OFFICIAL OPINION NO. 15

May 25, 1965

Hon. Mark L. France
Auditor of State
228 State House
Indianapolis, Indiana

Dear Mr. France:

Your letter of March 30, 1965, requests my Official Opinion in regard to certain language contained in the Acts of 1965, ch. 225, § 5. Your specific questions are set forth as follows:

> "(1) Shall a city or town which has come into existence since the last preceding United States decennial census whose population is therefore based on a United States special census share in these certain distributions from the cigarette tax fund?
>
> "(2) If your opinion with respect to question (1) is in the affirmative, shall a city or town existing at the time of the last preceding United States census which now has a population based on a subsequent United States special census share in these certain distributions from the cigarette tax fund on the basis of the decennial or the special census?"

The Acts of 1965, ch. 225, § 5, *supra,* reads as follows:

> "SEC. 5. Acts 1947, c. 222 is further amended by adding a new and additional section thereto to be numbered 27d and to read as follows: Sec. 27d. On and after July 1, 1965 one-third of the entire amount of the cigarette tax fund of the State of Indiana remaining after charges thereto required by section 27a hereby is *appropriated for distribution to* the Cumulative Capital Improvement Fund of *cities and towns in like proportion as the population of each city or town bears to the total population of all cities and towns of the state, as determined by the last preceding United States decennial census.* The distribution of said sum shall be computed by the Auditor of State semiannually to effect distribution thereof on the first day of June and

> December in each year, and the auditor of state shall draw warrants to the treasurer of each city or town as designated in the distribution presented to the auditor by said department of revenue." (Emphasis added.)

In construing statutes of this state, the fundamental rule of statutory construction is to ascertain the legislative intent as therein expressed. *Roth v. Local Union No. 1460 of Retail Clerks Union et al.*, 216 Ind. 363, 24 N.E.2d 280 (1939); *State ex rel. Clemens v. Kern et al.*, 215 Ind. 515, 20 N.E.2d 514 (1939); *State of Indiana v. Mears*, 213 Ind. 257, 12 N.E.2d 343 (1938). A second rule of statutory construction requires that where a statute is subject to two interpretations —the one making the statute constitutional and the other rendering it unconstitutional—the interpretation upon which the statute can be upheld as constitutional should be the one adopted.

The Indiana Constitution, Art. 4, § 23, reads as follows:

> "In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

In applying the above-enumerated rules of statutory construction to the statutory language here under consideration and in light of the Indiana Constitution, Art. 4, § 23, *supra*, certain conclusions seem apparent.

(1) In respect to your first question, it would *not* appear to be the intent of the Legislature to preclude a distribution of 1965 cigarette tax proceeds to cities or towns which, although coming into existence subsequent to the taking of the 1960 United States decennial census, were in existence during the time in which monies for such 1965 cigarette tax distribution were being collected and accumulated by the state. Rather, that the Legislature did intend such cities and towns to equitably participate in a distribution of cigarette tax monies seems to be a more fair and reasonable interpretation of the above-quoted statutory language—and a United States special census to establish the population of a city or town coming into existence subsequent to the taking of the 1960 United States decennial census would appear to be an appropriate

method for determining such a city's or town's specific share of the cigarette tax monies available for distribution to all cities and towns within the state, pending the taking of the next United States decennial census.

An examination of certain decisions of the Supreme Court of Indiana would also appear to require the adoption of the above-referred-to interpretation of the statutory language here in question. Thus, in the case of *Railroad Commission of Indiana v. Grand Trunk Western Railroad Company*, 179 Ind. 255, 100 N.E. 852 (1913), the Supreme Court of Indiana states, at p. 262 of 179 Ind.:

> ". . . 'Where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state'. Art. 4, § 23, Constitution of Indiana. 'It is also well settled, however, that in making a *classification* of the subjects of legislation the classification *must have some reasonable basis on which to stand,* and must operate equally upon all within the class *and the reason for the classification must inhere in the subject-matter, and must be natural and substantial. A proper classification must also embrace all within the class to which it naturally belongs.' Hirth-Krause Co. v. Cohen, supra.* See, also, *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671, 80 N.E. 529, 14 L. R. A. (N.S.) 418, and cases cited." (Emphasis added.)

