Opinion No. 70-54

June 8, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Edward P. Moya Chief Local Government Division Department of Finance & Administration Santa Fe, New Mexico 87501

QUESTIONS

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Under the laws of this state, particularly Laws of 1970, Chapter 66:

(1) Can a county cede or relinquish any portion of its five mills to any other governing body who participates in the twenty mills limitation, such as a school district or municipality?

(2) If a county does not levy its maximum millage (five mills) may some other political subdivision pick it up, without the approval of the county?

CONCLUSIONS

(1) See analysis.

(2) Yes.

OPINION

*{*90}* **ANALYSIS**

Laws of 1970, Chapter 66 provides:

"Section 1. Section 16-3-21, N.M.S.A., 1953 (being Laws 1968, Chapter 69, Section 35, as amended) is amended to read:

'16-3-21. FINANCE-TAX LEVY FOR DISTRICT COURT PURPOSES. -- Effective as of the year beginning January 1, 1970, each board of county commissioners shall make and order the levy each year for district court purposes of a tax of one-fourth mill on each dollar of the assessed value of taxable property in the county. The amount of the tax collected shall be remitted to the state treasurer for credit to the state general fund.'

Section 2. TEMPORARY PROVISION -- RELEASED FUNDS. -- Notwithstanding the provisions of any other law, the proceeds of the one-half mill released to the local governments by the repeal of Section 16-3-21, N.M.S.A., 1953 shall, if a levy is made of

this millage, be allocated by the board of county commissioners of each county making the levy without state or other control and without regard to millage limitations or expenditure limitations placed on a particular local government by statute. This one-half mill is reserved exclusively for county purposes, and the levy of all or any part may be made only if:

A. deemed necessary for county purposes by the board of county commissioners; and

B. the county also levies the full five mills authorized for county purposes.

Section 3. REPEAL. -- Effective January 1, 1971, Section 16-3-21, N.M.S.A., 1953 (being Laws 1968, Chapter 69, Section 35, as amended) is repealed."

This act is the most recent of a series of laws passed by the legislature providing for a portion of county levies to be sent to the state for district court purposes. In 1968, this series of laws began and provided for one full mill to be sent to the state out of the county levy. Laws of 1968, Chapter 69, Section 35. In 1969, this one mill was reduced to one-half mill. Laws of 1969, Chapter 170. As set out above the 1970 legislation reduces this amount to one-fourth mill and terminates this series of laws effective January 1, 1971, when the county will no longer be required to send to the state any of its millage levy for district court purposes.

Interpretation of the 1970 legislative act is best preceded by a general discussion of the statutory and constitutional provisions relating to the imposition and distribution of ad valorem taxes. The basis for our discussion is Attorney General Opinion No. 70-34, issued April 1, 1970, where this office completed and set forth the first extensive and definitive study of the ad valorem tax structure of this state. In the present discussion we will emphasize various points which may not have been apparent in our earlier opinion, but stress at the same time our adherence to the concepts stated in that opinion.

The basic limitations relating to the imposition and distribution of ad valorem taxes are found in Article VIII, Section 2 of the New Mexico Constitution, which provides that, with certain exceptions, taxes levied upon real or personal tangible property shall not exceed twenty mills annually. As in our earlier opinion, for purposes of this discussion, it will be assumed that the full twenty mill limit has been reached, unless it is stated otherwise. Section 72-4-11, N.M.S.A., 1953 Compilation, sets the maximum mill rates of taxation for state, county, municipal and school district purposes. The total mills authorized to be levied under this statute, for purposes permitted under the constitutional provision, adds up to 33.50 mills. Therefore, as we emphasized in our prior opinion it is obvious that the maximum rate of millage may not be utilized by all units authorized *{*91}* to levy taxes. Furthermore, the amount and distribution of mill levies has become largely a matter of administrative practice. By attempting to regulate the distribution and levy of various mill rates, the legislature entered an area which was more the result of administrative practices than of statutory control.

Although the various governmental units are authorized by statute to levy 33.50 mills, Section 72-4-11, supra, the constitutional limitation of twenty mills necessitates some arrangement and administrative practice between the various governmental units participating in the entire mill levies. In our earlier opinion, we concluded that as a result of these administrative practices, the state has levied 5.55 mills, the counties have levied 5.00 mills, the municipalities have levied 2.225 mills and the schools have levied 7.225 mills. This administrative practice adds up to a total mill levy of twenty mills, permissible under the constitutional restrictions. A county has no greater or inherent right to levy its full millage as authorized by statute than does a school district. Only the municipal levy is subject to and inferior to the county mill levy. See Section 72-4-1, N.M.S.A., 1953 Compilation. Not each governmental unit will be able to levy in a particular year all of the millage it has been authorized by statute. In addition, certain units will levy less millage than what is permitted by law because of the administrative practices mentioned above. With this summation of our earlier opinion and emphasis of the analytical premises of the taxations statutes, we now turn to the 1970 legislation.

