

Opinion No. 63-32

April 11, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: TO: Mr. Charles L. Craven Assistant District Attorney Aztec, New Mexico

QUESTION

FACTS

On January 20, 1960, the City of Aztec, New Mexico, entered into a contract and agreement with Boettcher and Company to act as fiscal agent for the city, the fee to be four percent of the bonds to be sold for the acquisition of the electric utility system. The contract was supplemented on March 28, 1962, to include a fee of two percent on the refunding of outstanding water and sewer revenue bonds. The City of Aztec was engaged in litigation involving the proposed bond issue and which action was terminated in favor of the City of Aztec. Subsequently, the City of Aztec petitioned the Public Service Commission of New Mexico to issue such bonds, and after a hearing before the Public Service Commission, at which hearing the fee to Boettcher and Company was disclosed, the Commission on November 9, 1962, rendered its decision allowing the City of Aztec to issue and sell \$ 1,650,000.00 of revenue bonds as a joint electric, water and sewer revenue issue. The bonds for such issue have now been sold to Boettcher and Company, and associates, at par. Under the terms of the agreement between the City of Aztec, New Mexico, and Boettcher and Company, the fee to be paid to Boettcher and Company is the sum of \$ 55,160.00.

QUESTIONS

1. Can the City of Aztec, New Mexico, from the \$ 1,650,000.00 received from the sale of the revenue bond issue, pay to the purchaser, Boettcher and Company, the fee of \$ 55,160.00?
2. In the event that the City of Aztec cannot from the bond receipts make such payment of the agreed fee of \$ 55,160.00, can the City of Aztec pay such fee on a monthly basis from the receipts derived from the joint utility property?

CONCLUSION

1. See Analysis.
2. See Analysis.

OPINION

{*65} ANALYSIS

Section 14-39-8, N.M.S.A., 1953 Compilation empowers the governing bodies of municipalities to issue revenue bonds and the proceeds thereof "to be used solely for the purpose of purchasing, acquiring, constructing and of making necessary improvements, extensions, repairs and betterments of said utility, or sewer system, or for the purchase and acquirement of wells, cisterns, reservoirs, or other sources of water supply and pumping plants or other works or machinery necessary for the operation thereof and the land works or machinery necessary for the operation thereof and the land and real estate upon which the same are situated."

Municipal revenue bonds issued for such purposes are required under Section 14-39-9, N.M.S.A., 1953 Compilation, to be "**sold for cash, at not less than par.**" In Attorney {*66} General's Opinion No. 62-150, dated December 27, 1962, this office ruled that allowances to purchasers of municipal bonds for "commissions" for the sale of such bonds are violative of the statutory provisions forbidding the sale of municipal bonds at below par. In such opinion the distinction was drawn between a fee or commission paid to a purchaser and a commission or fee paid to a bona fide agent, and therein, it was noted that the general rule is that a commission may be paid to a bona fide agent, where such services are necessary and the value thereof are reasonable. See also 162 A.L.R. 396.

In 91 A.L.R., at page 56, it is stated:

"While the courts have been liberal in permitting municipal corporations to incur necessary **expenses** and pay out reasonable commissions to bona fide agents, they have invariably frowned upon transactions **giving the purchasers of the bonds** large allowances for "commissions" and "expenses". Such transactions are universally held to violate the statutory prohibition against a sale at less than par". (Emphasis added).

It is important to note that the courts have in numerous decisions of other jurisdictions declared improper commissions or fees to purchasers. As pointed out in 91 A.L.R. at page 57:

"It will be observed that in the case of allowances to purchasers there is a difference between allowances for "commissions" and allowances for "expenses". It would seem that any allowance going under the name of commissions" must necessarily be invalid when made to a purchaser, since it is impossible for one who has purchased bonds outright and who is dealing with such bonds as owner to be entitled to compensation for services in disposing of the bonds. But in the case of allowances for "expenses" it is possible that the purchaser may have actually performed services, such as printing the bonds or getting legal opinions as to their validity, which would justify such an allowance."

The courts have generally permitted the payment of reasonable **expenses** to purchasers of bonds where such are incidental to the bond issuance and reasonable in amount.

Article 9, Section 9 of the State Constitution governs the use of funds borrowed by a municipality. This Section specifies that monies borrowed by a municipality "shall be applied to the purpose for which it was obtained, or to pay such loan, and to no other purpose whatever."

As stated in the facts given in your letter, the company contracting to act as fiscal agent for the City in respect to the sale of such municipal bonds, also became the purchaser of the bonds. The fee sought to be paid is based on a specified percent of the bonds sold, and is in the nature of a commission rather than actual expenses.

In line with our prior Attorney General's Opinion No. 62-150, *supra*, a commission paid to a buyer is in effect a sale at a discount and where such effects a realization by the municipality of less than the par value of such bonds it contravenes the provisions forbidding the sale of bonds at less than par. Therefore, in reply to {67} your first question, we are of the opinion that the payment of a commission or fee to the bond purchaser from the proceeds received from the sale of a revenue bond issue for acting as fiscal agent is contrary to the statutory provision forbidding the sale of municipal bonds at less than par. Section 14-39-9, *supra*, we believe, prohibits the payment of such fee to a purchaser and where such fee is payable for services in connection with the purchaser acting as the fiscal agent for the city in connection with such bond sale.

In your second question you inquire if we hold that a city may not properly pay such fee from the monies derived from the bond receipts, then may the city properly pay such fee out of receipts derived from the operation of the municipal utility.

Section 14-39-26, N.M.S.A., 1953 Compilation, specifically designates to what purposes the revenues derived from the operation of any public utility owned and operated by a municipality shall be applied. Certain priorities are stated governing the expenditure of such funds and it then is provided in part:

". . . when the utility shall annually transfer and set aside into an interest and sinking fund for the retirement of the outstanding revenue bonds, a sum equal to one hundred twenty-five percent of the interest and sinking (fund) requirements for such year, then any revenue in excess thereof may be transferred to the general fund of the municipality to be expended as the governing body of the municipality shall direct. . ."

As pointed out in 65 A.L.R. at page 856:

"Generally, the determination of the questions of what disposition may be made of income or earnings derived from revenue producing municipal enterprises, and the manner thereof, depends primarily on the construction and effect of specific statutory provisions."

Section 14-39-26, supra, clearly is controlling as to the purposes to which proceeds derived from the operation of municipally owned public utilities may be utilized. Under this statute after following the specified priorities if the utility realizes in excess of one hundred and twenty-five per cent of the interest and sinking fund requirements for retirement of the outstanding revenue bonds pertaining to such utility during a year -- then such excess revenues may be transferred to the general fund of the City to be expended as the governing body of the municipality may direct.

However, in our opinion, if such excess revenues do exist, we do not feel that such monies could properly be employed to pay a commission fee for the sale of such municipal revenue bonds to an agent for selling such bonds where the agent was also the purchaser of the bonds. Such procedure would constitute doing indirectly what the law provides is prohibited if done directly, and would effect a contravention of Section 14-39-9, N.M.S.A., 1953 Compilation. Such contract we believe would be ultra vires and the payment of the stated fees from the proceeds of the operation of the utility would, in our opinion, be improper.

By: THOMAS A. DONNELLY

Assistant Attorney General