

**OPINION  
54-104**

January 27, 1954 (OPINION)

**TAXATION**

RE: Allocation Gross Production Tax

This is in reply to your letter of January 15, 1954, in regard to chapter 339 of the 1953 Session Laws, our gross production tax on producing oil and gas properties, and Section 186 of our State Constitution. I will answer the questions asked in that letter in order stated.

Question No. 1. Shall the state treasurer and state auditor maintain a special fund?

Section 14 of the Act requires "deposit" with the state treasurer of all moneys collected by him under this Act. Section 15, subsection 1 provides that 1/4 of 1% of the proceeds be credited to the general fund. Section 15, subsection 2 provides that a part of the proceeds be allocated to the counties and a part of the proceeds be allocated to the general fund. Section 16 of the Act provides that where the proper county cannot be ascertained from the reports accompanying the tax proceeds, that such proceeds be apportioned to the general fund. From this it is apparent that the Legislature intended that only the 1/4 of 1% be immediately credited to the general fund, that the part going to the counties never go into the general fund and that the state's share of such proceeds only be credited to the general fund after being properly allocated under subsection 2 of section 15, or after being apportioned to such fund under section 16. Therefore, it will be necessary for the state auditor and state treasurer to keep unallocated and unapportioned proceeds and the counties' shares of the proceeds in a special fund.

Question 2. Does this statute constitute an appropriation of the amounts to be paid to the counties under section 14?

"Appropriation" can be defined as an act by which the legislative department of government designates a particular fund or sets apart a specified portion of the public revenue or of the moneys in the public treasury to be applied to some general object of governmental expenditure. This Act obviously fulfills such a definition. It sets aside a specific part of the proceeds of this tax to be applied to objects of governmental expenditure.

However, an appropriation of the county's share of the proceeds of this tax is not required by Section 186 of the North Dakota Constitution.

"Public money" as that phrase is used in our constitution must logically be limited to moneys belonging to the state and cases construing Section 186 have considered this to be the meaning of the term. (Campbell v. Towner County, 71 N.D. 616). A broader construction would require that all taxes collected by counties,

whether on behalf of themselves or on behalf of the state, be first paid into the state treasury and then appropriated back to the proper county.

Note that section 3 of this Act provides that this tax is in lieu of all ad valorem taxes by state, counties, cities, etc. and that section 15 provides for division of the proceeds between state, counties, cities, etc. Also note that the proceeds of the tax are required to be earmarked all through the procedure provided in the Act.

The counties' share of this tax are not public moneys as that phrase is used in Section 186 but are county taxes levied and collected by the state a matter of convenience, the state merely acting as a collecting agent for the counties here, (See city of Superior v. Donald, 163 Wis. 626, 158 N.W. 317) much as the county officers act as collecting agent for state taxes they are required to collect. (See Campbell v. Towner County, 71 N.D. 616, 3 N.W. 2d 822).

Question No. 3. Shall payment be made to county treasurers by state auditor's warrant or by state treasurer's check?

Payment should be made to the county treasurers by state auditor's warrant. While it might seem that a state officer would not have to fulfill the same requirements as to handling of counties' money as he would have to fulfill in regard to state moneys, section 54-2707 of the North Dakota Revised Code of 1943 specifically requires moneys apportioned to the counties to be paid out on order of the state auditor. As the operation of this section is not limited to state moneys or to moneys appropriated to counties the proceeds of this tax are not excepted from the operation of this section.

Question No. 4. Are payments to the counties to be approved by the State Auditing Board?

Payments to the counties are not to be approved by the State Auditing Board. Our statutes only require the auditing board to audit claims and demands against the state. (See sections 54-1403, 54-1404, 54-1405). As already set out herein the counties' share of the proceeds of this tax is not state money, it is county money, even though collected and held by state officers.

Therefore, the rights of the counties are not against the state requiring the state auditing board to act prior to payments to the counties would be analogous to requiring the state auditing board to audit the claim of the county against its other county tax collection officers.

Question No. 5. What beginning and ending dates shall be the yearly period of "annual revenue" referred to in line 1 of subsection 2, section 15?

The beginning and ending dates of the period of "annual revenue" referred to in line 1 of subsection 2 of section 15 shall be July first and June thirty-first. These are, of course, the beginning and ending dates of the state's fiscal year (54-2701) which should be used if possible in construing such a provision. That the

Legislature intended this particular Act to be so applied is further indicated by the fact that while section 23 of the Act provides for when the Act shall go into effect, section 1 in defining "quarter," as quarter annual period, states further that the first such quarter annual period shall begin July 1, 1953.

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