



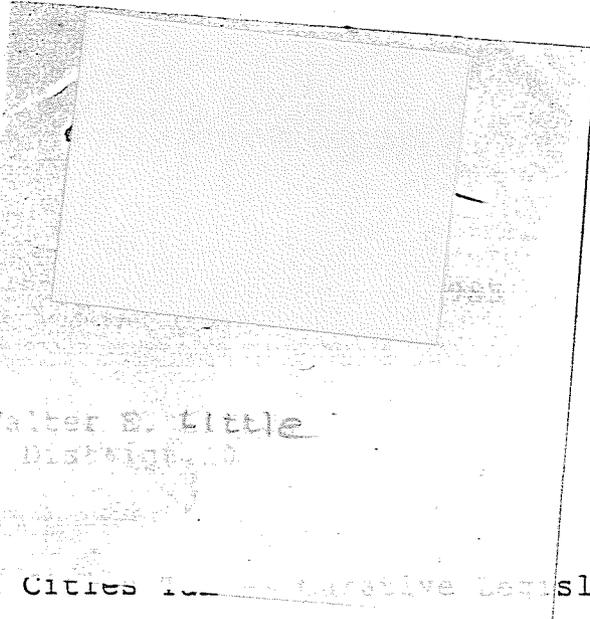
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The Honorable Walter B. Little
Representative, District 10

STATEHOUSE MAIL

Re: Resort Cities Tax Alternative Legislation

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION AND
IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Little:

In September of 1983, The Sun Valley Company initiated litigation against the City of Sun Valley seeking a determination that the city ordinances promulgated under the "City Property Tax Alternatives Act of 1978," Idaho Code § 50-1043, et seq., were invalid and that the authorizing statutes were unconstitutional. The scope of the litigation later expanded to include similar ordinances enacted by the City of Ketchum. While the litigation was in process, the

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Idaho Supreme Court decided a significant case dealing with the issues raised by the Sun Valley and Ketchum litigation. In Greater Boise Auditorium District v. Royal Inn of Boise, 84 ISCR 1147, _____ Idaho _____, _____ P.2d _____ (1984), the court upheld the constitutionality of legislation authorizing auditorium districts to impose a sales tax on receipts derived from furnishing hotel and motel rooms. In so holding, the supreme court resolved some of the ambiguities and problems which have plagued this area since State v. Nelson, 36 Idaho 713, 213 P. 358 (1923). The supreme court read State v. Nelson as forbidding the delegation of unrestricted and unguided taxing power to municipal entities. However, the court rejected the former interpretation of State v. Nelson which allowed the legislature to delegate only the power to levy ad valorem taxes to municipal entities. Judge Granata relied heavily on the Greater Boise Auditorium District rationale when he held the City Property Tax Alternatives Act of 1978 was unconstitutional as an overbroad delegation of the legislative power to levy taxes. Curative legislation has now been proposed to meet the judge's objections. We have been asked to discuss some of the issues raised by this curative legislation.

I. Proposed Curative Legislation.

We have been provided with House Bill No. 73, which is the text of the curative legislation. It consists of approximately five single-spaced pages of legislative material. Accordingly, we will cite only to the significant portions of the statute in discussing the particular issues raised by your request.

- (i) In general, the legislation allows resort city residents and city governments to act in concert to impose any combination of three authorized sales taxes. The qualifying condition for a resort city is that the local governing body pass an ordinance which shall contain finding of facts that:
 - (a) The city derives a major portion of its economic well-being from businesses catering to recreational needs and from meeting the needs of people traveling to that destination city for an extended period of time, and
 - (b) The city has a tourist population which exceeds the residence population of the city during at least 14 days in any calendar year.

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- (ii) If the city government passes an ordinance to assess the tax and the electorate approves by a 60% majority of all votes cast on the question, then the city may levy any or all of the three specified sales taxes.
- (iii) The statute also provides limitations on the manner of the election, the purposes for which the tax-generated funds may be expended, sets out requirements of cooperation with county local option and nonproperty sales taxes, and provides mechanisms for collections and administration of the sales taxes. The various sales taxes are limited to 5% in amount on each of the areas subject to taxation and to a total of 5% on any single sales transaction.

