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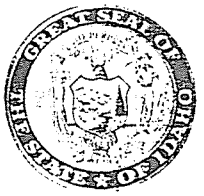

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February 25, 1986

The Honorable Ron J. Beitelspacher
Idaho State Senator

STATEHOUSE MAIL

The Honorable Larry Anderson
Idaho State Senator

STATEHOUSE MAIL

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

RE: Senate Bill 1325

Dear Senators Beitelspacher and Anderson:

This is in respones to your questions regarding the constitutionality of Senate Bill 1325. In particular, you have asked:

1. Is Senate Bill 1325 an unconstitutional delegation of the legislature's power to tax? As proposed, Senate Bill 1325 will allow certain vehicles to elect between two different systems of taxation.

2. Is it constitutional for Senate Bill 1325 to originate in the Senate since it is apparent that it is a revenue raising measure? It is my understanding that revenue

raising measures under the Idaho Constitution must originate in the House of Representatives.

3. Is Senate Bill 1325 unconstitutionally discriminatory based on the fact that proportionately registered vehicles must pay a registration fee whereas nonproportionately registered vehicles may elect to pay either a mileage fee or the registration fee as proposed in Senate Bill 1325?

Delegation of Legislative Power

The Bill would not result in an unconstitutional delegation of legislative power. Idaho Constitution, art. 3, § 1, vests the power to make laws in the Senate and House of Representatives. Accordingly, legislative power to make laws cannot be delegated to any other authority. Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978); State v. Kellog, 98 Idaho 541, 568 P.2d 514 (1977); Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

However, the bill does not delegate to individuals the power to make laws. Rather, the bill defines the taxes and defines optional schedules. In this respect, it is similar to numerous state and federal tax statutes which provide optional means by which taxes can be computed. Despite this common practice, we are aware of no state or federal cases holding that statutorily defined optional tax schedules result in an impermissible delegation of legislative power. Also, as the Idaho Supreme Court pointed out in Idaho State Tax Commission v. Payton, 107 Idaho 258, 259, 688 P.2d 1163 (1984), the Idaho Constitution accords the legislature substantial discretion in matters of taxation.

Thus, the use of statutuorily defined optional tax schedules would not result in an unconstitutional delegation of legislative power.

Revenue Bills To Original In The House.

Idaho Constitution, art. 3, § 14, provides in pertinent part that "... bills for raising revenue shall originate in the house

of representatives." Section 2 of the bill raises the amount of the annual registration fee for proportionally registered vehicles.

Many state constitutions contain language similar to that of Idaho Constitution, art. 3, § 14. Many courts have interpreted the phrase "bills for raising revenue" as applicable only to general revenue measures rather than to charges imposed for which the citizen directly receives a benefit in return (e. g., use of state maintained highways). This legal question is analyzed in some depth in the enclosed legal guideline of February 24, 1983, to Senator Fairchild.

As the guideline points out, the Idaho Supreme Court has not directly considered the question. The guideline concludes that the more likely result is that such a bill may originate in the Senate. However, if it is practical to do so in the future, we would recommend that similar bills originate in the House to avoid the potential problem.

Discrimination Against Interstate Commerce.

Generally, the commerce clause of the U. S. Constitution, art. 1, § 8, cl. 3, has been interpreted to prohibit state laws which directly discriminate against interstate commerce or which impose an undue burden upon interstate commerce. Pike v. Bruce Church, 379 U.S. 137 (1970).

In recognition of the fact that taxation is an essential function of state government, the U. S. Supreme Court has adopted special rules to determine whether state taxing statutes violate the commerce clause. In Complete Auto Transit v. Brady, 430 U. S. 274 (1977), the U. S. Supreme Court set forth a four-part test to evaluate state tax statutes. State tax statutes do not violate the commerce clause if:

(1) The activity taxed has a substantial nexus with the state;

(2) The tax is fairly apportioned;

(3) The tax does not discriminate against interstate commerce; and

(4) The tax is fairly related to the services provided the state.

Based upon existing case law, it appears to be clear that S. B. 1325 satisfies parts one, two, and four of the test. The remaining discussion will focus upon the question whether the tax would violate part three of the test by discriminating against interstate commerce.

Occasionally, discrimination appears on the face of the taxing statutes in express terms (e. g., taxing only interstate vehicles). As to such statutes, the U. S. Supreme Court notes that a "virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U. S. 617, 624 (1978).

More commonly, the question is whether the impact of the tax falls exclusively or more heavily on out-of-state enterprises. Boston Stock Exchange v. State Tax Commission 429 U. S. 318 (1977); Maryland v. Louisiana, 451 U. S. 725 (1981). As stated in Maryland v. Louisiana, supra:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." (citations omitted) In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as a result of various tax credits and exclusions. 451 U. S. 756.

Thus, to determine whether S. B. 1325 violates the commerce clause, we must also determine if the practical operation of

Idaho's tax statutes will work discrimination against interstate commerce.

