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Opinion No. 43

HAIL INSURANCE - Hail insurance levies are not taxes; Disposition of delinquent levies; Creation of lien for unpaid hail insurance levies; Withholding of refunds on delinquent levies. Article V, section 39, Constitution of Montana; sections 82-100, 82-1501, 82-1506, 82-1507 and 82-1509, R.C.M. 1974.

- HELD:**
1. A hail insurance levy is not a tax, although it is administered as such;
 2. An eight-year statutory period of limitations applies to the collection of past due levies, and any levies which have been delinquent for a period in excess of eight years should be disposed of pursuant to the provisions of section 82-110, R.C.M. 1947;
 3. A lien for unpaid hail insurance levies arises as to real property of a taxpayer electing to be covered by the act, and upon personal property in the form of crops of a

person who does not own unencumbered land or pay cash upon participation in the state hail insurance program;

4. The state hail insurance board has the authority to withhold refunds on delinquent levies.

May 3, 1972

Mr. Maurice W. Smith, Chairman
State Board of Hail Insurance
502 Lamborn
Helena, Montana 59601

Dear Mr. Smith:

You have requested my opinion as to whether:

1. a hail insurance levy is a tax and administered as such;
2. there is a statutory period of limitation on the collection of past due levies;
3. a lien arises as to both real property and personal property, in the form of crops, upon participation by a farmer in the state hail insurance program;
4. the board has the authority to withhold refunds on delinquent tax levies.

Section 82-1506, Revised Codes of Montana, 1947, authorizes a tax and directs it to be levied on all lands in this state growing crops subject to injury or destruction by hail, the owners of which have elected to become subject to the provisions of the Hail Insurance Act. Although this section classifies the hail insurance levy as a tax and directs that it be administered as a tax, the levy has not been interpreted to be a tax by this office in the past.

In 23 **Opinions of the Attorney General**, no. 32, then Attorney General Arnold Olsen held that hail insurance levies are not taxes, but are obligations owed to or held by the counties. He based his opinion upon then Attorney General L. A. Foot's opinion in 10 **Opinions of the Attorney General**, p. 391, and then Attorney General Freebourn's opinion in 18 **Opinions of the Attorney General**, no. 95. In 10 **Opinions of the Attorney General**, p. 391, Attorney General Foot examined the definition of taxes set forth by the Montana Supreme Court in **State v. Cowdy**, 62 Mont. 119, 203 Pac. 1115 (1921), and found that the special hail insurance levies were not taxes. Similarly, Attorney General Freebourn, in 18 **Opinions of the Attorney General**, no. 95, held that since the hail insurance levy is not "an enforced contribution of money or other property, assessed in accordance with some reasonable rule of

appointment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expense (citing authority)", it, therefore, is not a tax within the provisions of the constitution.

I find the above interpretation to be persuasive, and thus agree that the levies are not taxes but contract obligations. This interpretation is made in cognizance of attorney general opinions which may have used language indicating that the assessments were in fact taxes, i.e., 11 **Opinions of the Attorney General**, p. 158 and 18 **Opinions of the Attorney General**, no. 53. However, the analysis in regard to the definition of taxes provided in **State v. Gowdy**, supra, dictates the holding that these levies are not taxes.

Despite the fact that these levies are not taxes, in answer to the second part of your first question, they are administered as taxes pursuant to express statutory provision. Section 82-1506 (3), R.C.M. 1947, provides:

“ . . . Such tax levies respectively shall be chargeable to the lands of each taxpayer who shall elect to become subject to this act and shall be extended on the tax roll and collected by the officers charged with such duties in the manner and form as are other property taxes and if not paid shall be a lien on the lands against which the same are levied as are other property taxes . . . ”

In addition, pursuant to section 82-1509, R.C.M. 1947, the county treasurer in each county is required to collect such liens in the same manner as other property taxes are collected.

In response to your second question, the statute of limitations which applies to collection of past due levies is provided for in section 93-2601 and section 93-2603, R.C.M. 1947. Section 93-2601, supra, provides:

“The periods of limitation prescribed for the commencement of actions, other than for the recovery of real property, are as follows: . . . ”

Section 93-2603, supra, provides:

“Within eight years:

“An action upon any contract, obligation, or liability, founded upon an instrument in writing.”

Since the action would be upon a contract obligation as discussed above, and such obligation is in writing by virtue of the fact that the farmer fills out forms evidencing his desire to engage in the program as

directed by section 82-1501, R.C.M. 1947, the delinquent amount due cannot be recovered by legal action if the amount has been delinquent for more than eight years from the date of commencement of such action. See 23 **Opinions of the Attorney General**, no. 32.

However, Article V, section 39, of the Montana Constitution prohibits the extinguishment of a liability or obligation held or owned by the state except by payment of such liability or obligation. The pertinent language of Article V, section 39, provides:

“Except as hereinafter provided, no obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury.”

