

**OPINION**  
**71-49**

February 17, 1971            (OPINION)

Mr. Thomas F. Kelsch  
State's Attorney  
Burleigh County Courthouse

RE:   Cities - Special Assessments - Payment When Challenged

This is in reply to your letter of date 8 February 1971 with regard to a judgment issued by the Clerk of Court, Fourth Judicial District, Burleigh County, on the fourth day of February, 1971, between 25 named party plaintiffs, and the City of Bismarck; Tom Baker, as City Auditor; and Katie Peterson, as Treasurer of the City Commission, as defendants. Your letter does not go into the factual background of the matter. It does inform us that the city has indicated their intention to appeal the judgment, and that the time for appeal has not expired.

We believe we have read of this decision in locally published newspapers, which contained some information as to the factual situation; however, we find nothing in this judgment indicating, as was stated in newspaper articles, that the result would be to transfer the cost of the project involved to local general taxpayers. On such basis, we are not at this point considering same to be relevant to this matter and are expressing no opinion on such phase of the matter if same exists.

The background facts as shown by the judgment referred to (which, of course, may be different after a successful appeal) are:

A named city, through its Board of City Commissioners, elected to issue bonds in the sum of \$1,625,000.00 covering the total cost for construction of a parking ramp with commercial facilities in a parking improvement district in the named city. The named city, through its board of city commissioners, elected to enter into written leases on all space within said structure and covering all facilities at the site concerned.

The judgment determines that by reason of the issuance of bonds the levy of special assessments against the plaintiffs' property is invalid and contrary to law, that the leases should have provided for the payment by the lessee of net annual rentals at least sufficient to pay all principal and interest becoming due during the lease term on any amount of bonds issued by the city, to pay capital costs on the leased property, so that the total cost of the investment would be repaid in full with interest at 5 percent per annum, and that by reason thereof the levy of special assessments against the plaintiffs' property is wholly invalid and contrary to law.

The judgment further determines that the defendants are enjoined and restrained in proceeding with the levy and collection of special assessments against the plaintiffs' property with regard to described lands lying within the Parking Improvement District, and that the plaintiffs are entitled to specified costs.

Apparently the county in which the city is located, its auditor and treasurer were not made parties to the proceedings preceding this judgment. You do not ask us; and, of course, we do not speculate on the possibilities of an appeal being taken, of such an appeal being successful, or any phase of the law or reasoning by which this judgment was reached. It is, of course, the longstanding policy of this office that we do not comment on matters currently before the courts for determination. Apparently no litigation involving this matter involves the county or its officers.

Your questions are stated as:

- "1. If the Supreme Court held these special assessments to be valid and the County Treasurer allowed the plaintiffs to obtain discounts without payment of same by February fifteenth, whether the treasurer would then be required to collect the discounts plus penalties on the special assessments not paid.
- "2. Whether the insistence on the treasurer's part that the total amount of special assessments on this book be paid prior to February fifteenth, in order for these plaintiffs to obtain their discount on real estate taxes would place him in contempt of the courts restraining order, although he is not a named defendant.
- "3. Whether the treasurer may give discounts based upon a new certified list of special assessments provided to him by the City and County Auditor, showing the special assessment levied on these properties after deleting those levied on Parking Improvement District No. 17.
- "4. If one of these plaintiffs delivers a check to the treasurer for the amount of general and special assessments minus the amount of the specials for District No. 17 and the discount prior to February fifteenth, whether the treasurer is required to complete a receipt in full or whether he may handle the same as a partial payment demanding the remainder without discount if this decision is subsequently reversed by the Supreme Court."

You do not specifically inform us as to how the special assessments for this project were brought to the county auditor. We would tentatively assume that in accordance with section 40-24-11 of the North Dakota Century Code, or a similar relevant statute, the city auditor certified to the county auditor the installment of assessments which are to be extended upon the tax lists of the municipality for the current year. Pursuant to section 57-20-07 of the North Dakota Century Code the county treasurer is the receiver and collector of all taxes extended upon the list, including among other items special taxes for local improvements in municipalities. We tentatively assume that the city has not taken action to the current moment to change their certification of this special assessment to conform to the judgment, and if they do take an appeal will not alter this certification until such time as they have received a determination of the Supreme Court of this State of the

validity or invalidity of these special assessments. If no appeal is actually taken from this judgment, there may well be some question as to whether the city can allow the original certification of same to remain with the county auditor in view of the provisions of the judgment enjoining and restraining the defendants from proceeding with the levy and collection of same; though this possibly being a question before the court we will not comment further on same.

