

## Opinion No. 63-85

July 17, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mr. Bob White Director, Aviation Division State Corporation Commission Santa Fe, New Mexico

### QUESTION

#### FACTS

House Bill No. 245, enacted by the Twenty-sixth legislature as Chapter 314, Laws 1963, known as the "Aviation Act", created a New Mexico Aviation Department and a New Mexico Aviation Board, and assigned various powers and duties to the Board. Section 7 of the Act provides for the financial support of the Board, as follows:

"EARMARKED TAXES -- APPROPRIATION. -- There is created in the state treasury the "state aviation fund". The state treasurer shall credit to the state aviation fund all unrefunded taxes collected on the sale of motor fuel sold for use in aircraft. All income to the state aviation fund is appropriated to the board. All expenditures shall be made in accordance with budgets approved by the Department of Finance and Administration."

#### QUESTION

1. May the State Treasurer credit to the state aviation fund all unrefunded taxes collected on the sale of motor fuel sold for aircraft use, and may all such credit be appropriated to the New Mexico Aviation Board without conflicting with Sections 64-26-19 and 64-26-34, N.M.S.A., 1953 Compilation, providing for distribution of gasoline and motor fuel taxes and license fees?

#### CONCLUSION

1. Yes.

### OPINION

#### {\*185} ANALYSIS

At first glance, your question would seem to call for a negative answer, but further examination of the statutes in question and application of some general rules of statutory construction will prove to the contrary.

Section 64-26-19, N.M. S. A., 1953 Compilation provides:

"The proceeds of all taxes and all distributors', wholesale dealers' and retail dealers' license taxes . . . which shall be set aside by the state treasurer for the use of the bureau of revenue in administering this act (Motor Fuel Tax and License Fees, Sections 64-26-1 through 64-26-2; 64-26-4 through 64-26-5; 64-26-11 through 64-26-27; 64-26-29 through 64-26-30, N.M.S.A., 1953 Compilation), **shall be credited to the state road fund** to be used for maintenance, construction and improvement of the public highways and to meet Federal allotments under the Federal aid road laws; Provided, that sufficient of said road fund shall be set aside each year by the state treasurer to pay the principal and interest coupons of highway debentures issued to anticipate the collection of said fees and taxes as same mature." {*\*186*} (Emphasis and bracketed information supplied).

Section 64-26-34, N.M.S.A., 1953 Compilation states:

"The state comptroller (bureau of revenue), for the purpose of making refunds provided in this Act (64-26-31 to 64-26-38), is hereby authorized to create a special suspense fund with the treasurer of the state of New Mexico in sufficient amount to pay all legal claims made, . . . from the excise tax on gasoline and motor fuel as and when available . . . Any surplus fund over and above the estimated amount in such special suspense fund **shall forthwith be turned into the** highway funds of the state of New Mexico.

(Emphasis supplied).

Both of the foregoing sections specifically state that motor fuel taxes and license fees collected, and surpluses from refund reserves, are earmarked for the state highway fund. The only exception is in section 64-26-19, *supra*, where sufficient amounts are to be set aside to meet highway debt obligations. Earlier Attorney General's Opinions dealing with this same question held that unrefunded taxes paid by fliers to the Aeronautics Commission (now abolished by Section 11, Ch. 314, Laws 1963) may not be diverted from the state road fund -- without legislation on the subject. See, Attorney General's Opinions No. 6375 dated February 2, 1956, and No. 4783 dated August 31, 1945.

We now have legislation on the subject (Section 7, Ch. 314, Laws 1963), but the section, quoted in full in the statement of facts above, does not expressly provide for diversion of funds earmarked as state highway funds to a state aviation fund. Therefore, we are faced with the problem of construing Section 7, Ch. 314, Laws 1963 with Sections 64-26-19, and 64-26-34, N.M.S.A., 1953 Compilation. Since we have no express indication of the legislature's intent to amend Sections 64-26-19 and 64-26-34, *supra*, we have to treat the new act (Section 7, Ch. 314, Laws 1963) as an attempt to amend by implication.

According to Vol. 1 Sutherland, Statutory Construction, Section 1913, (3d ed. 1943).

"An implied amendment is an act which purports to be independent of, but which in substance alters, modifies, **or adds to a prior act**. To be effective, an amendment of a

prior act ordinarily must be express. Amendments by implication, are not favored and will not be upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together.

Amendment by implication is identical with repeal by implication when only part of the prior statute is repealed." (Emphasis supplied).

Here, we are attempting to "add to" the prior statutes, but not repeal any of the earlier portions.

In New Mexico the amendment of a statute by implication is not favored. **Tondre v. Garcia**, 45 N.M. 433, 116 P.2d. 584 (1941); **Johnston v Bd. of Education of {\*187} Portales Municipal School Dist. No. 1 Roosevelt County**, 65 N.M. 147, 333, P.2d. 1051 (1959). But, on the basis of the analogy as stated in Sutherland, Section 1913, supra, that "amendment by implication is identical with repeal by implication when only part of the prior statute is repealed," the New Mexico decisions will allow Section 7, Ch. 314, Laws 1963 to be harmonized with most provisions of Sections 64-26-19 and 64-26-34, supra, and will give operative effect to all three sections insofar as compatible. See, for e.g., **Territory v. Matson**, 16 N.M. 135, 113 Pac. 816 (1911), where the court stated,

"Repeals by implication are not favored, and it is the duty of the courts so to construe the acts, if possible, that both shall be operative. (Citation omitted). But where two statutes on the same subject are manifestly and totally repugnant in their provisions, the latter statute, to the extent of the repugnancy and contradiction operates as a repeal of the former."

It is our opinion that the latter act (Section 7, Ch. 314, Laws 1963) is not "totally repugnant and contradictory" in its provisions, but rather, **adds** to the earlier statutes. As was stated in **Alvarez v. Bd. of Trustees of La Union Townsite**, 62 N.M. 319, 309 P.2d. 989 (1957),

"The inconsistency or repugnancy between two statutes necessary to supplant or repeal the earlier one must be more than a mere difference in their terms and provisions. There must be what is often called such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made to stand together . . . The construction of statutes should be accepted which will make them effective and productive of the most good as it is presumed that these results were intended by the legislature."

To the extent that the new statute appropriates unrefunded aviation fuel tax to the aviation fund, it **is** repugnant to and contradicts the earlier statutes and therefore, amends them by implication.

As further evidence of the legislative intent, reference is made to Chapter 76, Laws 1963, in which the legislature created the motorboat fuel tax fund. Section 1 of the act stated that:

". . . of all the motor fuel sold in this state upon which a motor fuel tax is paid and not refunded, some is used to propel vessels on the waterways of the state. It is the policy of this state to use the funds derived from the sale of such motor fuel to construct, improve and furnish boating and related facilities in this state."

Section 3 of the act amended Section 64-26-19, N.M.S.A., 1953 Compilation, by adding the phrase that, "Two-tenths of one percent of all tax on motor fuel shall be deposited by the state treasurer **into the motorboat fuel tax fund.**" Section 4 of the act amended Section 64-26-34, N.M.S.A., 1953 Compilation, by stating in part, that, "Any surplus. . . in such special suspense fund shall forth-with be turned **into the funds of the state** and distributed as provided by law." The old wording "**highway funds**" was changed to "**funds of the state**".

Although the manner of creating {*\*188*} the motorboat fuel tax fund is somewhat different, we think the purpose behind both acts is the same. Therefore, our conclusion is that the unrefunded taxes collected on the sale of motor fuel for aircraft use may be credited to the state aviation fund for the use of the New Mexico Aviation Board.

By: JAMES E. SNEAD

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