

**OPINION
70-470**

April 24, 1970 (OPINION)

Mr. Byron L. Dorgan

State Tax Commissioner

RE: Taxation - Personal Property Tax Repeal - Replacement

This is in response to your letter in which you state the following:

As you know, the 1969 Legislature repealed taxation of locally assessed personal property and, as part of the repealing act, enacted section 57-58-01 N.D.C.C. Supplement (section 20 of chapter 528, S.L. 1969). This section provides for state-collected revenue to be distributed back to the counties and other political subdivisions to replace revenue that those taxing units would have received if personal property had continued to be taxed by them.

Several questions as to the proper interpretation of section 57-58 01 have arisen which I believe should be considered together and settled by your opinion so that those who are concerned with the proper administration of that section can proceed with it. Accordingly, there are listed below the following questions in answer to which I will appreciate receiving your opinion. Included with some of the questions are such comments as seem appropriate."

Basically the questions involve the authority and power of the tax commissioner. Generally, all governmental agencies, departments, bureaus, and commissions including the tax commissioner have only such authority and power as may be granted by law or necessarily implied from the grant. The powers and duties of the state tax commissioner are set forth generally in section 57-01-02. Subsection 5 thereof seems to be the pertinent section and it provides as follows:

May require township, village, city, county, and other public officers to report information as to the assessment and collection of property and other taxes, receipts from licenses and other sources, and expenditure of public funds for all purposes, and such other information as may be needful in the administration of the tax laws, in such form and upon such blanks as he may prescribe."

This is a viable provision of law and is not limited to other provisions of law as they existed at the time of its adoption. This section (subsection 5) of section 57-01-02 is so structured as to permit its application to new duties imposed upon the tax commissioner and other taxing authorities resulting from changes which seem to occur with regularity in the statutes relating to taxation.

The need for greater and more additional information became a

necessity with the enactment of chapter 528 of the 1969 Session Laws by repeal of personal property tax and the replacement or restoration of the tax revenue to the various political subdivisions.

We must assume that the legislature was aware of subsection 5, otherwise the legislature would have employed language directing or authorizing the tax commissioner to devise certain forms which would disclose the material information so as to permit the proper replacement of the taxes to the political subdivisions in accordance with the distribution formula contained in chapter 528.

On a previous occasion we have recognized that certain inequities exist and probably will exist until appropriate legislation is enacted to alleviate such inequities. To accomplish this successfully it is essential that the legislature be adequately informed which amongst other things requires detailed information, data and statistics on the manner in which taxes are assessed, levied and collected.

We further recognize that in order to effectively carry out the distribution of money to political subdivisions knowledge of the taxes to be replaced is an essential factor.

Such information should be obtained at the source or as close to the source as possible. Section 57-58-01 imposes various and numerous duties upon the tax commissioner and other officials including the county auditor without specifically specifying the manner in which same are to be carried out. This reinforces our assumption that the legislature was aware that certain powers and duties were granted to the tax commissioner under subsection 5 of section 57-01-02 and felt that resort to said provision should be made where the need arises.

For convenience we will recite the questions presented followed by the answer to each question.

QUESTION NO. 1:

Should the tax commissioner prescribe the certification form that each county auditor is required by the second sentence of the first paragraph of section 57-58-01 to make to the tax commissioner on or before March 15, 1971? In this connection, although this section is silent on the point, your attention is called to the provisions of subsection 5 of section 57-01-02."

Our answer to question No. 2 is in the affirmative. This information authority if not a duty to prescribe the certification form which is required under the provision of section 57-58-01.

QUESTION NO. 2:

Should the certification form referred to in question No. 1 include the amount of per capita school taxes levied in 1968 pursuant to section 57-15-23 and the amount of grain taxes levied in 1968 pursuant to chapter 57-03 N.D.C.C.? Although this is not expressly required by section 57-58-01, it is noted that the third sentence of the first paragraph of this section requires these amounts to be certified by the tax commissioner

to the state treasurer. These amounts were included in the county auditors' abstracts of tax lists for 1968 that were furnished to the tax commissioner in late 1968 and early 1969 pursuant to section 57-20-04 but only by total amounts levied within each county; those abstracts do not show the amount of per capita school tax allocated to each school district in the county nor the amount of grain tax allocated to each of the various taxing districts in the county. It is probable, too, that some abatements or corrections of those amounts have been made since those abstracts were furnished to the tax commissioner."

