

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. _____

February 27, 1991

SUBJECT: Taxation and Revenue - Illegal tax collection--remedy therefor.

SYLLABI: (1) A person who paid the one mill tax levy for the Orangeburg County Board of Education for the 1990 tax year may apply to the county auditor for the refund of the tax so paid.

(2) Whether the General Assembly could require the school districts in Orangeburg County to amend their budgets for the 1990-91 fiscal year and add an additional mill for use by the Orangeburg County Board of Education is questionable.

TO: Honorable John G. Felder
Member, House of Representatives
District No. 93

Honorable William S. McCain
Member, House of Representatives
District No. 95

FROM: Joe L. Allen, Jr. *JLA*
Chief Deputy Attorney General

QUESTIONS: Through inadvertence or oversight, a one mill levy was imposed in the 1990 tax year for the Orangeburg County Board of Education.

(1) What is the appropriate remedy for a person who paid the tax?

(2) Can the General Assembly now enact legislation to levy the tax?

APPLICABLE LAW: Act 297, Acts of 1989; S.C. Const. Art. VIII, Section 7, Art. X, Sections 5, and 7(b), Art. XI, Section 3; and S.C. Code Ann. Section 12-47-70, et seq. (1990 Supp.)

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DISCUSSION:

Question 1. Act 297, Acts of 1989, provided for the school districts of Orangeburg county to levy a one mill tax for use by the Orangeburg County Board of Education.¹ The applicable language is that:

The board of trustees of the school districts in Orangeburg County, before July first of each year, shall prepare a school district budget for the ensuing school year. Before September second of each year, each board of trustees shall notify the county auditor and treasurer in writing of the millage required for the operation of the schools in its district for the ensuing school year. The notice by each board constitutes authority for the levying and collection of the millage upon all of the real and personal property within the school district. The levy must be placed to the credit of the district and expended within that district, except that only for fiscal year 1989-90 one additional mill must be levied and collected by the county treasurer to be used by the county board of education. . .

The levy was for the school districts' 1989-90 fiscal year and was levied and collected for the 1989 tax year. No question exists concerning the one mill levy during the 1989 tax year, however, that levy was through error carried forward for the 1990 tax year.

S.C. Const. Art. X, Section 5 provides in part that:

No tax, subsidy or charge shall be established, fixed, laid or levied under any pretext whatsoever, without

¹For purposes of this opinion, the tax is considered to be a tax levied by the school districts. If it was a county tax, then there is a serious possibility that it would be in conflict with S.C. Const. Art. VIII, Section 7.

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the consent of the people or their
representatives lawfully assembled. . .

In Powell v. Chapman, 260 S.C. 516, 197 S.E.2d 287 (1973),
the Court stated the elements of a tax.

The essential characteristics of a tax
are that it is not a voluntary payment
or donation, but an enforced contribu-
tion, enacted pursuant to legislative
authority, in the exercise of the tax-
ing power, the contribution being of a
proportional character, payable in
money, and imposed, levied, and collect-
ed for the purpose of raising revenue,
to be used for public or governmental
purposes. . .

The essential characteristic of legislative authority is
not found for the one mill levy for the 1990 tax year and
hence the levy is invalid. Section 12-47-70 provides in
part that:

An incorrect property tax assessment or
collection by a county, municipality,
or other political subdivision must be
abated or refunded by the county, munic-
ipality, or other political subdivision
when a claim for the abatement or re-
fund is made within five years from the
date of the assessment or collection. .

S.C. Code Ann. Section 12-47-80 provides that a person who
claims the refund is to apply to the county auditor and
further sets forth the procedure the auditor is to follow.

CONCLUSION:

Question (1). A person who paid the one mill tax levy for
the Orangeburg County Board of Education for the 1990 tax
year may apply to the county auditor for the refund of the
tax so paid.

DISCUSSION:

Question 2. The resolve of this question is more complex.

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The general rule is stated in Dunham v. Davis, 229 S.C. 29, 91 S.E.2d 716 (1956), as follows:

We recognize the oft-cited general rule, which appellant pleads here, that the legislature, by a curative or validating statute which is necessarily retrospective in character and retroactive in effect, can validate any act which it might originally have authorized, Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, but this rule is subject to the constitutional limitation before mentioned.

See also 84 C.J.S., Taxation, Section 370, p. 703.

The General Assembly possessed the authority in the first instance to direct the school districts to levy the one mill tax.

The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State. . .

S.C. Const. Art. XI, Section 3.

This provision has been construed to vest authority in the General Assembly to provide the means to fund the schools of the State. Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988).

The school districts must adopt an annual budget with adequate funding as required by S.C. Const. Art. X, Section 7(b) and Act 297, Acts of 1989. The budgets with adequate funding for the 1990-91 fiscal year had to be adopted prior to July 1, 1990 and it is assumed that such was done.

Whether the General Assembly can now require the school districts to amend their budgets to include the one mill levy is questionable. S.C. Const. Art. X, Section 7(b) provides a limitation for an annual budget. It provides no means to amend the budget. It contemplates a budget year in which a revenue deficiency may occur. It further provides that the "General Assembly shall establish procedures to insure that the provisions of this section are enforced." All of the provisions mitigate upon the power of

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the General Assembly to require an amendment of a budget more than seven months into the budget year. Because of the limitations of S.C. Const. Art X, Section 7(b), the authority of the General Assembly to now levy the tax is questionable.²

CONCLUSION:

Question (2). Whether the General Assembly could require the school districts in Orangeburg County to amend their budgets for the 1990-91 fiscal year and add an additional mill for use by the Orangeburg County Board of Education is questionable.

JLAJr:wcg

²It should be noted, however, that all acts of the General Assembly are deemed to be constitutional until declared otherwise by a Court of competent jurisdiction. An act to require the school districts to amend their 1990-91 budgets would possess this presumption, however, as stated, it would be constitutionally suspect.