TAX COMMISSION, STATE BOARD OF: Municipally owned utilities, constitutionality of law exempting from all taxation; whether commercial purposes of utility taxable.

March 30, 1939.

Hon. Philip Zoercher, Chairman,
State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

My dear Mr. Zoercher:

I have your letter submitting the following questions:

"1. Is Senate Engrossed Bill No. 52, which exempts all cities and towns from any and all taxes on municipally owned * * * waterworks, electric utility, gas and heating plants, including that part of such plants operated for commercial purposes, etc. * * * constitutional?"

"2. Does this board have the authority to assess that part of the municipally owned utility that is devoted to commercial purposes the same as we did under the Act of 1933, p. 953, or is it now our duty to direct that part of the utility devoted to commercial purposes be taxed for all purposes, the same as other property?"

Section 1 of the bill referred to, which was passed by the 81st session of the General Assembly and approved by the Governor, reads as follows:

"Every city and town in the State of Indiana shall be exempt from any and all taxes, either real or personal, on properties or services and income therefrom, for any purpose whatsoever, on its public schools, public libraries, on its municipally owned parks, golf courses, playgrounds, swimming pools; hospitals, waterworks, electric utility, gas and heating plants, sewage treatment and disposal plants, cemeteries, auditoriums, gymnasiums, and any and all other municipally owned property, utility or institution; Provided, however, That this act shall not exempt any city or town from the requirement to pay the tax upon its gross receipts under the Gross Income Tax Law."

Section 2 repealed all laws in conflict with the foregoing, and section 3 declared an emergency.
The constitutional provision authorizing the General Assembly to grant exemptions from taxation is found in Art. x, Sec. 1 of the Indiana Constitution:

"The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law."

It is to be noted that the legislative power to exempt from taxation extends only to property "for municipal, educational, literary, scientific, religious or charitable purposes," and our Supreme Court has held that only property used for such purposes can be exempt from taxation by the General Assembly.

Stark v. Kreyling (1934), 207 Ind. 128.

The fundamental question to be determined in answering your inquiry is whether it can be said that property of a municipality devoted to the production and furnishing of utility service, such as water, electricity, gas and heat, a part of which service is produced for and sold to private persons for non-governmental uses, is property used for "municipal purposes."

As a preliminary question, it is necessary to determine the meaning of the term municipal purposes as used in Art. x, Sec. 1, of the Indiana Constitution.

It was suggested in the case of City of Louisville v. Babb (1935), 75 Fed. (2d) 162, 166, that "the Supreme Court of Indiana has never construed the words 'municipal purposes' as they appear in the Constitution of Indiana," and the Circuit Court of Appeals held that the term is employed in the broader sense of "public purpose," and upheld a legislative exemption from taxation granted to bridges across navigable streams erected pursuant to an act of Congress and to be ultimately free from tolls. The court, in that case said:

"Unquestionably the writers of the Indiana Constitution used the expression 'municipal * * * purposes' as describing public or governmental purposes which are inherently matters exclusively in the control of
the state, even though at times, and for the convenience of the state and local communities, it may create agencies to perform municipal functions. * * * * The Indiana Constitution provision makes no reference to any element of ownership, but authorizes the legislature in writing an exemption law to make certain exemptions based upon the purposes for which the property is used. So, in this case, the building of the bridge and the connecting of it with the highways of the State has created a property designated by the legislature as serving a municipal purpose within the provision of the Constitution of Indiana. If the property serves a municipal purpose, then the legislature had the power to enact the statute which it is here contended is unconstitutional. The passage of the Act is itself a construction of the provision of the Constitution by the General Assembly to the effect that the property involved falls within the classification of a municipal purpose, and that construction will not be disturbed unless clearly unreasonable."

City of Louisville v. Babb (1935), 75 Fed. (2d) 162, 168.

While the court in the foregoing case recognizes that use of the property is the test of the power to exempt under the "municipal purposes" provision, and that such use must be for "public or governmental purposes;" legislative designation of what constitutes "municipal purposes" or "public or governmental purposes" will be disturbed only when clearly unreasonable.

In view of the holding that the power to exempt must depend upon a use for a municipal, i.e., a public or governmental purpose, the interpretation given the term "public use" as constituting the basis for tax exemption may be considered in point:

"The expression 'public use' as employed in the statute has never been defined with exactitude. Its meaning must necessarily depend upon the peculiar circumstances of each case. * * *"

"Held for public use, in this connection, means that the property should be occupied, employed, or availed of, by and for the benefit of the community at large, and
implies a possession, occupation and enjoyment by the public or by public agencies."

