

County Commissioners — Tax Ferrets — Net Proceeds — Taxation.

County commissioners do not have the power to employ a tax ferret for the purpose of discovering net proceeds of mines or other property that escaped taxation.

Mr. Walter R. Knaack,
County Attorney,
Shelby, Montana.

December 8, 1931.

My dear Mr. Knaack:

I have your request for an opinion relative to the payment of commissions due V. F. Dahl for ferreting out property omitted from taxation in past years. The county treasurer's letter to you states that Mr. Dahl entered into a contract with the board of county commissioners to discover property, principally oil production, that escaped taxation in past years, by which contract he is to receive 25% commission on all revenue obtained through his efforts and he wishes to know whether the compensation to be paid Mr. Dahl shall be paid by warrant drawn on the general fund of the county or is it to be deducted from the taxes received from property discovered by Mr. Dahl to have been omitted from taxation in past years.

In connection with your inquiry I have reviewed the case of Simpson vs. Silver Bow County, 87 Mont. 83, 285 Pac. 195, which has, I think, been generally considered as upholding the power of the board of county commissioners to employ tax ferrets. However, upon carefully considering said case it is my opinion that too broad a construction has been placed upon that decision. In that case the contract was entered into in 1921 and it provided that the plaintiff would furnish the commissioners, sitting as a county board of equalization, information which would enable the board to cause to be assessed and taxed a large amount of taxable property which had escaped taxation, the contract to apply only to property added to the assessment of 1921.

The court upheld the contract in that case because there was discovered under it net proceeds of mines which had escaped taxation in the year 1920, and in 1921 the power to search out omitted net proceeds was by law conferred exclusively upon the board of county commissioners.

As is specifically pointed out in the opinion, however, the law was amended in 1923 and the state board of equalization was granted the

power to search out and cause to be assessed net proceeds of mines which had been omitted in past years, but, of course, this amendment did not affect the case in which the opinion was rendered because that case arose under the law prior to this amendment in 1923.

The contract in the above mentioned case was therefore sustained upon the theory that at the time it was entered into the law placed the duty upon the board of county commissioners to search out omitted net proceeds and that the duty was not cast upon any other officers. Since that time the law has been changed, as is pointed out in the opinion, so that that duty is now cast upon the state board of equalization. The very basis of upholding the contract in that case has been overturned by legislative enactments so that the duty is now upon the state board of equalization, and it is therefore my opinion that county commissioners do not have the right at this time to employ a tax ferret to search out omitted net proceeds.

As to the right to employ a tax ferret to discover other property which has been omitted from taxation, such as real and personal property that is assessed by the assessor, the opinion above referred to states that up to and including 1920 the county assessor assessed net proceeds of mines and that the duties of the assessor and the board of county commissioners with reference to this property were the same as their duties were with reference to any other property.

The court says that it is questionable at least if the county board would have had power to enter into such a contract under the law as it was up to and including 1920. In my opinion, the board does not have the power to employ persons to discover property which it is the duty of the county assessor to assess.

If this contract was valid it is my opinion that the compensation of Dahl would have to be paid out of the general fund. If it was the duty of the board of county commissioners to discover this property the performance of that duty by the board without an agent is paid for out of the general fund. Where the board, in the performance of the same duty, incurs additional expenses they should be paid out of the same fund that is provided by law for the payment of the expenses of the board in performing the duties, namely, the general fund. Furthermore, the county acts as a trustee of the taxes collected for the benefit of the various funds which have an interest in those taxes, and, of course, the trustees cannot apply any of the funds to any purpose other than that for which they were received by him without express authorization of the beneficiary of the trust.

Again, there are other considerations which forbid this compensation from being paid out of the tax moneys received. One illustration will suffice: The constitution provides that all taxes levied for state purposes must be paid into the state treasury. If part of the state's interest in these taxes was to be paid to Dahl it is apparent that full taxes levied for the state could not be paid into the state treasury which would be a violation of the constitution.

Very truly yours,

L. A. FOOT,

Attorney General.