

**OPINION
79-62**

September 6, 1979 (OPINION)

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

Dear Mr. Hanson:

This is in response to your letter of July 26, 1979, in which you set out several questions relating to the State Revenue Sharing Act on which you request my official opinion.

The State Revenue Sharing Act that was approved as an initiated measure by the people in November 1978, contained four sections, of which sections 2, 3, and 4 now appear in the North Dakota Century Code as sections 54-27-20.1, 54-27-20.2, and 54-27-20.3. Section 1 of the initiated measure, relating to intent, apparently has not been placed in the Century Code but it does, of course, appear in the Session Laws as Section 1 of Chapter 686, S.L. 1979. For purposes of answering your request, however, this opinion will refer to the sections of the initiated measure in the same way as you have in your request.

Your first question as quoted from your letter is as follows:

First, specifically, are there any real property taxes which are to be excluded in computing the amounts in Subsection 2 of Section 3 of the State Revenue Sharing Act? For example, should the Medical Center Levy be excluded or should the utilities be excluded? Would you please list those property taxes which are not to be included in the state revenue sharing computations. Also, are special assessments made by political subdivisions for improvements regarded as real property taxes?

Section 3 of the Revenue Sharing Act provides a distribution formula for the annual amount in the state revenue sharing fund that is created in the Office of the State Treasurer by Section 2 of the Act. Subsection 1 of Section 3 provides as part of the distribution formula that half the amount in the fund shall be allocated to the counties and cities on a population basis; Subsection 2 of Section 3 provides as follows for the balance:

2. The remainder shall be allocated in the following manner:
 - a. Such money shall be allocated to all countywide areas so that each countywide area shall receive an amount which bears the same ratio as the real property tax levy in dollars of all political subdivisions within the countywide area bears to the sum of the products. For the purposes of this Act, countywide area shall be the geographic area of a county.
 - b. The county government and all cities within the

countywide area shall be allocated that portion of the amount allocated to the countywide area pursuant to subdivision a which bears the same ratio to such amount as each such county or city's real property tax levy in dollars bears to the sum of the real property tax levy in dollars of all cities and county government within that countywide area.

In answer to the various parts of your first question, we note that subdivision (a) of subsection 2 of the distribution formula as quoted above refers to the "real property tax levy in dollars of all political subdivisions within the countywide area." Since the state itself is not a political subdivision, any tax levies by it on real property should be excluded in making the computations for that part of the formula. Therefore, in making the computations, the one mill levy for the state medical center should be excluded from the computations, since Article 60 of the amendments to the State Constitution provides that it "shall be annually levied by the State of North Dakota". Also, if the State Board of Equalization were to levy a state tax on property as authorized by Section 174 of the Constitution and as provided for in North Dakota Century Code section 57-15-03, any amount levied should be excluded from the computations; the State Board of Equalization has not, however, made any such levy for a number of years.

Therefore, the only real property tax levy now being made by the State on an ad valorem tax basis that should be excluded in making the computations for the distribution formula in Subdivision (a) of Subsection 2 of Section 3 of the Revenue Sharing Act is the dollar amount of the one mill state medical center levy that is levied each year. In this regard, we note that the twenty-one mill county equalization fund levy for schools that is mandated by North Dakota Century Code section 57-15-24 is not a state levy but is a political subdivision levy made in each county (see, *Dornacker v. Olson*, 248 N.W.2d. 844) and should be included in making the computations for the part of the distribution formula that is set out in Subdivision (a) of Subsection 2 of Section 3 of the Revenue Sharing Act. Also, the tax levy made by the Garrison Diversion Conservancy District is a levy by a political subdivision and should be included in making those computations (see, *In Re Garrison Diversion Conservancy District*, 144 N.W.2d. 82).

