

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

PHILIP C. ANDERSON; RAYMOND )  
WEILAGE, JR.; FEED SERVICE )  
CORPORATION, A Nebraska Cor- )  
poration; and MOREA LIQUIFEED )  
CORPORATION OF ILLINOIS, A )  
Nebraska Corporation, )

Plaintiffs, )

vs. )

NORBERT TIEMANN; FRANK )  
MARSH; RAY C. JOHNSON; )  
WAYNE R. SWANSON; MURRELL )  
McNEIL; STATE BOARD OF )  
EQUALIZATION AND ASSESSMENT; )  
and CLARENCE A. H. MEYER, )

Defendants. )

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DECREE

Now on this 30<sup>th</sup> day of August, 1967, this matter is before  
the Court for its decision.

Upon consideration of the pleadings, briefs and oral arguments  
of the parties through their respective counsel, and for the reasons more  
fully stated in an advisory opinion released by the Court concurrently with  
this decree,

IT IS ORDERED, ADJUDGED AND DECREED that the general  
demurrer of the defendants to this action be and hereby is sustained. Plain-  
tiff's are given fourteen (14) days from this date in which to amend their  
pleadings if such is their wish.

BY THE COURT

H. RONIN, J.

District Judge

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

PHILIP C. ANDERSON, et al.,     )  
                                  )  
                          Plaintiffs, )  
                                  )  
                          vs.             )  
                                  )  
NORBERT TIEMANN, et al.,     )  
                                  )  
                          Defendants. )

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MEMORANDUM OPINION

This is an action in equity by which Plaintiffs seek a declaratory judgment holding Sections 14 through 137 of Legislative Bill No. 377 enacted by the Legislature of the State of Nebraska to be unconstitutional, and therefore totally void and invalid as it relates to the State Income Tax, and that the Defendants be enjoined from enforcing the foregoing provisions of said Act.

The Defendants' demurrer to Plaintiffs' Amended Petition places squarely in issue the principal contentions of Plaintiffs. On the 21st day of August, 1967, the parties being present in Court by their attorneys, there was introduced two exhibits embodying certified copies of L.B. 79 of the Seventy-Fifth Session of the Nebraska Legislature, 1965, the statement of the Chairman of the Committee on Revenue and a portion of the minutes of this committee of the public hearing held on this bill which was later enacted.

Legislative Bill No. 79 of the 1965 Session of the Legislature provided for the submission of a constitutional amendment on the State Income Tax for the vote of the people and was subsequently approved by the electorate of this state and provides as follows:

"Sec. 1 B. When an income tax is adopted by the Legislature, the Legislature may adopt an income tax based upon the laws of the United States."

Section 14, as well as other portions, of L.B. No. 377 adopted by the 1967 Session of the Legislature of Nebraska expressly provide that any reference to the laws of the United States relating to federal income taxes shall include the Internal Revenue Code of 1954 ~~as amended~~, other provisions of the laws of the United States relating to federal income taxes and the rules and regulations issued under such laws, as the same may be or become effective, at any time or from time to time for the taxable year. (emphasis supplied)

Plaintiffs' first contention is that those provisions of L.B. 377 which attempt to automatically make effective future laws of Congress relating to the federal income tax as a part of state law are unconstitutional for the reason that the Nebraska Legislature has unlawfully delegated legislative power to the Federal Government in violation of Section 1, Article II and Section 1, Article III of the Nebraska Constitution. The validity of this challenge of Plaintiffs involves an interpretation of the foregoing Constitutional Amendment as to whether it grants such authority to the Legislature.

The Nebraska Legislature may lawfully adopt an existing law or regulation of another jurisdiction including federal laws by reference. *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W. 2d 277. However our legislature does not possess the power to adopt by reference future laws of other jurisdictions without provision in the State Constitution. *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492. The Constitutional Amendment having

been adopted subsequent to the Smithberger case, a determination is necessary as to whether it grants the legislature the authority necessary to adopt future federal laws relating to the income tax as they become effective.

The resultant effect of the Plaintiffs' position on this issue is that no additional authority was granted to the legislature by the electorate of this state in adopting the Amendment as the legislature already possessed power to adopt by reference existing laws of the United States. However, our Court has recognized the constitutional interpretation principle that each and every clause in a Constitution has been inserted for some useful purpose. Carpenter v. State, 179 Neb. 628, 139 N.W. 2d 541.

The Court is not persuaded with Plaintiffs' argument that the term "based upon" in the Amendment connotes exclusively something already in existence. It would appear that it could equally relate to that which comes into being at a later time. The Defendants further in their brief cite Webster's Seventh New Collegiate Dictionary which gives credence to this in defining the term "base" as:

"the point or line from which a start is made in an action or undertaking" or "the fundamental part of something."