In the subsequent case of *Evansville-Vanderburgh Levee Authority District et al. v. Kamp etc.*, 240 Ind. 659, 168 N.E.2d 208 (1960), the Supreme Court of Indiana reaffirms the above-quoted proposition by stating, at p. 662 of 240 Ind.:

> "The trial court held the act violative of Article IV, Sections 22 and 23 of the Constitution of this State.
>
> "The legal issue presented is whether or not the act in question is special and local in nature and not of uniform and general operation. *The constitutional provisions referred to do not prohibit a classification of the objects of legislation so long as there is a relationship between the classification used and the purpose of the act which inheres in the subject matter. The classifi-*

> *cation may not be purely arbitrary. Fairchild, Prosecuting Atty., etc. v. Schanke, et al.* (1953), 232 Ind. 480, 113 N.E.2d 159; *Perry Civil Township v. Indianapolis Power & Light Co.* (1943), 222 Ind. 84, 51 N.E.2d 371; *Kraus v. Lehman* (1908), 170 Ind. 408, 83 N.E. 714, 84 N.E. 769." (Emphasis added.)

The court continues, by stating at p. 663 of 240 Ind.:

> ". . . we must keep in mind also the general principle that in construing the constitutionality of a statute it is the duty of the court to adopt any reasonable construction which favors its constitutionality. 5 I. L. E., Constitutional Law, § 13, p. 278."

Thus, the Indiana Constitution, Art. 4, § 23, *supra,* requires that a relationship exist between the classification of the subjects of legislation and the subject matter of that legislation—it requires that the classification be reasonable and that such reason must be inherent in the subject matter of the legislation and must be substantial.

In the case of *Heckler v. Conter et al.,* 206 Ind. 376, 187 N.E. 878 (1933), the Supreme Court of Indiana had occasion to consider the constitutionality of a statute which abolished the office of city treasurer in all second and fourth class cities, located in a county having a population of not less than 250,000 nor more than 400,000 and which conferred upon the county treasurer all of the rights, powers and duties of such city treasurers. Therein, the Supreme Court states, at p. 379 of 206 Ind.:

> "It is contended by appellees that the question as to whether a general law can be made applicable in a given case is for the legislature, and that the legislative determination of that question is not subject to review by this court. They rely upon the case of *Gentile v. State* (1868), 29 Ind. 409, and authorities which follow that opinion. But we cannot approve of the reasoning in those cases. In the Gentile Case it is conceded that the object of Section 23 was 'not to confer any power on the legislature, but to restrain that body in the exercise of an inherent power of

> sovereignty, which, in the absence of such a restriction, it would possess.' But *if the legislature may arbitrarily decide that a general law cannot be made applicable, and its decision is final and cannot be questioned, it is not restrained or restricted in any sense, and the constitutional provision is, if not a nullity, at least a mere admonition. . . .*" (Emphasis added.)

The Court continues, at p. 380 of 206 Ind., by stating:

> "In construing such legislation, the rule that every reasonable presumption must be indulged in favor of its constitutionality will apply, and if any state of facts can be reasonably conceived upon which it can be held constitutional, such state of facts will be deemed to exist. But if it is clear that a general law can be made applicable, a special or local law cannot be upheld. . . ."

In discussing the reasonableness of the legislative classification as set forth in that particular act, the Court states, at pp. 381 through 383 of 206 Ind.:

> ". . . It is well settled that the legislature may classify cities upon the basis of population for the purpose of applying methods of governmental organization, and that if the classification is such that the operation of the law will be the same in all parts of the state, under the same circumstances, the law will be considered general. But in such cases, *the classification must not be capricious or arbitrary, but must be just and reasonable, and based upon substantial distinctions germane to the subject matter and the object to be attained. The distinctions must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situation related to the subject matter of the legislation which require, necessitate or make expedient different or exclusive legislation with respect to the members of the class. The classification must embrace all who possess the attributes or characteristics which are the basis of the classification, and their difference from those excluded must be substantial and related to the purpose of the legislation. . . .*

> ". . . The fact that they are located in a county with a population of not less than two hundred fifty thousand nor more than four hundred thousand cannot possibly account for any difference in situation in respect to the need of a city treasurer or the propriety of the county treasurer acting as such." (Emphasis added.)