You also ask in the first part of this question whether the taxes levied on utilities should be excluded in making the computations for the distribution formula. The State Board of Equalization places the assessed values on the operating property of railroads and other public utilities, as required by North Dakota Century Code chapters 57-05 and 57-06, and those assessed values are certified to the counties for purposes of applying the applicable property tax mill rates of the state and the political subdivisions against them. But the utility property assessed is not segregated as to real property and personal property and sections 57-05-04 and 57-06-22 provide that all of it is taxed as personal property. The property taxes levied on railroads and other public utility property assessed by the State Board of Equalization therefore are not taxes levied on real property and they should be excluded in making the computations for the distribution formula.

We also note that in an opinion issued on September 25, 1974, to Mr. Linn Sherman, State's Attorney of Kidder County, this office held that the tax on mobile homes that is provided for in North Dakota Century Code chapter 57-55 is a tax on personal property rather than on real property. The amount of this tax should therefore be excluded from the computations made for the revenue sharing distribution formula.

We note further that while subsection 25 of section 57-02-08 exempts most other personal property that had been subject to local assessment and to taxation prior to 1970, the last sentence of that subsection together with subsection 11 of section 57-02-08 continue to require certain personal property of the nonprofit organizations described in Subsection 11 to be assessed and taxed. The amount of taxes levied on that personal property should therefore be excluded from the computations made for the revenue sharing distribution formula.

Finally, certain other taxes that are collected by the county treasurer but are imposed as gross receipts taxes or as some other special type of tax in lieu of ad valorem property taxes should be excluded from the computations made for the revenue sharing distribution formula because they are not taxes levied on real property within the meaning of the Revenue Sharing Act. Those taxes are: gross receipts taxes imposed under North Dakota Century Code chapter 57-33 on rural electric cooperatives; taxes imposed under chapter 57-34 on mutual and cooperative and certain other telephone companies; and taxes imposed under North Dakota Century Code chapter 57-35 on banks and trust companies and under North Dakota Century Code chapter 57-35.1 on building and loan associations.

In addition to the in lieu taxes described in the preceding paragraph, North Dakota Century Code chapter 57-02.1 and section 57-02.1-05(2) thereof require the State Game and Fish Commissioner to make payments to counties for lands owned by it or held by it under a lease or license from the United States or a political subdivision in this state. While these payments are characterized as "in lieu of taxes" payments, they are not taxes levied on real property by political subdivisions nor are they taxes of any kind. Instead, they are payments made by the state through its Game and Fish Commissioner as required by chapter 57-02.1 and are made with respect to lands owned by the United States, this state, or its political subdivisions which are under the control of the Game and Fish Commissioner and which, under Section 176 of the State Constitution, are exempt from taxation. These payments therefore should be excluded from the computations made for the revenue sharing distribution formula.

In summary of the foregoing, the following property taxes and other taxes collected by the counties should not be included in any of the amounts of taxes levied on real property that are used in the computations for the distribution formula set out in Subsection 2 of Section 3 of the Revenue Sharing Act:

1. The tax levied for the state medical center pursuant to Article 60 of the State Constitution.

2. The taxes levied on the property of railroads and other public utilities that is assessed by the state board of equalization pursuant to N.D.C.C. chapters 57-05 and 57-06.
3. The taxes levied on mobile homes pursuant to N.D.C.C. chapter 57-55.
4. The taxes levied on any personal property of nonprofit organizations that is locally assessed and is taxed because it is not exempt under subsections 11 and 25 of section 57-02-08 or any other provision of law.
5. The gross receipts or other special taxes that are levied on:
 - a. Rural electric cooperatives pursuant to N.D.C.C. chapter 57-33.
 - b. Mutual, cooperative, and other telephone companies pursuant to N.D.C.C. chapter 57-34.
 - c. Banks and trust companies pursuant to N.D.C.C. chapter 57-35.
 - d. Building and loan associations pursuant to N.D.C.C. chapter 57-35.1.
6. Payments made to counties by the State Game and Fish Commissioner pursuant to N.D.C.C. chapter 57-02.1.

