

May 5, 1950

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

J. J. Linnane, Chairman
Board of Supervisors
Apache County
St. Johns, Arizona

Dear Joe:

Herewith is our opinion which was requested by you orally upon your last visit to this office.

We understood you to ask the following questions:

1. When does the change of classification of a county from the fourth class to the third class take effect?
2. Assuming that there is a change in classification of a county from a county of the fourth class to a county of a third class, when do the salary increases of county officers take effect?
3. Can the clerk of the board of supervisors be paid for his duties as clerk and also receive additional compensation from the county for other duties performed by him.
4. Does the Board of Supervisors have the authority to make refunds to taxpayers who have paid their taxes under an admittedly erroneous assessment but not under protest.
5. What effect does the change of classification of a county from the fourth to the third class have on the ten per cent budget limitation.

Answering your first question, it is our opinion that the change of classification of your county from one of the fourth class to one of the third class will take effect when the board of supervisors delivers the tax and assessment roll to the county treasurer, but before the first Monday in September of this year, in the event that the total assessed valuation of the property in Apache County, as shown on the assessment and tax roll, is in an amount of eight million dollars or more, and in an amount less than fifteen million dollars.

Section 12-703 ACA 1939 provides that:

"For the purpose of fixing the compensations of county and precinct officers, the several counties of the state are classified according to the assessed valuation of their taxable property as fixed and determined upon the assessment and tax rolls of the said counties. * * * counties having an assessed valuation of more than eight million (\$8,000,000) and less than fifteen million dollars (\$15,000,000) shall belong to the third class. * * * Whenever the assessed valuation of the taxable property of any county changes to a higher or lower class, the class of the county shall likewise change. The compensation of an officer shall be determined by the assessment roll of the year of election or appointment of such officer." (Emphasis supplied.)

Section 73-423, ACA 1939, provides the manner in which the board of supervisors, after having received the findings and any changes made by the State Board of Equalization, delivers the assessment and tax rolls to the county treasurer. This section also provides the time at which said assessment and tax rolls are to be delivered. It is our belief that even though the process of assessment begins earlier than the time indicated in Section 73-423, supra, the assessment does not become final until the board of supervisors delivers the roll, as provided in this section.

There might be some question raised as to the finality of the assessment in the event appeals were pending from the State Board of Equalization under Section 73-110 ACA 1939. However, before these appeals could have any effect upon the change in classification, they would necessarily have to involve assessments in an amount which would, if the assessments were lowered as contended for, reduce the total assessed valuation below the eight million dollar figure. The cases of

Phillips v. Graham County, 17 Ariz. 208,
149 P. 755

County of Yuma v. Sturges, 15 Ariz. 538,
140 P. 504

both either state or necessarily imply that the change of classification takes effect in September, and we believe that it must be presumed that these statements were based upon the fact that the assessment and tax roll becomes final in the month of September, as provided by law.

Viewing these cases and in consideration of the provisions of Section 73-423, supra, it is our opinion that the change of classification would occur, subject to the contingencies hereinabove stated, not later than the first Monday in September.

In response to your second question set forth above, and assuming the change of classification does take place as hereinabove outlined, it is our opinion the salary increases for county officers will take effect on the 1st day of January, 1951.

Prior to 1937 the present Section 12-703 did not contain this language:

"* * * The compensation of an officer shall be determined by the assessment roll of the year of election or appointment of such officer."

before the above quoted provision was added to the law in 1937 the Supreme Court of Arizona had held in several cases, among which are:

Bunch v. Woods, 13 Ariz. 318, 115 P.
76

Phillips v. Graham County, supra

County of Yuma v. Sturges, supra

that county officers are entitled to a salary increase to be effective at the same time the change in classification to a higher class takes place, and likewise it has been held that salary decreases would take effect immediately when the classification of a county changed to a lower class. These changes, whether the salaries be increased or decreased, have been held to occur in the month of September in the above mentioned cases.

The case of Yuma County v. Sturges, supra, construes

the following constitutional provision, which is Article 4, part 2, section 17 of the Arizona Constitution:

"The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office, * * *"

The court in this case held that this provision did not prohibit salary increases for county officers during their term upon the change of a county to a higher class. The court in dealing with this question stated at page 542 of the State Report:

"* * * A consideration of the statute fixing the compensation of the appellee at the beginning of his term of office will make clear the distinction. When his term of office began, his compensation was definitely fixed and prescribed according as the assessed valuation of the county may be ascertained, if less than \$9,000,000 a certain sum, and if \$9,000,000 and over a certain sum; the fluctuation not being occasioned by any subsequent legislative action, but by operation of the very law in force and effect and controlling the compensation of the office at the beginning of appellee's term of office--by the operation of that law automatically." (Emphasis supplied.)

To us, in the light of these cases and after examining the construction placed upon the constitutional provision, it would appear that the salary increases would take effect at the same time the change in classification of a county to a higher class occurred. However, we believe that the above quoted sentence which is contained in the 1937 amendment to Section 12-703, would alter this rule and was intended to change the time for the taking effect of salary increases from the time when the change of classification occurred to the 1st day of January next following. Although we have been unable to find any cases directly construing this sentence, it is our belief

that this was the intended effect and that the words used clearly import this meaning.

A hypothetical example will best serve to illustrate the effect of this provision. Let us suppose that A was elected county assessor in 1948 and that A's county at the time of his election (i.e., November, 1948) was a fourth class county. A would not be entitled to a salary increase until after he is again elected to the office of county assessor at the general election in November, 1950 (providing his county had become a third class county in September, 1949 or 1950), and until he takes office in January, 1951. The statute clearly states that the compensation shall be determined by the assessment roll of the year of A's election. No one would doubt that in order to commence his duties as assessor on January 1, 1951 A will have to be elected at the general election in 1950; 1950 is the year of his election.

