

Opinion No. 67-120

October 20, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Gail Harris, Mayor City of Roswell City Hall Roswell, New Mexico

QUESTION

QUESTIONS

1. Is a commercial airline a "commercial enterprise . . . distributing or selling products . . . of industry" within the meaning of Section 14-31-1(B)(2), N.M.S.A., 1953 Compilation (P.S.)?

a. Is a service industry providing training to commercial airline pilots an aircraft mechanics or other operating personnel an industry within the meaning of the Act?

b. Is it a project within the meaning of Section 14-31-1 (B) supra, for a municipality to acquire land, buildings and improvements for lease or sale to a commercial airline?

c. Is it a project within the meaning of Section 14-31-1 (B), supra for such training equipment as cockpit simulators or mock jet aircraft engines to be acquired, assembled, stored, distributed or sold?

d. If the answer to No. 1(c) is yes, does it make any difference what the predominant business is of the corporation which performs the enumerated functions?

e. May a private corporation furnishing recognized training to airline pilots or aircraft mechanics or other operating personnel leading to their certification of competency in their special field be a private institution of higher education under Section 14-31-1.2, N.M.S.A., 1953 Compilation (P.S.)?

2. May the City lease part of the building facilities to the commercial airline, assuming the building and real property are not subject to any type of lien?

3. Under Section 14-31-2, N.M.S.A., 1953 Compilation (P.S.), may an industry already located in New Mexico acquire facilities under the Industrial Revenue Bond Act (Sections 14-31-1, N.M.S.A., 1953 Compilation (P.S.), et seq)?

4. May a city finance operating capital under a bond issue under Section 14-31-1 (D), N.M.S.A., 1953 Compilation (P.S.) when no project other than mere operating capital is involved?

5. May a corporation operating internationally establish a New Mexico branch under the provisions of the New Mexico Industrial Revenue Act?

a. If so, must the acquisition be by or for a New Mexico corporation?

CONCLUSIONS

1. See analysis.

a. Yes.

b. Yes.

c. Yes.

d. No.

e. See analysis.

2. Yes.

3. Yes.

4. No.

5. Yes.

a. Yes.

OPINION

{*181} ANALYSIS

The first question, as submitted, is impossible to answer. This office has, therefore, taken the liberty of breaking the question down. The sub-questions are based upon information received in this office from Mr. Robert A. Johnson, Attorney at Law and Mr. John W. Karnett of Standard Mortgage Investment Company.

Section 14-31-1(B), N.M.S.A., 1953 Compilation (P.S.) defines project. It states:

B. "Project" means any land, and building or other improvements thereon, the acquisition by or for a New Mexico corporation of the assets or stock of an existing business or corporation located outside the state of New Mexico to be relocated within or near the municipality in the state of New Mexico, and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, which

shall be suitable for use by the following or by any combination of two (2) or more thereof:

(1) any industry for the manufacturing, processing or assembling of any agricultural or manufactured products, and

(2) any commercial enterprise in storing, warehousing, distributing or selling products of agriculture, mining or industry, but does not include facilities designed for the sale or distribution to the public of electricity, gas, water or telephone or other services commonly classified as public utilities;

{*182} We are fortunate that the legislature set out its intent with reference to this Act. Section 14-31-2, N.M.S.A., 1953 Compilation (P.S.) states:

14-31-2. Legislative intent. -- It is the intent of the legislature by the passage of sections 14-31-1 through 14-31-13 New Mexico Statutes Annotated, 1953 Compilation, to **authorize municipalities to acquire, own, lease or sell projects for the purpose of promoting industry and trade by including manufacturing, industrial and commercial enterprises to locate or expand in this state**, promoting the use of the agricultural products and natural resources of this state, and promoting a sound and proper balance in this state between agriculture, commerce and industry. It is intended that each project be self-liquidating. It is not intended hereby to authorize any municipality itself to operate any manufacturing, industrial or commercial enterprise. **Sections 14-31-1 through 14-31-13 New Mexico Statutes Annotated, 1953 Comilation shall be liberally construed in conformity with the said intent.** (Emphasis supplied).

The question is: given this liberal construction, are service industries to be excluded from the benefits of the Act because they are not specifically mentioned in the Act? It is the opinion of this office that service industries should not be so deprived. Because of the liberal construction of the Act this office believes that a business should be **specifically excluded** from the Act before it may be deprived of the Act's benefits. Such a liberal interpretation of this Act was established by the office as long ago as 1960, **Opinion of the Attorney General**, No. 60-172, issued September 23, 1960; see also Municipal Inducements -- The New Mexico Commercial and Industrial Project Revenue Bond Act, 48 California Law Review 58 (1960). It is clear from the exemption section under the Act that service industries are not mentioned. Section 14-31-1(B) (2). It is the opinion of this office that they therefore qualify as industries under the Act.

I understand the facts surrounding question 1(c) to be as follows: Mock jet aircraft engines and cockpit simulators would be bought by a New Mexico corporation disassembled. The various parts would be shipped into New Mexico after which they would be assembled, sold or distributed to the commercial airline for use in its business. Does this satisfy the definition of "project" as the acquisition by or for a New Mexico corporation of personnel property in connection with an industry as defined under the Act? We believe it is such a project for two reasons. One, as already stated, a

commercial airlines qualifies as an industry under the Act. Two, even if the airline did not so qualify on the grounds that it provides only services under Section 14-31-1(B) (1), supra, it would qualify using this project under Section 14-31-1(B)(2), supra. It is a "commercial enterprise in storing, warehousing, distributing or selling products of . . . industry . . ." Therefore, such activity in the opinion of this office qualifies as a project under the Act.

