

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

February 1, 1996

Senator Jill M. Goldthwait
Maine State Senate
3 State House Station
Augusta, ME 04333-0003

Dear Senator Goldthwait:

I am writing in response to your inquiry of January 5, 1996, requesting the opinion of this office as to whether individual members of the Maine Sardine Council may receive distributions, either collectively or individually, of assets purchased from the proceeds of the Sardine Excise Tax, and whether the Council may be given the authority to set the rate of the tax. For the reasons which follow, it is the Opinion of this Department that, if the Sardine Council were to be dissolved by the Legislature, it would not be unconstitutional for the assets of the Council to be distributed equitably among the entities which supported the Council through the payment of the Excise Tax. On the other hand, it would be unconstitutional for the Legislature to authorize the Council to convey a portion of its assets to an individual member of the Council or an individual entity which pays the tax, on the occasion of the withdrawal of that entity from the Council's programs. Finally, it would not be constitutional for the Legislature to authorize the Sardine Council to fix the amount of the tax.

The Maine Sardine Council was established by 32 M.R.S.A. § 4165 *et seq.* Its members are between three and nine persons appointed by the Commissioner of Marine Resources who are actively engaged in packing sardines, kippers, steaks and other canned herring products. 32 M.R.S.A. § 4167(1). The purpose of the Council is to promote the sale of these products through the establishment and enforcement of quality standards. 32 M.R.S.A. §§ 4167-A, 4168. The activities of the Council are funded through the Sardine Tax, established by 36 M.R.S.A. § 4692-A *et seq.*, which is an excise tax levied upon each case of packed sardines, kippers, steaks, and other canned herring products.

Currently pending before the Legislature is Legislative Document 1149, "AN ACT to Enhance Export Markets for Maine Sardines and Other Canned Herring Products by Clarifying the Maine Sardine Law." In the course of its deliberations on this bill, the Joint Standing Committee on Marine Resources has been presented with two proposals: First, it has been proposed that the individual members of the Sardine Council be given ownership of the assets of the Council, such as the building and land on which the Council has its offices, so that if a particular member of the Council chose to no longer be represented on the Council, and that member's business were no longer to participate in the activities of the Council, the member could receive in cash a proportionate share of the value of the property. Second, the Committee has received a proposal that the Sardine Council be authorized to set the rate of the Excise Tax. You have inquired whether each of these proposals would be constitutional.

I. Distribution of Assets to Council Members.

Your first question is broadly whether there is any constitutional problem if the Legislature were to authorize the Council to distribute its assets to its individual members. Your inquiry raises questions under two clauses of the Maine Constitution. First, it raises questions under the so-called "public purpose" doctrine, derived from Article IV, Part Third, Section 1 of the Maine Constitution which provides, in pertinent part that:

The Legislature . . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, . . .

Second, it raises questions under the so-called "Special Legislation" clause of the Maine Constitution, Article IV, Part Third, Section 13, which provides:

The Legislature shall from time to time, provide, as far as practicable, by general laws, for matters usually appertaining to special or private legislation.

The "public purpose" doctrine provides that taxation at the state or local level "must be for a public purpose," and that, similarly, expenditures of public funds must be for such a purpose. Common Cause v. State, 455 A.2d 1, 315 (Me. 1983). The statutory scheme under which the Maine Sardine Council operates clearly meets this requirement: the Legislature has imposed a tax upon all persons engaged in the packing of herring products, and has directed that the proceeds of the tax be utilized by the Sardine Council for the promotion of the sale of such products, through the establishment of standards and the utilization of enforcement powers. As the Law Court held in Common Cause, the objective of this program--economic development--is a valid "public purpose." Id. at 23-26. The question which you

raise, however, concerns whether the Legislature may establish the program in such a way as to permit a particular member of the industry to choose to no longer participate in it, and to receive a share of the assets of the Council if it should so withdraw.

In the view of this Department, if the Legislature were to provide that upon the dissolution of the Sardine Council, its assets could be sold and the proceeds distributed in some equitable manner among the entities which are funded through the payment of the Sardine Tax, such a result would not violate the "public purpose" doctrine. Rather, such action would simply amount to a pro rata refund of taxes. On the other hand, if the Legislature were to authorize an individual member of the Council to, in effect, withdraw that member's company from the Council's regulatory program and receive a proportionate share of the Council's assets, to be used in whatever way the company saw fit, such a proposal might well be found to violate the "public purpose" doctrine. In Common Cause, the Law Court reviewed a proposal to provide public funds to a private business for the purpose of establishing shipyard facilities in the City of Portland. In finding that the proposal did not violate the "public purpose" doctrine, the Court found it significant that the company in question would be obligated to use the public money in question to establish the shipyard. Common Cause v. State, 455 A.2d at 19, 25-26. These obligations ensured that the expenditure of public money would be directed toward the achievement of economic development, the public purpose underlying the proposal. In contrast, however, the proposal to simply allow an individual sardine packer to "cash out" from the Council's program, and use that money in any way that the company saw fit, would not ensure that such a payment would be in furtherance of economic development.

This conclusion is supported by the decisions of the Law Court under the "special legislation" clause, quoted above. As the Court has found, the principal objectives of this clause are to prevent the Legislature from being susceptible to "privilege, favoritism, and monopoly" and to encourage it to focus its attention on "matters of public interest." Fitzpatrick v. Greater Portland Public Development, 495 A.2d 791, 794 (Me. 1985). The bulk of the cases decided under this clause have involved legislation exempting individual people from general law. Brann v. State, 424 A.2d 699 (Me. 1981); Nadeau v. State, 395 A.2d 107 (Me. 1978); Look v. State, 267 A.2d 907 (Me. 1970); Maine Pharmaceutical Ass'n v. Board of Commissioners, 245 A.2d 271 (Me. 1968). However, the principle that prevents the Legislature from making exceptions for individuals from the application of general legislation without a valid public purpose is equally applicable to legislation providing simply for the appropriation of public monies for the benefit of a particular individual. Thus, unless the proposal to allow the Sardine Council to distribute some of its assets to one participating entity can be shown to benefit the public, it would be invalid under the "special legislation" clause as well.

II. Delegation of Power to Establish Rate of Tax.

Your second inquiry is whether there is any constitutional problem if the Legislature were to authorize the Maine Sardine Council to establish the rate of the Sardine Tax. The rate of that tax is currently fixed by statute, 36 M.R.S.A. § 4695. Article IX, Section 9 of the Maine Constitution provides that:

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

The issue, then, is whether the imposition of the Sardine Tax by the Legislature constitutes the exercise of the taxing power, since if it does, the Legislature may not delegate the discretion to impose the tax to an administrative agency.

In the view of this Department, the Sardine Tax is a tax within the meaning of the clause. Support for this conclusion may be found in the case of Maine Milk Producers v. Commissioner of Agriculture, 483 A.2d 1213 (Me. 1984), in which the Law Court determined that a tax on the production of milk used for promotional purposes did not violate this clause. While the Court found that the tax did not violate the clause because it was not fixed through the exercise of discretion by an administrative agency, it impliedly found that the tax was a tax for purposes of the clause in the first place. Id. at 1220. Since the Sardine Tax is similar, it too would be subject to the clause. However, unlike the situation with the assessment at issue in Maine Milk Producers, the proposal at issue here would vest discretion with the Sardine Council to fix the amount of the tax. Thus, it would be unconstitutional.

* * *

I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,



ANDREW KETTERER
Attorney General

CH:sw

cc: Jeffrey H. Butland
Theone F. Look
Co-Chairs, Joint Standing Committee on Marine Resources