Plaintiffs further assert that the wording of the Amendment does not expressly state that future changes of federal laws are to be included. Neither can it be said that the language of the Amendment contains words expressly restricting the "laws of the United States" as to present laws only, which presents the necessity for a judicial interpretation.

The minutes of the Committee on Revenue on the occasion of the public hearing on the aforesaid L.B. 79 of the 1965 Nebraska

Legislature clearly evidences that it was the intent of the legislature that power be given it by the Amendment to adopt the laws of the United States with future changes. The statements of two Senators support this and no statement is contained in the legislative history before the Court expressing a contrary intention.

Constitutional provisions should receive even broader and more liberal construction than statutes and are not subject to rules of strict construction. *Carpenter v. State*, supra. In *State ex rel Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W. 2d 63 our Court stated:

"Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the Court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid."

In applying these judicial directives, this Court holds that the Constitutional Amendment grants the Nebraska Legislature the authority to enact legislation which adopts by reference future federal laws on income tax as they become effective, and that the provisions of L.B. 377 relative thereto are valid.

Another issue raised by Plaintiffs is that Section 119 of Legislative Bill No. 377 which gives the Tax Commissioner the power to make certain rules and regulations delegates legislative authority and is violative of the Nebraska Constitution. This section provides as follows:

"The Tax Commissioner shall administer and enforce the income tax imposed by this act and is authorized to make such

rules and regulations and to require such facts and information to be reported, as he may deem necessary to enforce the income tax provisions of this act; Provided, that such rules, regulations and reports shall not be inconsistent with the laws of this state or the laws of the United States."

(emphasis supplied)

There are two express limitations on the rule making authority granted to the Tax Commissioner in this section of the Act. First, the rules and regulations are restricted in character to those which are to enforce the income tax laws of this state and including by reference the federal laws relative thereto. Second, the rules and regulations of the Tax Commission must be consistent with the state and federal laws.

The laws of the United States adopted by reference by L.B. 377 includes the Internal Revenue Code, Regulations of the Internal Revenue Department and court decisions interpreting them. *Willet's Estate v. C.I.R.*, C.A. La. (1966), 365 F. 2d 760. This constitutes a most comprehensive statement of federal law setting forth standards and directives in great detail, and which are supplemented with most of the 137 sections of L.B. 377. The legislature possesses the power to delegate to an executive department or official the authority to make rules and regulations that are administrative in nature. It is the opinion of this Court that because of the existence of this time-tested and currently functioning body of federal law in the income tax field and the restrictions set forth in Section 119 of the Act, that the rule making authority granted to the Tax Commissioner is administrative

in its nature and is not only necessary for the successful operation and enforcement of L.B. 377 but is a valid and lawful delegation of authority. Lincoln Dairy Co. v. Finigan, 170 Neb. 777 at page 780, 104 N.W. 2d 227.

Plaintiffs charge in Paragraph 10 of their Amended Petition that Sections 14 through 137, and each of them, of L.B. 377 are:

"invalid and unconstitutional in that they give to the State Tax Commissioner such broad and unrestricted powers that they constitute an unlawful delegation of state legislative power."

Section 115 of the Act contains certain prescribed duties required of persons subject to the Act and provides that anyone who wilfully fails to comply with said duties required by law or regulations,

"shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than three hundred dollars, or be imprisoned not more than six months, or be both so fined and imprisoned, together with the costs of prosecution." (emphasis added.)

The Court holds that to the extent that said Section 115 provides for delegation of legislative powers to the Tax Commissioner to make regulations the violation of which would constitute a misdemeanor with the penalty provided is invalid and unconstitutional for the reasons clearly stated in Lincoln Dairy Co. v. Finigan, supra. However, the provision in Section 119 that violation of laws constitute misdemeanors is valid for there would be no delegation of the legislative power by the legislature involved.

An examination of the prayer of the Plaintiffs' Amended Petition is that the State Income Tax provisions of L.B. 377 which comprise Sections 14 through 137, and each of them, be held totally null and void, invalid and unconstitutional and that the Defendants be enjoined in any manner from enforcing said Sections, and each of them. The finding of the Court that a portion of Section 115 is invalid would not void the remainder of the provisions of this Section and the Defendants' demurrer should therefore prevail notwithstanding the constitutional defect in said Section.

