Opinion No. 90-08

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OPINION OF: HAL STRATTON, Attorney General

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TO: Willard Lewis, Secretary, New Mexico Department of Finance and Administration, 425 State Capitol, Santa Fe, New Mexico 87503

QUESTIONS

1. Is the state permitted to use the proceeds of property taxes levied to pay principal and interest on the state's general obligation bonds for the purpose of paying the administrative fee charged by county treasurers under NMSA 1978, § 7-38-38.1?

2. What deadline, if any, applies to the state in connection with the payment of bills submitted by county treasurers pursuant to Section 7-38-38.1?

3. May county treasurers decline to transfer money collected as the result of lawfully imposed property tax levies until they receive the administrative fee provided for in Section 7-38-38.1?

CONCLUSIONS

1. Yes, provided the laws authorizing the bond issues provide for the payment of incidental expenses out of the tax proceeds.

2. See analysis.

3. No.

ANALYSIS

New Mexico statutes authorize county treasurers to charge administration fees to offset their costs in collecting revenue from ad valorem property taxes on behalf of revenue recipients. A "revenue recipient" includes "the state and any of its political subdivisions ... that are authorized by law to receive revenue," with some exclusions not relevant here. NMSA 1978, § 7-38-38.1(A)(2) (Cum. Supp. 1989 and as amended by N.M. Laws 1990, ch. 125, § 7). The statutes also provide that "[p]rior to the distribution to a revenue recipient of revenue received by a county treasurer, the treasurer shall bill the revenue recipient as an administrative charge" certain specified amounts. Id. § 7-38-38.1(B). Subsection (C) of NMSA 1978, § 7-38-38.1 provides for the collection and deposit of administrative charges into a county property valuation fund, and provides further that

"[t]he revenue recipient may pay the administrative charge from any fund unless otherwise prohibited by law."

1. Although the state legislature has the authority to impose a tax to pay the administrative fee, State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935) (legislature has plenary power to tax except as limited by the Constitution), it has not done so. NMSA 1978, § 7-38-38.1(C) provides for payment of the administrative charge "from any fund unless otherwise prohibited by law." We understand that there is no fund available from which to pay the charge and that the state legislature has not appropriated money to pay the fee.[1]

Using proceeds from taxes levied and collected to pay principal and interest on general obligation bonds issued by the state is limited under the state constitution and by statute. N.M. Const. art. IX, § 8 provides that, except for debt specified in art. IX, § 7,[2]

No debt...shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof.

This provision also requires that the law authorizing the debt be properly publicized and be approved by the electors of the state, and mandates that no debt shall be created if it would result in total state debt in excess of one percent of the assessed value of all taxable property in the state. Section 9 of N.M. Const. art. IX provides that "[a]ny money borrowed by the state, or any county, district or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, and to no other purpose whatever."

The tax levied under N.M. Const. art. IX, § 8 is used to pay interest and principal payments on the bonds. This kind of provision generally is interpreted to prohibit the proceeds from being used for other purposes. See, e.g., Bank of Picher v. Morris, 157 Okla. 122, 11 P.2d 178 (1932) (tax refunds could not be made from sinking funds governed by constitution); Dillard v. Sappington, 151 Okla. 47, 1 P.2d 748 (1931) (county treasurer had no authority to pay lawyers who obtained judgment on investments made with sinking fund money from proceeds of judgment which otherwise would belong to the fund); Cross of Malta Bldg. Corp. v. Straub, 257 Or. 376, 476 P.2d 921 (1970) (en banc) (earnings of war veterans' bond sinking fund could not be diverted to state general fund). Cf. Scott v. City of Truth or Consequences, 57 N.M. 688, 262 P.2d 780 (1953) (revenue derived from public utility funded with bonds issued by municipality could not be used for corporate purposes other than those specified in statute governing use of such revenue). A related limitation on taxes levied to pay principal and interest on bonds is that the taxes cannot be assessed at a rate greater than necessary to make the required payments. For example, in E.T. Lewis Co. v. City of Winchester, 140 Ky. 244, 247, 130 S.W. 1094, 1095 (1910), the court interpreted a provision of the Kentucky Constitution which required a municipality contracting debt "to provide for the collection of an annual tax sufficient to pay the interest of said

indebtedness, and to create a sinking fund for the payment of the principal thereof." According to the court, "[m]anifestly it was not the intention of the framers of the Constitution to require that more taxes should be collected from the people than necessary to meet the principal and the interest." Id. See also Rogge v. Petroleum County, 107 Mont. 36, 80 P.2d 380 (1938) (board of county commissioners was without authority to impose levy to raise money for sinking fund when there was more money than needed to pay principal and interest on bonds).