Sections 57-20-08 and 57-20-09 of the North Dakota Century Code provide:

"57-20-08. TAX RECEIPTS - WHAT TO SPECIFY - NUMBERED CONSECUTIVELY - DUPLICATE COPIES FILED WITH COUNTY AUDITOR - TRIPLICATE COPIES RETAINED AND FILED NUMERICALLY BY COUNTY TREASURER. Upon the payment of any tax, the county treasurer shall give to the person paying the same a receipt therefor showing the name and post-office address of such person, the amount and date of payment, the land, lot, or other property upon which the tax is levied, according to the description on the tax list, or in some other sufficient manner, and the year or years for which the tax was levied. If for current taxes on real estate, the receipt shall have written or stamped across its face 'taxes for' (giving the year in figures) or 'first installment taxes' (giving the year in figures) or 'second installment taxes' (giving the year in figures), as the case may be. Each year's tax shall be on a separate receipt. If land has been sold for taxes, either to a purchaser or to the county, and the time for redemption from such sale has not expired, the receipt for such taxes shall have written or stamped across the face 'sold for taxes,' with a statement of the year for which any of the real estate described therein has been sold for taxes and not redeemed. The treasurer shall make triplicates of all receipts and shall return a duplicate copy at the end of each day to the county auditor, who shall file and preserve them in his office charging the treasurer with the amount thereof. The triplicate copy shall be preserved in the office of the county treasurer and filed in numerical order."

"57-20-09. DISCOUNT FOR EARLY PAYMENT OF TAX. The county treasurer shall allow a five percent discount to all taxpayers who shall pay all of the real estate taxes levied on any tract or parcel of real property in any one year in full on or before February fifteenth prior to the date of delinquency. Such discount shall apply to all general real estate taxes levied for state, county, city, township, village, school district, and park district purposes, but shall not apply to personal property taxes, special assessment installments, or hail indemnity taxes. Whenever the county commissioners, by resolution, determine that an emergency exists in any county by virtue of weather or other catastrophe they may extend the discount period for an additional thirty days."

In looking to these statutes we find nothing therein indicating that the treasurer's receipt shall necessarily indicate that all due taxes are paid in full or indicating that such a receipt if issued would constitute a final determination absolving the taxpayer or his real estate from all tax liability for a given period of time. The term

receipt under the provisions of these statutes would imply an acknowledgment of the amount of money actually paid towards the tax liability of the taxpayer. We do note the statutory language to the effect that the "county treasurer shall allow a five percent discount," but we doubt also that this implies that the county treasurer can at this point finally adjudicate the amount of discount available to a taxpayer.

Rather, we would assume that these provisions are explanatory of the provisions of 57-20-07 of the North Dakota Century Code denominating the treasurer as receiver and collector of taxes and designed to aid the taxpayer in keeping appropriate records to show his payment of taxes. On such basis, it is only reasonable that the treasurer should receipt for the amount of moneys received by him on account of such taxes; and if, of course, such receipts show that all moneys, in terms of dollars and cents, actually due for taxes are paid by the discount date, the taxpayer will be entitled to the discount. If, however, all taxes actually due and owing are not paid by the discount date, the taxpayer is not entitled to the discount; and the treasurer would be obligated to take appropriate action to collect the unpaid amount of taxes actually due and owing.

Assuming that the district court judgment is not appealed and does become final, the special assessments determined to be invalid are invalid; and it will not be necessary to pay them prior to February 15 in order for the taxpayer to be entitled to the full discount for early payment of taxes. On the other hand, assuming that the district court judgment rendered is appealed within the time limited, and further assuming that the Supreme Court of this State determines the levy to be valid, it will have been necessary for the taxpayer to have paid these taxes prior to February 15 in order to be entitled to the discount for having paid all taxes prior to February 15.