The Court rejects other contentions of Plaintiffs as to similar grants of authority by the legislature to the Tax Commissioner in other sections of the Act. It is the opinion of this Court that an examination of these sections challenged in relation to the entire Act does not grant the Tax Commissioner the power to prescribe and write basic tax law, and are reasonable in scope and content. The employment of technical terms and accounting provisions embodied in the subject matter of this income tax legislation by its very nature requires a grant of extensive administrative authority to the Tax Commissioner whose duties are manifestly numerous and burdensome.

Plaintiffs also contend that L.B. 377 provides for a sales tax, a use tax, an income tax, and a franchise tax, thereby



violating Article III, Section 14 of the Nebraska Constitution, which provides that:

"No bill shall contain more than one subject."

The Defendants in answer to this charge aver that L.B. 377 pertains to but one subject, that of taxation. It is not the scope of a bill but whether it has but one general object and which does not contain matter not germane thereto that is determinative of this issue. *Rein v. Johnson*, 149 Neb. 67, p. 80; 30 N.W. 2d 548. The various taxes provided for in this Act are closely related and germane to each other and are all to be administered by the State Tax Commissioner. The various taxes are clearly stated in both the Title as well as the body of the Act and together comprise and constitute components of the tax structure of this state. This Court holds that its provisions contain but one general subject, that being taxation, and is not violative of the aforesaid Constitutional provision.

Plaintiffs further assail the constitutionality of Section 15 (3) (a) of L.B. 377 which allows a "food sales tax credit" against the tax of residents of this state but not to nonresidents. Plaintiffs contend this variance in exemption favors residents and violates the privileges and immunities and equal protection clauses of the Federal Constitution as well as the due process provision contained in Article I, Section 3 of the Constitution of the State of Nebraska. The original Plaintiffs to this action are two individual residents of the state and two Nebraska corporations, and the Defendants in their brief submitted to the Court challenged the right of these Plaintiffs to raise this issue. Plaintiffs thereupon obtained leave of Court to make

a nonresident employee of the Plaintiff Morla Liquifed Corporation of Illinois as an additional party plaintiff. The said Plaintiff corporation alleges that it intends to continue the employment of said employee who will work in Nebraska for between two to six weeks during the year 1968 and that his wages while being in Nebraska would be subject to the Act but that as a nonresident he will not be eligible for the "food sales tax credit" provided in Section 15 (3) (a) of the Act.

Our Court has repeatedly held that they will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected

"and that the Courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future."

Metropolitan Utilities District v. Merritt Beach Company, 179 Neb. 783, page 792, 140 N.W. 2d 626. It appears to this Court that the additional party plaintiff does not give Plaintiffs the standing to raise this issue as there could be many factors that would make it conjectural and speculative as to whether this additional plaintiff will be paying a state income tax in 1968 and what, if any, sales tax he will have paid. Excluding this finding for the reason it does not directly meet the Plaintiffs' contention, it would appear that the classification of exemptions complained of is not unreasonable discrimination as generally nonresidents do not pay sales tax of consequence in Nebraska and are not entitled to favored treatment and is therefore valid.

Another issue raised by Plaintiffs relates to Section 34 (2) of the Act which imposes a tax "for the privilege of exercising its franchise or doing business in this state in a corporate capacity" the tax to be measured by a corporation's (or other entity) entire net income derived from sources within this state. Plaintiffs contend that under prior decisions of our Court a franchise tax is held to be a property tax and is now prohibited by Article VIII Section 1A of the Nebraska Constitution, which provides that

"the state shall be prohibited from  
levying a property tax for state  
purposes."

The Court holds that the provisions of Section 34 (2) are based on the income of a corporation and is an excise tax or privilege tax and not a property tax within the meaning of the above Constitutional provision. See Annotation, 71 A.L.R. 258; State v. Savage; 65 Neb. 714, 91 N.W. 716; State v. Vinsonhaler, 74 Neb. 675, 105 N.W. 472. Other objections of the Plaintiffs as to the validity of this Section of the Act cannot be sustained if this provision relates to the taxation of the privilege given a corporation to do business rather than in a property sense.

There are numerous other constitutional objections raised by Plaintiffs in their briefs which this Court declines to comment on in this advisory opinion. Most of these objections would not in themselves render the State Income Tax as a whole invalid because of the provisions of the seperability section No. 136 of the Act. Furthermore, a number of these constitutional objections do not present a justiciable issue for the Plaintiffs, and the Court generally upholds the validity of the provisions of this comprehensive

tax legislation with the exception noted. The Court further sustains the general demurrer filed on behalf of all the Defendants by the Attorney General of this state and which order appears separately herein and the reasons for the ruling of the Court are stated in this memorandum opinion.

Dated and entered this 30<sup>th</sup> day of August, 1967.

Herbert A. Ponce

District Judge