A strict application of these principles would prevent the state from using taxes levied to pay principal and interest on the state's general obligation bonds to pay the administrative charge imposed under NMSA 1978, § 7-38-38.1. The payment arguably would constitute a purpose other than payment of principal and interest and it would require a tax rate greater than necessary to pay principal and interest. However, when considering costs properly included in special assessments for improvements, New Mexico courts have concluded that restrictions on the use of particular funds do not prevent their use for incidental expenses. For example, Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950), involved bonds issued by a municipality in connection with street improvements and sold to a broker at a discount. The court held that the discount was properly chargeable to the improvement district, stating that "[l]ogically, the discount is an incidental expense necessary to the construction and is properly assessable against the property located in the improvement district." 54 N.M. at 243, 220 P.2d at 708. Also, in Massengill v. City of Clovis, 33 N.M. 519, 523, 270 P. 886, 887 (1928), the court held that, under a statute permitting a city to assess property for street improvements, "all of the costs of the improvement, including the sums payable to the contractor, the engineer, the attorney, and all incidental expenses are to be included as a part of the cost of the improvement, and are properly chargeable in the local assessment against abutting property owners." See also AG Op. No. 5206 (1949) (restriction on the use of bond proceeds under N.M. Const. art. IX, § 9 did not prohibit payment of incidental expenses such as attorneys fees for work performed in connection with the bonds). Courts in other states have held that tax proceeds raised from special assessments to make improvements could be used to pay the costs of collecting the taxes. See Roberts v. City of Los Angeles, 7 Cal.2d 477, 61 P.2d 323 (1936) (charges for collection of assessments were properly included in cost of authorized improvements as incidental expenses); Sawicki v. City of Harper Woods, 1 Mich. App. 352, 136 N.W.2d 691 (Ct. App. 1965) (costs of making and collecting assessments were properly included in cost of improvement and were includable in the amount of the special assessment).[3]

The reasoning used in these cases can be applied to permit the use of tax proceeds dedicated to payment of principal and interest on general obligation bonds for incidental expenses necessary to make those payments, including collection costs. In a case involving a similar issue, the Florida Supreme Court decided that a drainage district was permitted to pay the costs of collecting and assessing an acreage tax out of the tax proceeds. Bedell v. Lassiter, 143 Fla. 43, 196 So. 699 (1940). The proceeds of the tax constituted a trust fund for the benefit of holders of matured bonds and interest coupons. Id. at 45, 196 So. at 700. According to the court, the tax proceeds required to

pay the bonds could not be used to pay the legal costs of plaintiff, who represented holders of unpaid and past due bonds, in bringing suit against the district or for the fees of attorneys who represented the district in handling their litigation. The court distinguished the use of tax proceeds to pay collection and assessment costs:

The lawful fees to the tax assessor and collectors of the counties within said drainage district are lawful charges and items incidental to the collection of the acreage tax and when lawfully approved as to amount or amounts should be paid out of said acreage fund.

143 Fla. at 53, 196 So. at 703.

In our opinion, the administrative fee imposed under NMSA 1978, § 7-38-38.1 is an incidental cost of collecting taxes required to pay principal and interest on the state's general obligation bonds and, provided the tax levied is sufficient to make principal and interest payments as required under N.M. Const. art. IX, § 8, can be paid from the proceeds of the tax. We understand, however, that there is some concern about whether the charge is proper in connection with those bonds that are currently outstanding because the laws approved by the voters of the state for issuance of the bonds do not include the administrative charge as part of the costs to be paid from the tax proceeds. See 1988 Capital Projects Bond Act, 1988 N.M. Laws, ch. 2. (2d Spec. Sess.); Educational Capital Improvements Bond Act, 1986 N.M. Laws, ch. 113; Educational Bond Act, 1984 N.M. Laws, ch. 6 (Spec. Sess.). Because those laws constitute "an irrepealable contract" with the holders of bonds, see, e.g., 1988 N.M. Laws, ch. 2, § 9 (2d Spec. Sess.), using tax proceeds to pay costs not specifically listed may give rise to an action for breach of contract or diversion of the tax proceeds. It might also result in a suit by property owners subject to the tax on the grounds that the tax rate is excessive.