Taken together, these limitations should pass constitutional muster. In the Boise Greater Auditorium District case, the Idaho Supreme Court upheld the sales tax which auditorium districts were authorized to impose under Idaho Code §§ 67-4917A through 67-4917C. The court noted that those statutes specifically defined the incidence of the tax, set forth the applicable exemptions, set a maximum amount which may be imposed, and delineated the administration and collection of the tax through incorporation of the Idaho Sales Tax Act.

A. Incidence of the Tax.

The proposed curative legislation specifically defines the incidence of the tax. It allows the resort city to impose any of three specifically defined taxes. The first is an occupancy sales tax on receipts derived from sleeping accommodations. The second is a sales tax on receipts derived from the sale of liquor by-the-drink, wine, and beer sold at retail for consumption on the premises. The third is a general retail sales tax on receipts derived on sales subject to the Idaho Sales Tax Act. The resort city may adopt any one or more of the authorized alternatives. While this delegation is somewhat broader than that represented in the Greater Boise Auditorium District case, it still meets the requirement that the enabling statute define the incidence of taxation. The legislation permits the imposition of three distinct taxes, each of which individually meet the stringent

requirements of the Greater Boise Auditorium District case. Since the legislation limits the tax imposed on any one sale to a 5% tax and each of the separate taxes would be valid if standing alone, it would be illogical to say that the combination is improper.

B. Maximum Amount of Tax.

As noted above, the individual options and the overall rate are limited in amount to a 5% maximum. This explicitly meets the standard set forth in Greater Boise Auditorium District.

C. Administration and Collection.

The curative legislation also incorporates the Idaho Sales Tax Act in administration and collections provisions to the same extent as that approved in Greater Boise Auditorium District. While this specific mechanism was approved in Greater Boise Auditorium District, both statutes lack a mechanism for providing due process in the adjudication of disputed tax liabilities. A simple inclusion of a reference to the administrative procedures in the Idaho Sales Tax Act is suggested as a prudent amendment to the legislation or a prudent inclusion in the municipal ordinance authorizing the taxation.

D. Exemptions.

The curative legislation is at least as explicit defining exemptions to the authorized tax as was the legislation at issue in the Greater Boise Auditorium District case.

Since there is no indication in the Greater Boise Auditorium District case that it represents the minimum standard and the protections provided in the proposed curative legislation are at least as good as those represented in Greater Boise Auditorium District, the proposed curative legislation is constitutional.

II. Other Issues Raised by the Curative Legislation.

A. Tourist Population.

The definition of resort cities has raised some questions regarding the determination of tourist population. We see no constitutional problem with such a determination. The tax law has long dealt with the issues of residence, domicile, situs and nexus. While a particular person's status with respect to each of these issues is subject to determination on a case-by-case basis, such terms have never been held too vague or indefinite so as to invalidate authorizing legislation.

The indefiniteness of the "tourist population" term here is mitigated by two circumstances. The first is that it's subject to a reasonable determination by the resort city government when it makes its findings of fact regarding its status as a resort city. Reasonable administrative determinations of status questions arising under taxing statutes have long been upheld. Secondly, the contrast with "resident population" clearly indicates that the tourists who are to be counted are those who are spending the night in the city limits of the proposed resort city.

B. Campgrounds.

A second question has been raised because the option on hotel and motel rooms does not also extend to campgrounds and parking facilities for recreational vehicles. The Greater Boise Auditorium District case answers this question. The sales tax there did not extend to the campgrounds or parking facilities and was nevertheless upheld. This omission causes no constitutional problem.

C. 14-Day Rule and Off Premises Sales.

Two other questions regarding discrimination have arisen: (1) whether resort cities and, specifically, only those resort cities which have a tourist population exceeding the resident population during at

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least 14 days, can be made the subject of the curative legislation; and (2) whether it's discriminatory to tax only the alcoholic beverages sold for consumption on the premises as opposed to the same products sold for consumption off the premises. The standard by which such discrimination arguments are to be judged is that there must be some rational relationship between the legitimate purpose of the statute and the method the statute uses in establishing various categories. Put another way, the person attacking the constitutionality of the statute must negative every possible rational explanation for the legislative classification. See School District No. 25 v. State Tax Commission, 101 Idaho 283, 612 P.2d 126 (1980), and Sheppard v. State Department of Employment, 103 Idaho 501, 650 P.2 643 (1982).