Chapter 66 of the Laws of 1970, the legislation under consideration, contains two basic subdivisions. The first area is composed of Section 1 and Section 3. The effect of this area is to require the county to send to the state one-fourth mill from its county levy to be used for district court purposes, but such requirement will cease on January 1, 1971, when this provision will be deemed to have been repealed. As to this portion of the legislation, we would emphasize that while on the surface this one-fourth mill may appear to be a part of a state levy, nevertheless, examination of the pertinent statutes and legislative history as outlined above indicates clearly that in fact this one-fourth mill is a part of the total mills levied by the county and remains a part of the county levy for purposes of determining whether or not a county has complied with the constitutional limitation on the millage to be levied. Nowhere in the statutes is it contemplated that a county might be able to levy its full five mills as authorized by Section 72-4-11, supra, and at the same time levy an additional one-fourth mill to be sent to the state for district court purposes. Therefore, the only reasonable conclusion is that this one-fourth mill is indeed a part of and remains within the county mill levy.

With this in mind, we focus upon the second area of the 1970 legislation, that is, that portion of the act set forth in Section 2 of the statute. Initially, we would point out that this section has been labeled by the legislature as a "temporary provision." The legislation has been compiled in the New Mexico Statutes Annotated, 1970 Interim Supplement, with this in mind, and with this sub-section being set forth only in a footnote reference to the compilation statute. The opinion of this office is that this section will continue only so long as Section 16-3-21, supra, is on the books, but will cease to exist as of January 1, 1971, when, by the terms of this statute, that section is repealed. In addition, this office is of the opinion that in light of the above analysis of the ad valorem taxation process this particular portion of the 1970 legislation is meaningless.

This section, which is in part identical with the 1969 legislation, supra, evidently contemplates that the proceeds of the millage which is sent to the state for district court

purposes shall be released to the counties. This section refers to a one-half mill as being released, and states that this one-half mill is to be reserved exclusively for county purposes. The opinion of this office is that examination of the taxation process does not support the conclusion that any millage is released to the counties as a result of the repeal of Section 16-3-21, supra. This office is of the opinion, on the other hand, that the result of the repeal of this legislation is not to release millage to *{*92}* the counties, as seems to have been indicated and contemplated by the legislation, but in fact to enable the counties to continue to levy their full five mills as permitted by statute and at the same time to no longer send to the state any millage from the county levy to be used for district court purposes.

If a county does not choose to continue to levy this portion of its millage and assuming that the county has been levying the full five mills permitted by statute, then the total mills levied by the county will be less than that which is permitted by statute. The result of this decision by the county would be to create a void between what is levied by all of the governmental units and the twenty mills permitted under the constitution. If this void at the end of the year 1970 is one-fourth mill, then the opinion of this office is that some other governmental unit may increase its millage levy proportionately, thereby remaining within the twenty mills permitted by the constitution.

The last half of Section 2, Chapter 66 of the Laws of 1970, exemplifies an apparent misunderstanding on the part of the legislature as to the realities of the ad valorem taxation process. While this portion of the legislation purports to restrict the levy of that millage which had been sent to the state for district court purposes, its effect is rather to provide that that millage can be levied by the county only if it also levies the full five mills authorized for county purposes. This result ignores the fact that the one-half mill which had been sent to the state for district court purposes is, and has been, a part of the county levy. It is meaningless, therefore, to provide that a county could levy this millage only if it was levying what it was authorized to levy, for the simple reason that it always has levied this millage regardless of whether or not it has in fact levied the maximum five mills authorized for county purposes. To summarize what has been stated above, this office is of the opinion that the mere fact that a county does not levy its full five mills as authorized by law does not lead to the conclusion that the county would cede or relinquish any portion of its authorized millage levy to any other governmental unit.

From what has been said above it is apparent that if a county does not choose to levy the full five mills permitted by law and the twenty mill maximum limitation provided in the constitution has not been filled, any other governmental unit may increase its millage levy proportionately to that amount by which the county is under its total five mills. For example, if a county were to levy only 4.50 mills of the total five mills permitted by law, and the total of the other millage levied by the other governmental units amounted to fifteen mills, the total mills to be levied by all governmental units would amount to only 19.5 mills. This total would leave .50 mills under the twenty mill constitutional limitation. If a school district, in this example, had originally chosen to levy only six of its ten mills permitted by law, (Section 77-6-38, N.M.S.A., 1953 Compilation), then, the school could increase its millage from six mills to 6.50 mills, leading to a total mill levy of all

governmental units of twenty mills and thereby complying with the constitutional limitation upon millage levies. There is no statutory requirement for approval of the county for this type of an increase in the school levy, and as was stated initially, the school district is just as entitled to levy this portion of the millage total as is the county.

By: Frank N. Chavez

Assistant Attorney General

and

James C. Compton, Jr.

Assistant Attorney General