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STATE OF ALASKA
THE LEGISLATURE

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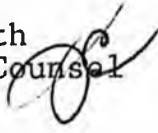
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 12, 1990

SUBJECT: Draft CSSB 272 (Judiciary)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee
ATTN: Chris Christensen

FROM: Jack Chenoweth
Legislative Counsel 

The bill draft delivered earlier substantially incorporates the changes suggested by Assistant Attorney General Laurie Otto in her July 27, 1989, letter to Senator Fred Zharoff.

AS 43.52.010(a) has been revised to impose the tax only on quantities of controlled substances the possession of which constitutes a misdemeanor under AS 11.71.040 [suggestion # 1 of Ms. Otto's memo]. In the same section, I've substituted blanks for amounts levied, allowing the committee to re-determine, should it so choose, the amount(s) of the controlled substance tax levy [suggestion # 3].

AS 43.52.030(c), new in this draft, is intended to respond to the suggestion that there be a credit for taxes previously paid to other jurisdictions (suggestion # 5).

AS 43.52.050(c), also new, incorporates the recommended modifications to the distraint procedure (suggestion # 6).

The amendment of AS 43.05.230(a), made by bill section 2, responds to the disclosure of confidential information concern [suggestion # 2].

All of the specific language amendments recommended by Ms. Otto beginning near the bottom of page 4 of her letter have been incorporated.

I have omitted only suggestion # 4 at the middle of page 3 of the letter, for I do not know the committee's thinking on the matter and am not usually asked to prepare committee letters of intent.

JBC:lmb
L9/121

Original sponsor(s): SEN. ZHAROFF

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 272 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act imposing taxes on controlled substances; and
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 43 is amended by adding a new chapter to read:

10 CHAPTER 52. TAX ON CONTROLLED SUBSTANCES.

11 Sec. 43.52.010. TAX IMPOSED. (a) There is levied an excise tax
12 in the following amounts on each of the controlled substances set out
13 below that a person possesses in the state:

14 (1) \$ _____ on each gram of a schedule IA controlled sub-
15 stance;

16 (2) \$ _____ on each gram of a schedule IIA controlled
17 substance;

18 (3) \$ _____ on each gram of a schedule IIIA or schedule
19 IVA controlled substance if the amount of the schedule IIIA or
20 schedule IVA controlled substance that the person possesses equals or
21 exceeds

22 (A) the number of tablets, ampules, or syrettes set
23 out in AS 11.71.040(a)(3)(B); or

24 (B) the aggregate weight set out in AS 11.71.040(a)-
25 (3)(C);

26 (4) \$ _____ on each gram of a schedule VA controlled
27 substance if the amount of the schedule VA controlled substance that
28 the person possesses equals or exceeds

29 (A) the number of tablets, ampules, or syrettes set

1 out in AS 11.71.040(a)(3)(D); or

2 (B) the aggregate weight set out in AS 11.71.040(a)-
3 (3)(E);

4 (5) \$ _____ on each gram of a schedule VIA controlled sub-
5 stance if the amount of the controlled substance that the person
6 possesses equals or exceeds the aggregate weight set out in AS 11.-
7 71.040(a)(3)(F).

8 (b) For the purpose of calculating the tax under this section, a
9 quantity of a controlled substance is measured by the weight of the
10 substance, whether pure, impure, or dilute, in the person's posses-
11 sion.

12 Sec. 43.52.020. STAMPS AFFIXED. (a) When a person acquires or
13 imports into the state a controlled substance on which the tax under
14 this chapter is due, if a stamp evidencing payment of the tax has not
15 already been affixed to the container in which the substance is en-
16 closed, the person shall have the stamp permanently affixed on the
17 container immediately upon receiving the substance. If the controlled
18 substance is subdivided into more than one container, a stamp must be
19 affixed to each container.

20 (b) Each stamp may be used only once.

21 Sec. 43.52.030. PAYMENT OF TAX. (a) The tax imposed by this
22 chapter is due and payable by the person immediately upon the person's
23 acquisition of the controlled substance.

24 (b) A person who is liable for the tax imposed by this chapter
25 shall pay the face value for each stamp.

26 (c) If another state or unit of local government has previously
27 levied and collected an excise tax on a controlled substance, subject
28 to the tax imposed by this chapter, the taxpayer must pay the differ-
29 ence between the tax due under AS 43.52.010 and the tax previously

1 paid. If the tax previously paid to the other state or unit of local
2 government was equal to or greater than the tax due under AS 43.52.-
3 010, a tax is not due. If a reduction or exemption is claimed under
4 this subsection, the burden is on the taxpayer to show that an excise
5 tax on the controlled substance has been paid to another state or unit
6 of local government.

