 1968, two days after the general election. See Section 3-4-21, supra. Even if the voting machines could be opened prior to the general election, it would still be impossible to hold an election using voting machines between the primary and general elections. Section 3-4-9(C), N.M.S.A., 1953 Compilation provides that the inspection and sealing of voting machines shall begin within 30 days prior to any election and shall continue until the machines are sealed. It is our understanding that it takes most of the statutory 30 days to prepare voting machines in some of the larger counties of this State. Thus it will be necessary to begin preparing the voting machines on or before October 7, 1968, for the general election. This is at most 8 days after the machines are opened after the primary election. We must therefore conclude that it is

impossible to comply with our election laws and hold an election using voting machines between the primary and general elections.

The question which naturally arises then is, when may a county income surtax election be held? We believe that the earliest date possible would be sometime after December 16, 1968. This is assuming that it would take only one week to set the voting machines for this election. Such an election must be held prior to January 1, 1969 as the county income surtax law allows the tax to be imposed only for the 1968 calendar year. We do not believe that the {\*123} legislature authorized such a tax to be adopted retroactively.

The only question that we have not answered is question 7 which asks if every voting division must be used in a county income surtax election. Again, it must be pointed out that such an election must be conducted and canvassed in the same manner as any primary election. Section 3-2-3.2, N.M.S.A., 1953 Compilation provides for the consolidation of voting divisions in all elections other than the general election. Section 3-2-3.3, N.M.S.A., 1953 Compilation places a limitation on consolidation for primary elections as follows:

"No consolidation shall be made for a primary election where the aggregate vote in the voting divisions proposed to be consolidated exceeded five hundred votes at the last preceding primary election."

In answer to the seventh question, voting divisions may be consolidated in county income surtax elections only if the divisions proposed to be consolidated had an aggregate of 500 or less votes cast at the last primary election. The last primary election would be the primary election held on August 27, 1968.

We have written this opinion in full light of the fact that the resolution imposing the county income surtax is to be enforced in accordance with the Tax Administration Act. Under this Act any taxpayer could make a claim for refund of the taxes paid within three years of the end of the calendar year in which payment was due. See Section 72-13-40, N.M.S.A., 1953 Compilation. If the taxpayer was successful in attacking the resolution imposing a county income surtax, the taxes paid would have to be refunded by the school district or districts with 6% interest thereon.

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