

VOLUME NO. 36

Opinion No. 61

TAXATION — All-purpose mill levy; Sections 84-4176, 84-4701.1 and 84-4801.2, Revised Codes of Montana 1947.

HELD: 1. Those cities which elect to finance their operations by adopting an all-purpose levy under section 84-4701.1, may not exceed the 65 mill limit contained therein in order to finance city responsibilities which are not specifically exempted from inclusion in that levy.

2. If taxes have been collected which are not permissible as being in excess of the 65 mill limit, the county commissioners should refund those taxes. However the individual taxpayers must strictly comply with the procedural requirements of section 84-4176 before they are entitled to such refund.

March 12, 1976

Mr. Theodore P. Cowan
Deputy County Attorney
Fergus County
Lewistown, MT 59457

Dear Mr. Cowan:

You have requested my opinion concerning the following questions:

1. Is it permissible for a city to impose an all-purpose annual mill levy in excess of the 65 mills provided for in section 84-4701.2?

2. If the levy is not permissible do the county commissioners have the authority under section 84-4176 to refund to the taxpayers any part of the taxes collected?

Your letter informs me that the city of Lewistown has levied a greater number of mills for taxation of city residents than the 65 mills provided for in section 84-4701.2. This action was taken to cover the increased costs of city government pursuant to the enactment of the 1975 legislature. More specifically, these include the increases relating to city police and firemen.

Section 84-4701.1 authorizes the all-purpose levy and it reads as follows:

84-4701.1. All purpose levy authorized. It is the purpose of this act to authorize and empower the cities and towns of the state of Montana, at their option, to make an all-purpose annual mill levy **in lieu of the multiple levies now authorized by the statutes of the state of Montana**. The all-purpose mill levy shall not include the levies imposed for bonded indebtedness, to pay judgments, or special improvement district revolving funds of municipalities, which levies may be made in addition to the all-purpose levy as provided in section 84-4701.6, R.C.M. 1947. This act shall not be construed as repealing those statutes providing for multiple separate levies. (Emphasis supplied)

It is apparent that this all-purpose levy is an optional system of financing a city's operations. It provides an alternative to financing through separate levies for each city function. Municipalities which choose this method of financing must include within the all-purpose levy those levies which would otherwise be imposed individually and which are not specifically exempt from the all-purpose levy.

Exceptions other than those found within section 84-4701.1 are, in some instances, contained in subsequent legislation. For example, section 16-5113 providing for the financing of local government study commissions specifically states that the tax levy to finance the operation of that commission "**may be levied by a municipality in addition to the all-purpose levy....**" (Emphasis supplied)

In the absence of such specific language, it is my opinion that those cities utilizing the all-purpose levy cannot exceed the 65 mill limit in order to meet increased obligations. If the 65 mill limit is not sufficient to meet increased responsibilities, the city should abandon the all-purpose levy and utilize separate levies until such time as the legislature either raises the limit or exempts additional functions from inclusion in the all-purpose levy.

With specific reference to the increased responsibilities of the cities in regard to policemen and firemen, I can find no language which would exempt these areas from inclusion in the all-purpose levy. Therefore I must conclude that these responsibilities cannot be financed with a levy exceeding the 65 mill limit.

Section 84-4176 provides in part:

84-4176. (2222) Taxes, etc., illegally collected to be refunded. (1) Any taxes, per centum and costs, heretofore or hereafter, paid more than once or erroneously or illegally collected, and any part or portion of taxes paid which were mistakenly computed on government bonus or subsidy received by the taxpayer, may, by order of the board of county commissioners, be refunded by the county treasurer. Whenever any payment shall have been made to the state treasurer, as provided in section 84-4401 of this code, and it shall afterwards appear to the satisfaction of the board of county commissioners that a portion of the money so paid should be refunded as herein provided, said board of county commissioners may refund such portion of said taxes, penalties and costs so paid to the state treasurer, and upon the rendering of the report required by section 84-4402 of this code, the county clerk shall certify to the state auditor, in such form as the state auditor may prescribe, all amounts so refunded, and in the next settlement of the county treasurer with the state, the state auditor shall give the county treasurer credit for the state's portion of the amounts so refunded. (2) When any part of the taxes, penalties or costs hereinbefore referred to were levied in behalf of any school district or municipal or other public corporation, and collected by the county treasurer, the same may be refunded upon the order of the board of county commissioners.

The question arises whether this statute authorizes a refund of those taxes which are not permissible as being in excess of the 65 mill limit. It is my opinion that it does so authorize.

Our Supreme Court has held that this statute is applicable to taxes "erroneously collected" as opposed to taxes "illegally collected". **Christofferson v. Chouteau County**, 105 Mont. 577, 581, 74 P.2d 427 (1937). An erroneous assessment occurs when the taxing officers have power to act but err in the exercise of that power, and an illegal assessment takes place when they have no power to act at all. *Id* at 582. In this case the officials do have the power to levy taxes to support the city functions at issue. However they committed error in adopting the all-purpose levy method of financing and then exceeding the 65 mill limit. Therefore the county commissioners should refund those taxes paid in excess of the allowable amount in those cases where the individual taxpayers have complied with the procedural requirement contained in section 84-4176 (3).

THEREFORE, IT IS MY OPINION:

1. Those cities which elect to finance their operations by adopting an all-purpose levy under section 84-4701.1, may not exceed the 65 mill limit contained therein in order to finance city responsibilities which are not specifically exempted from inclusion in that levy.
2. If taxes have been collected which are not permissible as being in excess of the 65 mill limit, the county commissioners should refund

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Very truly yours,
ROBERT L. WOODAHL
Attorney General