7 Sec. 43.52.040. ADMINISTRATION OF CHAPTER. (a) The department
8 shall

9 (1) administer this chapter;

10 (2) collect, supervise, and enforce the collection of taxes
11 due under this chapter and enforce the penalties provided in this
12 title for failure to pay a tax when due; and

13 (3) adopt a uniform system of providing official stamps for
14 controlled substances upon which a tax is imposed.

15 (b) The department may adopt regulations necessary for the
16 administration of this chapter.

17 Sec. 43.52.050. ASSESSMENT OF TAX BY COMMISSIONER. (a) An
18 assessment for a person not possessing valid stamps showing that the
19 tax has been paid shall be considered a jeopardy assessment or col-
20 lection. The commissioner shall

21 (1) assess a tax and applicable penalties based on personal
22 knowledge or information available to the commissioner;

23 (2) mail to the taxpayer at the taxpayer's last known
24 address, or serve in person, a written notice of the amount of tax and
25 penalty;

26 (3) demand immediate payment of the tax; and

27 (4) if payment is not immediately made, collect the tax and
28 penalty by any method prescribed in this title.

29 (b) The tax and penalties assessed by the commissioner in an

1 assessment made under (a) of this section are presumed to be valid and
2 correctly determined and assessed. The burden is upon the taxpayer to
3 show their incorrectness or invalidity. A certificate by the commis-
4 sioner of the amount of tax and penalties determined or assessed is
5 admissible in evidence and is prima facie evidence of the facts it
6 contains.

7 (c) Except for AS 43.20.270(b)(2) and (k), the provisions of
8 AS 43.10.030 and AS 43.20.270 apply to this chapter. However, if the
9 commissioner has reason to believe that collection of the tax is in
10 jeopardy, the commissioner may give notice and demand immediate pay-
11 ment of the tax. If the tax is not promptly paid, the commissioner

12 (1) may proceed to collect by levy under AS 43.20.270(c);

13 (2) may not sell the property seized for collection of the
14 tax until the time has expired for filing an appeal of the assessment
15 of the tax under AS 43.05.240;

16 (3) shall return the property seized if the owner provides
17 a surety bond equal to the appraisal value of the owner's interest in
18 the property, as determined by the commissioner, or deposits with the
19 commissioner security in a form and amount as the commissioner may
20 determine to assure payment of the tax liability.

21 Sec. 43.52.060. TAX PAYMENT REQUIRED FOR POSSESSION. (a) A
22 person who possesses a controlled substance in an amount the posses-
23 sion of which would be a felony under AS 11.71 must pay the tax on the
24 controlled substance imposed under AS 43.52.010 and affix the stamp
25 issued by the department on the controlled substance.

26 (b) A person lawfully in possession of a controlled substance is
27 not subject to the tax required under this chapter.

28 Sec. 43.52.070. CRIMINAL PENALTIES. The penalties provided in
29 AS 43.05.290 apply to the tax levied in this chapter.

1 Sec. 43.52.080. CIVIL PENALTY. A person who is in control of a
2 controlled substance in violation of this chapter is considered to
3 have possession of the controlled substance. A person in possession
4 of a controlled substance in violation of this chapter is personally
5 liable for the tax, plus a penalty of 100 percent.

6 Sec. 43.52.090. CONFIDENTIAL NATURE OF INFORMATION. (a) The
7 commissioner and employees of the department may not reveal facts
8 obtained from a person in the administration of this chapter except in
9 connection with a proceeding involving taxes due under this chapter
10 from the person. This subsection does not prohibit the commissioner
11 from publishing statistics about the tax levied by this chapter that
12 do not disclose the identity of persons who have purchased the stamps
13 as evidence of payment of the tax.

14 (b) Information obtained by the department from a person may not
15 be used against the person in the prosecution of an offense unless the
16 information

17 (1) is obtained independently of the person's acquiring the
18 official stamps; or

19 (2) consists of testimony given or statements made in a
20 proceeding involving taxes due from the person under this chapter.

21 (c) A stamp denoting payment of the tax imposed by this chapter
22 may not be used against the taxpayer in the prosecution of a criminal
23 proceeding.

24 Sec. 43.52.100. ACCOUNTING FOR RECEIPTS. The commissioner of
25 administration shall separately account for money collected under this
26 chapter that the department deposits in the general fund.

27 Sec. 43.52.110. RELATIONSHIP OF CHAPTER TO OTHER LAW. (a) At
28 the request of the taxpayer, the superior court shall stay the pro-
29 ceedings in an action to enforce the assessment, levy, and collection

1 of the tax imposed by this chapter until the conclusion of criminal
2 proceedings related to the controlled substance for which the tax is
3 imposed.