In my opinion, no requirement, necessity or expediency is served by precluding cities or towns which come into existence subsequent to a United States decennial census from proportionately sharing in the distribution of cigarette tax monies for years during which they were in existence and during which cigarette tax monies were being collected and accumulated by the state for a future distribution to the cities and towns of the state; nor would there appear to be a reasonable basis for such a classification, the reason for which is inherent in the subject matter of the statute and is a natural and substantial one.

I have, moreover, reviewed 1941 O. A. G., p. 110 and 1957 O. A. G., p. 131, No. 31, and find nothing therein which conflicts with the conclusion hereinabove reached.

(2) In answer to your second question, the legislative reference to "the total population of all cities and towns of the state, as determined by the last preceding United States decennial census" as that to which the population of any individual city or town should be compared clearly evidences the legislative intent to make distributions of cigarette tax proceeds to cities and towns depend upon United States decennial population figures rather than upon more frequently-changing population figures. Thus, such language is to be compared with the language providing for the distribution of motor vehicle highway account proceeds found in the Acts of 1941, ch. 168, § 3 as last amended by the Acts of 1949, ch. 270, § 1, as found in Burns (1949 Repl.), IND. STAT. ANN., § 36-2817, which reads, in part:

> ". . . This sum shall be allocated to the cities and towns upon the basis that the population of each city and town bears to the *total population* of all the cities

> and towns *at the last preceding United States census. . . .*" (Emphasis added.)

with the language providing for the distribution of alcoholic beverage tax proceeds found in the Acts of 1955, ch. 67, § 2, as found in Burns (1956 Repl.), IND. STAT. ANN., § 12-811b, which reads, in part:

> ". . . shall be allocated to each of the cities and towns of the state, upon the basis that the population of each such city or town bears to the *total population* of all cities and towns of the state, *according to the last preceding United States census.*" (Emphasis added.)

or with the language relative to the establishment of branch banks found in the Acts of 1933, ch. 40, § 224, as last amended by the Acts of 1963, ch. 350, § 1, as found in Burns (1964 Repl.), IND. STAT. ANN., § 18-1707, which reads, in part:

> ". . . according to the last preceding decennial United States census or special census. . . ."

It apparently was the intent of the Legislature to appropriate for distribution to the cities and towns of this state that share of the cigarette tax proceeds which their respective populations bear to the total population of all cities and towns in the state—both unit populations and total populations to be based upon the last preceding United States decennial census. Such would discourage the expenditure of public funds by the governing bodies of cities and towns in an effort to increase their relative shares of cigarette tax monies by means of United States special censuses. It is only where a city or town comes into existence subsequent to the taking of the last United States decennial census that necessity may require the use of a United States special census to establish the population of such city or town pending the taking of the next United States decennial census. Even as to such a subsequently-created city or town, however, I am led to believe that the population thereof, as of the time of the last preceding United States decennial census, could be determined by United States census figures relating to areas encompassed by natural and artificial boundaries and which areas are included within the newly-created city or town.

To recapitulate, it is my opinion that a city or town coming into existence subsequent to the last preceding United States decennial census, but in existence during the time in which monies for the next immediately forthcoming distribution from the cigarette tax fund were being collected and accumulated by the state, is entitled to share in the distributions of cigarette tax monies to the cities and towns of this state—the population of such city or town, for such purposes, being based upon a United States special census pending the taking of the next United States decennial census. It is my further opinion that a city or town existing at the time of the last preceding United States decennial census and which now has a population based on a subsequent United States special census continues to share in the distributions from the cigarette tax fund on the basis of its population as established by the last United States decennial census and not on the basis of a subsequent United States special census.

OFFICIAL OPINION NO. 16

May 26, 1965

Mr. Hobert P. Butler
Commissioner of Labor
1013 State Office Building
Indianapolis, Indiana 46204

Dear Mr. Butler:

The following is my answer to your letter requesting an Official Opinion concerning the Minimum Wage Law of 1965. Your exact questions are:

> ". . . we would like your opinion as to whether canneries, as are customary in the processing of tomatoes and other crops, are exempt from the coverage of the law under Section 4 (m) relating to agricultural labor. A clarification as to the point where labor in regard to farm products ceases to be 'agricultural labor' and becomes labor included within the coverage of the Act, from the time an agricultural product is planted to the time it reaches the consumer would be helpful.