Opinion No. 53-5645

January 26, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Edward M. Hartman State Comptroller Santa Fe, New Mexico

*{*30}* This is in reply to your letter of January 15, 1953, in which you ask for an opinion and comment upon a proposed amendment to § 76-1220 N.M.S.A., relating to individual income tax rates.

*{*31}* You have enclosed with your letter a copy of § 76-1220 as it would read after the proposed amendment. That portion of the amendatory language which need be considered in this opinion reads as follows:

(e) **Provided, however, that in the case of resident individuals who have an adjusted gross income of $ 10,000.00, or under, as shown on the Federal Return in lieu of the personal exemptions as provided by 76-1222, and any and all other deductions permitted by the Act, shall pay a tax equal to three per centum (3%) of the total income tax that would be payable for the same taxable year to the United States under the provisions of the Internal Revenue Code, without the benefit of the deduction of the tax payable hereunder to the State."**

In the opinion of this office the proposed amendment is objectionable on several grounds. Firstly, in our opinion, it would violate Art. IV, § 18 of the New Mexico Constitution, which provides that:

"No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended and extended shall be set out in full." In State v. Armstrong, 31 N.M.

220, the Supreme Court was confronted with a question very similar in its essentials to that which is presented here. The Legislature, in §§ 1 and 2, Ch. 118, Laws of 1923, had sought to adopt by reference the penal provisions of the National Prohibition Act as the law of this state. Only the title of that act was referred to, and the court held that Art. IV, § 18, New Mexico Constitution, was thereby violated in that the Legislature had attempted to extend the provisions of the federal act without setting out its provisions in full. The court recognized that in cases where an act is complete in itself, it may adopt rules of construction or modes of procedure for carrying out its provisions by reference to other statutes. The court held, however, that reference to a prior existing law concerning mere methods of procedure, but that positive and substantial rights were involved.

In the proposed amendatory language you submit, reference is made merely to the "Internal Revenue Code", which in our opinion is, under the doctrine of the Armstrong

case, no more adequate than reference to a title of an existing federal act, Likewise, as in the Armstrong case, it cannot be contended that the legislation sought to be adopted by reference relates to mere procedural matters or methods. It is quite true that the tax sought to be imposed by this amendatory language would not be the same tax, in amount, as that paid under the provisions of the Internal Revenue Code. However, in our opinion, the determinant of what the New Mexico tax shall be is dependent upon the Federal Code, and it would therefore be no less objectionable if the formula imposed by statute were 1%, 50% or 100%, rather than 3%.

The amendatory language would be open to further attack, even if Art. IV, § 18 New Mexico Constitution did not exist. (Many states do not have such a constitutional provision, which accounts for the seeming inconsistency in some of the decisions on "reference statutes"). It is clear from the words "shall pay a tax equal to three per centum (3%) of the total income tax that would be payable for the same taxable year . . . under the provisions of the Internal Revenue Code", that the amendatory language does not purport to adopt a prior existing law. It is apparent, *{*32}* in our opinion, that the language quoted directly above would impose three per cent of whatever the tax would be under the Internal Revenue Code in any particular year. As the burden of federal taxation became more or less onerous so would the New Mexico tax vary for those taxpayers with an adjusted gross income of less than $ 10,000. In short, this amendatory language seeks to adopt by reference future, as well as present, federal legislation.

The principle is firmly established that a State Legislature has no power to delegate any of its legislative powers to an outside agency. This doctrine is inherent in such constitutional provisions as Art. IV, § 1, which reads in part as follows: "The legislative power shall be vested in Senate and House of Representatives which shall be designated the Legislature of the State of New Mexico . . ." Despite this rule it is the majority view that a state does not so invalidly delegate its legislative authority by adopting a law of the United States or another State, if such law is already in existence or operative. **11 Am. Jur. 931, Anno. 79 L. Ed. 502,** et seq. Presumably, such would be the rule in New Mexico if Art. IV, § 18 were complied with. See **Armstrong v. State,** supra. This doctrine was followed in **Santee Mills v. Query, 115 SE 202,** where the South Carolina Legislature had passed a statute imposing an income tax equal to one-third of the federal income tax for which the taxpayer was liable under the Act of Congress and the regulations promulgated by the Department of Internal Revenue. The court construed the statute as referring to and adopting only the Federal Act and regulations as they existed at the time of the state's statute, and not to include future enactments or regulations. Hence the act did not constitute an invalid delegation of legislative authority, the court concluded.

The proposed amendatory language you have submitted cannot be given such a construction as was given the South Carolina statute. What is clearly indicated is an adoption, by reference, of future federal legislation and regulations. By the weight of authority when an act adopts by reference future or prospective federal legislation an unconstitutional delegation of legislative authority results. See **Anno. 133 ALR 401;**

Hutchins v. Mayo, 143 Fla. 707, 197 So. 495. Certainly this majority rule is sound, in our opinion, and is wholly consistent with the condemnation by Judge Watson in **State v. Armstrong** of "blind legislation".

Finally, the proposed amendatory language is open to still another objection. In our opinion the language would constitute an unreasonable classification, that is, an unreasonable distinction between persons whose adjusted gross income exceeds $ 10,000.00 and those whose adjusted gross income is below $ 10,000.00. For instance, in our opinion it is apparent that if the proposed amendatory language were adopted, a resident individual with an adjusted gross income of $ 9,000.00 for 1952 would have to pay a substantially larger tax than one who had an adjusted gross income of $ 11,000.00 and who could therefore pay his tax without reference to the Internal Revenue Code. This differential could of course vary from year to year, but even if federal income taxes were substantially reduced, this arbitrary classification would be no less objectionable.

In summary, it is our opinion that the proposed amendment to § 76-1220 N.M.S.A. is objectionable on the following grounds:

1. As violative of Art. IV, § 18 New Mexico Constitution.

*{*33}* 2. As an invalid delegation of legislative authority in derogation of Art. IV, § 1.

3. As an unreasonable classification of two categories of resident individual taxpayers.

We trust that this opinion has answered all your questions on this subject.

By: W. F. Kitts

Asst. Attorney General