Opinion No. 39-3127

May 5, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. C. C. McCulloh, Assistant Special Tax Attorney, State Tax Commission, Santa Fe, New Mexico.

*{*44}* I have had for sometime your letter requesting an opinion relative to Section 3, Chapter 190, Laws of 1939, with particular reference to whether that provision is applicable to levies made for interest and sinking funds for the payment of bonds of counties and school districts. I also *{*45}* have had requests for opinions directly from some county treasurers. As you know, I have always been of the opinion that such a statute would be invalid insofar as county, municipal and district taxes are concerned, but took time to give the matter thorough study because of its importance at this time.

Section 3 of Chapter 190, Laws of 1939, provides that "ten per cent of all delinquent taxes, interest and penalty, collected after the time when the State Tax Commission acquires jurisdiction to make collection of delinquent taxes, when collected shall be * * * covered into the State Tax Commission fund to be used by the State Tax Commission as provided by law." The Tax Commission acquires such jurisdiction six months after the date on which the second half of property taxes become delinquent. Section 141-701, 1929 Compilation.

The general rule is that:

"* * * the legislature has full power and control over the disposition of revenues derived from taxation, subject, of course, to any constitutional restrictions, this power extending to such taxes as are raised **by the political subdivisions of the state under authority of the state.** " 61 C.J. 1520.

There are no general constitutional restrictions except those contained in Article I, Section 10, Clause 1, of the Federal Constitution, and Section 19 of Article II of the State Constitution prohibiting the passage of laws impairing the obligations of contracts.

With respect to this matter it is stated under Constitutional Law in 12 C.J. 1013 that "statutes making changes in the tax laws impair no rights of creditors to whom no taxes have been pledged, either expressly **or impliedly,** for the payment of their debts, and mere legislative permission to apply revenue to the payment of a certain debt does not constitute an appropriation of such revenue to that purpose, nor deprive the legislature of the power to direct the application of such revenue to other purposes."

See also 15 C.J. 582, where, discussing the fact that the revenue of a county is subject to the power and control of the legislature, it is stated that "such legislative power and

control is subject * * * to the provision in the federal constitution, prohibiting a state legislature from passing laws impairing the obligations of contracts."

The only question that confronts us, therefore, is whether or not this statute impairs the obligations of contract existing between the counties and school districts and their creditors.

No doubt the statutes authorizing the issuance of bonds to be paid from the sinking funds and interest funds pledge all such taxes to the payment of those bonds, and no portion thereof may be diverted for any other purposes; but I do not stop to inquire into that because I am convinced that **all** taxes collected for the benefit of the counties, school districts and municipalities are impliedly pledged to such an extent that any diversion thereof would result in a violation of the constitutional provisions above referred to.

It has been held, as in Nevada, that though debts have been contracted which, but for a diversion of the funds by legislative direction, would have been paid from taxes already levied, no impairment of contract obligations resulted from such diversion, the Court saying that "the good faith of the State is the only reliance of its creditors." Young vs. Hall, 9 Nev. 212, at 224.

In such states the finances are probably handled much like our state finances are from general state levies, and the contracts are made on the faith and credit of the state or county. It should be observed that in concluding that opinion the Court also remarked:

"It should be added that the legislative control of the levy does not extend to depriving the creditor of funds raised for the payment of his demand, to which he has a vested right,"

and that the Court cited cases indicating such a vested right exists once the fund is collected, though not before collection.

Because of our celebrated Bateman Act, Sections 33-4241 to 33-4247, 1929 Compilation, I am unable to see any distinction between the rights of creditors to the fund after collection, and the rights of the creditors to the taxes due before collection, and particularly after the same have become due and delinquent.

The Bateman Act, which has remained *{*46}* unchanged since 1897, impliedly, if not indeed expressly, does pledge the taxes for each year for each fund as security for the payment of the debts incurred during that year, and in effect requires that all such indebtedness be upon the faith of those taxes rather than upon the faith and credit of the district or county. In Las Vegas Independent Publishing Co. vs. Board of County Commissioners, San Miguel County, 35 N.M. 486, I P. (2d) 564, the Court said with reference to the Bateman Act:

"Under the budget law, the $ 8,000, estimated and approved for elections in San Miguel county in 1928, **was as completely dedicated to that purpose,** as were the proceeds of Santa Fe county's special levy dedicated to payment of the certificates of indebtedness. It was as unlawful to divert the one fund as the other, and it would seem as unconscionable, in the one case as in the other, to hold a claim void because of misapplication of the fund provided for its satisfaction. In principle Capital City Bank v. County Commissioners, supra, seems applicable. "Construing the Bateman Act and the budget law together, we are of the opinion that the provisions of the former now operate upon each of the several funds into which the revenues flow, as it formerly operated upon the single fund. This is fairer to those dealing with the county. Before entering into contracts with it, they may ascertain from the public records, with some degree of accuracy, whether there will be funds out of which they can be paid. But, if they cannot rely upon the integrity of these funds, the budget law will serve as a trap for the unwary."

