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ATTACHMENT 4



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ROY COOPER
 ATTORNEY GENERAL

July 11, 2002

E. Norris Tolson
 Secretary of Revenue
 North Carolina Department of Revenue
 Post Office Box 25000
 Raleigh, North Carolina 27602

RE: Advisory Opinion: Authority of cities to levy local franchise taxes upon electric power companies when they receive only a partial tax distribution for a fiscal year; G.S. §§ 105-116 and 116.1

Dear Secretary Tolson:

G.S. § 105-116 levies an annual franchise tax upon the gross receipts of electric power companies. The tax is imposed for the fiscal year of the State in which it becomes due. G.S. § 105-114(a3). The return is filed quarterly; dependent upon total sales, power companies may pay the tax more frequently. Section 116(b). G.S. § 105-116.1(b) requires that the Secretary of Revenue distribute a specified share of the taxes to cities within 75 days after the end of each calendar quarter. Id.

For fiscal year 2001-2002, cities received franchise tax distributions in September and December, but none in March and June. The Governor directed that March and June distributions be applied to the State budget deficit. The Governor possesses extraordinary constitutional powers to reduce State expenditures to achieve a balanced budget. N.C. Const., Art. III, s.5(3). G.S. § 105-116(e) provides in pertinent part that municipalities may not levy similar franchise taxes upon power companies "so long as there is a distribution to cities from the tax imposed by this section...."

In light of the foregoing, you request our opinion as to whether a city may levy a local franchise tax upon electric power companies effective July 1, 2002 when it has "received some but not all of a distribution of the state franchise tax in fiscal year 2001-2002."

Scant direct authority exists to aid our analysis. While the prohibition against municipalities levying an independent franchise tax can be traced to 1949, apparently it has never

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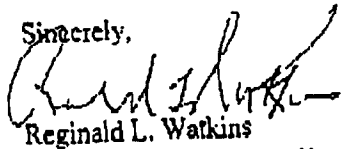
been judicially construed. Nevertheless, for several reasons we advise that the legislative prohibition continues to bar municipalities from imposing similar franchise taxes.

Technically, since the franchise tax is an annual levy, and cities have in fact received full shares of the levy for the previous two quarters, there has been a distribution to them during the fiscal year within the meaning of Section 116(e). The conditions upon which the legislature has elected to confer taxing authority upon a subordinate unit of government simply have not been satisfied. The powers of municipalities "relating to taxation are strictly construed." Kenny Co. v. Brevard, 217 N.C. 269, 272 (1940). A tax imposed without authority is an illegal tax. Redevelopment Comm. v. Guilford County, 274 N.C. 585, 589 (1968).

Moreover, for purposes of statutory construction it is well settled that the legislature enacted Section 116(e) fully aware that its provisions would be interpreted consistent with the exceptional constitutional powers given the Governor in times of economic crisis. State v. Emery, 224 N.C. 581, 585 (1944). The nature of these powers, themselves conditionally limited in duration, further suggests that "so long as" there remains a statutory mechanism normally requiring distribution, a presumptively temporary suspension of reimbursement was not intended to automatically cede taxing authority.

We hope the foregoing is helpful.

Sincerely,



Reginald L. Watkins
Senior Deputy Attorney General



George W. Boylan
Special Deputy Attorney General

GWB:jmc