

Insect Pest Fund—Taxation—Taxpayer.

The tax levy for the Insect Pest fund may not exceed one-half mill and the excess thereof is illegal and void and should be refunded, if paid, and, if not paid, an injunction lies to restrain the collection of the illegal portion.

L. R. Daems, Esq.,
 County Attorney,
 Harlowton, Montana.

My dear Mr. Daems:

You have submitted to this office for my opinion the following facts and questions:

“Wheatland county made and levied an assessment of one and one-half mills tax to take care of the warrants issued out of the Insect Pest fund. However, there have been many protests made in the paying of this tax and under Section 4504 of the Political Code of the Montana Revised Codes, 1921, it is provided that the Commissioners shall not levy a tax to exceed one-half mill on each dollar of assessed valuation and I have so advised the present Board. Will you kindly give us your opinion on this matter and also in regard to the money received up to this time over and above the one-half mill tax?”

Section 4504 of the Political Code limits the levy for the Insect Pest fund to one-half mill. To take advantage of a statute authorizing the refund of taxes illegally or wrongfully assessed, it must be shown that the tax was illegal or that the Assessor acted without jurisdiction. 37 Cyc. 1172-3.

Where a statute limits the taxing power of counties to the raising in any year of a specified sum or a certain percentage of the taxable property and taxes are levied to the prescribed limit the power is exhausted, and any excess levied is illegal and void.

Trumbull v. County, 95 S. E. 391;
Michigan Land, etc., Co. v. Republic Township, 65 Mich.
628;
Atchison, etc., R. Co. v. Wiggins, 49 Pac. 1019;
37 Cyc. 969.

In Worthen v. Badgett, 32 Ark. 496, it was held that an excessive levy vitiates the whole tax.

In Northern Pacific Railway Co. v. Musselshell County, 54 Mont. 96, where an injunction was sought to restrain the issuance of a tax deed for the reason that a part of the tax was illegal, Chief Justice Brantly, speaking for the Court, said:

“The question presented here is whether an injunction will be granted to restrain the issuance of a deed to the purchaser at a tax sale, when the tax to enforce the collection of which the sale was made was in part illegal. Where such a tax is wholly illegal, the sale may be enjoined. (Barnard Realty Co. v. City of Butte, supra.) The conclusion reached in that case was held permissible under Section 2741 of the Revised Codes, which, though prohibiting generally the issuance of an injunction to restrain the collection of a tax, nevertheless permits the issuance (1) when the tax is wholly or in part illegal or unauthorized by law, and (2) when the property is exempt. In the first case, if any part of the tax is illegal (legal), it must appear that this part has been paid. This presumes, of course, that the legal and illegal portions are separable and the legal part is ascertainable. Here the case is presented of a gross sum, the legal part of which cannot be ascertained and paid.”

It is, therefore, my opinion that the method of procedure you should adopt depends on whether the taxes have been paid. If the taxes have been paid an application for refund of the illegal portion should be made. If not, injunction lies to restrain the collection of the illegal portion.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.