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Dear Mr. Hamrick:

You have requested an opinion of the Attorney General regarding the constitutionality of proposed legislation (H.B. 2372) which would direct a small percentage of the gasoline and special fuel excise tax revenues to the Division of Natural Resources for its use. The proposed language, which would amend and replace Section 11-14-15 of the West Virginia Code, reads in its entirety as follows:

All tax collected under the provisions of this article shall be paid into the state treasury and shall be used only for the purpose of construction, reconstruction, maintenance and repair of highways, matching of federal monies available for highway purposes and payment of the interest and sinking fund obligations on state bonds issued for highway purposes: **Provided**, That for fiscal year one thousand nine hundred eighty-nine-ninety, twenty-five million dollars shall be used only for bridge repair and replacement and all amounts remaining shall next be used for payment of the interest and sinking fund obligations on state bonds issued for highway purposes: **Provided, however**, That any amounts remaining after funding these priorities shall next be used in matching any federal amounts available for expenditure on the Appalachian highway system in this State: **Provided further**, That any amounts remaining after funding these priorities shall be used for the maintenance, reconstruction and construction of state highways.

Unless necessary for such bond requirements, five fourteenths of the tax collected under the provisions of this article shall be used for feeder and state local service highway purposes and one point one percent of

such revenue shall be credited to the division of natural resources as follows: Forty-five percent to the law enforcement section, forty-five percent to the wildlife resources section, and ten percent to the administration section, to be used for boating safety programs, boating law enforcement; acquisition, construction and maintenance of boating and fishing access sites; and other law enforcement and wildlife resources purposes and two hundred thousand dollars of such revenues credited to the division of natural resources shall be expended annually by the division of natural resources for nongame and natural heritage programs and one hundred fifty thousand dollars for enforcement of all laws and regulations pertaining to the use of all-terrain vehicles in West Virginia. Any unexpended moneys credited to division of natural resources shall be carried forward to the next fiscal year. [Underscoring indicates new language that would be added.]

The same proposed legislation would also amend W. Va. Code § 11-14-11 so as to delete the existing mechanism for taxpayers to obtain refunds of taxes paid on gasoline, purchased in quantities of 25 gallons or more, "consumed in motorboats or other watercraft." The stated purpose of the bill is to utilize gasoline tax revenues derived from sportsmen and boaters in programs having a direct benefit to such persons.

The question raised by your opinion request is whether the proposed legislation would be constitutional in light of the following provision of the Constitution of West Virginia:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deduction of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

W. Va. Const. art. VI, § 52.

The potential problem with the proposed amendment, of course, is that it earmarks a portion of the money collected by the State under the gasoline and special fuel excise tax statutes for use by the Division of Natural Resources for non-highway purposes, while the Constitution appears to restrict such revenues to use for highway purposes. For that reason, we believe that the proposed legislation is unconstitutional as written. However, as discussed below, we also are of the opinion that the Legislature may accomplish the intended objective of the proposed legislation without running afoul of the quoted constitutional provision.

In assessing the validity of the proposed legislation in light of Article VI, Section 52, of the State Constitution, we have reviewed similar provisions from other jurisdictions. Unlike West Virginia, most states which have similar constitutional provisions limit the taxes which must be applied to highway uses to those taxes derived from the purchase of gasoline or other motor fuel for use on the public highways. See, e.g., Mich. Const. art. X, § 22; Minn. Const. art. XVI, § 10; Mont. Const. art. XII, § 1(b); and S. D. Const. art. XI, § 8. Under these constitutional provisions, it is easy to see that diversion of tax revenues from purchases of gasoline for other than highway use to other than highway purposes would be constitutionally permissible.

Other states, similar to West Virginia, do not restrict their constitutional provisions pertaining to highway funding to gasoline purchased for highway use. See, e.g., Iowa Const. art. VII, § 8; Ky. Const., § 230; Nev. Const. art. IX, § 5; and N. D. Const. art. X, § 11. The validity of diversion of such revenues to other than highway purposes is not so clear under these provisions, and we have found no court decisions on this issue in these jurisdictions.

Imposition of West Virginia's gasoline and special fuel excise tax is not expressly limited to fuel purchased for highway use. W. Va. Code § 11-14-3 (1991). The purchase of gasoline for certain uses, including use in aircraft and commercial watercraft and for heating and cleaning purposes, is exempted from such taxation. W. Va. Code § 11-14-5 (1991). In addition, in accordance with the Constitution, the Legislature has effectively provided additional "exemptions" by a separate statutory provision which allows for refunds of gasoline and special fuel excise tax to those who purchase such fuel in quantities of twenty-five gallons or more for certain non-highway purposes, including:

- (1) As a special fuel for internal combustion engines not operated upon highways of this state; or

(2) Gasoline consumed to operate tractors and gas engines or threshing machines for agricultural purposes, when such operation is not, in whole or in part, upon the highways of this state; or

(3) Gasoline used by any railway company, subject to regulation by the public service commission of West Virginia, for any purpose other than upon the highways of this state; or

(4) Gasoline consumed in the business of manufacturing or producing natural resources or in mining or drilling therefor, or in the transportation of natural resources solely by means of unlicensed vehicles or vehicles licensed under the motor vehicle laws of this state, either as a motor fuel or for any other purpose and which gasoline is not in any part used upon the highways of this state; or

(5) Gasoline consumed in motorboats or other watercraft operated upon the navigable waters of this state

W. Va. Code § 11-14-11(a) (1991) (emphasis added). Although the Legislature has not expressly limited fuel taxes to purchases of fuel used on the public highways, it has done so indirectly through these statutory refunds.

