Opinion No. 68-116

November 22, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Robert G. Mead State Investment Officer Legislative Executive Building Santa Fe, New Mexico

QUESTIONS

May the State Investment Council sell common stocks, realizing a capital gain and use such gains to offset a loss taken on the sale of a fixed income security, so that after completion of the transaction no loss would be suffered by the corpus of the State Permanent Funds?

CONCLUSION

No.

OPINION

*{*187}* **ANALYSIS**

The State Investment Council currently holds certain low yielding corporate bonds. It wishes to sell these securities in order to increase the capacity of the permanent school fund to invest in equity investments. Considering the present inflationary tendencies it is deemed vital to increase the investments of the permanent school fund in equity investments.

We have no doubt that the State Investment Council would be exercising the judgment and care which businessmen of ordinary prudence, discretion and intelligence exercise in the management of their own affairs if it were to sell low yielding corporate bonds in order to invest in equities. However, the State Investment Council is limited in exercising its good judgment by Article XII, Section 7 of the New Mexico Constitution when investing the principal of the permanent school fund and other permanent funds. Before discussing Article XII, Section 7 of the New Mexico Constitution as it now exists, it is helpful to discuss the background leading up to this opinion request.

Prior to a 1965 constitutional amendment, Article XII, Section 7 of the New Mexico Constitution provided as follows:

The principal of the permanent school fund, and other permanent funds, shall be invested by a state investment officer in accordance with policy regulations promulgated by a state investment council. The legislature may by a three-fourth's vote of the members elected to each house provide that said funds may be invested in interest bearing or other securities. **All losses from such interest bearing notes or securities which have definite maturity dates shall be reimbursed by the state.**

In making investments, the state investment officer, under the supervision of the state investment council, shall exercise the judgment and care under the circumstances then prevailing which businessmen of ordinary prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital; provided, not more than twenty-five per cent of the permanent school fund or other permanent fund, shall be invested at any given time in corporate stocks and bonds nor shall more than ten per cent of the voting stock of a corporation be held; and provided further, stocks eligible for purchase shall be restricted to those stocks of businesses incorporated within the United States which have paid dividends for ten consecutive years or longer immediately prior to the date of purchase and which are listed upon a national stock exchange. (As amended November 4, 1958.) (Emphasis added)

On August 3, 1961 this office advised the State Investment Council that stocks could be sold by the Council at a loss without reimbursement by the State. This office went on in this advisory letter to consider whether the Council could sell corporate bonds at a loss simultaneously with the sale of other corporate bonds at a gain, if the transaction would result in a net gain to the State. It was the opinion of this office that the emphasized portion of Article XII, Section 7 as quoted above, did not prohibit the State Investment *{*188}* Council from selling corporate bonds or securities in a simultaneous transaction, some at a loss and some at a gain, so long as the transaction resulted in a net gain to the State. Subsequently this office advised the Investment Council that it could sell corporate bonds at a loss and stocks at a gain in a simultaneous transaction without violating Article XII, Section 7 of the New Mexico Constitution so long as the transaction resulted in a net gain to the State. The reasoning behind this opinion is obvious. In 1961 neither Article XII, Section 7 of the New Mexico Constitution nor any statutory provision governing the State Investment Council prohibited the Council from selling corporate bonds at a loss. However, if a net loss to the permanent school fund occurred, the legislature was required to appropriate enough money to reimburse the permanent school fund for the amount of the loss. No significant statutory amendments to the powers of the Investment Council have occurred since our August 3, 1961 opinion. However, as noted above, Article XII, Section 7 of the New Mexico Constitution was amended in 1965.

The 1965 amendment to Article XII, Section 7 of the New Mexico Constitution relaxed the limitation on investments in corporate stocks and bonds by increasing the percentage from 25% to 50% of the permanent school fund and other permanent funds. But of more significance here was the insertion of a new paragraph in Article XII, Section 7 as follows:

The state investment officer, in order to realize increased income, may, with the approval of the state investment council, sell interest-bearing notes or securities at less than their original acquisition cost, **providing the proceeds are immediately reinvested in sufficiently higher yielding interest-bearing notes or securities,** to provide for a portion of the increased interest income to be amortized over the life of the new investment which will restore to the corpus of the fund the amount of the capital loss realized on the sale of the original investment. (Emphasis added)

It is our opinion that the effect of this amendment was to bring into operation the rule of construction "expressio unius est exclusio alterius", which means the expression of one thing excludes others. More simply stated, this rule means that where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode, and all other modes are excluded. See **Fancher v. Board of Com'rs of Grant County,** 28 N.M., 179, 210 Pac. 237 (1922). Prior to the 1965 amendment, if a loss was incurred in the sale of a corporate bond, it could be made up by a simultaneous sale of corporate bonds or stock at a gain so long as the transaction resulted in a net gain. The corpus of the state permanent funds was protected. Now Article XII, Section 7 provides that if a loss is incurred in the sale of an individual corporate bond, the loss must be offset by a gain from a subsequent investment of the proceeds from the sale in higher yielding interest-bearing notes or securities. We must conclude that since the 1965 amendment to Article XII, Section 7 of the New Mexico Constitution the State Investment Council has not had the power to sell common stocks realizing a capital gain and use such gain to offset a loss taken on the sale of a fixed income security.

By: Gary O'Dowd

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