See also James vs. County Commissioners, 24 N.M. 509, 174 P. 1001.

If the Legislature may take ten per cent of delinquent taxes, it may take ten per cent of taxes before they are delinquent; if it may do that then it may take fifty per cent or all. Unless provision is made for payment otherwise, this certainly would result in an impairment of the obligations of the contracts entered into between the county, district, or municipality and their creditors.

It is unnecessary to go into detail as to authorities on this point. The general rule has been quoted above from Corpus Juris on Taxation, Constitutional Law, and Counties, and the authorities are cited thereunder. I do wish to call attention to a few of those, however, such as Louisiana vs. Police Jury, 28 L. Ed. 574; Rose vs. Estudillo, 39 Cal/ 270; Thompson vs. Auditor General (Mich.), 247 N.W. 360, at 366, Syllabus 8-10; City of Ft. Madison vs. Ft. Madison Water Co. (8th Circuit), 134 F. 214; Moore County Treasurer vs. Otis (8th Circuit), 275 F. 747; Town of Sampson vs. Perry (5th Circuit), 17 F. (2d) 1; Fannin, et al, vs. Board of Education, 165 S.E. 542; McCless vs. Meekins (N.C.), 23 S.E. 99; United States vs. Thomas, 39 L. Ed. 450; In re Opinion of the Justices, 9 N.E. (2d) 189; Hayner vs. Board of County Commissioners of Dona Ana County, 29 N.M. 311, 222 P. 657; cf. Sanderson v. Texarkana (Ark.), 146 S.W. 105.

In the case of In re Opinion of the Justices, supra, a good example is given of a case where even in the case of bonds the Legislature may divert the revenues provided for such bonds, **if** there is still left just as efficient a remedy for their collection.

In United States vs. Thoman, supra, the Court held that where a statute provided that the surplus "may" be applied to the debts of "former years" was permissive only, and a diversion of such surplus did not impair the obligations of contracts. It gave very careful consideration to the question of whether that statute was merely directory or mandatory, indicating strongly that had it found the same to be mandatory a change could not have been made, so long as there were debts to be paid for former years, without impairing the obligations of contracts.

In Thompson vs. Auditor General, 247 N.W. 360, at 366, it was said:

"This law entered into and formed a part of the contract of the holders of notes issued in pursuance of the statute. Any legislation which renders the remedy of the noteholder less effective, or less convenient, or which changes their remedy or takes it away, impairs the obligation of their contract, unless a remedy substantially as efficacious remains. It is not a question of the degree of impairment; the least is as *{*47}* much prohibited as the greatest. Where, under the law in force at the time notes were issued and sold, the proceeds of the sale of delinquent tax lands were to **constitute a sinking fund to retire such outstanding notes to the payment of which such proceeds were pledged,** a subsequent statute postponing the sale of such delinquent tax lands until after the time to which such obligations could be legally continued changes the contract of the noteholders, and impairs the obligation of their contract within the meaning of the Constitution.'

Passing upon Chapter 49 of the Laws of 1935 authorizing the State Treasurer to apply ten per cent of the delinquent taxes to a deficit in the State Treasury occasioned by bank losses, this office has already held that the delinquent taxes for state sinking fund purposes cannot be diverted. Opinion by Mr. Modrall, No. 1450, dated October 20, 1936.

As stated above, it would seem that under the Bateman Act all county, district and municipal taxes are just as effectively pledged to the payment of debts arising during the year for which the taxes are levied, and I am strongly of the opinion that insofar as this statute attempts to divert any of those funds it results in an impairment of obligations of contract and in violation of the federal and state constitutional provisions above referred to. Whether the county treasurer or other county, district or municipal official may raise the constitutionality of the act is another matter; but since it is obligations between the counties, school districts or municipalities, and their creditors that would be impaired, I should think that it would be their duty to do so. If they do so, the Tax Commission may easily test the matter by mandamus. It is my opinion that that ought to be done in view of the importance of the matter and the amount of funds which would be involved. I have long hesitated to express an opinion which would deprive the State Tax Commission of these needed revenues, and I would prefer to see the matter settled by the courts. Such an act, Section 141-447, 1929 Compilation, was passed in 1927 but apparently superseded by Section 141-702, 1929 Compilation, passed in 1929, before any question was raised in the courts. That act limited such diversion to delinquent taxes for the years 1925 and prior, and perhaps it would be presumed that the Legislature had determined as a fact that there were no debts outstanding anywhere for that year and prior years. No such presumption could be indulged here in this general statute.

What has been said above with respect to county taxes is not true, of course, of state levies. Levies made for the state general fund and for state public health would seem to come within the category of tax revenues which are under the absolute control of the

Legislature. Taxes from levies for the state current school fund, however, cannot be diverted but must be used as provided by Section 4 of Article XII of the Constitution.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.