4638.

TAX AND TAXATION—ELECTRICAL ENERGY—FEDERAL TAX OF THREE PERCENT PAID BY CONSUMER AND NOT BY MUNICIPALLY OWNED UTILITY.

SYLLABUS:

1. *Municipalities owning and operating electric power plants may not, by ordinance or otherwise, assume the three percent federal tax on electrical energy consumed by domestic and commercial consumers levied by Section* 616, *of the Revenue Act of* 1932, *and not collect the same from the consumer, such tax being an obligation of the consumer.*

2. *When the ultimate cost of electrical energy furnished by municipally owned electrical power plants to certain classes of consumers is increased by reason of a tax levied by the federal government or by any other cause, which increased cost is not suffered by all classes of consumers of electrical energy furnished by such municipally owned utility, such municipality may by proper legislative action so amend its schedule of rates as to re-establish a fair differential between the different classes of consumers which may or may not be equivalent in amount to such tax; in so doing the municipality should take into consideration all changed conditions of the different classes of consumers.*

COLUMBUS, OHIO, September 22, 1932.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for opinion which reads:

> "Section No. 616 of the Federal Revenue Act of 1932 imposes a three percentum tax on the amount received for electrical energy consumed for domestic or commercial purposes, and on page 19 of Regulations 42 of the Bureau of Internal Revenue, it is held that governmentally or municipally owned electric power companies are not exempted from the collection of this tax from consumers.
>
> Question: May municipally owned electric power plants by action of council in cities, the board of public affairs in villages or by any other action assume this three percentum federal tax for electrical energy consumed for domestic and commercial purposes, and not collect same from the consumer?"

Section 616 of the Federal Revenue Act of 1932 referred to in your request, in so far as material to your inquiry, reads as follows:

> "(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, *to be paid by the person* paying for such electrical energy and to be collected by the vendor.
>
> (b) *Each vendor* receiving any payment specified in subsection (a) *shall collect the amount of the tax* imposed by such subsection *from the person making such payments,* and shall on or before the last day of each month make a return, under oath, for the preceding month, and pay

the taxes so collected, to the collector of the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland." (Italics the writer's.)

In the United States Daily, issue of July 11, 1932, is contained an article stating that under an oral ruling of the Bureau of Internal Revenue made public under date of July 9, 1932, such bureau ruled that "electrical power companies may not absorb" the three per cent levy on domestic and commercial electrical energy and thus relieve the consumers of the tax.

It has been consistently held by the courts that a municipality in the operation of electric light plants and municipal waterworks operates in a proprietary capacity as distinguished from a governmental capacity. Any tax levied in Section 616 of such Act is levied against the consumer and not against the producer or vendor. The language of such section is,

"To be paid by the person paying for such electrical energy and to be collected by the vendor."

The only obligation placed upon the vendor of electrical energy by the Federal Revenue Act of 1932 is to collect the tax. It is therefore evident that the tax levied by this section is not levied against the municipality. Since the tax is the obligation of the consumer, the question then arises as to whether the municipality may pay it rather than collect it from the consumer. If the assumption of the tax by the municipality would cause a deficit in the operating fund of the light plant which would have to be reimbursed from funds derived from taxation, there is little doubt in my mind that such assumption would be beyond the power of the municipality, since such act would be tantamount to levying a tax for the purpose of paying private obligations. It has been uniformly held by the courts that a tax can be levied only for a public purpose, *Davies* vs. *State ex rel. Boyles,* 75 O. S., 114; *State ex rel. Attorney General* vs. *Toledo,* 48 O. S., 112. The tax levied for the purpose of recouping the deficiency, which could thus be caused, would be little different from a direct levy on all the tax payers of a municipality for the purpose of paying a federal tax which is an obligation of a portion of the citizens of the municipality. The tax in question is levied only upon electrical energy used by domestic and commercial consumers; no tax is imposed upon industrial consumers of electrical current. I therefore am of the opinion that if the assumption of the tax would cause a deficit in the fund of the municipality for the operation of the light plant, it would be beyond the power of a municipality to make such assumption.

