

Opinion No. 87-07

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OPINION OF: HAL STRATTON, Attorney General

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TO: Tom F. Thornhill, Secretary, General Services Department, John F. Simms, Jr.
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QUESTIONS

Is the Property Control Division of the General Services Department ("GSD") required to pay the levies assessed by the Middle Rio Grande Conservancy District ("MRGCD") on real property owned by the Property Control Division within the MRGCD?

CONCLUSIONS

Yes.

ANALYSIS

Mr. Charles Martinez, the General Manager of the MRGCD, informs us that the annual assessment levied against property within the MRGCD goes to its "construction fund" and "maintenance fund." As such, the assessments are, by statute, assessments based on the benefits accruing to the assessed property. The construction fund of a district is created under section 73-16-4, which provides in part:

[A]s the affairs of the district may demand, the board shall levy on all property upon which benefits have been appraised, an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of such appraisal (except as paid out of the preliminary fund), the preparation and execution of the official plan, including superintendence of construction and administration during the period of construction.

Subsection B of this same section further provides: "The said assessment shall be levied by resolution of the board, shall be known as the construction fund assessment, shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised, and not in excess thereof...." Section 73-16-10 creates the maintenance fund of a district:

A. Upon the substantial completion of the improvements of the district, or any unit thereof, and on or before the first day of September in each year the board may levy an assessment on all property and upon public corporations subject to assessment under this act, to maintain, operate and preserve the improvements made, to strengthen,

repair and restore the same when needed or to defray the current expenses of the district.

B. The said assessment shall be levied by resolution of the board, shall be known as the maintenance assessment, shall be apportioned upon the basis of the total appraisal of benefits accruing from original and subsequent construction and shall not exceed one (1%) for centum thereof in any one year unless the court shall by its order authorize an assessment of a larger percentage.

Article VIII, section 3 of the New Mexico Constitution provides in relevant part:

The property of the United States, the state and all counties, towns, cities and school districts and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property not used for commercial purposes, all property not used for charitable purposes, all cemeteries not used or held for private or corporate profit and all bonds of the State of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation. (emphasis supplied.)

New Mexico case law makes clear, however, that a specific assessment on improvements based on benefits accruing to such property is not a tax under article VIII, section 3. In *Gutierrez v. Middle Rio Grande Conservancy District*, 34 N.M. 346, 282 P. 1 (1929), the Supreme Court of New Mexico, citing *In re Proposed Middle Rio Grande Conservancy District*, 31 N.M. at 200, 242 P. at 688 (1925), (state and private property) and *Lake Arthur Drainage District v. Field*, 27 N.M. 183, 199 P. 112 (1924) (state property) held that the assessments for benefits authorized in the Conservancy Act, chapter 45 of the Laws of 1927 [now codified at N.M. Stat. Ann. §§ 73-14-1 through 73-18-43 (1978)] ---- organizational costs of the district ----were not taxes within the meaning of article VIII, section 3. Those assessments authorized by the Conservancy Act are applicable to the MRGCD. The Supreme Court noted in *In re Proposed Middle Rio Grande Conservancy District*, supra that: "[S]pecific assessments on property for improvements, based on benefits, the cost of which is assessed against the property, is not a tax within the inhibition of section 3 of article 8 of the Constitution of New Mexico." 31 N.M. at 211, 242 P. at 693. In citing various sections of the Act as indicative of the legislature's intent that such assessments are not taxes, the Court stated: "Other sections of the act are to the same general effect. Indeed, it is quite evident that an unusual opportunity was taken to express the plan of assessment based on benefits and burdens." 31 N.M. at 201. 242 P. at 688.

In *Lake Arthur Drainage District v. Field*, supra, the Court held: "A specific assessment of property for improvements, the cost of which is assessed against the property, is not a tax within the constitutional sense." 27 N.M. at 187. 199 P. at 115. Finally, in *Lake Arthur Drain Dist. v. Bd. Com. Chav. Co.*, 29 N.M. 219, the New Mexico Supreme Court at page 223 stated why such assessments should not be deemed taxes under article VIII, section 3:

Generally speaking, we should say that liability for such assessments would be the rule and exemption the exception, and if the county had been intended by the Legislature to be exempt from assessments, the exemption would have been stated and not left to implication. Furthermore, the fact that the makers of the Constitution, in specifically providing that property of a county should be exempt from general taxation without providing an exemption from special assessments, would compel the contrary implication that no such exemption was intended; and, furthermore, if public property is to be exempted from taxation by implication, then section 3 of article 8 of the Constitution, by which such property is specifically exempted from general taxation is meaningless and useless. The very fact that the Constitution declares an exemption from general taxation in favor of public property is a recognition of the principle that, without such express exemption, such property would be subject to taxation along with private property. If it was necessary to make an express exemption in favor of public property from general taxation, surely was it necessary that there should be an express exemption if such property is to be free from special assessments for benefits.

The MRGCD's assessments on GSD property are for construction and maintenance funds. They are levied on property within the District according to the benefits assessed on such property. Under the case law, such assessments are not taxes under article VIII, section 3 of the New Mexico Constitution. Therefore, the state, like other landowners within the District, is required to pay such assessments.

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