Cooley, Const. Lim. 7th ed., p. 766;

However, there is authority to the effect that there is a distinction between "public uses" and "governmental uses," that the terms are not synonymous, and that both are included in the term "municipal purposes":

"The test of the right to tax is whether the property is devoted to a public use rather than whether it is used for governmental purposes."

Cooley on Taxation, 4th ed. Sec. 639.

"Much public property of municipalities exempt from taxation has and can have no governmental use."

Corporation of San Felipe de Austin v. State, 111 Tex. 108, 229, S.W. 845.

"'For public purposes' does not mean the same as 'for governmental purposes'."

Board of Councilmen, City of Frankfort v. Comm. 29 Ky., 699, 94 S.W. 648.

The courts of some jurisdictions have made the use of the utility services produced by the property the test of whether or not such municipally owned property is used for municipal purposes within constitutional or statutory provisions similar to our own. If utility service produced by the municipally owned utility is sold to individuals, firms, corporations, etc., to be used for commercial purposes, the property producing such service has been said not to be used for municipal purposes and not a proper subject of exemption from taxation. However, a different, and, I think, sounder test has been applied by the courts of Virginia, Michigan and Connecticut, in passing upon questions practically identical with the one that will confront you under the Constitution and the 1939 exemption Act, as suggested in your letter.

The constitutional provision involved in Commonweath v. Richmond (1914), 81 S. E. 69, L. R. A. 1915 A, 1118, exempted from taxation "property lawfully owned and held by counties,
cities, towns and school districts, used wholly and exclusively for county, city, town or public school purposes.” It was held in that case that an auditorium, market houses, water works and gas works owned by the city were within the exemption provision, notwithstanding the fact that revenues were received in the form of compensation paid by citizens and others for services rendered.

In the case of City of Traverse City v. Blair Twp. (1916), 190 Mich. 313, the exemption from taxation was conferred upon “lands owned by any county, township, city, village, or school district and buildings thereon used for public purposes.” It was there contended that a $150,000.00 city owned electric plant, 70 per cent of the income of which was derived from commercial business and 30 per cent from meeting demands of the municipality itself, was not devoted to a public use within the terms of the above quoted exemption. In refuting this contention, and holding the plant exempt from taxation the Supreme Court of Michigan in a very exhaustive opinion said:

“While in distinguishing the purely governmental powers of a municipality from its authorized business activities in supplying itself and its inhabitants with a certain class of utilities and conveniences for which in places of concentrated population there is a general need, and which it is recognized under present conditions of civilization public welfare demands, the latter are sometimes referred to as private business enterprises, perhaps because such wants may be and sometimes are supplied for profit by private parties; yet in the final analysis they are in no true sense private business or private property when operated and owned for public benefit by a municipality under constitutional or statutory authority. No question of private gain or private support is involved. The benefits, whether in direct profits or in protection of health, property, or life, accrue to and all losses fall upon the public generally. The only underlying support for all such public business activities is taxation, and taxation can only be for public purposes. Possible confusion of terms is cleared up and the real difference pointed out in the recent case of Wood v. City of Detroit, 188 Mich. 547 (155 N. W. 592), as follows:

“The distinction between powers governmental in
character and those private in character, as exercised by municipal corporations, does not involve the abrogation of the distinction between private municipal activity and private individual activity. To employ a seeming paradox, private municipal activities are all of them public. What has been called private in municipal activity is, nevertheless, public when contrasted with purely private enterprise and adventure. * * *

There is not, and there cannot be, any merely local power to tax persons or property, and municipal activity may still be, and it is the command of the Constitution that it shall be, restricted, limited, by the limitation of the power to tax, to borrow money and to exploit the municipal credit.'

"That after supplying its own direct, municipal needs the city furnished light or power to private parties and received a revenue therefrom, in no way detracts from the municipal or public purpose for which such authorized public utility was owned and operated. Neither is it of importance whether the enterprise was in itself profitable or unprofitable; it remained public property, owned and operated as an authorized public utility for municipal purposes and the general welfare, dependent for its credit and existence upon public support by taxation to whatever extent its necessities required.

"That this plant, owned and operated by the city to supply itself and its inhabitants with light and power, is used for public purposes not only finds support in textbooks and decided cases from other jurisdictions, but is, we think, settled law under decisions of this court rendered prior to the more recent and radical constitutional provisions and legislation adopted in this State authorizing municipal ownership of public utilities."