The question further arises as to whether the municipality may use the moneys paid into the electric light plant fund for the purpose of paying such tax so levied against the consumer. Section 5625-9, General Code, provides in part:

"Each subdivision shall establish the following funds:
* * * *
(g) a special fund for each public utility operated by each subdivision."

Section 5625-10, General Code, provides in part:

"* * * Money paid into any fund shall be used only for the purposes for which such fund is established."

While it is apparent that the moneys in such fund can be used for no other purpose than in the business of operating the public utility for which the fund was created, it would not be so apparent that the absorption of the federal tax might not be construed as an expense of operating or increasing the business of the utility conducted by the city in its proprietary capacity if the tax were alike levied on the three types of users especially since in many cities only a portion of the citizens use the municipal current. The legislature has authorized municipalities in their proprietary capacity to enter into the business of operating electrical energy plants. The limitations on the municipalities' powers in the exercise of such functions are stated by Matthias, J., in the case of *Butler* vs. *Karb, Mayor,* 96 O. S., 472, 483:

> "We think it must be conceded that the city, acting in a proprietary capacity, may exercise its powers as would an individual or private corporation."

Judge Matthias quotes from Pond in his work on public utilities, Section 11, as follows:

> "In its private commercial capacity while acting primarily as a business concern, the powers conferred on a municipal corporation are for its own special benefit and advantage. * * Recognizing this to be the principal object in the creation of such corporations and the sole purpose of endowing them with such commercial and proprietary powers as permit them and their citizens to enjoy the benefits of municipal public utilities, the courts permit and favor the exercise of the fullest discretion in the enjoyment and administration of such powers which are consistent with the general object of their grant and the best interests of all parties concerned who are intended to be benefited by such advantages.
>
> The discretion of municipal corporations in the exercise of their powers is as wide as they enjoyed by the general government and is to be exercised in accordance with the judgment of the authorities in charge of the municipal corporation as to the necessity or expediency of each particular subject when it arises."

If this had been true and no deficit in the fund established by the city for the maintenance and operation of the electrical power plant is created by the assumption of the three per cent (3%) federal tax, it would appear that it would be within the discretion of the council, in the case of a city, and the board of public affairs, in the case of a village, as to whether it would be good business practice to assume such tax as a part of operating the business.

It must be remembered, however, that the tax of three per cent (3%) is not levied on all types of consumers of electrical energy by the Revenue Act of 1932, but only on domestic and commercial consumers; industrial users being exempt. It is a rule of law that when municipal corporations enter into the public utilities field in a proprietary capacity, they are subject to the same rules of law as any private public utilities operator. They have no more right to discriminate among users than a private operator of a public utility would have. To use the language of Matthias, J., in the case of *Butler* vs. *Karb, supra,* page 485:

> "That neither public nor private corporations may discriminate between members of the public with reference to rates and terms of serv-

ice does not longer admit of controversy. This wholesome rule, long in force, has had frequent application, particularly to common carriers and utility companies. A municipality operating a utility is not exempt therefrom. Acting in a proprietary capacity, we have seen, it should have the freedom of action of a private utility corporation, but it is also subject to the same restrictions as to practices of discrimination in rates and service."

If we are to assume that the present schedule of rates adopted by the municipally owned plant with reference to the price of electrical energy furnished to domestic, commercial and industrial consumers was a proper schedule, without unjust discrimination as to one type of user over another, prior to the enactment of the Revenue Act of 1932, it would necessarily follow that the municipal utility could not assume a tax, as such, levied against one or more, but not all types of users. Such act would be tantamount to granting a rebate from the schedule of rates adopted by a public utility, which act is directly prohibited in the case of a private corporation operating such utility (Section 614-14, General Code) and as I have above pointed out, when a municipal corporation, in its proprietary capacity, enters into the utility field it becomes subject to the same restrictions as a private utility. I therefore must answer your specific inquiry in the negative, that is, a municipally owned public utility may not collect from the consumer for electrical energy consumed at the rates provided by ordinance without at the same time collecting the federal tax levied on commercial and domestic consumers and in lieu of such collection of tax, pay from the funds of the municipality to the federal government the tax levied by the "Revenue Act of 1932."

