

**OPINION
79-96**

November 16, 1979 (OPINION)

Mr. Thomas M. Tuntland
Morton County State's Attorney
P.O. Box 190
Mandan, ND 58554

Dear Mr. Tuntland:

This is in response to your letter of October 17, 1979, in which you requested an opinion regarding the responsibilities and liabilities of the County Auditor of Morton County under the provisions of sections 57-15-02 and 57-15-35 of the North Dakota Century Code.

You note that section 57-15-02 charges a county auditor with fixing the rate of all taxes, including taxes within municipalities, and further provides that if a municipality levied a greater amount than the maximum legal rate of levy will produce, then the county auditor shall extend only such amount of tax as the prescribed maximum legal rate of levy will produce. You note further that section 57-15-35 imposes a penalty on a county auditor who extends taxes in excess of the limitations prescribed in chapter 57-15, N.D.C.C. You then state:

Pursuant to the provisions of section 57-15-31 N.D.C.C. the City of Mandan levied an amount of taxes for fiscal 1980 and certified that levy to the County Auditor in accordance with the provisions of section 57-15-32.

On its face, the amount levied is within the amount the prescribed maximum legal rate of levy will produce. However, upon close examination of the municipality's budget, which accompanied the certification of levy, it appears possible, though not clear cut, that the statutory maximum allowed for an interim fund under the provisions of section 57-15-27 N.D.C.C. may have been exceeded.

Must the County Auditor look beyond the certification of levy and examine any accompanying budget to determine if the statutory limitations prescribed by chapter 57-15 have been exceeded, or shall the County Auditor restrict his examination to the certificate of levy which is presented to him?

As we understand your question, it relates to the manner of determining how the levy of a municipality for its interim fund is determined and whether, in the case of the City of Mandan, it has levied more for its interim fund in its budget than is permitted by section 57-15-27, thereby requiring the county auditor, pursuant to section 57-15-02, to spread a lesser amount of levy for the interim fund than the City of Mandan budgeted and levied for it.

We of course do not have the budget of the City of Mandan available and therefore do not know if the city's levy for its interim fund is excessive so as to require the county auditor to reduce it in

accordance with section 57-15-02.

Sections 57-15-02, 57-15-27, and 57-15-31 read as follows:

57-15-02. DETERMINATION OF RATE. The tax rate of all taxes, except the rate of the state tax and taxes the rate of which is fixed by law, shall be calculated and fixed by the county auditor within the limitations prescribed by statute. If any municipality shall levy a greater amount than the prescribed maximum legal rate of levy will produce, the county auditor shall extend only such amount of tax as the prescribed maximum legal rate of levy will produce. The rate shall be based and computed on the aggregate net assessed valuation of taxable property in the municipality of district levying the tax. The rate of all taxes shall be calculated by the county auditor in mills, tenths, and hundredths of mills.

57-15-27. INTERIM FUND. The governing body of any county, city, school district, park district, or other municipality authorized to levy taxes, may include in its budget an item to be known as the "interim fund" which shall be carried over to the next ensuing fiscal year to meet the cash requirements of all funds or purposes to which the credit of the municipality may be legally extended, for that portion of such fiscal year prior to the receipt of taxes therein. In no case shall such interim fund be in excess of the amount reasonably required to finance the municipality for the first nine months of the next ensuing fiscal year. Such interim fund shall not be in excess of three-fourths of the current annual appropriation for all purposes other than debt retirement purposes and appropriations financed from bond sources.

57-15-31. DETERMINATION OF LEVY. The amount to be levied by any county, city, township, school district, park district, or other municipality authorized to levy taxes shall be computed by deducting from the amount of estimated expenditures for the current fiscal year as finally determined, plus the required reserve fund determined upon by the governing board from the past experience of the taxing district, the total of the following items:

1. The available surplus consisting of the free and unencumbered cash balance;
2. Estimates revenues from sources other than direct property taxes;
3. The total estimated collections from tax levies for previous years; and
4. Such expenditures as are to be made from bond sources.

