

Opinion 156



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 90-2

TO: Merle D. Parsley
Manager
State Insurance Fund
317 Main Street
STATEHOUSE MAIL
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does Idaho Code § 41-4908(7), which imposes a "transfer fee" of one cent (\$.01) per gallon on the delivery or storage of all petroleum products within the State of Idaho, violate article 7, § 17, of the Idaho Constitution which requires that the proceeds of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state be used for highway purposes?

CONCLUSION:

No, the "transfer fee" established in Idaho Code § 41-4908(7) is not a "tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state"; therefore, section 41-4908(7) does not violate article 7, § 17, of the Idaho Constitution.

ANALYSIS:

Pursuant to the requirements of the Hazardous and Solid Waste Amendments, see 42 U.S.C. §§ 6991-91i, the Environmental Protection Agency developed a petroleum underground storage tank program in 1988. The EPA program requires registration of underground storage tanks, release detection and protective action, and financial responsibility for underground storage tank



owners and operators. 40 C.F.R. § 280. The regulations require demonstrated financial responsibility in specific per-occurrence and aggregate amounts to cover the cost of clean up and compensation of third parties for both bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. 40 C.F.R. § 280.93. Financial responsibility requirements can be met through a state fund or state assurance program. 40 C.F.R. §§ 280.94, 280.101.

In response to the requirements of the federal government, the Idaho Legislature enacted chapter 49, title 41, Idaho Code, known as the "Idaho Petroleum Clean Water Trust Fund Act." The legislature created a liability insurance trust fund to make liability insurance available to owners and operators of underground storage tanks. The trust fund is funded through (1) the payment by the owner or operator of an initial enrollment fee not to exceed twenty-five dollars for each underground storage tank, above ground storage tank, or farm or residential tank enrolled and not to exceed five dollars for each heating tank enrolled; and (2) the imposition of a "transfer fee" of one cent per gallon on the delivery or storage of petroleum products within the state. Idaho Code §§ 41-4908(1), (2), (3), and (8).

Article 7, § 17, of the Idaho Constitution provides in part:

[T]he proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state . . . in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

The question presented is whether the "transfer fee" established in Idaho Code § 41-4908(8) is a "tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles on the highways of the state" in violation of article 7, § 17.

In determining the constitutionality of a statute, Idaho courts have applied the following basic principles of statutory interpretation:

(1) . . . Statutes are presumed valid and all reasonable doubts as to constitutionality must be resolved in favor of validity. (2) When a statute is susceptible to two constructions, one of which would render it valid, the construction which sustains the statute must be adopted by the courts. (3) The burden of showing unconstitutionality of a statute is upon the party who asserts it and invalidity must be clearly shown. (4) It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction.

Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2d. 542, 552 (1969); see also Bingham Memorial Hospital v. Idaho Department of Health and Welfare, 112 Idaho 1094, 1096, 739 P.2d 393, 395 (1987); State AFL-CIO v. Leroy, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986). Therefore, the "transfer fee" must be construed to be something other than a "tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state" if such a construction is reasonable.

Idaho courts have addressed on several occasions the question whether a fee imposed by a governmental entity was actually a tax. Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989); Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988); State v. Bowman, 104 Idaho 39, 655 P.2d 933 (1982); Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941); State v. Nelson, 36 Idaho 713, 213 P. 358 (1923), overruled on other grounds, Greater Boise Auditorium District v. Royal Inn of Boise, 106 Idaho 884, 684 P.2d 286 (1984). A fee which is reasonably related to the services rendered is not a tax. Kootenai County, 115 Idaho at 680, 769 P.2d at 557. Further, imposing a fee on all members of the affected class, whether or not they choose to use the service, does not make the fee a tax. Id. (solid waste disposal charge on residential dwellings). Contra, a fee primarily designed to raise revenue for a state or political subdivision is a tax. Foster's, 63 Idaho at 218-219, 118 P.2d at 728.

The transfer fee established in Idaho Code § 41-4908(8) is reasonably related to the services provided and is not primarily designed to raise revenue for the state. The following legislative findings were adopted in support of the Petroleum Clean Water Trust Fund Act:

(1) The legislature finds that significant quantities of petroleum and petroleum products are being stored in tanks in Idaho to meet the needs of its citizens, foster economic growth and development and the overall quality of life in the state. While most storage tanks are being operated and managed responsibly, there are occasions when leaks and other releases occur, threatening the public health and safety, and the environment. It is to the benefit of Idaho's citizens to correct any such threats to the public health and safety or environment as quickly and completely as possible. Significant financial resources must be available to investigate and remedy any release. However, reasonably affordable petroleum liability insurance coverage is unavailable to pay for such corrective and cleanup measures. Thus, creation of a fund for corrective actions for petroleum releases would be beneficial to the state. Such a fund would be created by the imposition of a "transfer fee" of one cent (\$.01) per gallon on the delivery or storage of petroleum products within the State of Idaho. Such a fund would provide moneys for the immediate protection of the public health and safety and the environment, while helping avoid catastrophic losses to the owners and operators which could result in negative impacts on Idaho's economy.

Idaho Code § 41-4902(1).