North Dakota Century Code section 57-20-04 requires the county auditor of each county to annually prepare and transmit to the State Tax Commissioner "a complete abstract of the tax list in his county". It is our understanding that that abstract shows the dollar amount of taxes levied in the county by each taxing district on each category of property discussed above and that the abstract also shows the amounts of gross receipts and other special types of taxes levied for collection in that county by the county treasurer. The information in those abstracts would likely be helpful to your office and to the counties and cities in applying the revenue sharing distribution formula.

In the second part of your first question, you ask whether special assessments made by political subdivisions for improvements are regarded as real property taxes. While the levy by political subdivisions of special assessments for improvements is an exercise of the taxing power, we believe it is clear from the provisions of Section 1, Subsections 2 and 3 of Section 3, and Section 4 that special assessments should not be regarded as "real property taxes" within the meaning of that term as used in the Revenue Sharing Act.

Your second question is as follows:

Second, please define real property tax levy in dollars.

The meaning of the term "real property tax levy in dollars" necessarily depends upon the context in which it is used but, in the

sense it is used here, it means the dollar amount that all owners of taxable real property in a county are obligated by law to pay to the county treasurer as the tax or taxes levied on that real property by one or more taxing districts for one or more purposes as authorized by law. The term of course does not mean the assessed valuation placed upon real property pursuant to sections 57-02-27 and 57-02-01(4) for taxation purposes nor does it mean the net assessed valuation, commonly referred to as "taxable valuation", as defined in section 57-02-01(7), though the amounts of both the assessed valuation and the taxable valuation of real property must be used to determine the amount of the tax levy in dollars on the real property.

Except as is provided otherwise in section 57-15-01, that section requires all general property taxes to be "levied or voted in specific amounts of money", that is, in dollars. (See also, sections 57-15-31, 57-15-32, 57-15-02, and 57-15-35.)

In Subdivision (a) of Subsection 2 of Section 3 of the Revenue Sharing Act, the term "real property tax levy in dollars" is followed by the words "of all political subdivisions within the countywide area"; therefore, as used there the term means the amount of real property taxes levied by all political subdivisions in the county on all taxable real property in the county in a particular year and is the total amount of the real property taxes that the owners of that real property are obligated by the law to pay to the county treasurer on that real property for that year.

In Subdivision (b) of Subsection 2 of Section 3 of the Revenue Sharing Act, the term "real property tax levy in dollars" is used in a more limited sense in that only the amount of the real property tax levy in dollars that is made by the county itself and the amount made by each of the cities in the county are taken into account in making the allocation provided for in that Subdivision. In this regard, we refer again to the twenty-one mill county equalization fund levy for schools that is mandated by North Dakota Century Code section 57-15-24 and which we said above is a political subdivision for purposes of making the calculations for Subdivision (a) of Subsection 2 of Section 3 of the Revenue Sharing Act. However, in making the calculations for Subdivision (b) of Subsection 2 of Section 3, we believe that the dollar amount of that mill levy in the county must be excluded from those computations because the levy is made for school purposes rather than for county government purposes and because it is not actually made by the county government but is made by the county auditor pursuant to the mandate of section 57-15-24.

The term "real property tax levy in dollars" as used in the Revenue Sharing Act does not have any reference to the amount of taxes actually collected by the county treasurer or to the time when it is collected. Therefore, the amount of the real property tax levy in dollars should not be reduced by the discount allowed pursuant to section 57-20-09 for early payment of the tax by a real property owner.

Your third question, as quoted from your letter, is as follows:

Third, in computing the amounts due in Paragraph b, Subsection 2 of Section 3 of the Revenue Sharing Act relating to the

county and city's share of the revenue sharing money, does the amount of real property tax levy in dollars to be used for computation of the county's share include the amount of real property tax levy in dollars on both rural and urban taxable property which is levied by the county?