4 (b) This section does not prohibit the department from immedi-
5 ately seizing assets or collecting taxes.

6 (c) A court or the department may not grant a taxpayer immunity
7 for testimony given, or statements made, in connection with a proceed-
8 ing involving taxes due from the person under this chapter.

9 Sec. 43.52.199. DEFINITIONS. In this chapter

10 (1) "controlled substance" has the meaning given in AS 11.-
11 71.900;

12 (2) "schedule IA controlled substance" means a controlled
13 substance included in the schedule in AS 11.71.140;

14 (3) "schedule IIA controlled substance" means a controlled
15 substance included in the schedule in AS 11.71.150;

16 (4) "schedule IIIA controlled substance" means a controlled
17 substance included in the schedule in AS 11.71.160;

18 (5) "schedule IVA controlled substance" means a controlled
19 substance included in the schedule in AS 11.71.170;

20 (6) "schedule VA controlled substance" means a controlled
21 substance included in the schedule in AS 11.71.180;

22 (7) "schedule VIA controlled substance" means a controlled
23 substance included in the schedule in AS 11.71.190;

24 (8) "tax" means the tax levied by AS 43.52.010.

25 * Sec. 2. AS 43.05.230(a) is amended to read:

26 (a) It is unlawful for a current or former officer, employee, or
27 agent of the state to divulge facts obtained in the administration of
28 a tax levied by AS 43.52, or the amount of income or the particulars
29 set out or disclosed in a report or return made under this title,

1 except

2 (1) in connection with official investigations or proceed-
3 ings of the department, whether judicial or administrative, involving
4 taxes due under this title;

5 (2) in connection with official investigations or proceed-
6 ings of the child support enforcement agency, whether judicial or
7 administrative, involving child support obligations imposed or impos-
8 able under AS 25 or AS 47;

9 (3) as provided in AS 38.05.036 pertaining to audit func-
10 tions; and

11 (4) as otherwise provided in this section.

12 * Sec. 3. This Act takes effect January 1, 1990.
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STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
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1031 WEST 4TH AVENUE, SUITE 318
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PHONE: (907) 279-7424

July 27, 1989

The Honorable Fred F. Zharoff
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Zharoff:

As we discussed at the end of the session, the Criminal Division has continued to work on a committee substitute for SB 272. Taking the April 25, 1989 Chenoweth work draft as a starting point, we prepared the amendments set out in this letter. Although the amendments substantially improve the bill, and there is authority from other jurisdictions suggesting that taxation of controlled substances is constitutional, we cannot guarantee that this legislation will withstand a court challenge in Alaska.

In additions to the specific amendments offered below, I have a number of observations.

1. In developing the above amendments, I spoke with both a lawyer in the Minnesota Department of Revenue (Therese Koenig-Smith, 612-296-3438), and the person responsible for the drug tax program in Minnesota (Chris Sanft, 612-296-1940). We discussed the reasons why Minnesota chose to limit application of the drug tax law to dealers (defined as persons in possession of more than a specified quantity of drugs). Minnesota made this decision for two reasons: (1) since failing to pay the drug tax is a felony offense, the legislature did not want to turn a misdemeanor (e.g. possession of one gram of marijuana in an automobile) into a felony based solely on the drug tax law, and therefore, made the law applicable to possession of felony quantities of controlled substances; and (2) the cost of pursuing a tax action against a person in possession of one gram of marijuana is high and would not be offset by the tax revenues collected, therefore, the law was made applicable to persons in possession of a sufficient quantity of drugs to make the tax action cost-effective.

We share the concerns of the Minnesota policy makers, and believe a better approach would be to make the law

applicable only to "dealers." The definition of "dealer" in Minnesota is a person in possession of a felony quantity of controlled substances. We encourage you to amend SB 272 to make it applicable only to persons in possession of a felony quantity of controlled substances as set out in AS 11.71.040. In addition, based on the cost of pursuing tax assessments, it may be wise to raise the threshold quantity for imposition of taxes above what is set out in AS 11.71.040.