S. B. 1325 retains an annual registration and ton-mile fee schedule and retains the trip permit plus ton-mile fees. However, it also establishes an annual registration fee schedule based upon gross weight. The schedule is required for vehicles which are proportionally registered pursuant to Idaho Code § 49-127B, and optional for other vehicles. Idaho Code § 49-127B provides all fleet owners with the option of proportionally registering or paying the registration (or trip permit) plus ton-mile fees of Idaho Code § 49-127.

Reading the bill, together with Idaho Code § 49-127B, all motor vehicle owners would have the option of paying fees pursuant to either the registration/ton-mile fees of Idaho Code § 49-127 or the gross weight fees prscribed by Idaho Code § 47-127B. The statute is thus facially neutral and not subject to the virtual per se rule of invalidity. Therefore, the only remaining question is whether the practical operation of the statute will result in discrimination against interstate commerce.

It has been suggested to our office that the bill would result in discrimination against certain Idaho-based carriers engaged in interstate commerce, as discussed below.

A majority of states, including Idaho, operate pursuant to the "International Registration Plan" (I.R.P.). The I.R.P. is a reciprocity agreement among states which have agreed to grant reciprocity to proportionally registered fleets of interstate vehicles and certain other vehicles not eligible for proportional registration. The proportional registration formula of Idaho Code § 49-127B allocating Idaho tax according to mileage in Idaho verses elsewhere is the allocation formula called for by I.R.P., § III.A. The percentage representing in state mileage for each state is multiplied by the total fees each state charges for full registration to determine the fee of each state.

Pursuant to the I.R.P., the registrant must purchase a "base plate" from a "base jurisdiction." The "base jurisdiction" is a state in which the registrant has an established place of business, where mileage is accrued by the fleet and where operational records are maintained or can be made available. I.R.P., § II.C.1.

The registrant files an application for proportional registration only in the base jurisdiction and receives from the base jurisdiction registration plates and cab cards. The cab cards list the jurisdictions in which the vehicles are proportionally registered. The above procedure minimizes filing requirements and results in payment of roughly the equivalent of one allocated registration fee.

We are not aware of any state which mandates proportional registration. However, if a registrant based in an I.R.P. state desires to proportionally register in the I.R.P. states, he must file an application for proportional registration in a base state. (Certain exceptions exist due to specific reciprocity provisions, e. g., a registrant based in a non-I.R.P. state could file in the member state in which the most miles have been operated).

With the foregoing in mind, we consider the applicability of S. B. 1325 to three interstate carriers. Each operates in Oregon, Idaho, and Utah. Idaho, Inc., has an established place of business (base jurisdiction) only in Idaho; Oregon, Inc., has an established place of business only in Oregon; and Tri-State, Inc., has an established place of business in all three states. They are all competitors. They all will pay the least amount of fees if they proportionally register in Utah and Oregon and pay ton-mile tax in Idaho, pursuant to Idaho Code § 47-127.

Oregon, Inc., and Tri-State, Inc., will be able to accomplish their objective by proportionally registering in the base state of Oregon (or Utah) and paying ton-mile tax in Idaho. Idaho, Inc., however, will not be able to proportionally register in Utah and Oregon unless it applies for proportional registration in Idaho, since it must file its application for proportional registration in a base state

I.R.P., § IVA.1. Thus, Idaho, Inc., must either forego the benefits of proportional registration in Utah and Oregon or pay the higher (in this example) proportional fee in Idaho.

Circumstances such as described above are probably rare. Nevertheless, a carrier in Idaho, Inc.'s, situation might argue, based upon cases such as Maryland v. Louisiana, supra, that the statute "will in its practical operation work discrimination against interstate commerce." However, it is difficult to predict how the courts would deal with the situation since it is so different from that which is normally encountered. Normally, such cases arise because of alleged discrimination "against interstate commerce in favor of local interests." Maryland v. Louisiana, supra.

In the example above, the discrimination, if any in a legal sense, is against solely locally-based carriers doing interstate business. Also, it is not Idaho's statutes in themselves which would cause the locally-based carrier possible competitive problems with out-of-state based interstate carriers. Rather, the problem would result from Utah and Oregon's application of the I.R.P. to the situation, see, e. g., Kidd v. Alabama, 188 U. S. 730; Colgate v. Harvey, 296 U.S. 404 (1935), which arguably provides no basis for an attack upon Idaho's statute.

Finally, Idaho could argue that to the extent the solely locally-based interstate carrier may pay more than out-of-state-based carriers, the addition is fairly related to a justifiable difference in the operations of the carriers -- namely, that carriers with a sole base of operation in Idaho have a higher proportion of operational contact with Idaho than the out-of-state carriers.

The potential challenge to S. B. 1325 could be avoided by amending the bill to allow proportional registration utilizing either the schedule of Idaho Code § 49-127 or Idaho Code § 49-127A.

It should be noted, however, that if all persons have the option of paying tax under the old schedule or the new one, persons opting the new schedule presumably will be doing so to

reduce their fees. As a result, state revenues would necessarily be reduced.

Sincerely,

David G. High
Deputy Attorney General
Chief, Business Affairs and
State Finance Division

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