Our answer to this question is "yes". All of the taxable real property in a county which the county itself may tax includes real property located both within and outside each city in the county, except as might be expressly provided otherwise in the law for a particular tax levy.

Your fourth question, as quoted from your letter, is as follows:

Fourth, officials representing cities, counties, and townships have requested that our office compute the amount of state revenue sharing money which is to go to townships and city park districts. Do we have the authority to make such computations for them?

We have carefully considered all of the provisions of the Revenue Sharing Act and it is our opinion that the State Treasurer does not have either the duty or the authority under it to compute for the counties, cities, city park districts, and townships the amount of revenue sharing money that the city park districts and townships will receive. The reasons for this conclusion follow.

Section 2 of the Revenue Sharing Act provides that the state revenue sharing fund shall be administered by the State Treasurer and, as to the moneys credited to that fund, it provides that he shall "allocate and transfer such funds on a quarterly basis to cities and county governments in the manner provided in this Act." Subsections 1 and 2 of Section 3 of the Act then provide a formula for the State Treasurer to apply for allocating those funds to the counties and cities. The Act does not impose any other duty on the State Treasurer or vest him with any other authority except that the last sentence of Section 4 of the Act provides that he "may require local units of government receiving state revenue sharing funds to provide such information or copies of reports as may be necessary to administer the Act."

We do not believe that that part of Section 4 quoted immediately above, which authorizes the State Treasurer to require information and reports from local units of government if it is necessary for him in administering the Act, can be understood as authorizing him to compute the amount that each city park district and each township will receive out of each quarterly allocation and transfer that he will make to the cities and county governments. This is because: first, Subsection 3 of Section 3 provides that the funds allocated and transferred to a city by the State Treasurer shall be divided between the city and the city's park district, if it has one, in proportion to their mill levies and that: "The distribution shall be made by the city auditor"; second, Subsection 4 of Section 3 provides that funds allocated and transferred to a county by the State Treasurer shall be divided between the county and organized townships in it in the manner provided in that Subsection and that "The county treasurer shall transfer the township share of such revenue sharing

funds to the respective township or townships."

Where a statute provides a formula for computing the amount of funds to be distributed or transferred to a governmental unit and further provides which official shall make the distribution or transfer, it must necessarily be implied, in the absence of any provision to the contrary, that the official charged with making the distribution or transfer must also make the computations to determine under the formula the amount to be distributed or transferred to the governmental unit. This principle is stated in *Kopplin v. Burleigh County*, 77 N.D. 942, 946, 47 N.W.2d. 137, as follows:

The powers of public officers are to be measured by the terms and necessary implications of the grant conferring the power on them.

The Revenue Sharing Act does not grant any power to the State Treasurer, either expressly or by necessary implication, to compute the amounts that city park districts and organized townships will receive from revenue sharing funds. As already shown above, Subsections 3 and 4 of Section 3 of the Act do expressly provide that the city auditor shall "distribute" to the city park district and the county treasurer shall "transfer" to the organized townships the amount that a city park district or organized township is entitled to receive under the separate formula provided for each. The necessary implication of those provisions is that the city auditor and county treasurer must compute the amounts to be distributed or transferred by him.

While the Revenue Sharing Act itself does not require or authorize the State Treasurer to compute the amount of revenue sharing funds each city park district and organized township will receive, we believe your question makes it necessary to determine whether or not any other provision of law provides authorization for you to do so. In *Burchard v. State*, 58 N.D. 841, 227 N.W. 564, the state bonding department entered into a contract with a public accountant by the terms of which the public accountant agreed to audit the records of a school district that had filed a claim with the state bond fund. The Court held the contract to be void because there was no provision in the law which authorized the state bonding department to contract with another to perform the audit duties that the law placed on the state bonding department.