2. A recent case, State v. Durrant, 769 P.2d 1174 (Kan. 1989) (copy attached), upheld the constitutionality of the Kansas drug tax statute in the face of a challenge based on infringement of the right against self-incrimination. The court in Durrant at pages 1180-81 discussed the necessity for imposing penalties on any person who discloses confidential tax information as a way to protect against the use of self-incriminating statements in criminal prosecutions. Under AS 43.05.230, it is a crime punishable by a \$5000 fine, or by two years in jail, to divulge "the particulars set out or disclosed in a report or return made under this title." However, the drug tax law does not provide for either reports or returns. Therefore, either AS 43.05.230 needs to be amended to cover the situation presented in cases involving drug taxes, or criminal penalties for disclosure of confidential information should be written into AS 43.52.090. Although our recommendation would be to add a section to AS 43.52.090, you should discuss this issue with the Department of Revenue to see which alternative would make administration of the chapter easier.
3. We are concerned about the amount of tax imposed on Schedule IA controlled substances. Since the tax is set at \$100 on each one-tenth of a gram, the tax on a gram of substances such as opium, codeine, and heroin would be \$1000 a gram, or \$28,000 an ounce. This high rate of taxation opens the door to the argument that the tax is punitive, and therefore, criminal in nature and an impermissible exercise of taxing powers. See, e.g., Zwak v. United States, 848 F.2d 1179 (11th Cir. 1988); Sonzinsky v. United States, 300 U.S. 506, 81 L.Ed 772, 57 S.Ct. 554 (1937); and Annot. 81 L.Ed. 776 (1937). If an Alaska court found that the measure was punitive, it might mean, for example, that the protections normally available to criminal defendants, such as court appointed counsel, would be available to persons involved in tax proceedings. It could also mean that the state would be precluded, based on constitutional due process considerations, from both collecting a tax and pursuing

a criminal prosecution. See, e.g. United State v. Halper, ___ U.S. ___, 45 Cr.L.Rptr. 3033 (May 15, 1989).

We suggest that the amount of tax imposed on Schedule IA controlled substances be reduced to a more reasonable amount.

4. The statute is silent on the issue of whether a defendant would be entitled to retain sufficient assets to hire a private attorney. I assume this is because you did not intend to provide an exception to the law allowing seizure of all assets necessary to meet the entire tax liability. The United States Supreme Court recently determined, based in part on an analysis of legislative intent, that assets to pay attorney's fees can be forfeited without infringing on a criminal defendant's constitutional right to an attorney. See, United States v. Monsanto, ___ U.S. ___, 45 Cr.L.Rptr. 3133 (June 22, 1989) and Caplin & Drysdale v. United States, ___ U.S. ___, 45 Cr.L.Rptr. 3143 (June 22, 1989). In order to clarify the intent of the Alaska legislature on this issue, it would be prudent that the bill be accompanied by a statement of legislative intent to allow seizure of assets that could otherwise be used to pay attorney's fees.
5. The law does not make any provision for credit for previously paid taxes, and as a result, may impermissibly allow for double taxation. Minnesota amended its drug tax law this year to avoid this problem with the following language:

If another state or local unit of government has previously assessed an excise tax on the marijuana or controlled substances, the taxpayer must pay the difference between the tax due under [the section of law requiring payment of drug taxes] and the tax previously paid. If the tax previously paid to the other state or local unit of government was equal to or greater than the tax due under [the section of law requiring payment of drug taxes], no tax is due. The burden is on the taxpayer to show that an excise tax on the marijuana or controlled substances has been paid to another state or local unit of government.
6. As written, on page 3, lines 19 - 20, the bill requires that existing distraint procedures be used to collect drug tax assessments. However, we understand that you want authority to immediately seize property, and do not want there to be a ten day delay (or longer if a person

files an appeal). In its present form, the legislation does not provide this authority. For the sake of comparison, a copy of Minnesota's tax procedures is attached for your information, and may provide a helpful model for the legislative drafters. In subdivision 2 of section 270.70, for example, a specific waiver of the ten-day notice period is included.

One point of caution: in drafting jeopardy assessment procedures it is important to provide the level of procedural due process required by the state and federal constitutions. The specific issue is whether a judicial proceeding after the seizure of assets and before their sale, coupled with a full hearing on the merits later, is sufficient to meet the due process hearing requirement. A lengthy discussion of this issue is set out in Sisson v. Triplett, 428 N.W.2d 565, 568-571 (Minn. 1988). In Minnesota, the court approved the immediate seizure of assets because the statute specifically provided an opportunity for a judicial hearing and other relief prior to sale of the property by: (1) allowing property to be returned upon posting a bond; (2) providing for an injunction to prohibit the enforcement of a levy or sale upon a showing of irreparable injury; and (3) creating an action for "equitable relief" for release of the property.

7. We reviewed the bill from the perspective of the Criminal Division. However, we do not have special expertise in the field of taxation. In addition to our review, we strongly suggest that the next work draft of the bill be reviewed by an attorney familiar with Alaska's tax laws.

The specific amendments we suggest to the April 25, 1989 Chenoweth work draft are:

Amendment 1: "Dosage unit" could be interpreted to mean either one tablet, or multiple tablets, of a controlled substance. The amendment clarifies the intent of the legislation.

Page 1, line 21: The term "dosage unit" should either be defined, or replaced with the phrase "tablet, ampule, or syrette."

