

**OPINION
69-392**

January 13, 1969 OPINION)

Mr. Alph J. Overby
State's Attorney
Griggs County

RE: Taxation - Excess Levy in School Districts - Failure to Notify County Auditor

This is in reply to your two letters of date 30 December 1968 enclosing copy of notice of election with regard to a school district excess levy.

You inform us, in essence, that during the past year a school district voted a 50 percent excess levy as provided in Chapter 57-16 of the North Dakota Century Code. Through an error, the certification of the approval by the voters did not reach the county auditor and this excess levy has not been used in compiling the tax liability of the property owners within the district.

You inform us that the school district has asked you if it is permissible and, if so, under what authority, to have the auditor correct the levy, assess the tax and notify these persons who have already paid their taxes of a deficiency and thus record the amount approved for this year. You state that this proposal has been advanced as a probable method of recapturing the tax money, and it has been asked if the county auditor could do this as an omitted tax under the statute, or if there is another recommended method. You ask further whether, in view of the facts heretofore stated, if the local board under Section 57-16-04 is within its authorized powers in extending this levy for one year in order to raise the required funds.

The notice enclosed indicated same to be dated the fourteenth day of March 1968, calling an election on the twenty-eighth day of March, 1968. The question, as stated on the notice, is:

"Shall * * * of * * * and * * * County, State of North Dakota, levy taxes for the year 1968-69 which will exceed the legal limit by Fifty Percent (50 percent) so that the taxes levied for the current year instead of being \$* * *, which is the limit authorized by law, shall be \$* * *."

We do not have a copy of the ballot, but we tentatively presume that the question was stated on the ballot in substantially the language contained in the notice as indicated above.

We have checked our files under 57-16 and 57-20 of the Code back through the year 1947, and find only one item of correspondence involving a somewhat similar question,

Xerox copy of which is enclosed herewith. We note that same involves a school district; however, that question involved a continuing levy rather than a one year levy, and other circumstances which do put the question on a different basis.

We note that the statutory form of ballot (Section 57-16-06 of the North Dakota Century Code) provides:

"Shall school district levy taxes for the year (or years) , which shall exceed the legal limit by per cent, so that the taxes levied for this current year instead of being dollars, which is the limit authorized by law, shall be dollars:

Yes

No."

We assume that the reference in the question actually used by your district to the "year 1968-69" was caused by confusion of the officials preparing the ballot of the current school term with the taxable year. Taxes are levied for one year and collected beginning January first of the next. As of the dates of the notice and election, it is obvious, considering the question in the actual context of this state's taxing system, the number "1968-69" must mean taxes levied for the year 1968 to be spread on the tax levies in the fall of 1968 and collected commencing January first, 1969. We would assume also that the phrase "the current year" was substituted for the statutory language "this current year" as a result of similar clerical error, but can have only the meaning of the statutory language when considered in the light of this state's taxing system as of the time the notice and election are dated.

Ordinarily, the school board levies the school district taxes. In the case of these excess levies, we note under the provisions of Chapter 57-16 of the North Dakota Century Code, noting particularly the provisions of Section 57-16-02 of the North Dakota Century Code, the governing basic responsibility towards determining the amount of the tax is adoption of a resolution of necessity. Noting particularly the provision of Section 57-16-07 of the North Dakota Century Code, it would appear that the actual levy of the excess levy tax is made by the voters.

Looking more specifically into the provisions of said Section 57-16-07, we note particularly the sentence:

"In such case, the election board shall certify the result of such election to the county auditor within ten days after such election."

and the sentence

"If the question proposed carried by the required majority, the county auditor shall extend such excess levy upon the tax lists of the school district."