This perhaps does give the taxpayers otherwise subject to this special assessment (if valid) a problem, in that the special assessment has been declared invalid prior to February 15. Any decision determining the special assessment to have been valid will probably be rendered by our Supreme Court subsequent to February 15; and, therefore, it will probably be after the date payment is necessary to assure entitlement to the discount that the taxpayer and the county treasurer know finally that the special assessments must be paid in order to obtain the discount. If, of course, the taxpayer wants to be absolutely certain that he becomes entitled to the discount, regardless of the subsequent decisions that may be rendered by the courts, without the possibility of not being able to recover the amount paid in that may subsequently be determined to be for an invalid special assessment, we would assume that he would pay the amount of special assessments alleged to be invalid, under protest.

Thus, in answer to your first question, if the Supreme Court held these special assessments to be valid, the county treasurer would be required to receive and collect the amount assessed for these special assessments. If the taxpayer had not paid these special assessments plus all other real estate taxes by February 15 and additionally had deducted 5 percent for this discount, the county treasurer would be required to receive and collect these special assessments plus the 5 percent that the taxpayer had computed to be his discount.

In response to your second question, as you mention the treasurer is not named as a party leading to the court's restraining order. We do not understand what you refer to as the "insistence on the treasurers part that the total amount of special assessments on this book be paid prior to February fifteenth." We have always assumed that this "discount" provision is more or less self-operating. If the taxpayer takes advantage of these provisions by making timely payment, the treasurer customarily accepts such payment. If the taxpayer chooses not to take advantage of such provisions by making such early payment, we believe the county treasurer does not immediately commence collection procedures to force the taxpayer to immediately make payment. We think it would be very unusual for a county treasurer to get "insistent" upon payment of taxes in time to get the discount, and we would almost assume that there would be some undisclosed motive in a treasurer becoming "insistent" in this situation. On this basis, it seems possible that a treasurer becoming "insistent" upon collection of such amount at such time might be faced with legal proceedings possibly related to such restraining order; though we, of course, are not parties or of counsel in the proceedings in which the restraining order was rendered and thus would hesitate to comment on the court's conclusion in this regard.

We do feel that if the special assessments were not paid by February 15, the district court judgment was appealed, and in the usual course of events, and customary practice of the county treasurer's office, further procedures were in order to make collection such as giving further notices, commencing tax deed proceedings or the like, the treasurer would be obligated to take these steps in this instance in the same manner as is usually done with other taxes. It might serve to clarify this point if we would mention that this "discount" is actually given by the statute, not the county treasurer.

In instances where the statute grants the discount, the treasurer should recognize same and should not attempt to collect taxes that the statute declares under the circumstances to be deducted by reason of the statutory discount.

In response to your third question, as heretofore stated, we do not feel that the treasurer "gives discounts." The discount is granted by the statute in the instances where it is applicable. If a new certified list of special assessments was provided to him by the City and County Auditors showing the special assessments levied on these properties after deleting those levied on Parking Improvement District No. 17, his records would then reflect applicability of the discount, without payment of those levied on Parking Improvement District No. 17. If all taxes shown on those lists are thus paid by February 15, the discount would become applicable; and the treasurer would not be able to undertake further proceedings to collect the discounted amount. If, however, as your letter indicates, the city does intend to appeal the district court judgment, it seems most unlikely that the city officers would forward a new certification deleting the taxes declared invalid by the district court decision.

In response to your fourth question, assuming the absence of a new certification from city and county auditors, where one of these

plaintiffs delivers a check to the treasurer for the amount of general and special assessments minus the amount of the specials for District No. 17 and the discount prior to February 15, we believe the treasurer would be obligated to issue a receipt showing the actual amount of money paid in. We know of nothing in the statutes or in the usual practice of county treasurers authorizing issuance of an instrument further indicating the legal conclusion that taxes are paid in full, and we doubt that such a document would serve to bind the county if it turned out that the taxes were not paid in full. If, of course, the receipt showed an amount paid in equal to the amount shown on the treasurer's books as due, the treasurer would probably be precluded from taking further proceedings to collect for these taxes, assuming, of course, he had followed the appropriate legal procedures to and including that point. In the example you give in this question, if the Supreme Court subsequently determined to reverse the district court decision, the county treasurer would be required to collect the amount of these specials unpaid, plus the amount the taxpayer had computed to be his discount, plus, of course, any statutory penalties accruing on either or both such amounts as of the time collection was accomplished.

HELGI JOHANNESON

Attorney General