Page 1, line 28: The term "dosage unit" should either be defined, or replaced with the phrase "tablet, ampule, or syrette."

Page 2, line 1: The term "dosage units" should either be defined, or replaced with the phrase "tablets, ampules, or syrettes."

Page 2, lines 15 - 16: The term "dosage units" should either be defined, or replaced with the phrase "tablets, ampules, or syrettes."

Amendment 2: As currently drafted, the bill requires that the stamp be affixed to the controlled substance, which is a physical impossibility. The amendment corrects this problem.

Page 2, lines 2 - 8: The existing section should be deleted and replaced with the following:

Sec. 43.52.020. STAMPS AFFIXED. (a) When a person acquires or imports into the state a controlled substance on which the tax under this chapter is due, if a stamp evidencing payment of the tax has not already been affixed to the container in which the substance is enclosed, the person shall have the stamp permanently affixed on the container immediately upon receiving the substance.

(b) If the controlled substance is subdivided into more than one container, a stamp must be affixed to each container.

(c) Each stamp may be used only once.

Amendment 3: Since the legislation requires purchase of stamps, and affixing of stamps, and makes no provision for alternative indicia of purchase, the reference does not make sense and should be deleted from the bill.

Page 2, line 13: Delete the phrase "or other indicia of purchase".

Page 2, lines 23-24: Delete the phrase "or other official indicia".

Page 2, line 29 and Page 3, line 1: Delete the phrase "or other official indicia."

Amendment 4: This phrase was taken from the Minnesota statute, does not make sense in Alaska, and should be deleted from the bill.

Page 3, lines 14 - 15: Delete phrase "Statement filed by the commissioner with the court administrator, or any other".

Amendment 5: As written, the tax law would apply to drugs lawfully obtained by prescription, possessed for research approved under federal law, or possessed by doctors, pharmacies and hospitals. The amendment adds an exception for possession of controlled substances under these circumstances, and is modelled on a similar provision in the Minnesota law.

Page 3, lines 21 - 26: The existing section should be deleted and replaced with the following:

Sec. 43.52.060. TAX PAYMENT REQUIRED FOR POSSESSION. (a) A person may not possess a controlled substance subject to the tax imposed by the chapter unless

(1) the tax has been paid on the controlled substance; and

(2) a stamp issued by the department has been affixed to the controlled substance.

(b) A person lawfully in possession of a controlled substance is not subject to the tax required under this chapter.

Amendment 6: There are two criminal penalty provisions in AS 43.05. The amendment clarifies which penalty provision applies to drug tax cases.

Page 3, line 28: The reference to "AS 43.05" should be changed to "AS 43.05.290".

Amendment 7: Although an exception is made in AS 43.52.090(a) for release of information obtained in connection with a proceeding involving drug taxes, a similar exception is not contained in AS 43.52.090(b). If proposed amendment 8 is incorporated into the bill, and the taxpayer is given the option of staying the tax proceedings until conclusion of related criminal cases, there is no reason to prohibit prosecution use of testimony

The Honorable Fred F. Zharoff

July 27, 1989

Page 8

If you have any questions, please feel free to call. If a new work draft is prepared, I would very much appreciate receiving a copy.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 

Laurie H. Otto
Assistant Attorney General

Attachment

cc: The Honorable Jan Faiks
Douglas B. Baily
Bob Evans
Royce Weller

LHO:me-103

by the commissioner within five years after the date of assessment of the tax. A notice of lien filed in one county may be transcribed to any other county within ten years after the date of its filing, but the transcription shall not extend the period during which the lien is enforceable. A notice of lien may be renewed by the commissioner before the expiration of the ten-year period for an additional ten years. The taxpayer must receive written notice of the renewal.

Subd. 5. (Repealed, 1985 c 101 s 17)

Subd. 6. Enforceability of lien. The lien imposed by this section shall be enforceable by levy as authorized in section 270.70, or by judgment lien foreclosure as authorized in chapter 550.

Subd. 7. Notice of mortgage foreclosure or contract termination. If a lien has been filed by the commissioner of revenue against real property pursuant to this section, and, subsequent to the recording of the lien, a mortgage foreclosure upon the real property is commenced under chapter 580, or a termination of contract of sale of the real property is commenced under section 559.21, notice of the mortgage foreclosure or termination of contract of sale shall be mailed to the commissioner not less than 25 days prior to the foreclosure or termination. Provided, notice need not be given pursuant to this subdivision if the lien of the commissioner has been filed within 30 days or less prior to the foreclosure or termination. The contents of the notice shall be as prescribed in section 7425(c)(1) of the Internal Revenue Code of 1954, as amended through December 31, 1982.

