

No. 311

**TAXATION—POOR PER CAPITA TAX—COUNTY
COMMISSIONERS, Levy of, on whom**

Held: County Commissioners may not levy the per capita poor tax authorized by Section 4465.4 only on taxpayers between certain ages subject to such tax. Such tax may not be levied on those persons exempt from tax under provisions of law.

December 6, 1941.

Board of County Commissioners
Silver Bow County
Butte, Montana

Gentlemen:

In pursuance to the request of Mr. Joseph O'Donnell, member of your Board, in our conversation a few days ago, I am pleased to give you my opinion on the following question:

Under the provisions of Section 4465.4, Revised Codes of Montana, 1935, as amended by Chapter 165, Laws of 1941, may the Board of County Commissioners in levying the per capita poor tax provide that such tax be levied only on those taxpayers between certain ages?

This question must be answered in the negative.

Section 4465.4, Revised Codes of Montana, 1935, as amended by Chapter 165, Laws of 1941, provides in part:

"The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To provide for the care and maintenance of the indigent sick, or otherwise dependent poor of the county; erect and maintain hospitals therefor, or otherwise provide for the same, **and to levy the necessary tax therefor per capita, not exceeding \$2.00. . . .**" (Emphasis mine.)

It would have been within the authority of the legislature to have provided such levy be made on persons between certain ages, had they so desired.

61 C. J. 1534, Section 2255;

Pohl v. Chicago, Milwaukee, etc., Ry., 52 Mont. 572, 160 Pac. 515;

Thurston County v. Tenino Stone Quarries, Inc., 44 Wash. 351, 87 Pac. 634.

This the legislature did in Section 5039.48, Revised Codes of Montana, 1935, whereby it authorized cities and towns to levy per capita poor taxes on male residents between the ages of 21 and 45 years. However, the legislature failed to do so in Section 4465.4, *supra*.

When we consider the history of per capita taxes, it is easy to understand why the legislature restricted the imposition of the road per capita tax upon male residents between the ages of 21 and 45 years, while refraining from such restriction in imposing per capita poor taxes. It is well stated by the Court in the case of *Thurston County v. Tenino Stone Quarries*, *supra*, in the following language:

"The propriety of the enactment and enforcement of statutes providing for a poll tax has been recognized ever since, and prior to the foundation of our government . . . In this and other states, classifications here found have been provided. The reason for such classification is found in the nature of the subject matter itself. It was formerly the common practice and is yet, if we are not incorrectly

informed, for persons subject to a poll tax to "work out" said tax upon the public highways. The inappropriateness of women being called upon to render such a service to the state is readily apparent. . . . That there is an age, when, by reason of immaturity, the imposition of this public service or tax, should not be made is evident, as is likewise the proposition that an age may be reached when a man should not be called upon to render this character of service or pay a per capita tax. . . ."

It is significant the legislature has set the age limits for residents subject to the road poll tax, while it has failed to do likewise in the statute relative to the poor tax. In the one it has authorized the taxing power (cities and towns) to make this classification—in the other it has not done so.

A board of county commissioners is one of limited powers, and must in every instance justify its action by reference to the provisions of law defining and limiting its powers. (State ex rel. Lambert v. Coad, 23 Mont. 131, 56 Pac. 1092; State ex rel. Gillett v. Cronin, 41 Mont. 293, 109 Pac. 44; Morse v. Granite County, 44 Mont. 78, 119 Pac. 287.)

All proceedings in the nature of assessing property for the purpose of taxation, and in levying and collecting taxes thereon, are in invitum, and must be stricti juris, that is, strictly in accordance with the statutory provisions. (Perham v. Putnam, 267 Pac. 305, 82 Mont. 349.)

Therefore, county commissioners may not limit the payment of the per capita poor tax authorized by Section 4465.4, as amended, to residents of specified ages, or to any particular class or sex, because they cannot point to any provision of said section or any other statute giving them such authority. The tax may not however be levied upon those residents exempt from such taxes under other provisions of law.

