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VOLUME NO. 45

OPINION NO. 20

INITIATIVE AND REFERENDUM - Power to amend law pending referendum election;
INITIATIVE AND REFERENDUM - Power to repeal law subject to pending referendum election;
STATUTES - Effective date of law approved by referendum after suspension by referendum petition;
MONTANA CODE ANNOTATED - Sections 1-2-109, 1-2-201(1), 13-27-105;
MONTANA CONSTITUTION OF 1889 - Article V, section 1;
MONTANA CONSTITUTION OF 1972 - Article III, section 5;
MONTANA LAWS OF 1993 - Chapter 634;
OPINIONS OF THE ATTORNEY GENERAL - 45 Op. Att'y Gen. No. 18 (1993), 42 Op. Att'y Gen. No. 21 (1987).

- HELD: 1. The Legislature lacks the power to modify the measure upon which the voters will vote in the election on IR 112. That measure is HB 671, as codified in 1993 Mont. Laws, ch. 634.
2. The Legislature retains the power to enact measures prior to the referendum election on IR 112 which change the taxation of income and corporate licenses. Such measures may be enacted contingent upon the approval of HB 671.
3. The Legislature lacks the power to repeal legislation whose effectiveness has been suspended by referendum petition under Mont. Const. art. III, § 5, until the legislation has become effective following a vote of the people.
4. If approved by the voters, HB 671 becomes effective upon the completion of the canvass of the election results.
5. Approval of HB 671 would include approval by the people of its retroactive application to tax years beginning after December 31, 1992.

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Hon. Fred Van Valkenburg
President
Montana State Senate
Capitol Station, Room 305
Helena, MT 59620

Dear Senator Van Valkenburg:

You have requested my opinion on four questions relating to the interrelationship between 1993 Mont. Laws, ch. 634 (commonly known and hereafter referred to as "HB 671"), a bill which made significant changes in Montana's income and corporate license tax laws, and IR 112, an initiative petition seeking a referendum vote on HB 671. Following the enactment of HB 671 by the legislature and its signature by the Governor, voters submitted petitions to the Secretary of State bearing the signatures of a sufficient number of voters both to refer HB 671 for approval or rejection by the voters and to suspend its effectiveness pending the referendum election. You have posed questions which I have phrased as follows:

1. May the legislature enact a bill requiring the election on IR 112 be held on a date other than November 8, 1994, the date which appeared on the initiative petitions and on which the next regularly scheduled statewide general election will be held?
2. Prior to the election on IR 112, does the Legislature have the power to amend HB 671? If so, what effect would the amendment have on the referendum election?
3. Prior to the election on IR 112, does the Legislature have the power to repeal HB 671? If so, what effect would the repeal have on the referendum election?
4. If HB 671 is sustained by the voters in a referendum election held in 1994, what effect will the result of the referendum election have on income and corporate license tax liabilities for calendar years 1993 and 1994?

In your opinion request, you asked that I answer the questions you pose serially rather than in a single opinion, due to the exigencies of the current special legislative session. I have earlier submitted a response to question 1 under separate cover.

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45 Op. Att'y Gen. No. 18 (1993). My responses to questions 2, 3 and 4 follow herein.

I.

The Montana Supreme Court has described the referendum as a species of legislative action, akin to submission of a bill to a third house of the legislature for its concurrence prior to its finally becoming law. State ex rel. Hay v. Alderson, 49 Mont. 387, 407, 142 P. 210, 213 (1914). However, the analogy between the referendum and a third house of the legislature is not perfect, since the people lack the ability, which a legislative chamber has, to enact amendments to a referred law. Their choice, rather, is to approve or reject it as is. The referendum is, in effect, a popular veto of the actions of the legislative assembly. Id.

Your second question asks whether and to what extent the legislature may amend HB 671 prior to the referendum election. The reference to amendments to HB 671 lends itself to confusion. HB 671's effectiveness is suspended, and it will not become effective until that suspension is lifted through an affirmative vote of the people. Technically, there is nothing for the legislature to amend until such time as HB 671 is in effect or finally approved by the voters. There is, however, a referendum petition which will be the subject of a public vote at some time in the future. There is also a body of law with reference to income and corporate license taxes. Your inquiry deals with the extent of the legislature's power to enact laws which either affect the wording of the pending referendum ballot issue or change the laws with respect to income and corporate license taxes.

