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MAR 18 1991
DEPT. OF JUSTICE

DATE: March 15, 1991

SUBJECT: Distribution of Payments Based on Gross Revenues Made by Public Power Districts under Neb.Rev.Stat. § 70-651.04 (Reissue 1990).

REQUESTED BY: John Breslow, Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested us to review the conclusion reached in our letter opinion to former State Auditor Ray A. C. Johnson dated July 13, 1989, regarding the interpretation of the distribution under Neb.Rev.Stat. § 70-651.04 (Reissue 1990) to local government subdivisions of the five percent gross revenue payments made by certain public power and irrigation districts pursuant to Neb.Rev.Stat. § 70-651.03 (Reissue 1990).

Section 70-651.03 provides:

> Beginning in 1960, every public corporation and political subdivision of the state, which is organized primarily to provide electricity or irrigation and electricity, and which sells electricity at retail within incorporated cities or villages, shall on or before April 1, of each year, pay to the county treasurer of the county in which any such incorporated city or village may be located, a sum equivalent to five per cent of the gross revenue derived by it during the preceding calendar year from retail sales of electricity within such incorporated city or village, less an amount equivalent to the amount paid by such public corporation in lieu of taxes in the 1957 calendar year with respect to its properties in such city or village.

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The distribution of payments received by a County Treasurer is governed by §70-651.04, which provides:

> All payments which are based on retail revenue from each incorporated city or village shall be divided and distributed by the county treasurer to that city or village, to the school districts located in that city or village, and to the county in which may be located any such incorporated city or village in the proportion that their respective property tax levies in the preceding year bore to the total of such levies. (Emphasis added).

The distribution language contained in §70-651.04 is very similar to language establishing the method of distributing in lieu of tax payments by public power districts previously contained in Neb.Rev.Stat. §70-653 (Reissue 1950) (repealed Laws 1959, c.317, §6). Section 70-653 provided that such payments were to be distributed ". . . proportionate to the respective tax levies for the current year of the state and governmental subdivisions entitled to participate in such distribution." The method of distribution set forth in §70-653 was interpreted in State ex rel. School District of Scottsbluff v. Ellis, 160 Neb. 400, 70 N.W.2d 320 (1955) to mean that each governmental subdivision was entitled to participate in distribution of the total amount paid in lieu of taxes in each county proportionately based on the ratio which the mill levy of each subdivision bore in relation to the total mill levy. See also Report of Attorney General 1959-60, Opinion No. 118, p. 205.

Based on the foregoing, we concluded in our prior opinion that, under current §70-651.04, any in lieu of tax payments received by a County Treasurer pursuant to §70-651.03 must be distributed to the ". . . city or village, to the school districts located in that city or village, and to the county in which may be located any such incorporated city or village in the proportion that their respective property tax levies in the preceding year bore to the total of such levies." (Emphasis added). We believe this language is clear and straightforward, and mandates distribution to the respective subdivisions based on the proportion which their particular property tax rate for the year preceding distribution bears in relation to the total property tax rate for all such entities in that year.

In asking us to review our conclusion, you have directed us to a prior opinion of this office discussing the distribution to local subdivisions of fees deposited in the Motor Vehicle Tax Fund under former Neb.Rev.Stat. § 77-1241.09 (transferred to Neb.Rev.Stat. § 60-305(15) (Reissue 1988)). Report of Attorney General 1979-80, Opinion No. 322, p. 465. In this opinion, we

concluded the term "levy," in the context of construing the statutory requirement that funds deposited in the Motor Vehicle Tax Fund be distributed to taxing agencies within a county "in the same proportion that the levy of each such taxing agency bears to the total of such levies of all taxing agencies in the county," referred to the amount of taxes levied, as opposed to the rate of tax imposed. We noted that the word "levy" has been used interchangeably with the term "mill levy," and thus could be interpreted as being "either the amount of taxes to be collected or the rate of taxation, i.e. mill levy." Id. at 466. Construing the particular statute at issue, we determined that the word "levy" was intended to refer to the total amount of taxes levied, as opposed to the rate of taxation. Id. at 467.

In construing the distribution formula set forth in § 70-651.04, however, it must be remembered that the authority for the Legislature to require certain public power districts to make payments based on a portion of their gross revenues, and the distribution of funds received from public power districts in this manner, emanates from a specific grant of constitutional power. Article VIII, Section 11, of the Nebraska Constitution, provides, in part:

> Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.
>
> The legislature may require each such public corporation to pay to the treasurer of any county in which may be located any incorporated city or village, within the limits of which such public corporation sells electricity at retail, a sum equivalent to five (5) per cent of the annual gross revenue of such public corporation derived from retail sales of electricity within such city or village, less an amount equivalent to the 1957 payments in lieu of taxes made by such public corporation with respect to property or operations in any such city or village. The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.

Of particular importance with regard to interpreting the proper distribution under § 70-651.04 of payments by public power districts of five per cent of gross revenues (less the in lieu payment amount) is the final portion of Article VIII, Section 11, which provides:

> So much of such five (5) per cent as is in excess of an amount equivalent to the amount paid by such public corporation in lieu of taxes in 1957 shall be distributed in each year to the city or village, the school districts located in such city or village, the county in which such city or village is located, and the State of Nebraska, in the proportion that their respective property tax mill levies in each such year bear to the total of such mill levies. (Emphasis added).

While we noted in our 1980 opinion that the term "levy" may be used to refer to either the amount of taxes levied or the rate of taxation (i.e., mill levy), the provisions of Article VIII, Section 11, mandating distribution of the five per cent gross revenue payments made by public power districts to subdivisions based on the proportion in the respective "property tax mill levies" bear to the "total of such mill levies," eliminates any possible ambiguity as to the meaning of the word "lev[y]" in § 70-651.04. As we stated in our earlier opinion, the term "mill levy" can only refer to the rate of taxation; it cannot be construed to mean the amount of taxes levied. Thus, while it is true that property tax rates in Nebraska are no longer stated as "mill levies," it is our conclusion that the reference in § 70-651.04 to distribution of proceeds of payments made by public power districts based on gross revenues pursuant to § 70-651.03 must be based on the proportion that each subdivision's property tax rate bears to the total property tax rate for all subdivisions.

Very truly yours,

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Assistant Attorney General

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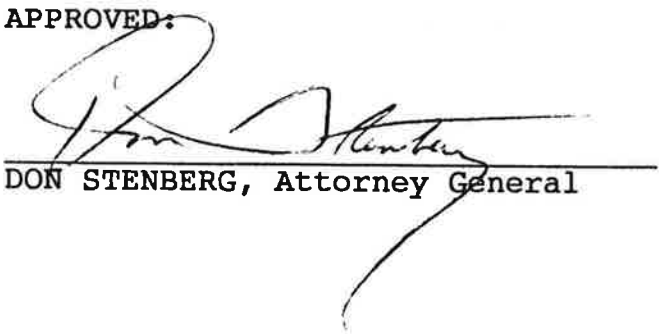
APPROVED:



DON STENBERG, Attorney General