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January 16, 1985

ATTORNEY GENERAL OPINION NO. 85- 6

Honorable Rex Crowell, Chairman
Special Committee on Transportation and
Utilities
R.F.D.
Longton, Kansas 67352

Re: Taxation--Retailers' Sales Tax--Transfers from
General Fund to Highway Fund

Kansas Constitution--Legislature--Delegation
of Legislative Authority

Synopsis: A law which does not attempt to confer legislative power upon some person or group cannot be found to involve an unlawful delegation of legislative authority. The provisions of 1985 House Bill No. 2023, concerning the transfer of a portion of the sales tax receipts of the state from the general fund to the highway fund, do not attempt to delegate legislative power. Thus, those provisions do not involve an unlawful delegation of legislative authority. Cited herein: K.S.A. 79-34,147, 79-34,148, Kan. Const., Art. 2, §1, 1985 House Bill No. 2023.

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Dear Representative Crowell:

As chairman of the Special Committee on Transportation and Utilities, you seek our opinion on whether certain amendments proposed by the special committee which relate to the transfer of sales tax moneys from the state general fund to the state

highway fund involve an unlawful delegation of legislative authority to the secretary of revenue. The amendments are proposed in 1985 House Bill No. 2023.

Your concern arises from the fact that, under current law, the amount of sales tax revenue that is transferred from the state general fund to the state highway fund is set at a fixed percentage rate by K.S.A. 79-34,147. The statute, in relevant part, provides:

"(a) The secretary of revenue shall certify daily to the director of accounts and reports the amount equal to 9.19% of the total revenue received by the secretary . . . under the Kansas retailers' sales tax act . . . on the preceding day. . . .

(b) Upon receipt of such certification under subsection (a), the director of accounts and reports shall transfer from the state general fund to the state highway fund the amount computed as follows:

. . . .

(2) during the fiscal year ending June 30, 1985, the amount equal to 10/42 of the amount so certified. . . ." (Emphasis added!)

As the 9.19% rate is fixed by statute, this rate will not vary from year to year, but can be changed only by an amendment to the statute. In order to determine whether that percentage rate should be changed, the legislature, when it enacted K.S.A. 79-34,147 also enacted K.S.A. 79-34,148, which provides:

"On or before each December 1, the secretary of revenue shall determine the percentage of the total estimated revenues to be received under the Kansas retailers' sales tax act and credited to the state general fund during the fiscal year commencing on the ensuing July 1 which represents that portion of such estimated revenues which are attributable to the retail sale of new and used motor vehicles intended for use on the highways of this state. Upon making such determination, the secretary of revenue shall certify such percentage to the director of the budget and to the director of the legislative research department."

It is clear that when the provisions of K.S.A. 79-34,147 and 79-34,148 were originally enacted in 1983 (L. 1983, ch. 320, §§22, 23), the percentage determined by the secretary under K.S.A. 79-34,148 would be used for informational and planning purposes. Now, however, the special committee proposes legislation which would use this percentage rate as the rate of sales tax revenue that is to be certified to the director of accounts and reports under subsection (a) of K.S.A. 79-34,147. Specifically, the special committee has recommended that K.S.A. 79-34,148 be amended to include the language underscored below and to read:

"On or before December 1, the secretary of revenue shall determine the percentage of the total estimated revenues to be received under the Kansas retailers' sales tax act and credited to the state general fund during the fiscal year commencing on the ensuing July 1 which represents that portion of such estimated revenues which are attributable to the retail sale of new and used motor vehicles intended for use on the highways of this state, but such percentage shall never be determined to be more than .5% above nor less than .5% below the percentage determined under this section the immediately preceding year. Upon making such determination, the secretary of revenue shall certify such percentage to the director of the budget and to the director of the legislative research department."

Further, the special committee proposes to amend subsection (a) of K.S.A. 79-34,147 by making the following changes:

"(a) The secretary of revenue shall certify daily to the director of accounts and reports the amount-equal-to-9.19% percentage most recently determined under K.S.A. 79-34,148 and amendments thereto of the total revenues received by the secretary from the taxes imposed under the Kansas retailers' sales tax act and deposited in the state treasury and credited to the state general fund on the next preceding day that such revenues were so received and deposited."

Thus, the committee proposes to eliminate the fixed percentage rate now prescribed by statute and replace it with the percentage

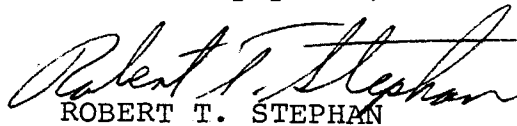
Representative Rex Crowell
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rate that is determined annually by the secretary of revenue. It has been questioned, however, whether this proposal involves an unlawful delegation of legislative power to the secretary of revenue, since the secretary's estimated percentage under K.S.A. 79-34,148 would be used as the basis for transfers of monies under K.S.A. 79-34,147.

Article 2, Section 1 of the Kansas Constitution provides: "The legislative power of this state shall be vested in a house of representatives and senate." Thus, under our constitution, it is the legislature that possesses the authority to legislate -- to make the law -- and such authority cannot be delegated to some other tribunal or person. See State v. Dumler, 221 Kan. 386, 391 (1977); State ex rel. v. Fadely, 180 Kan. 652 (1957); and Coleman v. Newby, 7 Kan. *82 (1871). In order to violate this constitutional principle, a law must attempt to confer legislative power, i.e. the power to make law, on a person or group. If such is not done, the statute clearly does not involve an unlawful delegation of legislative power, since there is no delegation of legislative power at all.

We state this obvious fact because, under the bill proposed by the special committee, we fail to perceive any attempt to confer legislative power upon the secretary of revenue. It appears to us that the law simply would require the secretary to perform two administrative duties. Specifically, under K.S.A. 79-34,148, the secretary would determine a percentage, within a range established by the legislature. Then, under K.S.A. 79-34,147, the secretary would certify an amount to the director of accounts and reports. Neither of these actions involves the exercise of legislative power. Thus, we do not believe the provisions of this proposed legislation involve an unlawful delegation of legislative authority.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
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RTS:JSS:RJB:jm