

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



84-27

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

September 10, 1984

Honorable John L. Martin
Speaker, House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Speaker Martin:

You have inquired into the constitutionality of a proposed amendment to Legislative Document No. 2485, "AN ACT to Revise Certain Portions of the Tax Laws Relative to . . . Cigarette Taxes." The amendment would provide that an increase of eight cents in the State cigarette tax contained in the bill be contingent upon the taking effect, on October 1, 1985, of a provision of current federal law which makes a corresponding reduction in the federal cigarette tax. The question is whether this amendment would constitute a violation of Article IX, Section 9 of the Maine Constitution which provides that:

The Legislature shall never, in any manner,
suspend or surrender the power of taxation.

For the reasons which follow, it is the opinion of this Office that, although the question is not free from doubt, the proposed amendment is not clearly unconstitutional.

Research discloses no case, either in Maine or in any other jurisdiction which has a Surrender Clause in its Constitution, which passes upon the constitutionality of a state tax which is made contingent upon the future effectiveness of current federal legislation. The Supreme Judicial Court of Maine has made it clear, in interpreting the so-called Vesting Clause of the Maine Constitution, Article IV, Part 1, Section 1, that the

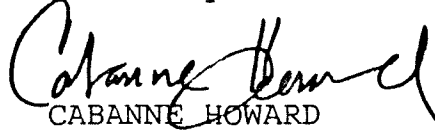
Legislature could not incorporate into state law future enactments of the United States Congress. State v. Webber, 125 Me. 319 (1926); State v. Gauthier, 121 Me. 522 (1922); State v. Intoxicating Liquors Vino Medical Co., 121 Me. 438 (1922). On the other hand, in its most recent decision under the Surrender Clause, the Court indicated that it is possible that the Legislature might enact a tax the effectiveness of which would be contingent upon "an event having significance independent of a decision by potential taxpayers of the question whether to make the statute effective by voting for the tax." Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33, 39 (Me. 1982). The question thus presented is whether the creation of a contingency of the kind contemplated in the proposed amendment is of a kind that the Court would find within the range of permissible contingencies alluded to in Boston Milk Producers.

In the view of this Department, the proposed amendment might well fall within this range. First of all, the amendment does not make the effectiveness of the tax contingent upon a vote of those who would be paying it, as was the case in Boston Milk Producers. Secondly, the amendment does not vest in the federal government any discretion to establish any particular tax or tax rate in Maine. Finally, the amendment specifies that the Maine tax shall become effective merely upon the future effectiveness of a federal statute which is already law, thus not requiring any affirmative action on the part of the United States Congress. In view of these factors, it would appear that were it to adopt the amendment, the Legislature would simply be making its tax effective upon a discrete event, not involving the exercise of any discretion with regard to the Maine tax itself by a third party, and would therefore not constitute a surrender of the power of taxation. See generally Opinion of the Justices, (December 14, 1982) (provision of state law adjusting state income tax according to the Consumer Price Index, a calculation of the United States Department of Commerce, not unconstitutional).

In reaching this conclusion, this Office is aware that it might also be found that the fact that the amendment makes the effectiveness of the tax contingent upon the action of the United States Congress, as opposed to some other non-legislative body, would be constitutionally significant. Moreover, in conveying this conclusion to the Legislature, we do not wish to be interpreted as expressing any opinion whatever as to whether the passage of the proposed amendment would constitute wise tax policy. This Opinion addresses only the question of whether, should the amendment pass, it would withstand constitutional scrutiny.

I hope the foregoing is of assistance to you. Please feel free to reinquire if further clarification is necessary.

Sincerely



CABANNE HOWARD

Assistant Attorney General
Chief, Opinions Section

CH/ec

cc: Sen. Frank P. Wood
Rep. H. Craig Higgins
Chairman, Joint Standing Committee on Taxation

Rep. John A. Cashman
Rep. Edward J. Kane