Subd. 8. Filing entitlement. Execution of notices of liens or of other notices affecting state tax liens by the commissioner of revenue or a delegate entitles them to be filed, and no other attestation, certification, or acknowledgment is necessary.

Subd. 9. Lien search fees. Upon request of any person, the filing officer shall issue a certificate showing whether there is on file, on the date and hour stated in the certificate, any notice of lien or certificate or notice affecting any lien filed after June 30, 1979, naming a particular person, and giving the date and hour of filing of each notice or certificate naming the person. The fee for a certificate shall be as provided by section 336 9-407 or 357.1S, subdivision 1, clause (3). Upon request, the filing officer shall furnish a copy of any notice of state lien, or notice or certificate affecting a state lien, for a fee of 50 cents per page.

Subd. 10. Limitation for homestead property. A lien imposed under this section upon property defined as homestead property in chapter 510 may not be enforced against homestead property by levy under section 270.70, or by judgment lien under chapter 550.

History: 1982 c 523 art 2 s 8; 1983 c 180 s 3-6; 1985 c 101 s 6-9; 1985 c 281 s 2; 1986 c 444; 1Sp1986 c 1 art 7 s 11-14

270.70 LEVY AND DISTRAINT.

Subdivision 1. Authority of commissioner. If any tax payable to the commissioner of revenue or to the department of revenue is not paid when due, such tax may be collected by the commissioner of revenue within five years after the date of assessment of the tax, or if the tax judgment has been filed, within the statutory period of enforcement of a valid tax judgment, by a levy upon all property and rights to property of the person liable for the payment or collection of such tax (except that which is exempt from execution pursuant to section 550.37) or property on which there is a lien provided in section 270.69. For this purpose, the term "tax" shall include any penalty, interest and costs properly payable. The term "levy" includes the power of distraint and seizure by any means.

Subd. 2. Notice and demand; jeopardy collection. Before a levy is made, notice and demand for payment of the amount due shall be given to the person liable for the payment or collection of the tax at least ten days prior to the levy. If the commissioner has reason to believe that collection of the tax is in jeopardy, notice and demand for immediate payment of the tax may be made by the commissioner. If the tax is not paid,

*Mina
Collection
Statute*

the commissioner may proceed to collect by levy without regard to the ten day period provided herein.

Subd. 3. Manner of execution and sale. In making the execution of the levy and in collecting the taxes due, the commissioner shall have all of the powers provided in chapter 550 and in any other law for purposes of effecting an execution against property in this state. The sale of property levied upon, and the time and manner of redemption therefrom, shall, to the extent not provided in sections 270.701 to 270.709, be governed by chapter 550. The seal of the court, subscribed by the court administrator, as provided in section 550.04, shall not be required. The levy for collection of taxes may be made whether or not the commissioner has commenced a legal action for collection of such taxes.

Subd. 4. Stay of sale. (a) Where a jeopardy assessment or any other assessment has been made by the commissioner, the property seized for collection of the tax shall not be sold until the time has expired for filing an appeal of the assessment with the tax court pursuant to chapter 271. If an appeal has been filed, no sale shall be made unless the taxes remain unpaid for a period of more than 30 days after final determination of the appeal by the tax court or by the appropriate judicial forum.

(b) Notwithstanding clause (a), seized property may be sold if

(i) the taxpayer consents in writing to the sale, or

(ii) the commissioner determines that the property is perishable or may become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense.

Subd. 5. Probate court jurisdiction. Where a levy has been made to collect taxes pursuant to this section and the property seized is properly included in a formal proceeding commenced under sections 524.3-401 to 524.3-505 and maintained under full supervision of the court, such property shall not be sold until the probate proceedings are completed or until the court so orders.

Subd. 6. Bond or security to release seizure. The property seized shall be returned by the commissioner if the owner gives a surety bond equal to the appraised value of the owner's interest in the property, as determined by the commissioner, or deposits with the commissioner security in such form and amount as the commissioner deems necessary to insure payment of the liability, but not more than twice the liability.

Subd. 7. Injunction. Notwithstanding any other provision to the contrary, if a levy or sale pursuant to this section would irreparably injure rights in property which the court determines to be superior to rights of the state in such property, the district court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

Subd. 8. Surrender of property subject to levy. Any person who fails or refuses to surrender without reasonable cause any property or rights to property subject to levy, upon demand by the commissioner, shall be liable personally to the state of Minnesota in an amount equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made. Any amount recovered under this subdivision shall be credited against the tax liability for the collection of which such levy was made.