In general,

Implied covenants are not favored in law. And where a written agreement between parties is seemingly complete, a court will not lightly imply an additional covenant enlarging its terms. But if it is clear from all of the pertinent parts of provisions of the contract, taken together and considered in light of the facts and circumstances surrounding the parties at the time of its execution, that the obligation in question was within the contemplation of the parties or was necessary to carry their intention into effect, it will be implied and enforced.

Stern v. Dunlap Co., 228 F.2d 939, 942-43 (10th Cir. 1955) (citations omitted). For two of the recent bond issues, the authorizing statutes contain language suggesting that, although the actual fee imposed under Section 7-38-38.1 might not have been contemplated, the parties to the bond contracts did anticipate that incidental expenses would be paid from tax proceeds. Section 8 of the 1988 Capital Projects Bond Act states:

The state treasurer shall keep separate accounts to all money collected pursuant to the provisions of the 1988 Capital Projects Bond Act and shall use this money only for the purposes of paying the interest and principal of the bonds as they become due **and any expenses relating thereto**.

(Emphasis added). 1988 N.M. Laws, ch. 2, § 8 (2d Spec. Sess.). Similarly, the Educational Capital Improvements Bond Act provides that tax proceeds shall be used only for principal and interest payments "and any expenses incurred in satisfying these obligations." 1986 N.M. Laws, ch. 113, § 8. The administrative charge is an expense incurred in collecting the amounts necessary to pay principal and interest, and, therefore, qualifies as a related expense and an expense incurred in satisfying the obligations.

By contrast to the 1988 and 1986 bond statutes, the Educational Bond Act states that money collected shall be used only for paying principal and interest, and does not give any indication that payments other than those necessary for principal and interest will be made out of tax proceeds. 1984 N.M. Laws, ch. 6, § 8 (Spec. Sess.). Because it is clear that the administrative fee was not contemplated by the parties at the time of the 1984 statute and payment of the fee from the tax proceeds is not clearly necessary to achieve payment of principal and interest on the bonds, we believe that the statutory language governing distribution of the tax proceeds does not provide sufficient leeway to allow payment of the fee. Accordingly, for bonds issued under the 1984 statute, payment of the fee must be made from another source.

2. NMSA 1978, § 7-38-38.1 does not specify the time revenue recipients must pay the required administrative charge. If the transaction was part of a voluntary agreement requiring revenue recipients to pay county treasurers for their services in collecting property taxes, we would apply basic contract principles. Under those principles, when no time is specified for performance by a party, the law implies that the contract will be performed within a reasonable time. Hagerman v. Cowles, 14 N.M. 422, 424, 94 P. 946, 947 (1908); Smith v. Galio, 95 N.M. 4, 7, 617 P.2d 1325, 1328 (Ct.App. 1980); NMSA 1978, § 55-2-309(1). What constitutes a reasonable time depends on the circumstances existing at the time of performance. Roswell Drainage Dist. v. Dickey, 292 F. 29, 32 (8th Cir. 1923) (what was reasonable time depended on circumstances such as the scarcity of labor resulting from World War I, incompetency of labor secured and difficulties in procuring materials and repair parts); Smith v. Galio, 95 N.M. at 7, 617 P.2d at 1328 ("[w]hat constitutes a reasonable time, under the evidence, is a question of fact"); NMSA 1978, § 55-2-204(2) ("[w]hat is a reasonable time [under the Uniform Commercial Code] for taking any action depends on the nature, purpose and circumstances of such action").

The legislature is presumed to know the law in effect at the time it enacts a statute, including common law. Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971). Because the requirement in Section 7-38-38.1 is similar to a contract between revenue recipients and county treasurers for payment in return for collecting property taxes we conclude that the absence of any specific time for payment in the

provision means the legislature intended that it should be made within a reasonable time.

