STATE OF KANSAS

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April 5, 1976

ATTORNEY GENERAL OPINION NO. 76- 119

The Honorable Walter W. Graber
State Representative
3rd Floor - State Capitol Building
Topeka, Kansas 66612

Re: Taxation--Regulatory Fees--Contributions to General Fund

Synopsis: The enforced contribution to the state general fund of twenty percent of regulatory fees collected by a state agency to defray the indirect regulatory and enforcement costs of such agency does not compel the conclusion that such fees exceed the direct and indirect costs of such regulation, under *Fidelity Investment Co. v. Hale*, 212 Kan. 321, 510 P.2d 1236 (1973). Whether the general fund contribution of a particular agency so far exceeds the indirect costs incurred in behalf of such agency as to be improper can be determined only as a factual matter on an agency-by-agency basis.

* * *

Dear Representative Graber:

You inquire concerning the constitutionality of various statutory provisions whereby twenty percent of the receipts of various state agencies are required to be credited to the state general fund.

K.S.A. 1975 Supp. 74-1405 is typical of the several provisions in question. It provides in pertinent part thus:

> "The secretary-treasurer [of the Kansas Dental Board] shall remit all moneys received by or for him from fees, charges or penalties to the state treasurer at least monthly. Upon receipt of any such

> remittance the state treasurer shall deposit the entire amount thereof in the state treasury. *Twenty percent (20%) of each such deposit shall be credited to the state general fund* and the balance shall be credited to the dental board fee fund." [Emphasis supplied.]

A similar question provision was challenged in *Panhandle Eastern Pipe Line Co. v. Fadely*, 183 Kan. 803, 332 P.2d 568 (1958). G.S. 1949, 55-609 authorized the Corporation Commission to tax and assess the costs incurred in hearings and certain other proceedings before it under that act against the parties thereto. Concerning the disposition of the proceeds of this assessment, the cited statute directed thus:

> "All such costs collected by the corporation commission shall be paid into the state treasury, and the state treasurer shall credit twenty percent (20%) thereof to the general fund of the state, and the remaining eighty percent (80%) shall be deposited in a special fund for the use of the corporation commission in administering the provisions of this act."

The special fund in question in that case was the natural gas conservation fund, which had grown to approximately $161,000, apparently far more than was necessary to defray the costs it was designed to meet. Accordingly, the Legislature in 1957 enacted Senate Bill No. 425, directing the transfer of $100,000 from the unexpended balance of that fund to the state general fund. The plaintiff pipeline company challenged the transfer as "an attempt to raise revenue under the guise of the police power," as a discriminatory burden on interstate commerce, as a denial of due process and equal protection of the law, and as violative of Article 11, §§ 1 and 5 of the Kansas Constitution. Further, plaintiff contended that the "exaction by the state for the general revenue fund of twenty percent of all costs collected by the commission . . . is an attempt to raise revenue under the guise of the police power," and as such violates both the commerce clause and the Fourteenth Amendment to the United States Constitution, as well as Article 11, § 5 of the Kansas Constitution.

The state sought to defend this contribution to the general fund thus:

> "The state, on the other hand, maintains that the commission receives indirect assistance from other departments and agencies of the state when it carries out its duties under the oil and gas laws, that the commission is empowered to collect fees to recompense these other departments, and that the apportionment by the state to the general fund of twenty per cent of all costs collected by the commission is to cover these indirect expenses. The state asserts that neither the Federal nor the state constitution prohibits the legislature from seeking reasonable recompense for the assistance in regulation and supervision rendered by other departments."

The court held that sections 55-609, -711 and -131

> "do not clearly authorize the commission to collect both its direct expenses and the indirect expenses of regulation resulting from the assistance of other departments and agencies."