Your question must be divided into two parts. First, does the legislature have the power to change the text of the law which will be referred to the voters in the IR 112 election? Second, does the legislature retain the power, prior to the IR 112 election, to make changes in the income and corporate license tax laws, either as interim measures to be in effect prior to the election or as changes in the law to become effective contingent upon approval of IR 112 by the voters?

The power of the legislature is plenary, such that the legislature may enact laws on any subject not forbidden by the constitution. See, e.g., State ex rel. Bonner v. Dixon, 59 Mont. 58, 76, 195 P. 841, 844 (1921). The constitutions of some states have affirmatively removed initiated or referred laws from the legislature's power. See, e.g., Ward v. Industrial Comm'n, 70 Ariz. 271, 219 P.2d 765 (1950) (applying art. IV, pt. 1, § 1(6) of the Arizona Constitution, which prohibits the legislature from

amending or repealing initiated or referred laws which have been approved by the voters). Montana's constitution has no such language, and the Montana Supreme Court has clearly held that the legislature retains the power to modify referred laws. State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920); 42 Op. Att'y Gen. No. 21 (1987). In First Continental Sav. & Loan v. Director, 229 Md. 293, 183 A.2d 347, 350-51 (1962), the Maryland Court of Appeals followed this reasoning in rejecting a claim that the filing of referendum petitions divested the legislature of the power to adopt a measure pending the referendum election.

I find the reasoning of the court in Ginsburg v. Kentucky Util. Co., 83 S.W.2d 497 (Ky. Ct. App. 1935), persuasive on this point as well. The case concerned a local ordinance providing for construction of a municipal electric utility. The voters petitioned for a referendum election on the ordinance, and they were granted an injunction against the sale of the bonds contemplated by the ordinance until such time as the measure was approved by the voters. After the petition was filed, the town council repealed the ordinance. The court held that the repealer did not violate the injunction, nor did it unlawfully evade the referendum process. The voters sought the referendum specifically to prevent the ordinance from taking effect. The town council gave them the result they sought by repealing the ordinance. As long as the repealer was not a subterfuge under which the town sought to reenact a similar ordinance and evade the referendum election, the court found no impropriety in the repealer.

The holding in Ginsburg is consistent with what appears to be the majority rule in other jurisdictions, that a legislative body retains the power to amend a law pending a referendum election, so long as the legislative body acts in good faith and does not seek to evade the referendum process by repealing and subsequently reenacting the referred law without significant change. See, e.g., Wicomico County v. Todd, 260 A.2d 328 (Md. 1970); Gilbert v. Ashley, 209 P.2d 50, 51 (Cal. Ct. App. 1949); Utah Power & Light Co. v. Ogden, 79 P.2d 61 (Utah 1938); Keighly v. Bench, 63 P.2d 262, 265 (Utah 1936); Megnella v. Meining, 157 N.W. 991, 992 (Minn. 1916); see also Annotation, 33 A.L.R.2d 1118, 1130-34 (1953) (collecting cases); but see Oklahoma Tax Comm'n v. Smith, 610 P.2d 794, 806 (Okla. 1980) (contra); In re Referendum Pet. No. 1, 220 P.2d 454, 459 (Okla. 1950) (contra); Opinion of the Justices, 174 A. 853, 854 (Me. 1933) (contra). The Montana Supreme Court has not had occasion to decide this issue, but I believe it would follow the majority rule.

In Oklahoma Tax Comm'n v. Smith, 610 P.2d 794 (Okla. 1980), the Oklahoma Supreme Court dealt with a related but distinct issue, holding that the legislature retained the power to adopt laws dealing with subject matter which was before the voters in a pending initiative election. The court distinguished the situation presented by your request for opinion, suggesting that the rule with respect to a referendum would be different and that the legislature could not amend the law in an area in which a referendum election was pending. Id. at 806, citing In re Referendum Pet. No. 1, 220 P.2d 454 (Okla. 1950).

