Opinion No. 31-61

February 16, 1931

BY: E. K. Neumann, Attorney General

TO: Hon. J. M. Lujan, State Comptroller, Santa Fe, New Mexico.

*{*45}* This is in answer to your letter of the 11th instant, wherein you enclosed a letter from Dr. J. H. Senford, Mayor of Santa Rosa, questioning whether or not a municipal corporation might impose a 1c per gallon excise tax on each gallon of gasoline sold within the corporation limits, and cover the proceeds, to the sinking funds to retire bond obligations of the municipality.

I believe that both matters could be regulated by proper legislation, but in absence of statutory provision, and I am unable to find any statute permitting same, in my opinion, neither can the tax be levied nor if levied could it be used for the purpose mentioned.

"In absence of express or implied authority delegated by the legislature, a municipality has no power to tax earnings, receipts and sales." 28 Cye. 1683.

Nowhere as said have I been able to find express authority for the municipalities to levy a tax as proposed, and I doubt that such is the implication of the general provision, which is as follows:

"Section 90-402 (1929 Code) **Third.** To levy and collect taxes for general and special purposes on real and personal property."

It has been said: "On the other hand, no such power is conferred by a mere grant of authority to levy on real and personal property, or taxable property, xxx" 28 Cyc. 1685, which leads me to the conclusion that our statutes do not provide authority for the municipalities to levy a 1c per gallon gasoline tax.

It is also a general rule of municipal law, as I understand it, "authority conferred upon a municipality to incur a debt does not carry with it the power to levy a tax to pay the debt where other provision is expressly made for such payment" 28 Cyc. 1673.

In case of all bonded indebtedness incurred by the municipalities, there is statutory provision that such indebtedness shall be retired by an annual tax levy upon all taxable property within the municipality sufficient to pay the annual interest and principal due. (Except bonded indebtedness for special improvements to be paid by assessments against the property improved.) So again I am forced to the conclusion that even the tax as proposed were levied, without legislative authority the proceeds thereof could not be used for the retirement of the municipality's bonded indebtedness.

Trusting the above answers the question raised, I am