3. Section 7-38-38.1 does not specify how the administrative fee it imposes is to be enforced. The provision states only that a county treasurer may "bill" a revenue recipient for administrative charges prior to the distribution of revenue to the revenue recipient. Under the rules of statutory construction, the terms of a statute are given their ordinary meaning, unless the legislature indicates otherwise. State ex rel. Maloney v. Sierra, 82 N.M. 125, 134, 477 P.2d 301, 310 (1970). One dictionary's definition of "bill", when used as a verb, is

1. to make out a bill of (items); to list.

2. to present a statement of charges to.

Webster Unabridged Dictionary 182 (2d ed. 1983). See also Black's Law Dictionary 149 (5th ed. 1979) ("As a verb, as generally and customarily used in commercial transactions, "bill' is synonymous with "charge' or "invoice'"). The ability to bill a revenue recipient before distributing the proceeds of property taxes does not give county treasurers authority to withhold tax proceeds pending payment of the administrative charge.

Courts interpret statutes to avoid absurdity, hardship or injustice, to favor public convenience, and to oppose prejudice to public interests. Cox v. City of Albuquerque, 53 N.M. 334, 340, 207 P.2d 1017, 1021 (1949). See also State ex rel. State Hwy. Comm'n v. Board of County Comm'rs of Dona Ana County, 72 N.M. 86, 93, 380 P.2d 830, 835 (1963). If the authority to refuse to distribute tax revenues were implied from the power to bill revenue recipients, the state and local governments which had a valid reason for not paying the charge could be forced to default on their obligations to bond holders. Aside from the immediate effect on bond holders, this would prejudice that public by making bonds used to finance government operations less desirable investments, thereby jeopardizing an important source of funding. Given these potentially serious consequences, we conclude that, absent express authorization from the legislature, county treasurers do not have the power to require payment of the administrative fee before distributing the tax proceeds.

The amendments to Section 7-38-38.1 enacted in 1988 provide additional support for this portion. See 1988 N.M. Laws, ch. 68, 1. Prior to the amendments, the provision allowed county treasurers to retain the amount of the administrative charge from tax proceeds and distribute the balance to revenue recipients. NMSA 1978, § 7-38-38.1(B) (Repl. Pamp. 1986). The change in the provision indicates that, far from authorizing county treasurers to withhold the entire amount of a distribution from revenue recipients, the legislature decided that it did not want to authorize county treasurers to retain even a portion of the tax proceeds which otherwise would be distributed.

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GENERAL FOOTNOTES

n1 Our opinion is that Section 7-38-38.1(C) does not constitute an appropriation under New Mexico law. The New Mexico Constitution requires that "[e]very law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied." N.M. Const. art. IV, § 30. Under Gamble v. Velarde, 36 N.M. 262, 267, 13 P.2d 559, 562 (1932), the sum appropriated is sufficiently specified "by limiting the aggregate of the payments to a special fund, all of which is dedicated to the specified object, or so much of it as may be necessary." This arrangement is acceptable because it does not amount to the legislature surrendering control of the purse strings to the executive. Id. at 269, 13 P.2d at 563. Section 7-38-38.1(C) permits payments to be made from "any fund." This does not sufficiently isolate a maximum amount to be spent by the executive branch and, if intended to be an appropriation, relinquishes too much of the legislature's control over expenditures from the treasury. See also McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322 (1930) (statute which permitted tax refunds out of state treasury without setting a maximum amount to be drawn upon was unconstitutional). Accordingly, we conclude that the funds referred to in Section 7-38-38.1(C), so far as the state is concerned, are those already appropriated by the legislature.

n2 N.M. Const. art. IX, § 7 permits the state to borrow money not exceeding $200,000 to meet casual deficits or failure in revenue or for necessary expenses, and authorizes the state to contract debts to suppress insurrection and to provide for the public defense.

n3 One court has held that a city could not assess property for incidental costs of improvements, such as engineering charges and clerical fees, absent express mention in the ordinance or charter authorizing the improvement. Giles v. City of Roseburg, 82 Or. 67, 160 P. 543 (1916). New Mexico courts apparently do not concur with this view, but consider incidental expenses as part of the cost of the authorized improvement. See Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950); Massengill v. City of Clovis, 33 N.M. 519, 270 P. 886 (1928). See also Pflueger v. Kinsey, 320 Mo. 82, 6 S.W.2d 604 (1928) (language in charter that authorized assessments for entire cost of improvements authorized inclusion of incidental charges for engineering and inspection services).