

**Opinion No. 65-40**

March 5, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Honorable Eddie R. Barboa, State Representative for Bernalillo County, Santa Fe, New Mexico

**QUESTION**

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Is House Bill No. 332, introduced in the Twenty-Seventh Legislature, constitutional?

CONCLUSION

Yes.

**OPINION**

{\*67} ANALYSIS

For the sake of clarity we quote the subject Bill No. 332, as follows:

"AN ACT RELATING TO PUBLIC RECREATIONAL FACILITIES; AND ENACTING A NEW SECTION 72-14-14.1 NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION, TO PROVIDE FOR MORE EQUAL PUBLIC RECREATIONAL FACILITIES FOR A CLASS "A" COUNTY AND THE MUNICIPALITIES THEREIN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new Section 72-14-14.1 New Mexico Statutes {\*68} Annotated, 1953 Compilation is enacted to read:

"72-14-14.1. [NEW MATERIAL] DISTRIBUTION OF THE COUNTY AND MUNICIPALITY RECREATIONAL FUND IN CLASS "A" COUNTIES. -- The bureau of revenue, by warrant, shall distribute all sums determined to be distributable to class "A" counties and the municipalities therein according to Section 72-14-14 New Mexico Statutes Annotated, 1953 Compilation, but under no circumstances shall the county receive less than twenty percent of the total sum distributable to a class "A" county and the municipalities therein."

It is our understanding that, pursuant to our suggestion, an amendment to the above Bill will be offered to change the words "bureau of revenue, by warrant," to "state treasurer,"

in order to prevent a conflict with Section 72-14-14, N.M.S.A., 1953 Compilation, which places the duty for distribution of moneys to municipalities and counties upon the state treasurer. We further suggest that the language "as classified in Section 15-43-1, N.M.S.A., 1953 Compilation" be inserted after the words "to class "A" counties" appearing on line 22 of the proposed bill.

Section 72-14-14, supra, provides for distribution of specified cigarette tax moneys at the end of every month; (1) "To each county at the rate of the proportion that the sale of cigarettes made within the county borders, **exclusive of the sales within any municipality in the county** bears to the total sales of cigarettes in the state during such month"; and (2) "to each municipality at the rate of the proportion that the sale of cigarettes made within the municipality during such month bears to the total sales of cigarettes in the state for such month. . . ." (Emphasis supplied)

The proposed new section 72-14-14.1, N.M.S.A., 1953 Compilation, will, in effect, alter the distribution of moneys with respect to class "A" counties and the municipalities therein. The proposed change, in short, would guarantee to such class "A" county twenty percent (20%) of the total sum distributable to such county **and** the municipality therein. If and when other counties in this state become class "A" they too would fall within this new law.

No question is raised here with regard to the power of the state to impose a excise (luxury) tax upon cigarettes; nor are we concerned with whether the state lawmaking body has the power to prescribe the mode of disposition or distribution of the moneys collected therefrom. It has been said that:

"The basis or foundation for an excise tax is reasonable classification of subjects of taxation. Given a reasonable classification of subject, the power of the legislature to lay an excise tax is almost unlimited, at least so long as it does not go to the extent of extortion or confiscation." **George E. Breece Lumber Co. et. al. v. Mirabal**, 34 N.M. 643, 649, 287 P. 699.

Granting therefore the power to lay the excise tax and the power to direct the mode of distribution of moneys collected thereunder, what if any constitutional restriction would be applicable upon the legislative determination regarding the percentage of tax moneys to be allocated to the respective counties and/or municipalities? We can, at present, detect only one possible, though probably not valid, constitutional question which could be raised in opposition to the subject Bill No. 332. This concerns the distinction sought to be imposed between class "A" counties and the municipalities therein and other classes of counties and their municipalities, and the consequent denial of equal protection of the laws proscribed by Article II, Section {\*69} 18 of the New Mexico Constitution.

It is our feeling that the question of the allocation of state moneys is a matter of public concern, properly resting upon legislative discretion; and further, that the constitutional requirement of reasonable classification of subjects pursuant to Article VIII, Section 1,

New Mexico Constitution, is applied much more stringently when the question involves the imposition of the tax, in the first instance, rather than merely the allocation of tax moneys. Certainly gross abuse of discretion or arbitrary legislative action would be subject to question.

The case of **McKinley County Board of Education v. Tax Commission, et al.**, 28 N.M. 221, 210 P. 565, is partially in point. In that instance the constitutionality of a statute, which provided for tax levies, school terms and limitations on the amounts to be expended in ungraded rural schools, was questioned. One of the contentions against the statute was that it was a local and special law. The court said:

"The legislature has seen fit for many years to differentiate between classes of rural schools. The law defines a graded school as one of . . . An ungraded rural school is one . . .

'Nearly every matter of public concern is divisible and division is necessary to methodical legislation.' State v. A.T. & S.F. RR. Co., 20 N.M. 562, Pac. 305.

The legislature is not entitled to exercise an arbitrary power of classification. The power must be exercised within the limits of reason and of a necessity more or less pronounced. No definite rule can be laid down as to when classification is or is not justified."

And it was further stated, with regard to allegations of denial of equal protection of the laws in violation of the Constitution:

"The constitutionality of . . . is attacked by the appellant on the ground that it denies to children of ungraded rural schools employing first grade certificate teachers the equal protection of the laws. The denial of equal rights or the imposition of unequal burdens can be pleaded only by those discriminated against. **Pueblo of Isleta v. Tondre**, 18 N.M. 388, 137 Pac. 86. If the law did so discriminate, the appellant is not in a position to raise the question."

The purpose of the proposed Bill is stated to be "to provide for more equal public recreational facilities for a class "A" counties and the municipalities therein. The distinct classification which would thus be adopted for class "A" counties and their municipalities as compared to other classes of counties and their municipalities would appear to be reasonable in view of the difference in the make-up and status of class "A" counties; and further such a classification would appear to be consistent with other distinctions made among counties in this State, e.g., salaries, power to enact ordinances, etc., presently provided for in our laws.

It is, therefore, our opinion that proposed House Bill No. 332 would offend no provision of our Constitution for the reasons expressed herein.