Our answer to question No. 2 is the affirmative. This information is needed to make a proper distribution and also to keep the legislature informed.

QUESTION NO. 3:

If the amount of taxes levied in 1968 by a taxing district on real estate or on locally assessed personal property that is now exempt has been reduced by abatement pursuant to chapter 57-23 N.D.C.C. or changed either because of corrections that may have been made pursuant to section 57-14-01(5) N.D.C.C. or for any other reason, should the certification pursuant to section 57-58-01 by the county auditor for that taxing district show the actual amount levied for 1968 or that amount as changed by abatement or otherwise?"

The information required relates specifically to the amount of taxes which were lost as the result of the repeal of the personal property tax. In examining section 22 of chapter 528 it sets forth the legislative intent. We are convinced that the distribution is not to be on the basis of assessments or levies alone but will be predicated on the revenue lost as a result of the repeal of the personal property tax. This would not include nonpayment of taxes. Consequently, any changes occurring after assessment and levy must be taken into account. Any changes such as correcting the amount levied, or eliminating or reducing the taxes by or through abatement must be disclosed. The distribution is only on the basis of the revenue which would have been produced had the personal property tax not been repealed.

QUESTION NO. 4:

Is each county auditor required to show in the certification required by section 57-58-01 the amount levied in 1968 by each taxing district for each fund or purpose on real estate and the similar amount levied on personal property that is now exempt? Whether or not this must be shown in the certification by the county auditor, it appears that the political subdivision will have to allocate the replacement money to the various funds and purposes in the same manner as the personal property revenue would have been allocated, as is indicated in the last paragraph on page 5 of your opinion of April 18, 1969 to the Honorable Don Halcrow, Representative, Eleventh District, Drayton, North Dakota."

Our answer to No. 4 is in the affirmative. This information is needed to cross-check the distribution and also to keep the legislature informed so it may exercise its sound judgment.

QUESTION NO. 5:

Is each county auditor required to make a certification to the tax commissioner on or before March 15, 1972 and each year thereafter of the amount of taxes levied by each taxing district on real estate and, if so, must the certification show the amount levied by each taxing district in the county for each fund or purpose? Although certification by the county auditor on or before March 15, 1972 and each year thereafter is not expressly required by this section, it would seem to be necessary in order for the tax commissioner to make the certification to the state treasurer in 1972 and following years that is required by the third sentence of the first paragraph of section 57-58-01."

Our answer to question No. 5 is in the affirmative. The reasons for same are substantially as stated in answer to question No. 4.

QUESTION NO. 6:

Should the real estate taxes levied by the taxing districts in the year 1970, rather than in the year 1971, be used for applying the formula in the last two sentences of the first paragraph of section 57-58-01 to determine the amount that the tax commissioner will certify to the state treasurer for payment to the county treasurers in the spring of 1972?"

The taxes levied on real estate in the year 1971 should be used by the tax commissioner in certifying to the state treasurer for the payment to the county treasurers in the spring of 1972. (See also last paragraph of this opinion.)

QUESTION NO. 7:

If a tax levy must be made or spread against property in a taxing district in 1970 for payment of an existing bonded indebtedness of the taxing district, should the amount certified by the tax commissioner to the state treasurer for distribution to the counties and the taxing districts in 1971 include any amount with respect to the 1970 bonded indebtedness levy of the taxing district if:

- a. A levy had been made in 1968 for the particular bonded indebtedness?
- b. A levy had not been made in 1968 for the particular bonded indebtedness?

It is noted that the first sentence and the third from the last sentence of the first paragraph of section 57-58-01 expressly refer to bonded indebtedness levies for 1970 and that they were added by amendment to the original bill, Senate Bill 137."