Subd. 9. Penalty. In addition to the personal liability imposed by subdivision 8, if any person required to surrender property or rights to property fails or refuses to surrender the property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 25 percent of the amount recoverable under subdivision 8. No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

Subd. 10. Person defined. The term "person" as used in subdivision 8 includes an officer or employee of a corporation or a member or employee of a partnership who, as such officer, employee or member is under a duty to surrender the property or rights to property or to discharge the obligation. The personal liability imposed by subdivision 8 and the penalty imposed by subdivision 9 may, after demand to honor a levy

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has been made, be assessed by the commissioner within 60 days after service of the levy. An assessing tax order under this subdivision shall be appealable to the tax court without payment of the tax, penalty, or interest in the manner provided by law, but an appeal shall not preclude the commissioner from exercising any collection action the commissioner deems necessary to preserve the interests of the state while the matter is pending.

Subd. 11. **Optional remedy.** Any action taken by the commissioner pursuant to this section shall not constitute an election by the state to pursue a remedy to the exclusion of any other remedy.

Subd. 12. **Equitable relief.** After the commissioner has seized the property of any person, that person may, upon giving 48 hours notice to the commissioner and to the court, bring a claim for equitable relief before the district court for the release of the property to the taxpayer upon such terms and conditions as the court may deem equitable.

Subd. 13. **Levy and sale by sheriff.** If any tax payable to the commissioner of revenue or to the department of revenue is not paid as provided in subdivision 2, the commissioner may, within five years after the date of assessment of the tax, delegate the authority granted by subdivision 1, by means of issuing a warrant to the sheriff of any county of the state commanding the sheriff, as agent for the commissioner, to levy upon and sell the real and personal property of the person liable for the payment or collection of the tax and to levy upon the rights to property of that person within the county, or to levy upon and seize any property within the county on which there is a lien provided in section 270.69, and to return the warrant to the commissioner and pay to the commissioner the money collected by virtue thereof by a time to be therein specified not less than 60 days from the date of the warrant. The sheriff shall proceed thereunder to levy upon and seize any property of the person and to levy upon the rights to property of the person within the county (except the person's homestead or that property which is exempt from execution pursuant to section 550.37), or to levy upon and seize any property within the county on which there is a lien provided in section 270.69. For purposes of the preceding sentence, the term "tax" shall include any penalty, interest and costs properly payable. The sheriff shall then sell so much of the property levied upon as is required to satisfy the taxes, interest, and penalties, together with the sheriff's costs; but the sales, and the time and manner of redemption therefrom, shall, to the extent not provided in sections 270.701 to 270.709, be governed by chapter 550. The proceeds of the sales, less the sheriff's costs, shall be turned over to the commissioner, who shall then apply the proceeds as provided in section 270.708.

Subd. 14. **Priority of levy.** Notwithstanding section 52.12, a levy by the commissioner made pursuant to the provisions of this section upon a taxpayer's funds on deposit in a financial institution located in this state, shall have priority over any unexercised right of setoff of the financial institution to apply the levied funds toward the balance of an outstanding loan or loans owed by the taxpayer to the financial institution. A claim by the financial institution that it exercised its right to setoff prior to the levy by the commissioner must be substantiated by evidence of the date of the setoff, and shall be verified by the sworn statement of a responsible corporate officer of the financial institution. Furthermore, for purposes of determining the priority of any levy made under this section, the levy shall be treated as if it were an execution made pursuant to chapter 550.

Subd. 15. **Effect of honoring levy.** Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the commissioner, surrenders the property or rights to property (or who pays a liability under subdivision 8) shall be discharged from any obligation or liability to the person liable for the payment or collection of the delinquent tax with respect to the property or rights to property so surrendered or paid.

Subd. 16. **Notice of levy.** Notwithstanding any other provision of law to the contrary, the notice of any levy authorized by this section may be served by mail or by delivery by an employee or agent of the department of revenue.

History: 1975 c 377 s 6; 1976 c 134 s 78; 1977 c 307 s 29; 1982 c 523 art 2 s 9-16; 1983 c 180 s 7-9; 1985 c 101 s 10,11; 1986 c 444; JSp1986 c 3 art 1 s 82

270.701 SALE OF SEIZED PROPERTY.

Subdivision 1. Notice of seizure. As soon as practicable after seizure of property, notice in writing shall be given by the commissioner of revenue to the owner of the property (or, in the case of personal property, the possessor thereof), and shall be served in like manner as a summons in a civil action in the district court. If the owner cannot be readily located, or has no dwelling or place of business within this state, the notice may be mailed to the last known address. The notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

Subd. 2. Notice of sale. The commissioner shall as soon as practicable after the seizure of the property give notice of sale of the property to the owner, in the manner of service prescribed in subdivision 1. In the case of personal property, the notice shall be served at least 10 days prior to the sale. In the case of real property, the notice shall be served at least four weeks prior to the sale. The commissioner shall also cause public notice of each sale to be made. In the case of personal property, notice shall be posted at least 10 days prior to the sale at the post office nearest the place where the seizure is made, and in not less than two other public places. In the case of real property, six weeks' published notice shall be given prior to the sale, in a newspaper published or generally circulated in the county. The notice of sale provided in this subdivision shall specify the property to be sold, and the time, place, manner and conditions of the sale. Whenever levy is made without regard to the ten-day period provided in section 270.70, subdivision 2, public notice of sale of the property seized shall not be made within the ten-day period unless section 270.702 (relating to sale of perishable goods) is applicable.