The latter observation is dictum, and for the reasons discussed herein I do not find it persuasive. I do agree with the Smith court as to one aspect of its opinion, however. In reaching its conclusion, the Oklahoma court held that the legislature lacks the power to change the terms of the measure upon which the people will vote. 610 P.2d at 806. The issue which will be submitted to the voters in the referendum election currently scheduled for November 8, 1994, will be the terms of HB 671 as enacted by the Fifth-third Legislative Assembly and codified in 1993 Mont. Laws, ch. 634. That is the "act of the legislature" upon which the people have exercised their power of referendum, see Mont. Const. art. III, § 5, and the legislature does not have the power to require submittal of a different issue in the IR 112 referendum election. A bill requiring that the referendum election be conducted with respect to a different amended act would clearly infringe the people's right of referendum. Thus, it is my opinion that the legislature does not have the power to enact a bill changing HB 671 as it will be submitted to the voters.

However, the ordinary powers of the legislature have not been otherwise diminished by the referendum power found in article III, section 5 of the constitution. The legislature remains free to adopt legislation dealing with income and corporate license taxes. Thus, the legislature would have the power to enact a law providing that, upon the contingency of HB 671 becoming effective following a referendum election, its provisions will be amended in some regard, or even repealed entirely. Cf. 2 Sutherland Statutory Construction § 33.07 & n.6 (5th ed. 1993) (collecting cases holding that legislation may be made effective contingent upon a vote of the people). As noted above, the Montana Supreme Court has clearly held that the legislature has the power to amend laws adopted by initiative or referendum. State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920); 42 Op. Att'y Gen. No. 21 (1987).

The legislature could also make changes in the income and corporate license tax laws, including changes effective only during the

period when HB 671's effectiveness is suspended by the current referendum petitions. If the law were otherwise, the legislature would be powerless to act in the face of an emergency situation which could conceivably arise either from the people's power to suspend the effectiveness of laws pending a referendum or from other unrelated exigencies.

A hypothetical example illustrates the point. HB 671, in addition to adopting changes in the tax laws, repealed the existing provisions for itemized deductions for income tax purposes. 1993 Mont. Laws, ch. 634, § 22. Suppose, for example, the legislature had placed the repealer language from HB 671 in a separate bill rather than incorporating it in HB 671. The suspension of HB 671 effectively reinstated the income tax laws previously in effect, to the extent they had been changed by HB 671. However, the referral of HB 671, and the suspension of its effectiveness, would not of itself supplant a separately enacted repeal of the existing tax deduction laws. Under this hypothetical state of facts, if the referendum on HB 671 were to have the effect of divesting the legislature of the power to act in this area pending the election, Montana would have an income tax structure with no provisions for itemized deductions from income. Nothing would preclude the legislature from enacting provisions allowing itemized deductions pending the referendum election in such a case.

The universe of potential amendments to existing corporate and income tax law is endless, and an attempt to evaluate all of them quickly enters the realm of speculation and conjecture. The legislature should be aware, however, that courts in other jurisdictions have held that amendments may not be used to infringe the people's power of referendum. Consequently, legislation whose effect was to undo the suspension of HB 671 prior to the referendum election might be vulnerable to a successful court challenge, and could not be relied upon to obviate the need for an election on IR 112. See Citizens for Financially Responsible Gov't v. Spokane, 99 Wash. 2d 413, 662 P.2d 845, 852 (1983).

In sum, the legislature retains the power to enact laws dealing with the subject matter of income and corporate license taxes, despite the pending referendum election on HB 671. The enactment of legislation in this area cannot change the text of the measure to be submitted to the voters and any enactments of the legislature in this area will not affect the necessity of holding a referendum election on IR 112.

II.

Your third question deals with the legislature's power to repeal HB 671 prior to the referendum election. Because of the peculiar status of HB 671 as a law suspended by referendum petition, it is my opinion that the Legislature does not have the power to repeal it.

A bill may not be "repealed" prior to its enactment by the legislative authority. Repeal signifies the abrogation of one statute by another. Butte & Boston Consol. Mining Co. v. Montana Ore Purchasing Co., 24 Mont. 125, 133, 60 P. 1039, 1042 (1900). HB 671 has not been finally enacted by the legislative authority of the State of Montana, and it is therefore not a "statute." It lacks the concurrence of the people, and pursuant to the terms of Mont. Const. art. III, § 5(2), it becomes operative as law "only after it is approved at an election." See also Mont. Code Ann. § 13-27-105(3). Because its effectiveness is suspended pending further legislative action through the referendum process, it is not a statute and it may not be repealed by the legislature until after the people have given it their approval.