It is clearly rational for the legislature to determine that resort cities face greater demands on their city services compared to their ad valorem tax base than nonresort cities, and provide accordingly. The proper analysis then ascertains if it is rational for the legislature to determine that the resort cities most likely to be affected by these excessive demands for services are those where the tourist population exceeds the resident population for at least 14 days in any calendar year. Since a tourist population exceeding resident population is a measure of the demand on the city services and the 14-day period is a qualification related to the duration of that demand, the overall limitation is rational and should be upheld. It is not a proper analysis to question legislative motives in drawing the line at 14 as opposed to 12 or 16 days if the 14 days is a rational measure of demands for city services. It clearly is, and should be upheld.

Opponents of the Bill question whether the requirement that the resort city make a finding of fact based on evidence presented to it or by it that it qualifies as a resort city is a sufficient limitation. Even though there are no due process standards stated in the statute, the Idaho Supreme Court has never hesitated to imply such standards where quasi-judicial fact-finding is undertaken by a

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municipal entity. See Cooper v. Board of County Commissioners of Ada County, 101 Idaho 407, 614 P.2d 947 (1980).

D. Delegation of Taxing Authority.

There is a question regarding the delegation of the general sales tax power to the cities which authorizes them to tax all or any portion of the transaction under the Idaho Sales Tax Act. Thus, the cities have the power to pick certain sales transactions as being subject to their general sales tax. The outside limits are the sales transactions taxable under the Idaho Sales Tax Act. This limited discretion on the part of the cities is probably valid for the same reasons that providing multiple options for the cities to choose from is valid. The legislature has limited the outside bounds of the cities' discretion. Within those limits, the legislature could certainly delegate the choice of several different taxing schemes to the resort cities. The sum of all such delegations should meet the constitutional limitations, provided that each delegation meets the standards set forth in the Greater Boise Auditorium District case. Even if a court took issue with the city's actions, at most, the exemptions from sales taxable under the Idaho Sales Tax Act might be invalidated. However, this is clearly not such a broad delegation as would invalidate the enabling statutes. As stated above, the enabling statutes meet the requisites of the Greater Boise Auditorium District case.

III. Validation and Retroactive Application.

The curative statute, by its terms, ratifies, confirms and approves any tax imposed by a resort city under the sections of the Idaho Code which were held to be unconstitutional. The ratification and approval relates back to November 28, 1984. Such a validation and confirmation is probably permissible. In 3 Sutherland, Statutory Construction, § 41.17, page 303, is stated:

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In most jurisdictions, however, it seems settled that by subsequent act, the legislature may ratify unauthorized taxes, and give them retroactive validity. Defective tax assessments may be validated. (cites omitted)

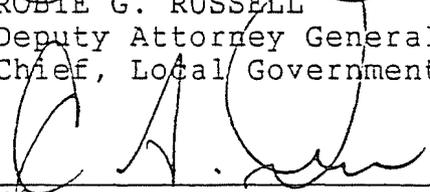
The district court held Idaho Code §§ 50-1043 through 59-1049 to be unconstitutional as an overly broad delegation of legislative power. Where the legislature later upholds the delegation and ratifies the taxes imposed thereunder, the legislative enactment should be honored.

Although the statute purports to be retroactive to November 28, 1984, it does not appear that the legislature intends to authorize resort cities to enact a tax which dates back to November 28, 1984. Rather, the intent appears to be to ratify those taxes which were put into effect on or after November 28, 1984. Because of the nature of the sales tax, it is doubtful that the courts would uphold retroactive imposition of a new sales tax. Thus, while the legislature can remedy the defects found by the district court and ratify the existing taxes, it probably cannot authorize the resort cities to now enact a new tax with retroactive application to November 28, 1984.

If we can be of any further assistance, please contact us.

Sincerely,


ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division


C. A. DAW
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Idaho State Tax Commission

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