This provision would apply with equal clarity to a candidate who might defeat A at the General Election to be held this November. 1950 is the year of his election and it is the year in which his compensation is determined by the assessment roll, and under the provisions of Section 12-703.

As to your second question, it is our conclusion that the salary increases for the county officers of Apache County become effective on the 1st day of January, 1951, in the event Apache County changes classification from a county of the fourth class to one of the third class during the year 1950.

As to question number 3, it is our opinion that the Clerk of the Board of Supervisors can receive no additional compensation aside from his salary of \$200.00 per month, as provided by Section 12-703(a) ACA 1939. The section just referred to seems expressly to cover this situation when it states:

"* * * No clerk of any board of supervisors shall be paid any compensation other than the salary herein fixed.
* * *"

It is our belief that this express statement would undoubtedly answer your query. In addition to this, we also believe that Section 12-709 ACA 1939 (and the cases cited thereunder) would also govern this situation because of the following language used in the statute:

"The salaries provided in this chapter shall be in full compensation for all services rendered by any officer, deputy or assistant * * * All state or county officers, employees, members of boards, and commissions, not mentioned in this chapter, and all deputies, stenographers, clerks and employees of any officer, board or commission, or of any institution, shall receive the salary provided by the laws creating or authorizing their respective positions, and shall not, under any pretext, receive any salary or emolument in excess of the salaries so provided by law."

In the case of Webster v. Parks, 17 Ariz. 383, 153 P. 455, the court under a similar statute held that the granting of additional compensation to the Clerk of the Board for preparation of a duplicate assessment roll was a payment of money without authority of law and that said money was recoverable in a suit by a taxpayer.

The rule seems to apply even though the clerk or other officer performs services outside the official and required hours of duty and also when said clerk or officer performed services which the law does not strictly require to be performed by such clerk or officer. We feel that it seems unfortunate that upon a change of classification all county officers except the Clerk of the Board receive a substantial increase in salary. However, under the authority of these statutes we are unable to see how the Clerk can be paid any additional compensation other than that prescribed by law.

In considering question number 4 it is our opinion that the Board of Supervisors has no authority whatever to make refunds to taxpayers who have paid their taxes under an admittedly erroneous assessment, but not under protest.

We have looked in vain in the statutes of this State but have been wholly unable to find any such authority. Section 73-822 ACA 1939 provides for the compromise of taxes by the board. However, this section cannot apply for the reason that it presupposes that the taxes have not been paid and for the further reason that it deals only with compromise of delinquent taxes listed in the "back tax book". It seems

apparent from a reading of this section that to attempt to make it apply to the situation presented in your question number 4 would be a wholly unwarranted extension of the meaning of this statute. The case of Territory v. Gaines, 11 Ariz. 270, dealing with a similar provision, held that taxes could be compromised only upon the conditions mentioned and a compromise not based upon the provisions of the statute was ineffective. The court further said that the Board had only those powers expressly or by necessary implication conferred by statute.

The rule at common law by the overwhelming weight of authority is that taxes voluntarily paid without protest cannot be recovered by the taxpayer even though based on an erroneous or excessive assessment.

Arizona Eastern Railway Co. v. Graham
County, 20 Ariz. 256, 179 P. 959

Maricopa County v. Arizona Citrus Land
Co., 55 Ariz. 234, 100 P. 2d 537

The two cases last cited also hold that the statutes of this State provide the exclusive remedy for the recovery of taxes which are alleged to be excessive or erroneous. These sections are 73-110, 73-419 and 73-841.

Section 73-843 contains the words, "When a tax has been set aside as invalid, or when money has been refunded to a taxpayer as double or erroneous assessments, * * *" (Emphasis supplied.) However, this has been clearly held to apply only to the reimbursement by the State to the county where an illegal tax has been repaid to a taxpayer. Maricopa County v. Arizona Citrus Land Company, supra, states that the underscored words that are used in this statute have nothing whatever to do with the question of whether or not a taxpayer is entitled to a refund, and further that this statute cannot grant to a taxpayer the right to a refund without first having complied with the method of recovery set forth in the cited statutes.

There are numerous Arizona cases which restate the common-law rule as indicated above, however, we do not feel that citation of additional authorities is necessary on this question, and our answer to your question number 4 is that the Board of Supervisors does not have authority to make refunds of tax money to persons who have paid their taxes under an admittedly erroneous assessment, but not under protest.

J. J. Linnane, Chairman
Board of Supervisors

Page eight
May 5, 1950

In regard to your fifth question relating to the effect of the change of classification on the 10 per cent budget limitation, we do not have any direct question to answer. However, we will endeavor to state what we believe the proper procedure would be in the adoption of a budget for the next fiscal year.

If it can be seen from the assessment roll at the time of the meeting of the County Board of Equalization that Apache County will in all probability have an assessed valuation in excess of \$8,000,000, then we would suggest that the amount necessary to increase the salaries of your county officers from January 1, 1951 to June 30, 1951 be included in the budget under the item of salaries of public officers. It is our belief that this salary increase will not in itself cause the budget for the next fiscal year to be more than 10 per cent in excess of the budget of the current fiscal year. However, in the event it is in excess of more than 10 per cent, then, of course, it will become necessary for you to apply to the State Tax Commission for authority to incur additional expenses in excess of the budget for the current fiscal year, plus 10 per cent thereof.

We refer your attention to Article 5 of Chapter 73, both as contained in the 1939 Code and as changed or amended in the 1949 Supplement thereto. Although you are doubtless familiar with these sections.

We hope that this will serve to answer your inquiries.

Sincerely yours,

FRED O. WILSON
Attorney General

CALVIN H. UDALL
Assistant Attorney General

CHU:lh