In answer to question No. 7, we are convinced that information on bonded indebtedness or whether a levy is made because of a bonded indebtedness or that a levy was not made is essential and pertinent. Therefore, our answer to question No. 7 is that the information must be submitted either in a form devised by the tax commissioner or by some other appropriate method that a levy was made in 1968 for a particular bonded indebtedness or in the alternative that no levy was made in 1968 for a particular bonded indebtedness. We would also suggest that the tax commissioner devise a place on the form which would disclose this information. This information is vital to the proper administration of chapter 528.

QUESTION NO. 8:

If 1968 was the last year for which a tax levy was spread against property in a taxing district for retirement of a particular bond issue of that taxing district, should the amount certified by the tax commissioner to the state treasurer for distribution to the county treasurer in 1971 for allocation to that taxing district include the amount of that bonded indebtedness levy made in 1968 on personal property that is now exempt? If so, should it be credited to the general fund of that taxing district?"

In examining the provisions of section 57-58-01, and section 22 of chapter 528 of the 1969 Session Laws, it appears quite obvious that the legislature intended the 1968 year to be the base and the constant factor in the distribution formula. While it might appear that the taxing district would receive a special benefit, nevertheless unless the taxing district's real property taxes would be reduced by the amount applied to the bond issue such taxing district would be penalized under the growth formula.

In analyzing the results by taking the 1968 year as a constant for personal property taxes to be used as a factor in the distribution formula and the growth formula on real taxes the district which would temporarily gain would stand to lose additional funds under the growth formula if a subsequent bond issue is floated by the taxing district. The growth formula is the one for four dollars on real estate taxes which the state will contribute or deduct depending on whether there was an increase or a decrease. In this respect it would balance itself out. In direct response to question No. 8, the fact that in 1968 the last taxes were levied for a given bond issue should not prevent the use of the taxes produced from personal property in the year 1968 as serving as the base or constant in the distribution formula plus the growth formula on real property taxes. Chapter 528 was designed to replace personal property taxes using 1968 as the base year.

QUESTION NO. 9:

If 1968 was the last year for which a taxing district made a levy for a particular fund or purpose, should the amount certified by the tax commissioner to the state treasurer for distribution to the county treasurer and allocation to the taxing district include the amount levied by that taxing district in 1968 for that particular fund or purpose on the

personal property that is now exempt? If so, to what fund showing the taxing district credit the distribution?"

In answer to question No. 9, we must take into account that the legislature meant to replace the taxes lost because of the repeal of the personal property tax. The replacement is to go to the taxing district and in direct relation to the revenues lost from the repeal of the personal property tax. The fact that the tax was going to expire after the year 1968 should make no difference. The answer to question No. 8 and the discussion therein would have application here. It is our conclusion that the taxes raised in 1968 regardless if some of those taxes went for a specific purpose or went to a particular fund or that the levy would not be made in a subsequent year should not alter this fact. In this respect we see no distinction between taxes which were levied for a specific purpose which ended in 1968 or those which would end in 1969 or 1970. If the fund no longer exists the money should be placed in the general fund.

The legislature might wish to modify this provision.

QUESTION NO. 10:

If two school districts that levied property taxes in 1968 were combined in 1969 or 1970 into one school district, either by merger of one into the other or by formation of an entirely new school district, should the amount certified by the tax commissioner to the state treasurer for distribution in 1971 to the new or remaining school district include the amounts that had been levied by both school districts in 1968 on personal property now exempt?"

Every effort should be made to determine the tax revenues produced in the area which is involved and the amount of taxes which would have gone to the new district and the remaining district should be distributed accordingly. Again this would be on the basis of the personal property tax produced in the year 1968 taking into account bonded indebtedness and such other factors. In allocating the funds between the remaining district and the new district the action if any taken by the board of arbitration or specified in the reorganization plan would be material and would serve as a basic guide as to the amount of funds which will be distributed to the new district and to the remaining district.

QUESTION NO. 11:

If a township which borders a city levied township taxes in 1968 and a part of the township was annexed by the city in 1969 or 1970, should the amount levied in 1968 or the personal property now exempt that was in the area annexed by the city be distributed by the county treasurer in 1971 to the township or to the city? In this connection it is noted that section 40-51.2-16 N.D.C.C. relating to the effective date of an annexation for general taxation purposes, was enacted in 1969."