It does not, however, follow from this conclusion, that the council or board of public affairs may not take into consideration the changed conditions of certain classes of its customers, by reason of the levy of the 3% tax by the federal government, and the fact that the present rates produce a surplus in the electric light operating and maintenance fund, and adopt a new schedule of rates which would in actual effect absorb the additional burden placed on the consumer. In other words, in the establishment of a rate schedule for a public utility it is desirable that the rate should yield to the producer a fair return on his investment. It is likewise desirable that the charge for the commodity to the consumer shall not be in excess of its reasonable value to him. A decided violation of either of these principles may ultimately do permanent damage to the utility. If a fair return is not received on his investment the capital with which to operate the utility will be diverted to other channels. If the charge for the utility on a particular class of consumers is in excess of the value of the commodity the rate will naturally tend to divert customers to the use of a substitute for the commodity of the utility. The aim is to make a total schedule which will produce a fair return on the investment of the utility but to do so distribute the average rate among consumers in proportion to the value of the service to each class of consumers. Thus, if the value of the electrical current to domestic and commercial consumers is not equal to the present established rate to them plus the three per cent tax, it would tend to cause such class of consumers to seek elsewhere for a substitute commodity and such rate would be an unfair discrimination, not only to the consumer, but likewise to the producer or public utility. Any other factor so increasing the cost would produce like results. The public utilities commission of Wisconsin, on the hearing of the complaint of the Black River Falls Municipal Electrical Utility on August 31, 1932 (United States Daily, September 1, 1932) held that by reason of the levy of a tax by the federal government

on domestic and commercial consumers of electrical energy without at the same time levying a like tax on industrial users, the differential between the types of users was disturbed and that a reduction of rates to domestic and commercial consumers without a like deduction to industrial consumers was justified.

I am therefore of the opinion that:

1. Municipalities owning and operating electric power plants may not, by ordinance or otherwise, assume the three per cent federal tax on electrical energy consumed by domestic and commercial consumers levied by Section 616 of the Revenue Act of 1932 and not collect the same from the consumer, such tax being an obligation of the consumer.

2. When the ultimate cost of electrical energy furnished by municipally owned electrical power plants to certain classes of consumers is increased by reason of a tax levied by the federal government or by any other cause, which increased cost is not suffered by all classes of consumers of electrical energy furnished by such municipally owned utility, such municipality may, by proper legislation, so amend its schedule of rates as to re-establish a fair differential between the different classes of consumers, which may or may not be equivalent in amount to such tax; in so doing the municipality should take into consideration all changed conditions of the different classes of consumers.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4639.

LIABILITY INSURANCE—COUNTY NOT LIABLE FOR INJURIES TO THIRD PERSONS FROM STEAM BOILERS IN COURT HOUSE—COUNTY COMMISSIONERS UNAUTHORIZED TO TAKE OUT INSURANCE ON SUCH.

SYLLABUS:

1. *The expenditure of public funds by a board of county commissioners to pay the premium on a policy of insurance purported to indemnify the said commissioners and the county which they represent, for public liability and property damage growing out of accidents which may occur as an incident to the operation of steam boilers used for the heating of a court house or a county home is unwarranted and unauthorized.*

2. *Neither a board of county commissioners, nor the county which it represents, is liable in damages for injuries to third persons caused by the explosion or the use of steam boilers operated for heating a county court house or the buildings of a county home.*

COLUMBUS, OHIO, September 22, 1932.

HON. JOSEPH J. LABADIE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "The Commissioners of Putnam County request to know whether or not they are required to carry Public Liability & Property Damage Insurance on the steam boilers which the county operates for heating