

## Opinion No. 68-03

January 8, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Robert G. Mead State Investment Officer State Capitol Santa Fe, New Mexico

### QUESTIONS

#### FACTS

The State Investment Council is contemplating the sale of certain interest-bearing bonds at less than their original acquisition cost. The proceeds of the sale will be reinvested in higher yielding interest-bearing bonds having a total par value which is less than the total par value of the bonds to be sold. The total assured value (total income plus par value) of the bonds to be purchased will be greater than the total assured value of the bonds to be sold.

Is the phrase "capital loss" as used in Article XII, Section 7 of the New Mexico Constitution defined as the difference between original acquisition cost of the bonds to be sold and the proceeds of the sale or as the difference between the total par value of the bond to be sold and the total par value of the bonds to be purchased?

#### CONCLUSION

The difference between the original acquisition cost of the bonds to be sold and the proceeds of the sale of these bonds.

### OPINION

#### {\*5} ANALYSIS

Article XIII, Section 7 of the New Mexico Constitution provides in part that:

The state investment officer, in order to realize increased income, may, with 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)

The interest-bearing bonds are securities within the meaning of Article XII, Section 7 of the New Mexico Constitution. Opinion of the Attorney General No. 62-46, dated March 22, 1962.

In Opinion No. 62-46, supra, this office discussed substantially the same transaction as is in question here. The facts of that opinion were that the Investment Council had transferred certain bonds to a group of securities brokers and received in return cash in an amount which was less than the original acquisition cost of the bonds. With the proceeds of the sale, the Investment Council purchased other bonds which had a total par value equal to the total par value of the bonds which had been sold. This office concluded that a loss had been sustained within the meaning of the first paragraph of Article XII, Section 7 of the New Mexico Constitution.

The Investment Council argued that the two transactions taken together showed that no loss had occurred or would occur because, at the time the bonds matured, the Council would have exactly the same number of dollars, capital-investment-wise, that it had when it purchased the original bonds. In reply, this office said that "were we to allow these two transactions to be placed together to create a fiction that no loss occurred from the sale and purchase, we would be opening the door to the eventual nullification of the constitutional requirement" that losses from interest-bearing securities which have definite maturity dates be reimbursed by the state. This office concluded that under this constitutional requirement each transaction must be considered alone to determine if a loss has been sustained.

Whether a capital loss will be realized and the amount of the loss which will be realized must be determined by considering the sale of the bonds alone, without reference to the higher yielding bonds which will subsequently be purchased.

The language of that part of Article XII, Section 7 of the New Mexico Constitution quoted above supports the conclusion reached by this office in Opinion No. 62-46, supra as it applies to the question under consideration. The phrase "capital loss" is modified by the phrase "realized on the sale of the original investment". The preposition "on" has various meanings depending upon its use. When it is used to indicate a position in respect to time it means coinciding with, following, or as a result of. Webster, **New International Dictionary** (2nd 1955); Black, **Law Dictionary** (4th 1951). Thus, the capital loss which the Investment Council must restore to the corpus of the state permanent fund is that loss which is realized at the time of or as a result of the sale of the original investment. This modifying phrase indicates that the new investment may not be considered in determining whether a capital loss will be realized or what will be the amount of the capital loss.

It is, therefore, our opinion that the phrase "capital loss" as it is used in Article XII, Section 7 of {\*6} the New Mexico Constitution means the difference between the original acquisition cost of the bonds to be sold and the proceeds of the sale.

By: Edward R. Pearson

Assistant Attorney General