If HB 671 had not been suspended by the referendum petitions, different considerations would come into play. Article III, section 5, provides that a law which has not been suspended "is in effect." The Montana Supreme Court, in interpreting the predecessor provision of the 1889 constitution, held that a law which has not been suspended is in effect until the result of the election disapproving it is proclaimed as provided by law. Lodge v. Ayers, 108 Mont. 527, 534-35, 91 P.2d 691, 694-95 (1939); Fitzpatrick v. Board of Examiners, 105 Mont. 234, 240-41, 70 P.2d 285, 287-88 (1937). I express no opinion here on the issue, which your opinion request does not present, of whether the legislature may repeal a law which is the subject of a pending referendum election but whose effectiveness has not been suspended under Mont. Const. art. III, § 5.

There is authority in other states for the proposition that repeal of a law subject to a pending referendum election obviates the need for the election to be held. See, e.g., Yakima v. Huza, 407 P.2d 815 (Wash. 1965). Since it is my opinion that the legislature may not repeal HB 671 prior to its final enactment by the people, I need not address the issue of whether repeal would obviate the need for an election.

However, the legislature retains the power to withdraw its consent to a law it has enacted which has been the subject of a successful referendum petition. Just as the concurrence of the people is

required to sustain such a law, the continued concurrence of the legislature is required to maintain its effectiveness. The legislature retains the power to repeal laws enacted by initiative or referendum. State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920); 42 Op. Att'y Gen. No. 21 (1987). If HB 671 were to be approved by the people, the legislature would retain the power to call itself into session the day after the election results were official and repeal the law in its entirety, if it chose to do so. The only lawful check on such activity, other constitutional requirements having been observed, is in the responsibility of the legislators to answer to the voters at the ballot box for their actions. See Oklahoma Tax Comm'n v. Smith, 610 P. 794, 806 (Okla. 1980).

III.

Your fourth question deals with the effective date of HB 671 if it is approved by the voters in the referendum election. You inquire whether HB 671 can have any effect on the tax liability of a Montana taxpayer before the time it is approved by the voters.

With regard to this question, the language of the 1889 constitution is clearer than that of its 1972 counterpart. Article V, section 1 of the 1889 constitution provided, in pertinent part:

Any measure referred to the people shall still be in full force and effect unless such petition be signed by fifteen per cent. of the legal voters of a majority of the whole number of the counties of the state, in which case the law shall be inoperative until such time as it shall be passed upon at an election, and the result has been determined and declared as provided by law.

(Emphasis added.) The intent of this language is clear. It holds "inoperative" a suspended law "until" it has been approved by the people in a referendum election.

Article III, section 5(2) of the 1972 constitution contains the following language on the effectiveness of a law subject to a referendum:

An act referred to the people is in effect until suspended by petitions signed by at least 15 percent of the qualified electors in a majority of the legislative representative districts. If so suspended the act shall become operative only after it is approved at an election, the result of which has been determined and declared as provided by law.

While the first sentence of the 1972 constitutional provision, read in isolation, would appear to allow a construction that a suspended law is effective with respect to transactions which occur "until" petitions bearing sufficient signatures have been filed to suspend it, in my opinion this would be an erroneous construction for two reasons. First, and most important, it would not give full effect to the second sentence of the section, which states that a suspended provision "shall become operative only after it is approved at an election." (Emphasis added.) This sentence clearly contemplates that a suspended provision is "inoperative" in the same sense as that intended by the 1889 constitution, i.e., it is of no force and effect until approved at an election.

Second, there is no indication in the constitutional convention proceedings that the change in language between the 1889 and 1972 constitutions was intended to work a change in the law. Rather, the transcripts and committee reports with respect to the provision which became article III, section 5 clearly suggest that the convention thought it was using clearer and more modern language to express the same legal concepts which were found in the 1889 constitution. See, e.g., II 1972 Mont. Const. Conv. 820 (1981) (committee report stating that "[t]he only changes" from the 1889 version were in the number of petition signatures required, and that the two provisions were otherwise "analogous"); VII 1972 Mont. Const. Conv. 2717 (1981) (remarks of Delegate Etchart) (stating that "the only changes" from the 1889 provision were in the number of signatures required, and that the 1972 language was "parallel" to the earlier language).

