

Opinion No. 62-150

December 27, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General From: Thomas A Donnelly, Assistant Attorney General

TO: Mr. A. M. Ulibarri, Commissioner, N.M. Public Service Commission, Santa Fe, New Mexico

QUESTION

FACTS

The New Mexico Public Service Commission, pursuant to Sections 14-39-15 and 14-39-25, New Mexico Statutes Annotated, 1953 Compilation is vested with the general authority to approve the issuance of municipal public utility revenue bonds and public utility refunding bonds. The Commission has noted that in some instances the purchaser of such bonds, usually in conjunction with an investment banker, also acts as a fiscal agent for the municipality and receives a fee for such services in connection with the bond issue. The bonds have ordinarily been sold at private sale to the purchaser for par. The purchaser then resells the bonds at whatever premium he can obtain for them.

QUESTIONS

1. Does the sale of municipal public utility revenue bonds at par to a purchaser, and, in addition, the payment by a municipality of a fee to the purchaser for services as a fiscal agent to the municipality in connection with the bond sale, constitute a sale at less than par which is prohibited by Section 14-34-21, N.M.S.A., 1953 Compilation?
2. Would the sale of public utility revenue bonds which are issued for obtaining funds for the purchase or construction of a utility by a municipality and in addition the payment by the municipality of a fee to the purchaser for services as a fiscal agent to the municipality in connection with the bond sale, constitute a sale at less than par which is prohibited under the provisions of Section 14-39-9, N.M.S.A., 1953 Compilation?

CONCLUSION

1. See Analysis.
2. See Analysis.

OPINION

ANALYSIS

Because of the similarity of the two questions presented, both questions will be discussed and answered together.

Under the terms of the general legislation authorizing municipalities to issue municipal public utility revenue bonds and municipal public utility refunding revenue bonds for the financing of publicly owned utilities or for the retirement of revenue bonds previously issued (14-39-15 and 14-39-25, N.M.S.A.), it is specifically provided that the issuance of such securities by municipalities is subject to the prior approval and the continued supervision of the New Mexico Public Service Commission.

Section 14-39-21, New Mexico Statutes Annotated, 1953 Compilation, specifies that municipal public utility refunding revenue bonds "shall be sold or exchanged for bonds to be retired at not less than par, or sold at either public or private sale".

In considering your first question phrased above, it is patent that the objective of Section 14-39-21, supra, is to prohibit the sale or exchange of any public utility revenue bonds by a municipality where the net result of such sale or exchange would be to effect a realization of consideration or value to the municipality below that of the par value of such bonds.

The problem presented has not been expressly ruled upon by the New Mexico Supreme Court; however, a myriad of decisions have dealt with this subject in other jurisdictions. In 91 A.L.R. 7, the "Sale of Municipal or other public bonds at less than par or face value" is discussed, and it is there noted:

"As in the case of other restrictions designed to limit the contracting of indebtedness by municipal corporations, numerous schemes have been devised to get around the statutory prohibition against a sale of municipal bonds for less than par. Finding themselves unable to sell the bonds at par, officers in charge of municipal bond issues frequently seek to accomplish indirectly what they are prohibited from doing directly. Needless to say, the courts have been prompt to declare invalid all such indirections. As in other cases where it is sought to do indirectly what cannot be done directly, it is the policy of the law to look beyond the face of the transaction and to hold unlawful any agreement having the effect of avoiding the statutory prohibition."

The practice of allowing a purchaser of municipal bonds a "commission" or "expenses" has come under the scrutiny of the courts in a number of cases. As stated in 91 A.L.R. 7, supra, at page 50:

"Schemes of this kind have been used extensively in the case of the sale of municipal bonds where the statutes forbid the sale of the bonds for less than par.

...