We have been unable to find any provision of law which allows a city auditor or county treasurer to contract with the State Treasurer to perform duties that are placed by law on the city auditor or county treasurer. Provision is made in North Dakota Century Code chapter 57-40 for joint exercise of governmental powers by agreement between governmental units but we do not believe anything in that chapter authorizes the State Treasurer as a state agency to contract with a city auditor or county treasurer to compute the share of state revenue sharing funds that each city park district and organized township is entitled to receive.

In particular, we do not believe such an agreement is authorized by subsection 2 of section 54-40-08. Even if we were to assume that a city can contract on behalf of its city auditor and that the county

can contract on behalf of its county treasurer under that subsection with the State Treasurer for the performance by the State Treasurer of some duty placed by law on the city auditor or county treasurer, we do not believe that the words "buildings and facilities under the control of such state agency . . ." as used in that subsection contemplate authorizing an agreement by which a state agency agrees to provide to a local official or local governmental unit a service of the kind under consideration here.

Your fifth question, as quoted from your letter, is as follows:

Fifth, if the State Treasurer's Office is allowed to make computations regarding the amount of revenue sharing which goes to townships and city park districts the question of population of townships arises. Subsection 4 of Section 3 of the State Revenue Sharing Act outlines distributions to organized townships. The distribution to townships is to be based on population. Individual townships were not a specific enumeration district in the last federal census. Because of this there are no official federal census figures for individual townships. The federal government does, however, have a set of figures they use to compute federal revenue sharing for townships and counties. Is it permissible for the State Treasurer's Office to use the population figures used by the federal government for federal revenue sharing to compute the state revenue sharing figures for townships even though they are not official federal census figures?

As set out in the answer to your fourth question, it is the county treasurer who has the duty of computing the amount of revenue sharing funds to be allocated and transferred under this provision of the Revenue Sharing Act to each organized township in the county. Since the state's attorney of a county is by law (subsection 9 of section 11-16-01) the legal advisor for the officers of the county, we believe any county treasurer who is concerned about the question you have raised should first ask the advice of the state's attorney of that county. The state's attorney can then issue an opinion to the county treasurer or ask this office for an opinion on the question.

Your sixth question, as quoted from your letter, is as follows:

Sixth, in Paragraph a, Subsection 1 of Section 3 of the State Revenue Sharing Act, it states the population of the county shall be based on the most recent federal census, either regular or special. Can the figures used in the federal government's computation of their federal revenue sharing for rural areas of a county be used as the population figures for this particular section of the State Revenue Sharing Act?

Section 3 of the Revenue Sharing Act provides a distribution formula for revenue sharing funds. Subsection 1 of Section 3 provides an allocation formula for one-half of the amount in the state revenue sharing fund; the part of that formula to which your question relates is stated in Subdivision (a) of Subsection 1, as follows:

- a. Each county shall share in the fund in the proportion that the population of each bears to the population of

all based on the most recent federal census, either regular or special.

Subdivision (a) just quoted is so explicit in stating how the population of a county must be determined (that is, according to the most recent regular or special federal census) that in our opinion no other method for determining the population of a county can be used. Therefore, to the extent that the Federal revenue sharing law, 31 U.S.C.A. Sections 1221-1265, may provide a different method for determining the population of any geographic area, the population of that area as so determined cannot be used for determining the population of a county under Subdivision (a) of Subsection 1 of Section 3 of the State Revenue Sharing Act.

Your seventh question, as quoted from your letter, is as follows:

Seventh, Subsection 4 of Section 3 of the State Revenue Sharing Act outlines the formula for computing the amount that is to be allocated to townships in a countywide area which is not fully organized into townships. The law states, "If the countywide area is not fully organized into townships, the allocation to townships shall be divided between the county government and the townships within the countywide area in the manner otherwise provided by in this section." Does the term "countywide area" in this particular instance also include the population of incorporated cities in that particular county?

Our response to your seventh question is the same as our response set out above to your fifth question.

Sincerely,

ALLEN I. OLSON

Attorney General