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March 20, 2015

The Honorable Nancy Rodriguez
New Mexico State Senator
1838 Camino La Cañada
Santa Fe, NM 87501

Re: Opinion Request – Limits on Taxes Imposed by Home Rule Municipalities

Dear Senator Rodriguez:

You requested our advice regarding whether home rule municipalities are permitted to impose taxes without a specific grant of authority from the legislature. Specifically, you asked:

Can a home rule municipality impose a tax on items (i.e. telecommunications services, Styrofoam use tax, plastic bottle use tax, carbon emission tax or plastic bag use tax) that are not expressly prohibited from being taxed pursuant to state law?

As discussed below, we conclude that a home rule municipality may not impose taxes unless specifically authorized to do so by the legislature.

The New Mexico Constitution provides home rule municipalities with broad legislative authority. “A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.” N.M. Const. art. X, § 6. The New Mexico Supreme Court determined that this constitutional amendment means “a home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act.” *Apodaca v. Wilson*, 1974-NMSC-071, ¶ 14, 86 N.M. 516, 521.

Based on our research, we believe that the legislature has effectively limited the authority of a home rule municipality to impose taxes by general law. Two statutory provisions are of particular significance. First, the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1965, as amended through 1990), provides, in pertinent part, that a municipality adopting a charter “shall not authorize the levy of any tax not specifically authorized by the laws of the state.” NMSA 1978, §

3-15-7. This statutory provision is directed to home rule municipalities and expressly denies them the power to tax without specific legislative authority.

The second significant statute is NMSA 1978, Section 3-18-2, which prohibits a municipality from imposing an income tax, property tax or “excise taxes on any incident relating to: (a) tobacco; (b) liquor; (c) motor fuels; and (d) motor vehicles,” unless otherwise provided by law. Subsection (D) of Section 3-18-2 goes on to allow a municipality to:

impose excise taxes of the sales, gross receipts or any other type on specific products and services, other than [tobacco, liquor, motor fuels and motor vehicles], if the products and services taxed are each named specifically in the ordinance imposing the tax on them and if the ordinance is approved by a majority vote in the municipality.¹

Apodaca v. Wilson, cited above, was the first New Mexico Supreme Court case interpreting Article X, Section 6 of the state constitution. See 1974-NMSC-071, ¶ 8, 86 N.M. at 520. Significantly, the decision in that case pointed to the predecessor to the current Section 3-18-2 as “an example of [a] specific denial of power” to a home rule municipality contemplated under Article X, Section 6. *Id.* ¶ 14, 86 N.M. at 521. See also *Casuse v. City of Gallup*, 1987-NMSC-112, ¶ 5, 106 N.M. 571, 572 (discussing *Apodaca* and its reference to what is now Section 3-18-2 as an example of a general law expressly limiting a municipality’s home rule power).

We conclude that the Municipal Charter Act, a general law, prohibits a home rule municipality from imposing any tax absent specific legislative authorization. Section 3-18-2, twice described by the Supreme Court as an express statement in the general law effectively limiting home rule power, precludes a municipality, including a home rule municipality, from imposing income and property taxes unless otherwise provided by law and allows excise taxes on certain products and services. Excise taxes permitted under Section 3-18-2 may be imposed only if the products or services subject to the tax are named specifically in the ordinance imposing the tax and the ordinance is approved by a majority of the voters in the municipality.

We caution that even if an excise tax is permitted under Section 3-18-2, there may be other statutory provisions that affect whether and how a home rule municipality exercises its authority to impose the tax. See, e.g., *Waksman v. City of Albuquerque*, 1984-NMSC-114, ¶ 7, 102 N.M. 41, 43 (“A municipality lacks the power to alter, by ordinance, a legislatively-mandated tax limitation”).

¹ Article X, Section 6(D) of the state constitution provides: “No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.” We interpret this provision to condition the effectiveness of a tax imposed by a home rule municipality on the approval of voters in the municipality unless a general law authorizes the municipality to impose the tax without voter approval. In this case, Section 3-18-2(D) expressly requires a municipality to submit an ordinance imposing a permissible excise tax to voters for their approval.

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If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Manierre', written in a cursive style.

CAROLINE MANIERRE
Assistant Attorney General