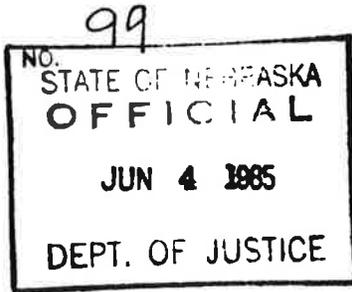


John Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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ROBERT M. SPIRE
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June 4, 1985

Senator Jerry Chizek
Nebraska State Legislature
State Capitol
Lincoln, Nebraska 68509

Dear Senator Chizek:

You have requested our opinion regarding the constitutionality of certain language amending LB 653A, relating to the cigarette tax. In particular, you refer us to section 2 of the bill, which provides, in part, that the tax imposed on each package of cigarettes shall be

. . . an amount equal to the difference between thirty-four cents and the federal excise tax on cigarettes as provided by the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248, Title II, Subtitle F, Part III, Section 283(c), 96 Stat. 569, as amended, but in no case less than eighteen cents.

In addition, you further refer to certain language establishing the distribution of the revenue raised under the bill, providing ". . . an additional amount which shall be the equivalent of eight cents of such tax or the difference between the special privilege tax on cigarettes and eighteen cents, whichever is less," shall be placed in the Cash Reserve Fund, or into the General Fund, for the periods specified. You state the intent of the amendment is to "pick up" the eight cent tax imposed under federal law which is scheduled to expire, or any portion thereof which is allowed to expire.

The question you have addressed is whether the amendment's reference to federal tax law, and the potential enactment of legislation by the United States Congress affecting the amount

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of the tax, would represent an unconstitutional delegation of legislative authority.

In 1935, the Nebraska Supreme Court held a statute appropriating funds to be expended under terms and conditions to be provided by an act of the United States Congress, to be passed in the future, was an unconstitutional attempt on the part of the Legislature to delegate legislative authority to the Congress. Smithberger v. Banning, 129 Neb. 651, 262 N.W. 491 (1935). Subsequently, in Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967), the Court stated the rule announced in the Smithberger case had not been overruled, and remained the law in this jurisdiction.

Based on the principle established in Smithberger, it would appear the amendment to LB 653A, to the extent it refers to provisions of federal law which may be affected by future congressional legislation, could be viewed as an unconstitutional delegation of legislative authority.

We would point out, however, that case law from several jurisdictions outside Nebraska supports the proposition that the prospective incorporation of federal tax law does not constitute an impermissible delegation of state legislative authority. Parker Affiliated Companies, Inc. v. Department of Revenue, 382 Mass. 256, 415 N.E.2d 825 (1981); see also, City National Bank v. State Tax Commission, 251 Iowa 603, 102 N.W.2d 381 (1960) (state constitutional provision forbidding reference to other law to determine tax held not violated by Legislature's definition of state net income as adjusted gross income on federal tax return); First Federal Savings & Loan Association v. Connelly, 142 Conn. 483, 115 A.2d 455 (1955) (corporate income tax statute may utilize federal definition of gross income); accord, Katzenberg v. Comptroller of the Treasury, 263 Md. 189, 282 A.2d 465 (1971).

Generally, these cases recognize that, while federal action in the form of congressional legislation may influence the amount of tax payable, the mere reference in state legislation to federal tax statutes, utilized in determining the tax payable, does not represent a delegation of the state taxing power to the federal government. Thus, under the amendment to LB 653A, while future action by Congress may affect the amount of cigarette tax paid, the reference to federal law would not, under this principle, amount to an unconstitutional delegation of the state's taxing power by the Legislature.

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While we are not unmindful of the Nebraska Supreme Court's decision in Smithberger, we believe the "pick up" tax imposed under LB 653A, as amended, could successfully be defended against constitutional attack. We do not believe the reference to federal tax law in the amendment would unconstitutionally delegate the state's taxing power to Congress. While the amount of the tax payable may be influenced by future congressional action, this would not, in this instance, constitute a delegation of the state's taxing power in derogation of the Nebraska Constitution.

Very truly yours,

ROBERT M. SPIRE
Attorney General



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cc Patrick J. O'Donnell
Clerk of the Legislature