Thus, the legislature determined that petroleum storage tanks pose a threat to the health and safety of the public, that an insurance trust fund was necessary to protect the public, and that the petroleum industry--distributors who deliver and store petroleum products and the owners and operators of storage tanks--should pay the costs of any clean up or damage liability incurred through their activity. At least in part, the benefit provided is that distributors of petroleum products and owners and operators of storage tanks are allowed to continue pursuing a hazardous activity in the State of Idaho by having the means to comply with federal law in obtaining liability insurance. Further, by developing guidelines for payments from the trust

fund, the state ensures swift corrective action if a release of petroleum occurs. Idaho Code § 41-4902(2).

The scheme developed in the Idaho Petroleum Clean Water Trust Fund Act demonstrates a relationship between the services provided and the transfer fee. The transfer fees collected and all interest earned thereon, minus administrative costs, are to be deposited into the clean water trust fund account and are not to be used for other public purposes. Idaho Code §§ 41-4909 and 41-4913. Collection of the transfer fee is suspended when the trust fund equals twenty million dollars and will not be reinstated until the unencumbered balance reaches ten million dollars. Idaho Code § 41-4908(10). The funds accumulated from the transfer fees are tied to the trust fund and thus are not designed to create revenue for the state. Because of the large number of storage tanks which could participate in the fund and the potential liability if even one tank is involved in a serious release of petroleum, the twenty million dollar upper limit of the fund is not unreasonable. Since the transfer fee is reasonably related to the services provided under the Idaho Petroleum Clean Water Trust Fund Act and considering the principles of statutory construction set forth previously, the transfer fee should not be construed as a tax violative of article 7, § 17, of the Idaho Constitution.

Adverse decisions from other states regarding similar state assurance programs have been examined, but they are unpersuasive due to differences in state laws. The Alabama Supreme Court held that a proposed statute levying an environmental protection fee upon motor fuels to establish and maintain a state trust fund violated the Alabama Constitution. In re Opinion of the Justices No. 324, 511 So.2d 505 (Ala. 1987). The Alabama Constitution, however, limited the use of "any fee . . . levied by the state, . . . relating to [motor] fuels" to highway purposes with limited exceptions. Id. at 511. The Idaho Constitution does not prohibit the use of a fee. See Idaho Const. art. 7, § 17. Similarly, the Arizona Attorney General opined that a proposed statute placing a license tax on vehicle fuel to provide for a state assurance fund violated the Arizona Constitution which limits the use of "license taxes relating . . . to fuels" to enumerated purposes primarily involving highways. Op. Ariz. Att'y Gen. I89-085 (1989). The Idaho legislature has not utilized a license tax. Differences between the Idaho Constitution and other state constitutions, as well as differences in the various statutes adopted, make decisions in other states distinguishable.

Even if the transfer fee were to be construed as a tax, the tax probably would not be construed as a tax on "gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state" within the meaning of article 7, § 17, of the Idaho Constitution. If the transfer fee were a tax, the tax would be on the acts of delivery and storage of all petroleum products, Idaho Code § 41-4908(8), rather than on motor vehicle fuels used to propel motor vehicles on the highway. See Diefendorf v. Gallett, 51 Idaho 619, 10 P.2d 307 (1932) (distinction between a tax on property and a tax on the income from property). Thus, even if the transfer fee were construed to be a tax, the tax would not violate article 7, § 17.

AUTHORITIES CONSIDERED:

1. Federal Code

U.S.C. §§ 6991-91i.

2. Idaho Constitution

Art. 7, § 17.

3. Idaho Code

§ 41-4902(1).
§ 41-4902(2).
§ 41-4908(1).
§ 41-4908(2).
§ 41-4908(3).
§ 41-4908(7).
§ 41-4908(8).
§ 41-4908(10).
§ 41-4909.

4. Idaho Cases

Bingham Memorial Hospital v. Idaho Department of Health and Welfare, 112 Idaho 1094, 1096, 739 P.2d 393, 395 (1987).

Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988).

Diefendorf v. Gallett, 51 Idaho 619, 10 P.2d 307 (1932).

Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941).

Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2d. 542, 552 (1969).

Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989).

State AFL-CIO v. Leroy, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986).

State v. Bowman, 104 Idaho 39, 655 P.2d 933 (1982).

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923), overruled on other grounds, Greater Boise Auditorium District v. Royal Inn of Boise, 106 Idaho 884, 684 P.2d 286 (1984).

5. Other Cases

In re Opinion of the Justices No. 324, 511 So.2d 505 (Ala. 1987).

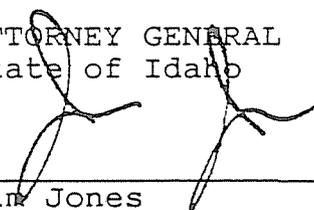
6. Other Authorities

C.F.R. § 280.

Op. Ariz. Att'y Gen. I89-085 (1989)

Dated this 7th day of June, 1990.

ATTORNEY GENERAL
State of Idaho



Jim Jones

ANALYSIS BY:

BARBARA J. REISNER
Deputy Attorney General
Business Affairs and
State Finance Division