Question (d) raises the issue of whether an industry engaged generally in transporting people and goods by air travel may engage in the assembling, storing, distributing or selling of mock aircraft engines and cockpit simulators. Nothing in the Act would preclude such activities. It is the opinion of this office that the general business the industry is engaged in would not effect its assembling, etc. of the above items.

Your question (e) raises the issue of what is a private institution of higher education. Section 51-14-36, N.M.S.A., 1953 Compilation is of little aid in deciding what factors must be present before an institution of higher education {¹⁸³} exists. Actually at least two questions are pertinent here. They are: (1) What areas must the higher education be geared to? (2) What authority must recognize that higher education in certain areas is occurring? Section 73-1-7(E) (), N.M.S.A., 1953 Compilation might have been of some aid in answering the problem, It was, however, repealed this year, Laws 1967, Chapter 16, Section 301. On the facts presented to this office, no answer may be made to this question. The students involved would be learning a trade involving complex mechanical units and a difficult and trying vocation. Their actions, once graduated out of the system of education alluded to, will effect much property and many lives. However, the information possessed by this office does not allow an answer to the question.

Your second question refers to Section 14-31-9, N.M.S.A., 1953 Compilation (P.S.). The general sense of the section is this: a municipality may not, under this act, obtain land or pay for any costs of a project such as a commercial airline by using money from its general fund.

Bonds issued by a municipality under authority of sections 14-31-1 through 14-31-13 New Mexico Statutes Annotated, 1953 Compilation, shall not be the general obligation of such municipality within the meaning of article 9, sections 12 and 13 of the Constitution of New Mexico. (Section 14-31-4, N.M.S.A., 1953 Comp. (P.S.), emphasis supplied).

Article IX, Sections 12 and 13, when read with Article IV, Section 14 of the New Mexico State Constitution disallow the making of any gift or donation by the state to a private person or enterprise. The language in the two sections was obviously intended to take the statute out of the rigors of the Constitution. The purpose of the constitutional section is to avoid the danger of a municipality's giving away a portion of land to lure industry into its locale.

It is the opinion of this office that a lease such as the one mentioned in your question does not violate the constitution, provided a reasonable consideration is established. It

should be noted that the city is not in danger of losing the property because of a lien. The city is in no danger of losing title to the land. Further, the property was not acquired by virtue of the city's taxing power. The cost of the property to the city was one dollar (\$ 1.00). It is the opinion of this office that a lease between the city and the airline, providing a reasonable consideration as settled upon is valid.

The answer to your third question is yes. Any other answer requires that the section be read in the conjunctive sense. Such a reading was expressly repudiated by this office in 1960, Opinion of the Attorney General No. 60-172, supra. We quote from that opinion:

. . . we are now of the opinion that they are more properly read in the disjunctive if we are to permit the intention of the Legislature to be carried out. This is especially so in view of the last sentence of § 14-41-32, supra, which indicates that the Act shall be liberally constructed to achieve the intention therein stated. That intention includes not only the desire to relocate enterprises in this state but also to expand enterprises in this state. As we view the problem, this intention could not be met if the three clauses of § 14-41-31 defining "project" are read conjunctively that would mean that a project would have to involve the acquisition of the stock or assets of an out-of-state corporation for transfer to a New Mexico corporation. The very limiting nature of this type of restriction is pointed up if we consider the effect of this restriction by way of an example. For instance, if General {*184} Motors Corporation desired to build an assembly plant in New Mexico, this narrow restriction would mean that all of the stock or assets of the great General Motors Corporation would have to be transferred to the municipality in exchange for the bonds issued under the Act. Such a result is patently absurd. . . .

It hardly seems likely that the legislature intended to benefit only those businesses without the State of New Mexico. The use of the disjunctive necessarily leads to the conclusion that businesses within New Mexico were intended to benefit from the Act. The goal of the Act is to strengthen and balance the state's economy. Denying the Act's benefits to New Mexico businesses hardly bears a reasonable relation to the Act's goal.

Your fourth question is whether a city may finance operating capital under a bond issue when no project is involved under Section 14-31-1.1(D), N.M.S.A., 1953 Compilation (P.S.). That subsection reads:

D. "Property" means any land, improvements thereon, buildings and any improvements thereto, machinery and equipment of any and all kinds **necessary to the project**, operating capital and any other personal properties deemed necessary **in connection with the said project;**" (Emphasis supplied)

It is the opinion of this office that a bond issue may be used to finance a project in existence. The above language indicates that a bond may be used only if there is a corresponding project. The answer to your fourth question is therefore no.

Your fifth question refers to Section 14-31-1(B), N.M.S.A., 1953 Compilation (P.S.).

B. "Project" means . . . the acquisition by or for a New Mexico corporation of the assets or stocks of an existing business or corporation located outside the state of New Mexico to be relocated within or near the municipality in the state of New Mexico, . . .

To rephrase your question, you ask; must the acquisition of the assets or stock of the existing business or corporation be in toto; sixty-five percent, fifty-one percent?

It is the opinion of this office that the intended "project" is accomplished when the following occurs:

1. some amount of stock or assets of the existing business or corporation located outside New Mexico is acquired; and
2. the existing business or corporation is relocated within New Mexico or near a municipality.

No certain amount of stocks or assets need be purchased. The purchase need not be the causal factor for the move. But the business must be relocated within New Mexico.

Finally, the acquisition must be "buy or for a New Mexico corporation." This office realizes the simplicity involved in setting up a dummy corporation to satisfy this requirement. Nevertheless, it must be done.

By: Donald W. Miller

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