It is therefore my opinion the board of county commissioners in levying the per capita poor tax, authorized by Section 4465.4, as amended by Chapter 165, Laws of 1941, may not provide only those taxpayers between certain specified ages be subject to such tax.

Sincerely yours,

JOHN W. BONNER
Attorney General

SUPPLEMENT TO OPINION NO. 311

December 24, 1941.

TO ALL BOARDS OF COUNTY COMMISSIONERS
AND COUNTY TREASURERS:

It has been called to my attention Opinion No. 311, Volume 19, Official Opinions of the Attorney General, dated December 6, 1941, and rendered to the Board of County Commissioners of Silver Bow County, interpreting Section 4465.4 of the Revised Codes of Montana, 1935, providing for the levy of the per capita poor tax, has been given various interpretations. It is to clear up any misunderstanding of the holding of this opinion that I direct this communication to you.

The question presented upon which said opinion is based is as follows:

"Under the provisions of Section 4465.4, Revised Codes of Montana, 1935, as amended by Chapter 165, Laws of 1941, may the board of county commissioners, in levying the per capita tax, provide that such tax be levied only on those taxpayers between certain ages?"

The opinion held specifically the board "in levying the per capita poor tax authorized by Section 4465.4, as amended by Chapter 165, Laws of

1941, may not provide only those taxpayers between certain specified ages be subject to such tax," and further the tax "may not be levied upon those residents exempt from such tax under other provisions of law."

The Attorney General is directed by statute to render his opinion in writing on questions of law to certain named public officers. He may not legislate but may only interpret the law as it is written. The statute in question does not provide the county commissioners may specify an age limit of persons liable for the tax. In interpreting such statute, neither the courts nor the attorney general may insert what the legislature has omitted.

As pointed out in the opinion, the Supreme Court has said a board of county commissioners is one of limited powers and must in every instance justify its action by reference to some statute. However, it is clear, from a reading of Section 4465.4, as amended, that the legislature has lodged with the board of county commissioners a discretion in the levy of this tax.

Poll or per capita taxes from the beginning of the law have been authorized on the theory that, as the state accords to every inhabitant, regardless of his property, the protection and advantage of its laws, it asks a tribute toward the support of the government from the beneficiaries who are able to pay regardless of whether they have property. The legislature—in enacting Section 4465.4—did not intend children or indigents should be subject to this tax. The sole reason for this law is to assist in making provision for the care of the unfortunate, indigent but deserving people. The statute—granting authority to the board to levy the necessary tax per capita not exceeding two dollars to support the indigent sick and otherwise poor—lodges in the board a discretion. This discretion, however, must be exercised in a reasonable manner and not arbitrarily. If the board has power to say only those between twenty-one and sixty years shall pay, it may likewise say only those between ten and twenty, or sixty and eight, shall pay. To require those residents to pay the tax who are dependent solely upon the small pittance received as old age assistance, or a minor or female without any income or ability to pay the tax would, in my opinion, be an unreasonable exercise of the discretion given the board under this statute.

On the other hand, it is reasonable to require a male person twenty-one years old to pay the tax, and exempt therefrom a female of the same age, both of equal ability to pay? Why should a male resident twenty-one years of age be required to pay the tax, while a female resident twenty years old with the same or greater ability to pay be exempt? Many of our residents over sixty years of age, owning no visible property, have the ability to pay this tax. Why, therefore, should they be exempt while others of less or no ability be required to pay the tax because they happen to be a year younger? Age or sex can have no consideration in the payment of this tax. Only ability to pay should be the basis of the levy.

The tax may not be levied on officers and members of unpaid fire companies regularly organized, and exempt firemen specifically exempt under Section 5144, Revised Codes of Montana, 1935, or on military men and veterans, specifically exempted under Section 1401, Revised Codes of Montana, 1935.

Therefore, the board of county commissioners—in levying the tax—should make such levy apply only to those residents or taxpayers having the ability to pay, excepting therefrom those specifically exempt by statute hereinabove pointed out. This is the only reasonable interpretation of the statute and of the opinion here referred to.

Respectfully yours,

JOHN W. BONNER
Attorney General