The legislature has specifically addressed the effectiveness of initiatives and referenda in Mont. Code Ann. § 13-27-105, which provides in pertinent part:

(3) Unless specifically provided by the legislature in an act referred by it to the people or until suspended by a petition signed by at least 15% of the qualified electors in a majority of the legislative representative districts, an act referred to the people is in effect as provided by law until it is approved or rejected at the election. An act that is rejected is repealed effective the date the result of the canvass is filed by the secretary of state under 13-27-503. An act referred to the people that was in effect at the time of the election and is approved by the people remains in effect. *An act that was suspended by a petition and is approved by the people is effective the date the result of the canvass is filed by the secretary of state under 13-27-503.*

(Emphasis added.) In my opinion, HB 671 is currently not "in effect," and will not be "in effect" until the results of an election approving it are established by canvass, as provided in Mont. Code Ann. § 13-27-105.

If HB 671 were silent with respect to its effective date, the above discussion would be dispositive, and HB 671, if approved by the voters, would be applicable to income earned after it becomes effective as provided in Mont. Code Ann. § 13-27-105. However, HB 671 contains a peculiar effective date provision which, in my opinion, compels a different result for this piece of legislation.

All legislation has an effective date, either a date particularly stated in the bill itself, or, if no date is specified, either January 1, July 1 or October 1 following passage and approval, depending on the nature of the statute. Mont. Code Ann. § 1-2-201(1). Further, legislation may be made to operate retroactively in some cases if the legislature expressly so declares. Mont. Code Ann. § 1-2-109.

HB 671 contains the following effective date provision:

[This act] is effective on passage and approval and applies retroactively within the meaning of 1-2-109, to tax years beginning after December 31, 1992.

1993 Mont. Laws, ch. 634, § 23. This provision is part of HB 671, and will be among the provisions submitted to the voters for approval pursuant to IR 112. The voters will not be given the option of amending HB 671 to change its effective date, since the referendum process envisions only a choice between approval, in toto, of the legislative enactment, or disapproval. If the voters approve HB 671, it is my opinion that they will have approved its retroactive application to tax years beginning after December 31, 1992.

You have not asked my opinion as to the specific issue of whether the legislature, or the people through referendum, may, consistent with the federal or state constitutions, enact a bill changing the tax rate applied to income earned in earlier tax years, as HB 671 would do if approved by the voters. I express no opinion herein on that question, in keeping with the longstanding practice of this office to avoid expressing opinions on the constitutionality of proposed legislation, especially when no opinion on the constitutional issue has been requested.

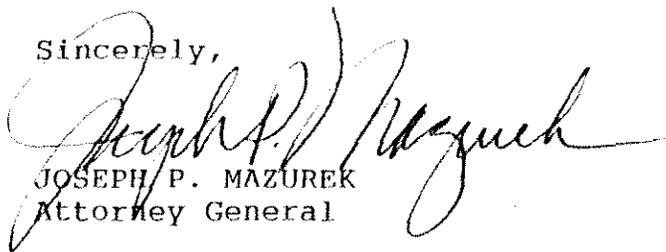
IV.

The discussion in Parts I and II above refers only to the existence of legislative power under our constitution to repeal HB 671 prospectively or to change the income and corporate license tax laws pending the referendum election. I express no opinion as to the advisability of any substantive amendments to Montana's tax laws pending the outcome of the referendum election. I note, however, that the Montana Supreme Court has been vigilant in protecting the people's right of initiative and referendum, and any legislation touching these issues certainly will, if challenged, receive exacting scrutiny by the courts to ensure that it does not interfere with the right of the people to express their will with reference to HB 671.

THEREFORE, IT IS MY OPINION:

1. The Legislature lacks the power to modify the measure upon which the voters will vote in the election on IR 112. That measure is HB 671, as codified in 1993 Mont. Laws, ch. 634.
2. The Legislature retains the power to enact measures prior to the referendum election on IR 112 which change the taxation of income and corporate licenses. Such measures may be enacted contingent upon the approval of HB 671.
3. The Legislature lacks the power to repeal legislation whose effectiveness has been suspended by referendum petition under Mont. Const. art. III, § 5, until the legislation has become effective following a vote of the people.
4. If approved by the voters, HB 671 becomes effective upon the completion of the canvass of the election results.
5. Approval of HB 671 would include approval by the people of its retroactive application to tax years beginning after December 31, 1992.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/cdt/dm