Allowance may be made for a permanent delinquency or loss in tax collection not to exceed five percent of the amount of the levy.

It is our opinion that the next to the last sentence of section

57-15-27, quoted above, does not constitute a "prescribed maximum legal rate of levy" under section 57-15-02 for the interim fund that the county auditor must apply or be concerned with insofar as section 57-15-02 and section 57-15-35 are concerned. This is because "the amount reasonably required to finance the municipality for the first nine months of the next ensuing fiscal year" as provided in section 57-15-27 is a matter of judgment or discretion to be "determined upon by the governing board from the past experience of the taxing district" as provided in section 57-15-31. In this regard, see *Great Northern Railway Company v. Duncan*, 42 N.D. 346 at 351 (last paragraph), 176 N.W. 992 at 994 (next to the last paragraph).

It is further our opinion, however, that the last sentence of section 57-15-27, quoted above, is a limitation "prescribed by statute" and constitutes a "prescribed maximum legal rate of levy" under section 57-15-02 for the interim fund that the county auditor must apply. This is because the amount of the interim fund, as provided in section 57-15-27, cannot be "in excess of three-fourths of the current annual appropriation for all purposes other than debt retirement purposes and appropriations financed from bond sources." Therefore, if the dollar amount budgeted for the interim fund would cause that fund to be in excess of three-fourths of the current annual appropriation for all purposes except debt retirement and appropriations financed from bond sources, the county auditor is required by section 57-15-02 to apply a mill rate for the interim fund that will produce an amount for the fund which will prevent it from exceeding the three-fourths limitation. We assume that the certificate of levy and budget of the taxing district must necessarily show the information necessary for the county auditor to examine in order for him to determine if the taxing district's levy for its interim fund will cause the amount of that fund to exceed the three-fourths limitation. The procedure for making this determination is a mathematical procedure that does not require the county auditor to exercise his judgment or discretion as to the reasonableness of the amount of the levy. It is therefore a limitation prescribed by section 57-15-27 which under section 57-15-02 is a "limitation prescribed statute". See the case of *Great Northern Railway Company v. Duncan*, cited above.

For a discussion of the meaning of "appropriations" as used in section 57-15-27, see the enclosed copy of our letter of June 27, 1978, to the Bottineau County State's Attorney.

Our answer to your question is based in part on our interpretation of the term "reserve fund" as used in section 57-15-31 in the clause "plus the required reserve fund determined upon by the governing board from the past experience of the taxing district". We believe it is clear from the statutory history of this section and other sections as set out in the next paragraph that "reserve fund" as used in section 57-15-31 means the interim fund that is provided for in section 57-15-27, and that "reserve fund" in section 57-15-07 relating to city tax levies, in section 57-15-05 relating to county tax levies, and in section 57-55-11 relating to park district tax levies also means the interim fund provided for in section 57-15-27.

The source notes following each of the above-cited sections and section 57-15-35 all show that they have their source in Chapter 235,

S.L. 1929. Sections 10 and 11 of Chapter 235, S.L. 1929, are the source of sections 57-15-27 and 57-15-31, respectively. Section 57-15-27 is the same as it appeared in Section 10 of the 1929 law, except that the term "General Reserve Fund" was used in the 1929 section in place of the term "interim fund" that is used in section 57-15-27. Section 10 of the 1929 law was amended and completely changed by Section 2 of Chapter 288, S.L. 1941, but Section 10(a) of Chapter 268, S.L. 1943, again amended the provision by changing it back to exactly the same language as that in Section 10 of the 1929 Act, except that the term "Interim Fund" was substituted for "General Reserve Fund". Section 57-15-27 therefore is the same as Section 10 of the 1929 law except that the term "interim fund" is now used in place of "General Reserve Fund". From this it is clear that "reserve fund" as used in section 57-15-31 and "interim fund" as used in section 57-15-27 both refer to the same fund.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General