In this statutory context it would appear that this situation is a parallel to that considered by our Supreme Court in *Schouweiler et al., v. Allen* 17 N.D. 510. As stated in that decision, at pages 516 and 517 of the North Dakota Reporter:

"* * * The code provides for an election in school districts to vote upon the issuance of bonds in such cases, and Section 911, Revised Codes 1905, contains the requirement that, if the majority of all votes cast 'shall be in favor of issuing bonds, the school board, through its proper officers, shall forthwith issue bonds in accordance with such vote.' The bonds cannot be issued except upon an affirmative vote. The wisdom of their issuance is a question solely for the voters of the district themselves, and not for the board to determine. The members of the Board are but the special agents of the people constituting the school district. The law has provided the method whereby the principal - in this case the voters - may instruct its agents, and when the instruction is in favor of issuing bonds the legislature has not seen fit to provide any method for revoking such instruction. After an affirmative vote at the election, the duties of the school board are ministerial, and consist in obeying implicitly the directions of the voters so given. * * *"

To attempt to paraphrase this statement we might state - The code provides for an election in school districts to vote upon the imposition of an excess levy and Section 57-16-07 contains the requirements that if the required majority of all votes cast is in favor of the question submitted, such excess levy shall thereby be authorized. Said Section 57-16-07 further provides that if the question proposed carried by the required majority, the county auditor shall extend such excess levy upon the tax lists of the school district. The excess levy cannot be imposed except upon an affirmative vote. The wisdom of its imposition is a question solely for the voters of the district themselves and not for the board to determine. The members of the board are but the special agents of the people constituting the school district. The law has provided the method whereby the principal - in this case the voters - may instruct its agents, and when the instruction is in favor of imposition of the excess levy, the legislature has not seen fit to provide any method for revoking such instruction. After an affirmative vote at the election, the duties of the school board are ministerial and consist in obeying implicitly the direction of the voters so given.

In these circumstances it would also appear that the county auditor's duties are also purely ministerial. We note in *State ex. rel., Strutz v. Huber*, 69 N.D. 788, at page 791:

"The duties of the respondent county auditor with respect to the matters here involved are purely ministerial. He has no discretion in the matter. See *Murray v. Mutschelknaus*, 70 N.D. 1., 291 N.W. 118. If he fails to perform them, mandamus is the proper remedy to invoke against him. Comp. Laws 1913, Section 8457. The fact that the board of county commissioners has directed him to do otherwise is no excuse. The statute controls. Their action cannot override it. * * *"

We recognize that, in the current situation, no one has apparently attempted to override the direction of the voters, all officers concerned have indicated their willingness to proceed in accordance therewith to the extent of their abilities. However, the fact remains that, basically, under the statutory provisions we are concerned with, the school board and the county auditor are not in a position to override the expressed will of the voters by any positive act. In such circumstances it would be impossible to contend that, by their mere inaction, they have defeated the will of the voters.

In these circumstances, we feel that the school board has no choice but to certify the results of the election to the county auditor. Assuming that the question proposed carried by the required majority, we likewise feel that the county auditor has no choice but to extend the excess levy upon the tax lists of the school district, even though all other levies of the area have been spread, tax statements made out and, in some instances, all taxes but the one here concerned have been paid and tax receipts issued.

We might point out that the tax receipt authorized by Section 57-20-08 does not contain any guarantee that the taxes receipted for constitute all property taxes that might be due from the taxpayer. The only problem that might arise in this context is the possibility that the individual taxpayer might not have the same length of time to pay this tax after receipt of notice, in order to obtain his tax discount. If a problem arises in this regard, we would assume it could be resolved rather simply by the remedy provided in Section 57-20-09 of the North Dakota Century Code that:

"* * * 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."

We do not feel that the provisions of Chapter 57-14 of the North Dakota Century Code have any bearing on this current problem. This is not a case of omitted property. This would appear to be a situation where erroneous tax lists have been prepared and appropriate corrections are in order.

As to your further question, in view of our answer to your first question we do not feel an answer is necessary. The statutory provisions with regard to the extension of the levy, we assume would refer to an instance where an excess levy voted had been in effect abandoned by the school district and county officials. We find no authority in the statutes for "abandonment" or other means for officials to refuse to carry out the expressed wish to the voters in this context. On such basis we assume the question cannot come up.

HELGI JOHANNESON
Attorney General