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March 5, 1987

Mr. Martin L. Peterson
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Statehouse, Room 122

STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Code Section 23-1319 -- Wine Tax

Dear Mr. Peterson:

This is in response to your request for our advice regarding the following question:

If the 1984 amendment to § 23-1319, Idaho Code, is unconstitutional, should the State Tax Commission begin enforcing the law as it was written prior to the 1984 amendment? This would tax all wine sold in Idaho, regardless of the state of origin, at \$.45 per gallon.

Attorney General Opinion No. 86-14 found the tax preference of Idaho Code § 23-1319 to be unconstitutional based upon the recent United States Supreme Court decision of Bacchus Imports, Ltd., et al. v. Diaz, 468 U.S. 263, 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984). Accordingly, we conclude that the State Tax

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Commission should begin enforcing Idaho Code § 23-1319 as it existed prior to the unconstitutional tax preference amendment to the section.

We reach the above conclusion based upon our understanding of legislative intent and upon the general approach used by the Idaho Supreme Court in analyzing the effect of invalid legislation. In determining the appropriate remedy when legislation is invalid, courts will look to the intention of the legislature and attempt to fashion a remedy consistent therewith. Lynn v. Kootenai County Fire Protection District No. 1, 97 Idaho 623, 550 P.2d 126 (1976).

In enacting the Wine Tax Act, it is clear that the legislature intended to impose a tax on wines sold in Idaho. The 1984 amendment was not intended to eliminate the general tax rate of \$.45 per gallon. Rather, it was intended to foster the local wine industry with a preferential tax rate. Idaho House of Representatives, Revenue and Taxation Committee, minutes, February 21, March 2 and 23, 1984. Since the legislative intent was not to eliminate the general tax rate, the most likely result would be for the court to invalidate only the 1984 amendment providing for the preferential rate. This would leave in effect the prior language of § 23-1319 which imposed a \$.45 tax on all wines, regardless of where produced.

This approach would also be consistent with the Idaho Supreme Court's general approach regarding invalid substitute legislation announced in American Independent Party in Idaho, Inc., v. Cenarrusa, 92 Idaho 356, 359, 442 P.2d 766 (1968), which held:

When a statute by express language repeals a former statute and attempts to provide a substitute therefor, which substitute is found to be unconstitutional, the repeal of the former statute is of no effect, unless it clearly appears that the legislature intended the repeal to be effective even though the substitute statute were found invalid.

The argument favoring retention of the \$.45 per gallon tax rate would appear to be even stronger than was the argument favoring reinstatement of the former statute in Cenarrusa,

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supra, since the general \$.45 per gallon tax rate was never repealed in this case. Thus, we advise that the Tax Commission should begin enforcing Idaho Code § 23-1319 as it existed prior to the unconstitutional amendment.

In making this determination, we have also considered whether the State Tax Commission is administratively required to continue to enforce a statute which is clearly unconstitutional. It has been held that administrative agencies generally do not determine constitutional issues and do not determine the constitutionality of statutes or ordinances under which they act. Usually, the validity of such statutes and ordinances must be assumed by the agency until there is a judicial declaration to the contrary. See, for example, Wanke v. Ziebarth Construction Company, 69 Idaho 64, 75, 202 P.2d 384 (1949). Determination of the constitutionality of a statute is a judicial function. Thus, it would generally be improper for an administrative agency to refuse to enforce a statute on grounds of its alleged unconstitutionality. Wanke, supra.

In our opinion, the rule announced in Wanke, supra, is applicable in cases where there is some reasonable basis in law to argue that a legislative enactment is constitutional. In such cases, due deference to the legislative and judicial branches requires the executive branch to carry out a statute unless it is determined to be unconstitutional by the judiciary.

On the other hand, when it is clear from case law that no reasonable defense can be made of a statute, due deference to the judicial branch requires the executive branch to follow clear decisions of the judicial branch.

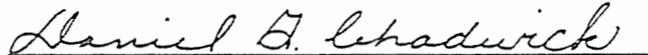
A specific example includes enforcement of the federal Fair Labor Standards Act, 29 U.S.C.S. § 217, made applicable to the states in the case of Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Although Idaho was not a party to the case, it must clearly abide by the decision, even though state statutes remain inconsistent with federal law. Another example on the state level is the conflict of the Parental Responsibility Act found at Idaho Code § 32-1008A and federal law, thoroughly discussed in Attorney General Opinion No. 85-10. In that situation, an Idaho agency, in order to retain federal funds, was required to ignore the mandates of state law.

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Similarly, it was held in Attorney General Opinion No. 84-10 that a bill was clearly ineffective to amend the income tax provisions of Idaho Code § 63-3022(a)(1) since there was no indication of the intended amendment in the title of the bill. In that case, it was necessary for the State Tax Commission to ignore the invalid amendment in order to give effect to the Idaho Constitution as interpreted by the Idaho Supreme Court in several cases on point.

In this case, Attorney General Opinion No. 86-14 determined that the tax preference of Idaho Code § 23-1319 is clearly unconstitutional given the recent U. S. Supreme Court decision in Bacchus Imports, Ltd., et al. v. Diaz, supra. Accordingly, the State Tax Commission should no longer enforce the unconstitutional preference.

Sincerely,


Daniel G. Chadwick
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Chief, Intergovernmental Affairs
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