Thus, at first blush, it would appear that the application of section 93-2603, *supra*, to the collection of past due hail insurance levies would be barred by Article V, section 39, *supra*. This problem is not one of first impression in Montana, however. The Montana Supreme Court addressed itself to a similar situation in **Board of County Commissioners v. Story**, 26 Mont. 517, 520, 69 P. 56 (1902). In this case, the court was concerned with the question of whether a two-year statute of limitations barred the county commissioners of Custer County from bringing an action against county residents to recover unpaid taxes. The court examined this question in light of the prohibitions contained in Article V, section 39, *supra*, and held:

“The statute relied on by the defendants, which limits the right to sue within two years after the maturity of the demand, does not operate to remit, release, or extinguish the obligation. With respect to personal actions for the recovery of debt, statutes of limitation are not statutes of release or liquidation; **they affect the remedy and not the right.**” (Emphasis supplied)

The rationale relied upon by the court in **Story**, *supra*, may also be applied to the operation of Article V, section 39, *supra*, and its relative effect on section 93-2603, *supra*. Section 93-2603 merely eliminates the legal **remedy** available for the collection of past due levies; it does not eliminate or extinguish the contractual obligation.

Consequently, since there is no legal remedy available for the collection of the obligation, it becomes, for all intents and purposes, uncollectable. A procedure for the disposition of uncollectable obligations was established by the Forty-second Legislative Assembly in section 4, Chapter 268, Laws of 1971. This act amended former section

82-110, R.C.M. 1947. The pertinent amendment to said section is currently codified in section 82-110 (c), R.C.M. 1947, which provides:

“The controller may establish procedures for canceling and writing off accounts receivable carried on the books of various state agencies which are uncollectable or the continued pursuance of the collection thereof would cost the state more than the amount collected. Such procedures shall include the reporting of such canceling and writing off of accounts receivable to the next session of the legislative assembly.”

Therefore, hail insurance levies which have been delinquent for a period in excess of eight years, and are thus uncollectable by legal process, should be cancelled and written off pursuant to the provisions of section 82-110, *supra*.

The answer to your third question rests upon statutory language in section 82-1506, *supra*, subparagraph (2), which provides:

“In addition to the lien created above on the land of the insured, the levy for such hail insurance shall also constitute a lien on the crops insured with the exception that the said crop lien shall not apply to owners of unencumbered land, or on the land or crops of those who pay cash for hail insurance . . .”

Subparagraph (3) of section 82-1506, *supra*, quoted earlier, stated that the tax levies, if not paid, shall be a lien on the lands of a taxpayer electing to become subject to the act. Section 82-1506 (2), *supra*, provides that unpaid hail insurance levies constitute a lien on the crops insured if the farmer does not own unencumbered land or pay cash for hail insurance. Thus, if the insured farmer owns unencumbered land, unpaid hail insurance levies become a lien against his land; and, if a farmer does not own unencumbered land or does not pay cash, then the unpaid hail insurance levies become a lien against the crops.

Your final question relates to whether the board has the authority to withhold refunds on delinquent levies. The board has the authority to grant refunds under section 82-1507 (1) 4, which provides:

“If at the end of any hail insurance season the state board of hail insurance determines and finds that more funds are accumulating from the current year’s levies than were estimated when the levy was made, and which funds are in excess of the need for the payment of losses and expenses and maintenance of the reserve, the state board of hail insurance may, at its discretion, refund to the farmers insured for the said year, on a pro rata or percentage basis the excess.”

The board also is authorized to make rules and regulations in regard to the administration of the Hail Insurance Act as provided in section 82-1501 (2), R.C.M. 1947:

“... (s)aid board ... is hereby authorized, directed and empowered to make such rules and regulations as it may from time to time find practical, necessary and beneficial for the conduct of the department of hail insurance, subject to the provisions of this act.”

Therefore, the refund is not mandatory, and reading the two provisions in conjunction with one another, the board has the authority to make rules and regulations for the administration of that refund one of which is that a holder has until June 30 to pay his premium and receive his pro rata refund. In addition, to pay a refund without having received moneys from a particular person would be contrary to what the term “refund” would permit; i.e., to “refund” means to return money in restitution, repayment. *U.S. v. Wurts, Pa.*, 303 U.S. 414. If one has not paid into the insurance fund, he cannot expect to be reimbursed for money he has failed to pay.

THEREFORE, IT IS MY OPINION that:

1. The hail insurance levy is not a tax, although administered as such.
2. An eight-year statutory period of limitations applies to the collection of past due levies and consequently any levies which have been delinquent for a period in excess of eight years should be cancelled and written off pursuant to the provisions of section 82-110, R.C.M. 1947.
3. A lien for unpaid hail insurance levies arises as to real property of a taxpayer electing to be covered by the act, and upon personal property in the form of crops of a person who does not own unencumbered land or pay cash upon participation in the state hail insurance program.
4. The state hail insurance board has the authority to withhold refunds on delinquent hail insurance levies.

Very truly yours,

ROBERT L. WOODAHL
Attorney General