It would seem that the essential question in determining whether an allowance for "commissions" or "expenses" on a sale of municipal bonds amounts to a sale of the

bonds for less than par is whether such an allowance was made in good faith or whether it was employed simply as a subterfuge to get around the statutory prohibition. This question depends in turn upon two subordinate considerations:

(1) whether the allowance was made in consideration of services actually rendered and necessary in order to enable the municipal corporation to dispose of the bonds and in an amount bearing some reasonable relation to the value of the services; and (2) whether, considering the real nature of the transaction, the person to whom the allowance was made occupied the position of agent or purchaser."

It is generally held that if the allowance made by the municipality is not to a purchaser, but is made to an agent employed by the municipality to assist in the necessary sale or disposition of the bonds and the allowance is reasonable, then such allowance does not constitute a sale at below par in contravention of a state statute. **Manitov v. First National Bank**, 37 Colo. 344, 86 P.75; **Davis v. San Anotnio**, (Tex. Civ. App.) 160 S.W. 1161; **States v. Paschall** (Tex. Civ. App.) 243 S.W. 611; **State v. Banks**, 33 Idaho 765, 198 P. 472.

Contrasted with the rule announced above, it has been generally held by the courts which have considered this question, that where municipalities have sought to give or allow purchasers of municipal bonds large allowance for "commissions" and "expenses" such transactions are violative of the legislative enactments proscribing the sale or exchange of bonds at less than par. **Arkansas Foundry Co. v. Stanley**, 105 Ark. 127, 233 S.W. 922; **Rowland v. Beck**, 108 Kan. 440, 195 P. 868; **Smith v. State**, 99 Miss. 859, 35 L.R.A. (N.S.) 789, 56 So. 179.

Allowances to purchasers of municipal bonds for "commissions" have been generally held to be invalid, **State v. Buchanan** (Tenn.) 52 S.W. 480, **Koochiching County v. Elder**, 145 Minn. 77, 176 N.W. 195, **Drainage Comm'rs. v. Arnold**, 156 Ga. 733, 120 S.E. 310. However, it has also been held that an allowance for expenses or attorneys' fees incidental to the municipal bond issues is valid, where the allowance is reasonable in amount, made entirely in good faith and without intention to circumvent the statutory prohibition against a sale of such bonds below par.

Where the municipality sells the bonds to a bond purchaser who also acts as fiscal agent for the municipality, and in addition the municipality pays the bond purchaser a commission, fee or allowance, or makes a credit to such person against the purchase or exchange of municipal utility bonds, it is our opinion that such practice is clearly violative of the provisions of Sections 14-39-15 and 14-39-25, N.M.S.A., supra, forbidding the sale of municipal bonds at below par.

In Attorney General's Opinion No. 5206, dated April 1, 1949, it was held that attorneys fees were a proper charge from the sale of county bonds. Also, in Attorney General's Opinion No. 47, dated March 6, 1958, this office ruled that printing costs of county bonds may properly be paid from the proceeds of the sale of the bonds.

While a municipality may clearly employ a fiscal agent to assist in effecting the sale or exchange of municipal utility bonds, it would be improper for such agent to also become the purchaser of such bonds and deduct the charge for acting as agent from the price for purchasing the bonds. As pointed out in **McQuillin, Municipal Corporations**, 3d. Ed., Section 43.67, at page 597, under a statute requiring bonds to be sold to a purchaser at not less than par, a commission paid to a purchaser would "constitute in substance and effect a discount in violation of law". See also Attorney General's Opinion No. 116, dated November 4, 1941.

Since the New Mexico Public Service Commission is vested with supervisory and approving authority over the issuance of municipal public utility revenue bonds, it has general supervisory authority to inquire into the matters surrounding the issuance of such bonds and to withhold or refuse approval of such bonds where the proposed sale or exchange is improper and unlawful.

In exercising such supervisory authority the Commission must determine whether the person receiving a fee for services or other allowance is a bona fide purchaser or actually an independent agent. If the person or firm is found to be actually a purchaser of such bonds, then in our opinion, the payment, allowance of a fee or credit or deduction of any amount against the par value or sale price in favor of such purchaser, is violative of the statutory requirement that the bonds not be sold at below par.