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DEPARTMENT OF JUSTICE
STATE OF NEBRASKA • STATE CAPITOL
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NO.
STATE OF NEBRASKA
OFFICIAL
FEB 16 1990
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: February 16, 1990

SUBJECT: LB 1059 - Constitutionality of Establishing Different Sales Tax Rates for Sales of Motor Vehicles and Sales of Other Tangible Personal Property

REQUESTED BY: Senator Rex Haberman
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to the constitutionality of a proposed amendment to LB 1059. Generally, LB 1059 is designed, in part, to alter the method of financing the public school system in Nebraska in a manner which will "[p]rovide state support from all sources of state funding for forty-five percent of the general fund operating expenditures of school districts; . . . ." LB 1059, §2(2)(a). The bill provides for an increase in the state income tax rate established in Neb.Rev.Stat. §77-2701.01 (Cum.Supp. 1988) from three and fifteen-hundredths percent to three and seventy hundredths percent. LB 1059, §27. The bill also provides for an increase in the state sales tax rate established in Neb.Rev.Stat. §77-2701.02 (Reissue 1986) from four to five percent. LB 1059, §28. As you note in your request, all proceeds of sales and use taxes derived from sales of motor vehicles, trailers, and semitrailers are credited to the Highway Trust Fund, and are not, as are other proceeds from sales and use taxes, credited to the General Fund. Neb.Rev.Stat. §77-27,132 (Supp. 1989). Therefore, as you note, the additional revenues generated by increasing the sales tax rate as to motor vehicles would not be credited to the General Fund, but would be credited to the Highway Trust Fund. Under such circumstances, this revenue would, under existing law, not be available to provide additional state funding for the public school system. Thus, your question is whether it would be constitutionally permissible to amend LB 1059 to provide a one percent increase in the general state sales tax rate (from four to five percent), while retaining the current four percent rate for sales of motor vehicles, trailers, or semitrailers.

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It is generally recognized that a sales tax is an excise tax, and not a property tax. 68 Am.Jur.2d Sales and Use Taxes §4 (1973). In State v. Galyen, 221 Neb. 497, 378 N.W.2d 182 (1985), the Nebraska Supreme Court held that a tax imposed on the doing of an act constituted an excise tax and not a property tax and, therefore, the requirement of uniformity in Article VIII, Section 1, of the Nebraska Constitution, did not apply to an excise tax. The Nebraska sales tax, imposed on "all sales of tangible personal property sold at retail," is properly characterized as an excise tax in that it is based on the act or transaction consisting of the occurrence of a retail sale. Neb.Rev.Stat. §77-2703(1) (Reissue 1986); See Pepsi Cola Bottling Co. v. Peters, 189 Neb. 271, 202 N.W.2d 582 (1972). Thus, while the requirement of uniform and proportionate taxation in Article VIII, Section 1, mandates equality in both the valuation of property and the rate of taxation, Xerox Corp. v. Karnes, 217 Neb. 728, 350 N.W.2d 566 (1984), the uniformity requirement applicable to ad valorem property taxes does not apply to excise taxes such as the sales tax. Accordingly, the uniformity provision in Article VIII, Section 1, does not preclude the establishment of different tax rates in the sales tax area, such as contemplated by your proposed amendment to LB 1059.

The question which remains is whether the establishment of different sales tax rates in the manner you propose would create an unreasonable classification in violation of the prohibition against special legislation in Article III, Section 18, of the Nebraska Constitution.

In Stahmer v. State, 192 Neb. 63, 68-69, 218 N.W.2d 893, 896 (1974), the Nebraska Supreme Court stated the following with regard to the power of the Legislature to classify and the prohibition against special legislation under Article III, Section 18:

> It is competent for the Legislature to classify for purposes of legislation, if the classification rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. . . .
>
> The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated. (Citations omitted).

In assessing the reasonableness of your proposal to enact a different tax rate for sales of motor vehicles than for sales of other tangible property, it is important to note both the apparent purpose for the increase in the sales tax rate under LB 1059, and the disposition of sales tax revenues raised on sales of motor vehicles under current Nebraska law. As noted, LB 1059 is intended, in part, to alter the method of financing the public school system in Nebraska in a manner which will increase "state support from all sources of funding" to a specified level of school district general fund operating expenditures. LB 1059, §2(2)(a). One of the means by which funding for such increased state support is to be achieved is the one percent increase in the sales tax rate provided for in §28 of LB 1059. Pursuant to §77-27,132, all proceeds from sales and use taxes derived from motor vehicles, trailers, and semitrailers are credited to the Highway Trust Fund, a special fund separate and apart from the state General Fund. See Neb.Rev.Stat. §39-2215 (Reissue 1988). Thus, any increase in the sales tax rate as applied to sales of motor vehicles will not result in an increase in General Fund revenues available for the provision of additional state support for the public school system, as all sales tax revenues generated by sales of motor vehicles are committed to the Highway Trust Fund, a special fund which provides for the allocation and disbursement of monies credited thereto.

On the basis of existing law governing the distribution and allocation of revenues generated by the sale of motor vehicles under §§77-27,132 and 39-2215, it would not appear to be unreasonable for the Legislature to retain the current sales tax rate for sales of motor vehicles while enacting an increase in such rate for other retail sales, in view of the goals and objectives of LB 1059. The establishment of such a classification is consistent with the avowed purpose of LB 1059, as it would recognize revenues from sales of motor vehicles are committed to a special fund which, under current law, would not provide a source of state funds available for increased state financial support for the public school system. Under these circumstances, the classification created by your proposal appears reasonably related to the objective of the bill.

This is not to suggest, however, that other alternatives are not available to the Legislature. For example, the Legislature could amend the present statutory direction that all proceeds from sales and use taxes derived from sales of motor vehicles, trailers, and semitrailers be credited to the Highway Trust Fund by providing that any revenues generated on such sales above the current four percent rate be credited to the General Fund. In this manner, additional state funds available to provide the type of support contemplated by LB 1059 would be generated by the sales tax increase contained in §28 of the bill. Our opinion that your

proposal appears constitutional under current law should not be construed to mean that other options are not available to address the situation raised by your request.

Very truly yours,

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7-376-2

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:

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