The exemption provisions of the Connecticut statutes were treated by the highest court of that state "as if it exempted from taxation all property held by municipalities for public use." The court continued:
“It is the recognized law that the furnishing of electricity to the public for light, heat and power, for pay, is a public use, for which the power of eminent domain may be exercised. It is now the common law in Connecticut and in substantially all the states, that a municipality, which, acting under legislative authority, maintains and operates a public service plant and furnishes water or gas or electricity for light, heat and power, to itself, and to its inhabitants for pay, holds such plant for a public use. The great weight of authority holds that such a plant is exempt from taxation, wherever situated within the state of the municipality. * * * These principles of law and the public policy underlying them have been so fully set forth in the quoted cases and elsewhere, that it is no longer desirable to repeat them.”

North Haven v. Wallingford (1920), 95 Conn. 544.

The following quotations from the textbooks are in accord with the results reached in the preceding decisions:

“Power to produce revenue not the proper test.—Nor should the act that revenue may be derived from the operation of such plants by the city change the principle of their exemption from taxation, for in no sense can that fact alter the nature of the use to which such property is put nor the purpose accomplished by such use. And this is the proper test of its being a proper subject of support by taxation and of exemption from taxation. That revenue may be realized from such plants, tending to make them self-supporting, is no reason for subjecting them to the payment of taxation for their own support and that of the government to which they belong. This incidental matter of revenue does not change the nature of the use or purpose of such property from a public one and for municipal purposes generally, to one that is wholly private and that is conducted for the sole purpose of pecuniary profit rather than for the general welfare, so as to make it liable to taxation, as is contended in some of the cases to which reference will be made.”

Pond on Public Utilities, 4th ed. Sec. 407.
“The exemption of county, city, town or school district property, although confined by the constitution to property used "wholly and exclusively" for county, city, town, or public school purposes, includes municipal public utilities owned by a city although it incidentally derives revenue therefrom.

"Where a municipality owns its own water or light plant, and furnishes water or light to its inhabitants, the water or light plant in question is exempt from taxation as public property for public purposes. This is so although the consumers pay for the water or light furnished, or water or light is incidentally furnished to neighboring towns and their inhabitants for pay, or profit is derived from the plant, or though part of the plant is located outside the territorial limits of the municipality."

Cooley on Taxation, 4th ed. Sec. 644.

Our courts have long recognized the authority of a municipal corporation to furnish water and lights to its inhabitants for their private use, as well as to produce such utility service for use in public places.

City of Crawfordsville v. Braden, 130 Ind. 149.

In some of its recent decisions the Indiana Supreme Court has discussed tax exemption statutes affecting municipal utilities. In the case of City of Logansport v. Public Service Commission (1931), 202 Ind. 523, at 547, it was pointed out that under the then existing statutes a public utility purchased and operated by a city was withdrawn from the tax duplicate and exempt from taxation. After that opinion was written, the General Assembly enacted a provision authorizing the collection of state and county taxes upon such municipally owned utility property, except upon that part of the valuation determined "to be reasonably allocated to the furnishing of service to such municipality itself for its own municipal purposes." This statute was given effect by the Supreme Court in the cases of DeHaven v. Municipal City of South Bend (1937), 212 Ind. 194, and Borgman v. City of Fort Wayne (1939), 18 N. E. (2d) 762, where it had been contended that municipally owned utilities should be exempt from all taxes. The Supreme Court in its opinion in the latter case justified
the legislative action in making a part of such municipally owned property subject to taxation on the ground that the taxable part was not devoted to governmental purposes. It is evident that the holdings were correct in view of the fact that there can be no exemption from taxation unless especially granted by the General Assembly, and the further fact that in granting exemptions to property used for municipal purposes, the General Assembly has the power to limit such exemptions only to property devoted to "governmental," as distinguished from "public" purposes. But the cases involved no question concerning a legislative designation of municipally owned property furnishing utility service to both the municipality itself for its own governmental purposes, and to its inhabitants and others for their private purposes, as property "used for municipal purposes." In view of the authorities above cited and our own legislative history, a designation of such property as exempt from all taxes, does not conflict with our Constitution. Your first question is answered in the affirmative.

In view of the foregoing, your board lacks the power to take either of the two courses of action suggested in your second question.

ARCHITECTS, INDIANA BOARD OF REGISTRATION FOR:
License to practice architecture, whether issuable without examination to former license-holder who has not practiced in last five years.

March 31, 1939.

Mr. Leighton Bowers, Secretary,
Indiana Board of Registration for Architects,
State House,
Indianapolis, Indiana.

Dear Mr. Bowers: Re: The Indiana Architectural Act of 1929 and its subsequent amendment, chapter 252 of the Acts of 1935, as applied to Frederick Mertz, Jr.

Your letter of March 30, 1939, for an official opinion relative to one Frederick Mertz, Jr., who asks to have his architectural license restored upon payment of registration fees, has been received.