In considering whether the diversion of a portion of the revenue derived from gasoline and special fuel taxes would be constitutional, we note that the West Virginia Supreme Court of Appeals has said, regarding Article VI, Section 52, of the State Constitution:

This section is not self-enacting, and the fund created by it must rely upon legislative enactment for its resources. It does not provide that any revenue shall come into the fund, but it does provide that if, by legislative enactment, taxes are derived from certain sources, they may not go into any other fund or be used for any other purpose. In other words, the moneys which go into this fund do not constitute a part of the general revenues of the State, since they can not be used for general purposes, but only for the purposes specified in the Amendment.

State ex rel. State Road Commission v. O'Brien, 140 W. Va. 114, 124, 82 S.E.2d 903, 908 (1954). See also Charleston Transit Co. v. Condry, 140 W. Va. 651, 86 S.E.2d 391 (1955). Conversely, although the Constitution itself does not so restrict it, the

Legislature, through the use of exemptions or statutory refunds, may limit the fund created by Article VI, Section 52 to revenues derived, for example, from gasoline and other fuels used on the public highways. The exemption and refund provisions cited above indicate that this is what the West Virginia Legislature has done. The moneys collected under Chapter 11, Article 14 of the Code which are subject to refund, therefore, are not restricted to use for any particular purpose.

It is an established principle of constitutional law that "[s]tatutes will not be held violative of the Constitution except in the clearest cases and where it is necessary to a decision of the controversy." Charleston Transit Co., 140 W. Va. at 659, 86 S.E.2d at 396. Furthermore, in another case considering the validity of an act of the Legislature under this constitutional provision, the Supreme Court of Appeals held, in part, as follows:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965).

A strict construction of the constitutional provision at issue might suggest that "[r]evenue from gasoline and other motor fuel excise and license taxation, . . . and all other revenue derived from motor vehicles or motor fuels" includes any unclaimed statutory refunds. W. Va. Const. art. VI, § 52 (emphasis added). Such a construction, of course, would require that all such revenue be used for highway purposes only. However, as noted by the State Supreme Court in O'Brien, Section 52 of Article VI is not self-enacting, but depends on legislation to give it effect. Moreover, Section 52 itself, in its allowance for the deduction of statutory refunds, expressly places in the Legislature the authority to determine which uses of such fuel are ultimately subject to taxation. Since the constitutional provision contemplates that revenue will not be generated by the sale of all gasoline, a

reasonable interpretation of its provisions is that those unclaimed moneys subject to statutory refund are not subject to the constitutional restriction limiting certain revenues to highway purposes.

By virtue of the constitutional recognition of the Legislature's authority to define the tax revenues which must be devoted to highway purposes through statutory exemptions and refunds, there is no constitutional prohibition of the diversion to other purposes of moneys which, although collected pursuant to West Virginia Code, Chapter 11, Article 14, do not represent tax revenues subject to the constitutional mandate of Article VI, Section 52. Accordingly, in our opinion the Legislature, to this extent, may enact legislation allocating that portion of the moneys collected through the sale of gasoline and special fuels which is subject to refund, but which is unclaimed, to other than highway purposes.

The foregoing conclusion is consistent with an opinion of the Supreme Court of New Hampshire which upheld proposed legislation applying unclaimed tax refunds, from fuel sold for use in boats, to the Fish and Game Department. Opinion of the Justices, 230 A.2d 221 (N.H. 1967). Unlike West Virginia, the New Hampshire Constitutional provision at issue restricted the use of taxes derived from fuel used to propel vehicles on public highways, as opposed to all motor fuel. Like West Virginia, however, motor fuel used in boats was subject to refund, and it was the unclaimed refunds which the Legislature wished to divert to the Fish and Game Department. Thus, a State court has approved the dedication of monies collected pursuant to a general fuel tax to non-highway purposes by recognizing that an identifiable portion of such revenues is not constitutionally restricted.

In order to ensure that the statutory dedication of such moneys to non-highway purposes is not done arbitrarily, and hence unconstitutionally, there should be included in said statute a legislative finding as to what portion of the gasoline and special fuel tax represents unclaimed refunds, since only those funds appear to be available for such use. Such findings are given great weight and are not subject to judicial review unless "clearly erroneous, arbitrary, or wholly unwarranted." Appalachian Power Co., 149 W. Va. at 751, 143 S.E.2d at 359. Alternatively, the task of determining this amount could be delegated by statute to the Tax Division or other agency with reason to know the amount of such unclaimed refunds. In either case, the statutory refund provided by W. Va. Code § 11-14-11(a)(5) for taxes paid on fuel used in motorboats or watercraft should be left in place, rather than being deleted as is contemplated by the proposed bill.

In conclusion, it is our opinion that the proposed amendment to Chapter 11, Article 14, of the West Virginia Code, as set forth above, is unconstitutional. However, it is also our opinion that similar legislation would survive constitutional scrutiny if the revenues dedicated to the Division of Natural Resources were limited to unclaimed statutory refunds, and if such legislation was accompanied by legislative findings as to what proportion of such revenues constitute unclaimed refunds, or with provisions for an administrative determination of that amount on an annual basis. The refunds available for this purpose need not be limited to those attributable to watercraft.

SUMMARY

House Bill 2372, which would amend W. Va. Code § 11-14-15 so as to dedicate 1.1 percent of tax revenues from gasoline or special fuels to the Division of Natural Resources, is unconstitutional as written in that it violates Article VI, Section 52 of the West Virginia Constitution, limiting the use of such revenues to the construction, repair and maintenance of public highways. However, it would not be unconstitutional for the Legislature to dedicate to the Division of Natural Resources unclaimed refunds of taxes collected for fuel used in watercraft or for other non-highway uses, which are subject to refund under W. Va. Code § 11-14-11.

Very truly yours,

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