

## Opinion No. 33-604

May 31, 1933

**BY:** E. K. NEUMANN, Attorney General

**TO:** Mr. J. M. Dillard, Attorney at Law, Carlsbad, New Mexico.

{\*53} In your letter of May 25th, 1933, you request the opinion of this office with reference to the manner in which a judgment in the hands of your client may be enforced against Eddy County. You ask that opinion, as you state, at the request of Mr. Reese, your district attorney.

The questions you ask are as follows:

- (a) Can said judgments be set off against taxes owed by the judgment creditors?
- (b) Can the judgment creditors, if sued for taxes, set up, as a defense, the judgments they hold?
- (c) How can they be paid?

It at once becomes apparent that the only way these judgments can be paid, forgetting for the moment any possibility of a set off as against taxes owed by the judgment creditor, is for the county to levy a sufficient special tax to pay them. See Constitution, Article 8, Section 7 and Section 33-3704, 1929 Code.

It is also apparent that, said judgment having been procured since the last tax levy was made, there is no fund against which warrants could be drawn to pay the judgments and consequently no warrants could legally be drawn. This tax levy to pay any judgment becomes a special fund and the judgment creditor can only look to this special fund for payment. Assuming that there is a "Judgment Fund" existing and warrants were drawn against same for the payment of your judgments, even though there was insufficient funds therein to pay said warrants, it would be impossible, in our opinion, to satisfy the taxes owed by the holder of such warrants with such warrants. Our reasons:

Section 141-403, 1929 Code is, in part, as follows:

"\* \* \* Taxes shall be payable only in money."

"State or municipal bonds or the coupons therefrom, city or county warrants etc., are not receivable in payment of taxes unless so provided by statute \* \* ." Cooley on Taxation (4th Ed.) Vol. 3, Sec. 1252.

"Taxes are levied to raise money for specific purposes, as indicated by the appropriations of the current year, and a taxpayer cannot, by exercising the right of set-

off, divert the taxes to another purpose, namely the payment of the debt due him." 26 R C L 378.

You are, no doubt, familiar with Sections 141-407 and 141-408 of the 1929 Compilation. Under these {\*54} sections, the County Treasurer, before cashing warrants, is required to deduct taxes, penalties and costs due by the payee or the assignee. This is, in effect, a payment of taxes with warrants, but this situation arises only when there are funds available for the payment of said warrants. There is no statute authorizing the County Treasurer to accept warrants in payment of taxes when funds are not available for the payment of the warrants presented; hence the general law, as above stated would govern.

As to the matter of set-off, we find the following rules:

"As a tax is not a debt in the ordinary sense, nor the liability for it founded upon contract, it cannot, unless the statute so provides, be paid or discharged by setting off or counterclaiming against it a debt due from the municipality to the individual taxpayer, and still less of course a debt due from the collector of taxes in his private capacity. A person who has recovered judgment against a county, and transferred it for value, is not entitled to have the amount of taxes for which a tax execution has issued against him during the life of the judgment, credited upon the judgment." 61 C J 963.

"In an action for taxes set off of an indebtedness of the state or municipality to the tax debtor will not be allowed, the statutes of set off being construed in the light of public policy as not allowing the remedy in proceedings for this purpose, unless expressly authorized by statute." 57 C J 381.

In *City of Camden vs. Allen*, 26 N J L 398, the court states:

"Debt is the subject matter of set-off and is liable to a set off; a tax is neither. To hold that a tax is liable to set-off would be utterly subversive of the power of government and destructive of the very end of taxation."

Another case: *Hedge vs. Des Moines*, 119 N W 276, wherein the court reasons as follows:

"Taxes are usually levied for particular purposes, and are carried in public treasuries in separate and particular funds. It is essential to the machinery of government that they be collected and applied to the particular purposes for which they were levied. If they may be waylaid by creditors of the municipality and seized by attachment or execution, or if the taxpayer may set off against them his counterclaims against the municipality, then the special purposes of taxation are thwarted, the power of government to accomplish its ends are checked, and the orderly conduct of public affairs through the machinery of government may be rendered quite impossible."

Numerous other cases hold the same way. Consequently, in my opinion, you have no remedy to enforce the payment of your judgment, except the usual remedy provided for by our constitution and our laws.