

N.D.A.G. Letter to Hanson (July 8, 1987)

Overruled in part by N.D.A.G. 2004-L-42

July 8, 1987

Mr. Robert E. Hanson
State Treasurer
State Capitol
Bismarck, ND 58505

Dear Mr. Hanson:

Thank you for your letter of April 9, 1987, in which you request my opinion relative to the township highway aid fund established by N.D.C.C. § 54-27-19.1. I apologize for the delay in responding.

In your letter, you state that in 1982, the State Treasurer requested, and received, a township road certification form from each county auditor certifying the road mileage in both organized and unorganized townships of the county. This certified data was used by the State Treasurer's Office for determining distribution from the township highway aid fund to the respective counties. Recently, your office was informed by a county that its 1982 certification of mileage had failed to include the mileage for a township in that county. Had the correct mileage been provided to your office, the county would have received an additional \$15,000 over the past several years which, in turn, would have been distributed to the township in question.

You ask whether the State Treasurer's Office is authorized to issue a remedial payment to the township or county to correct the underpayment. If my response to the above question is negative, you inquire whether there is any other recourse for the county or township. Initially, I will address the question relating to the State Treasurer's authority to issue a remedial payment.

For the 1981-83 biennium, the distributions of tax revenues to the local townships were governed by N.D.C.C. §§ 57-50-01 and 57-51-15. N.D.C.C. § 57-51-15(1) provided that a tax in the amount of "one percent of the gross value at the well of the oil and gas upon which a tax is collected under this chapter" be deposited with the State Treasurer and distributed in the following manner:

1. (a) For taxes received between July 1, 1981, and June 30, 1983:
 - (1) The treasurer shall first distribute an amount which, when added to that distributed to townships from nonrefunded motor vehicle fuel and special fuel taxes under section 57-50-01 will

result in a total distribution to townships under these two sections of eight million dollars for the 1981-83 biennium. The same distribution formula shall be used for moneys allocated to townships under this section as under 57-50-01:

....

(Emphasis supplied.)

N.D.C.C. § 57-50-01 (which was repealed in 1983) provided that the \$8 million should be distributed "based upon the proportionate number of miles [kilometers] of township roads within the organized or unorganized township as compared with the total number of miles [kilometers] of township roads in the state."

The 1983 Legislative Assembly continued the practice of distributing tax revenues to assist local townships for highway and bridge purposes by enacting N.D.C.C. § 54-27-19.1. N.D.C.C. § 54-27-19.1 provides in relevant part as follows:

54-27-19.1. TOWNSHIP HIGHWAY AID FUND DISTRIBUTION. .

. . The tax commissioner shall transfer the proceeds of one cent per gallon [3.79 liters] of the tax imposed by sections 57-43.1-02 and 57-43.2-02 to the state treasurer who shall deposit the proceeds in a township highway aid fund in the state treasury. The state treasurer shall quarterly allocate and distribute all moneys in the township highway aid fund to the counties of the state based on the length of township roads in each county compared to the length of all township roads in the state.

N.D.C.C. § 54-27-19.1 further establishes the means of distribution from the county to its townships.

Neither the law in effect during the 1981-83 biennium nor present law provides a means for the State Treasurer to make a remedial payment to a township that failed to submit its mileage data to the State Treasurer's Office or the county which, in turn, would have submitted such information to the State Treasurer.

A similar situation was addressed by the North Dakota Supreme Court in Stark County v. State, 160 N.W.2d 101 (N.D. 1968). In that case, Stark County brought an action against the State for money the county claimed was due it from the Motor Vehicle Registration Fund of the state. In Stark County, the facts indicated that the plaintiff county had received less than its share of funds whereas other counties had received more than their share of funds. Nevertheless, the court dismissed the county's action and stated as follows:

In the case before us, there is no showing that the state has used or has retained any part of the monies which the County of Stark is seeking to recover. In fact, it is conceded that such monies as are claimed by the plaintiff have been paid to other counties under the improper method of

allocating the motor-vehicle registration funds to the various counties. Under this situation, the state of North Dakota is not liable to Stark County for any monies for which it has paid to other counties, even though such distribution was, perhaps, improper.

Id. at 107.

In accordance with Stark County, and the Legislature's failure to provide a specific means for correcting improper payments, it is my opinion that the State Treasurer is not authorized to issue a remedial payment to the township or county in question.

Your second question asks whether the township or county has any other recourse in this matter. A similar issue was presented to the North Dakota Supreme Court in Richland County v. State, 180 N.W.2d 649 (N.D. 1970). In Richland County, 7 counties commenced separate actions against 14 defendant counties and the State Treasurer based upon the same facts as presented in Stark County. The plaintiff counties were alleging that they had received less than their proper share of the motor vehicle registration fees and that the defendant counties had received too large a share.

Upon finding that the distributions were improper, the court held that "those counties which received less than their just portion of such fees should have some right to recover from those which received more than their lawful share under the statute." 180 N.W.2d at 655. This holding was based upon the doctrine of unjust enrichment.

Based upon the facts as presented in your letter, the county and township in question may have a cause of action against other counties and townships that were unjustly enriched by the alleged improper payments. Additionally, the township may have a cause of action against its county in relation to the distribution of funds from the county to the township pursuant to N.D.C.C. § 54-27-19.1. These potential causes of action will have to be pursued by the county or township in the proper courts.

Sincerely,

Nicholas J. Spaeth

cv