Opinion No. 19-2362

September 19, 1919

BY: HARRY S. BOWMAN, Assistant Attorney General

TO: Mr. Charles Springer, Chairman State Highway Commission, Santa Fe, New Mexico.

Authority of Counties to Levy Road Taxes in Excess of 5-Mill Limitation.

OPINION

Your oral inquiry, concerning the authority of various counties to levy taxes for road purposes in excess of the 5-mill limitation provided for county purposes and uses, as prescribed in section 1, Chapter 17, Laws 1919, presents many difficulties in its solution.

Your first query involves the authority of counties to levy the 5-mill tax provided in section 2645, Code 1915, the 3-mill levy authorized in section 2673, Code 1915, and the 2-mill levy authorized in section 24, Chapter 38, Laws 1917, and the 2-mill levy authorized in section 5, Chapter 99, Laws 1919.

Both of the levies provided for in sections 2645 and 2673, Code 1915, are proportionately reduced by section 12, Chapter 54, Laws 1915. I am of the opinion that these levies as reduced are still authorized as special tax levies, unless they can be held to be within the meaning of the provisions of section 1, Chapter 17, Laws 1919, and should be in excess of the limitation therein prescribed.

The 2-mill tax levy provided for in section 24, Chapter 38, Laws 1917, is suspended for the years 1919, 1920 and 1921, by section 2, Chapter 168, Laws 1919. Therefore, no county can levy this tax during the said period.

The 2-mill levy provided for in section 5, Chapter 99, Laws 1919, in our opinion is authorized to be levied unless it also should be found to be within the prohibition contained in section 1, Chapter 17, Laws 1919.

The question naturally follows, then, as to which, if any, of these levies can be held to be within the inhibition contained in this last named section. Section 1, Chapter 17, Laws 1919, insofar as it relates to the levy of taxes for county purposes, reads as follows:

"The maximum rate of tax to be levied for all county purposes and uses, excepting special school tax levies, special levies on specific classes of property shall not exceed five mills on the dollar."

The language of this part of the section is identical with the language limiting the tax levy for counties contained in section 12, Chapter 54, Laws 1915.

Under date of April 10, 1917, former Attorney General H. L. Patton rendered an opinion to the State Highway Commission in which he held that the tax levies provided for in section 24, Chapter 38, Laws 1917, must not be permitted to exceed the 5-mill tax levy limitation provided for in section 12, Chapter 54, Laws 1915. He also held that the levies provided for in sections 2645 and 2675, Code 1915, were also subject to the limitation of section 12, Chapter 54, Laws 1915, and while the levy provided for in Section 24, Chapter 38, Laws 1917, is not now involved, for the reason of its suspension as heretofore stated for the limited period. We concur in the views expressed in the opinion of Mr. Patton as heretofore mentioned, believing them to be correct insofar as is involved the question of limitation of tax levies as provided for in section 1, Chapter 17, Laws 1919, the language being the same, as heretofore stated, as that contained in the section under consideration by Mr. Patton.

The 2-mill levy provided for in section 5, Chapter 99, Laws 1919, would also fall within the limitation of section 1, Chapter 17, unless there be something in the laws of the last session which would either specifically or impliedly exclude it from such limitation. We find no express exclusion.

The tax levy of 3 mills provided for in Chapter 168, Laws 1919, is specifically excluded from the limitations provided for in section 12 of Chapter 54, and Chapter 74, Laws 1915, and therefore would also be excluded from the limitation provided for in Chapter 17, Laws 1919, the latter being the reenactment of Chapter 54, Laws 1915, so far as limitation upon county indebtedness is concerned. Nowhere, however, do we find any express exclusion of the levy provided for in section 5 of Chapter 99.

The question then arises whether it is impliedly excluded. We are of the opinion that it is not. In order to so hold it would be necessary to take the position that section 1, Chapter 17, is repealed insofar as it applies to road levies to be made by counties by Chapter 99, and in order to so hold it would be necessary to conclude that the two provisions were so inconsistent as to be unable to both stand as law. We do not find any such inconsistency, as both provisions can prevail and the limitation be held to apply to this 2-mill levy. We are therefore constrained to hold that the 2-mill levy prescribed in Chapter 99 must not be permitted to exceed the 5-mill limitation provided for in Chapter 17.

We realize that this construction of the statutes will result in some of the smaller counties being unable to levy any tax whatsoever for road purposes, and we have endeavored to find a method whereby we could reach a different conclusion, but have been unable to persuade ourselves that the foregoing is not the correct interpretation of the statutes as they now exist.

It was suggested by you that possibly the levies for state highways provided for in some of the sections heretofore mentioned might be construed so as to not be limited to "county purposes and uses."

This, then, involves the definition of the terms "county purposes and uses."

An examination of the authorities wherein these words were before the courts for construction shows some diversity in the different states as to what meaning is to be given to the words "county purposes and uses."

In the case of State ex rel. Potter et al. vs. King County et al. (Wash.) 88 Pac. 935, where there was under consideration a statute providing that counties may contract indebtedness for "strictly county purposes" on a vote of the people, and that on the consent of three-fifths of the voters money could be raised and bonds issued therefor, it was held that such an act did not give the county power to issue bonds for the construction of a ship canal for the benefit of the federal government, although such a canal was entirely within the boundaries of the county, the court holding that the construction of such a canal was not a strictly "county purpose."

This case would seem to sustain the contention that the levy of a tax for state highway purposes would not be a "county use or purpose."

In the case of State ex rel. Conrad vs. Piper (Missouri) 114 South-western 1, it was held that the words "county purposes" meant all subdivisions of the county for the use of which taxes may be imposed.

In this case was involved the apportionment of a road tax between a county and a township, and the court held that the township was not deprived of the right to levy a road tax where a statute provided that in the apportionment of a fund derived from the tax prescribed by the constitution for county purposes, the county court apportioned the tax 80 per cent to the county and 20 per cent to the township.

In the case of Shea vs. Skagit County (Wash.) 122 Pac. 1061, where the same statute was under consideration as in the case of State ex rel. Potter vs. King County, **supra,** it was held that counties could issue bonds when authorized by such vote for the construction and improvement of roads, but not for their general repair, such not being a "strictly county purpose" within the meaning of the statute.

This holding was had by reason of certain peculiarities of the statutes, but indicates that repairing of roads is not a strictly county purpose and would also tend to support the suggestion made by you to the writer.

The two Washington cases, however, which support your contention, involve peculiar local statutes, so that we fear that they would not be of much weight as authority should the matter be brought before our courts for legal determination.

The case of the Southern Railway Company vs. Board of Commissioners (N. C.) 61 Southeastern 690, would also seem to support this position upon the general grounds that the limitation prescribed would in effect prevent the levy of taxes for road purposes in many of the counties. The opinion in this case is quite long but the reasoning appeals to us somewhat, although in it are also involved local statutes such as are not involved in the matter now under consideration.

The question, then, as to what would constitute "county purposes and uses" is one of so much uncertainty that we hesitate to express any certain opinion as to what our courts might hold would, or would not, be included within these terms, but would suggest that the counties be authorized to make the levy provided for in Chapter 99, and that in order to determine the validity of the levy in some county where the same is in excess of the limitation provided for in Chapter 17, a friendly suit be instituted at once and appealed to the Supreme Court that the question may be judicially determined without delay.