

Opinion No. 35.**Taxation—Illegal Tax, Refunds of—
Refunds of Illegal Tax—County
Commissioners—Schools,
Tax Levy|**

HELD: The board of county commissioners has no authority to order a refund of the illegal tax where a school levy was eight mills in excess of the maximum legal levy provided by Sec. 7 of Chapter 146, Laws of 1931.

February 2, 1935.

Mr. George J. Allen
County Attorney
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Your letter to us of recent date is as follows:

"Enclosed find copy of letter given to the Board of County Commissioners of Park County, Montana, regarding their right to refund taxes.

"The facts are as follows: School District No. 53, in Park County, voted a special levy of 8 mills for maintenance of the schools. However, the budget, when prepared according to law, showed that a levy of 7.4 mills would be sufficient to produce the revenue required to be raised by taxation. The Board of County Commissioners, instead of fixing the levy at only 7.4 mills, fixed a levy of 18 mills. The Northern Pacific Railway Company paid their taxes under protest as to this school district levy, claiming that the County Commissioners had no authority to levy in excess of 7.4 mills. The Northern Pacific Railway Company has agreed to accept a refund of 8 mills instead of filing suit to recover the amount protested.

"May I please hear from you regarding the correctness of the enclosed opinion."

Section 19 of Chapter 146, Laws of 1931, provides: "The county superintendent of schools, as clerk of the school budget board, shall, when the board of county commissioners meets on the second Monday in August for the purpose of fixing tax levies, lay before such board the budgets for all school districts in the county, as finally adopted and approved by the school budget board, and the board of county commissioners shall, for each district, fix such number of mills of the tax levy for each fund, within the limits prescribed by law, as will produce the amount shown by the final budget to be raised by tax levy." Section 7 of the same Act expressly limits the tax levy to ten mills, except in a case where the qualified electors of the school district approve an additional tax levy. (*Chicago, M. St. P. & P. R. Co. v. Fallon County*, 95 Mont. 568.)

As stated in your opinion to the board of county commissioners of Park County, so much of the eighteen mill tax levy as was not necessary for school district purposes is doubtless illegal. It has been repeatedly held that all proceedings in the nature of assessing property for purposes of taxation and in levying and collecting taxes thereon are *in invitum* and must be according to strict law. (*Western Ranches v. Custer County*, 28 Mont. 278; *Perham v. Putnam*, 82 Mont. 349; *Clark & Wilson Lumber Co. v. Weed*, 2 Pac. (2d) 12; 61 C. J. 557, 562.)

Such being the situation from a juristic standpoint, is the board of county commissioners vested with authority to order a refund to the Northern Pacific Railway Company equal to eight mills of the tax paid by it? Like you, we must answer in the negative. The power of the board to refund taxes is found in section 2222, Revised Codes of Montana 1921, which reads as follows: "Any taxes, per centum, and costs paid more than once or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer, and the state's portion of such tax, percentage, and

costs must be refunded to the county, and the state auditor must draw his warrant therefor in favor of the county." But section 2269, Revised Codes of Montana 1921, as amended by section 1 of Chapter 142, Laws of 1925, has impliedly repealed so much of section 2222 as provided for a refund of property taxes erroneously or illegally collected. (*First Nat. Bank v. Sanders County*, 85 Mont. 450; *First Nat. Bank v. Beaverhead County*, 88 Mont. 577; *Williams v. Harvey*, 91 Mont. 168.)

The board of county commissioners is a body of limited powers. It may exercise only such powers as are expressly given to it or which are necessarily implied from those so given. (*Morse v. Granite County*, 44 Mont. 78; *Lewis v. Petroleum County*, 92 Mont. 563; *American Surety Co. v. Clarke*, 94 Mont. 1.) It has been well said that the repeal of a statute authorizing a refund of taxes takes away the right of the citizen to claim such refund and of the public officers to make it. (61 C. J. 975.)

We have assumed all along, of course, that section 1202, Revised Codes of Montana 1921, as amended by section 1 of Chapter 123, Laws of 1929, is not involved.