In answer to this question, we again are impressed that chapter 528 was to repeal the personal property tax and provide for the replacement of the revenues lost. Subsequent annexation would affect

the distribution in the area which is annexed to a city. The taxes produced by the area in the year 1968 would go to the city in the same manner as if the personal property tax had not been repealed keeping in mind, however, that the distribution formula is based on the year 1968 plus the growth factor. In making the distribution full credit can be given to section 40-51.2-16.

QUESTION NO. 12:

In the year 1971 and each year thereafter should the tax commissioner make any kind of a certification to the state treasurer as to the amount that 'shall be paid on or before June 1, 1971, and each year thereafter' by the state treasurer to the county treasurers which amount is 'the remaining fifty percent due each county' after the first fifty percent payment is distributed by the state treasurer on or before May 1, 1971, pursuant to the certificate of the tax commissioner?"

In answering question No. 12, we are mindful that the state treasurer is charged with certain duties and responsibilities but nowhere do we find that the state treasurer has any authority to demand certain information on taxation from county auditors or other sources. The provisions of chapter 528 imply that the treasurer must be informed of the amounts to be paid. It appears logical that the only officer on the state level that will have the necessary information is the tax commissioner. We, therefore, conclude that the tax commissioner is required to make a certificate to the state treasurer setting forth the amounts to be paid and the state treasurer pursuant to the certificate will make the distribution.

QUESTION NO. 13:

Should the amount certified by the tax commissioner to the state treasurer for distribution to each county each year also be certified to the director of the department of accounts and purchases in view of such provisions as those included in section 15-52-09 and in subsections 8, 11, 14, 17, 18 and 20 of section 54-44-04 N.D.C.C.?"

In answer to question No. 13, we are taking into account the various duties and responsibilities of other state officials including the department of accounts and purchases. The distribution pursuant to the certificate made by the tax commissioner will affect the general fund of the state of North Dakota. The certificate in itself does not alter the general fund figures but is an indication that the general fund will be obligated. It would appear that a copy of the certificate made to the state treasurer could be furnished to the accounts and purchases department. The state treasurer, however, should devise some method whereby the state accounts and purchases department is informed when the actual distribution takes place. For that matter it may be deemed advisable for the tax commissioner to furnish two copies of the certificate to the state treasurer. The state treasurer can then forward one copy to the accounts and purchases department when the distribution is accomplished. We would view question No. 13 as being mostly a matter of administration and that several methods are open and available which may be used permitting the respective officers and offices to carry out the

official duties and responsibilities.

QUESTION NO. 14:

If the certifications required to be made by the county auditors to the tax commissioner on or before March 15, 1971 and the certification required to be made by the tax commissioner to the state treasurer on or before May 1, 1971 are made before those dates, may the state treasurer distribute either or both of the equal payments to the counties before the dates of May 1 and June 1, 1971, respectively? This question has been asked by various officials of local government who have the responsibility of preparing preliminary budgets in which the estimated amounts to be received during the next fiscal year from all sources other than property tax levies must be estimated by them."

In answering this question it should be remembered that accuracy is the major concern of any of these reports. If the situation in the county is static so that the report can be prepared prior to the date specified, we see no legal objection if the county auditors were to do so. In this regard it is our conclusion that if the report is accurate the distribution can be made on such report even though the compilation and data was obtained at a prior time. We are not so much concerned with the time element as to when the report was completed but whether or not the information contained in the report is accurate for the period covered in the report. The clear indication is that the payments must be made no later than the dates mentioned - May 1 and June 1.

The questions were submitted without any material facts; consequently, the answers were given in an abstract manner. We also recognize that in a major revision of tax laws as we have here the legislature may not be aware of all the problems which may arise or anticipate the detailed results of the revision. As information becomes available it is conceivable that the legislature might wish to make amendments to correct situations which can result in inequities.

Some of the actions required to be taken will occur in the early part of 1971 which will permit the legislature to make amendments if the results are not what it had desired. We deem it advisable to specifically call to the attention of the legislature the answers to questions 6, 7, 8, and 9 so if any improvements are desired it can make the necessary corrections or revisions.

HELGI JOHANNESON

Attorney General