The court found that neither the senate bill transferring $100,000 from the fee fund to the general fund, nor another bill amending the cited provisions above,

> "expressly declares that the amounts transferred and appropriated to the state general revenue fund are to be used to reimburse other departments and state agencies for indirect assistance rendered the commission, nor do the bills specifically appropriate the amounts for such purpose. Both bills, in clear terms, direct payment of the mentioned funds to the general fund of the state without any limitation, and the most reasonable inference to be drawn . . . is that the $100,000 and the twenty per cent are to be used indiscriminately for all general expenses and obligations of the state. Such legislative acts, in spite of the presumption of validity . . . show on their face that some part of the exaction is to be used for a purpose other than the legitimate one of regulation, and for that reason . . . [they] are void." 183 Kan. at 807-808.

The express legislative declaration which was lacking in 1957 was enacted in 1963. K.S.A. 75-3170 states thus in pertinent part:

> "Upon receipt of the fees and moneys paid into the state treasury in accordance with the provisions of sections 1 to 31 . . . of this act, the state treasurer shall credit the same as follows:
>
> (a) Twenty percent (20%) of the gross receipts received from each particular agency shall be credited to the general fund to reimburse the said fund for accounting, auditing, budgeting, legal, payroll, personnel, and purchasing services, and any and all other state governmental services, which are performed on behalf of each of said agencies by other state agencies receiving general revenue fund appropriations to provide such services."

K.S.A. 1975 Supp. 75-3170(a) contains a virtually identical legislative declaration.

In *Fidelity Investment Co. v. Hale*, 212 Kan. 321, 510 P.2d 1236 (1973), plaintiff, a mortgage banker engaged in the real estate loan business, challenged the legality of certain fees assessed it under the Truth-in-Lending Act, K.S.A. 16-801 *et seq.* Plaintiff argued that, *inter alia*, the fees involved were assessed, in substance, as a revenue-raising measure rather than as regulatory fees, relying in part on *Panhandle, supra.* The Act then contained the common provision that twenty percent of all moneys collected thereunder shall be credited to the state general fund, the remaining eighty percent to be deposited in a special revenue fund, the "nonlicensee administration fund," which was appropriated for the purpose of paying the cost of administering and enforcing the provisions of the act as to nonlicensees.

The court distinguished *Panhandle*, relying on the 1963 express legislative declaration in K.S.A. 75-3170, and stating thus:

> "Sections 1 and [*sic*] 31 referred to in the statutes are other statutes directing disposition of funds obtained by thirty-one state agencies, each of which authorizes the particular agency to convey funds pursuant to 75-3170. Fees collected under the truth-in-lending act are not mentioned; hence it cannot

> be said that 75-3170 is expressly applicable. Despite this, however, 75-3170 does appear to be direct legislative response to the inference posed in *Panhandle*, that is to say, it constitutes legislative declaration that twenty percent of regulatory fees collected is a reasonable reimbursement for supportive state services performed for the regulatory agency. It enumerates specific state services, all of which would be applicable in behalf of the consumer credit commission and its staff. The record contains no showing of any kind that twenty per cent of fees collected does not constitute reasonable reimbursement for other state supportive services and we have no finding, as in *Watson*, that the charge is out of all proportion to the costs involved.
>
> We conclude that the provision for payment into the state general revenue fund of twenty per cent of the fees does not convert the assessment into a revenue measure." 212 Kan. at 329-330.

Thus, under *Fidelity Investment*, the enforced contribution to the general fund of twenty percent of the regulatory fees collected by an agency does not, in and of itself, compel the conclusion that the fees collected exceed the amounts justified by the direct and indirect expenses of regulation. It may be that, in particular instances, the twenty percent contribution far exceeds the actual indirect costs incurred by and in behalf of that agency by other governmental agencies. We are advised, for example, that the State Banking Department contributed $171,341.56 to the general fund in the 1974-1975 fiscal year as twenty percent of its fee receipts. Similarly, the State Board of Embalming contributed $10,098.00. Whether these sums bear any relationship to the actual indirect costs which they are designed to defray is, of course, a factual question which might properly be addressed by the budgeting and auditing agencies of the state, but one which cannot be resolved merely as a question of law.

Yours very truly,

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