Subd. 3. Sale of indivisible property. If any property liable to levy is not divisible, so as to enable the commissioner by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of the property shall be sold.

Subd. 4. Time and place of sale. The time of sale shall be after the expiration of the notice periods prescribed in subdivision 2. The place of sale shall be within the county in which the property is seized, except by special order of the commissioner.

Subd. 5. Manner and conditions of sale. (a) Before the sale the commissioner shall determine a minimum price for which the property shall be sold, and if no person offers for the property at the sale the amount of the minimum price, the property shall be declared to be purchased at the minimum price for the state of Minnesota; otherwise the property shall be declared to be sold to the highest bidder. In determining the minimum price, the commissioner shall take into account the expense of making the levy and sale. The announcement of the minimum price determined by the commissioner may be delayed until the receipt of the highest bid.

(b) The sale shall not be conducted in any manner other than:

- (i) by public auction, or
- (ii) by public sale under sealed bids.

(c) In the case of seizure of several items of property, the items may be offered separately, in groups, or in the aggregate, and shall be sold under whichever method produces the highest aggregate amount.

(d) Payment in full shall be required at the time of acceptance of a bid, except that a part of the payment may be deferred by the commissioner for a period not to exceed 30 days.

(e) Other methods (including advertising) in addition to those prescribed in subdivision 2 may be used in giving notice of the sale.

(f) The commissioner may adjourn the sale from time to time for a period not to exceed 30 days.

(g) If payment in full is required at the time of acceptance of a bid and is not then and there paid, the commissioner shall forthwith proceed to again sell the property in the manner provided in this section. If the conditions of the sale permit part of the

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within ten days from the sale cause the certificate of sale to be duly recorded by the county recorder of the county in which the real property is located.

History: 1952 c 523 art 2 s 20

270.705 EFFECT OF CERTIFICATE OF SALE.

Subdivision 1. Personal property. (a) In all cases of sale pursuant to section 270.701 of personal property, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the right of the commissioner to make the sale, and conclusive evidence of the regularity of the proceedings in making the sale. The certificate shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

(b) If the property consists of stocks, the certificate of sale shall be notice, when received, to any corporation, company, or association of the transfer, and shall be authority to the corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(c) If the subject of sale is securities or other evidences of debt, the certificate of sale shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of the securities or other evidences of debt.

(d) If the property consists of a motor vehicle, the certificate of sale shall be notice, when received, to the registrar of motor vehicles of this state of the transfer, and shall be authority to the registrar to record the transfer on the books and records in the same manner as if the certificate of title to the motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

Subd. 2. Real property. In the case of the sale of real property pursuant to section 270.701, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the facts therein stated, and shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto.

Subd. 3. Junior encumbrances. A certificate of sale of personal property or real property given pursuant to section 270.704 shall discharge the property from all liens, encumbrances, and titles over which the lien of the state of Minnesota with respect to which the levy was made had priority.

History: 1952 c 523 art 2 s 21; 1986 c 444

270.706 RECORDS OF SALE.

The commissioner shall, for the department of revenue, keep a record of all sales of property under section 270.701 and of redemptions of real property. The record shall set forth the tax for which the sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making the sale, the amount of expenses, the names of the purchasers, and the date of the certificate of sale. A copy of the record, or any part thereof, certified by the commissioner shall be evidence in any court of the truth of the facts therein stated.

History: 1952 c 523 art 2 s 22

270.707 EXPENSE OF LEVY AND SALE.

The commissioner shall determine the expenses to be allowed in all cases of levy and sale.

History: 1952 c 523 art 2 s 23

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payment to be deferred, and if the part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or that part thereof as has not been paid, together with interest at the rate specified in section 549.09 from the date of the sale; or, in the discretion of the commissioner, the sale may be declared by the commissioner to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in this section. In the event of a readvertisement and sale, any new purchaser shall receive the property or rights to property free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by the defaulting purchaser shall be forfeited.

History: 1982 c 523 art 2 s 17; 1986 c 444

270.702 SALE OF PERISHABLE GOODS.

If the commissioner determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that the property cannot be kept without great expense, the commissioner shall appraise the value of the property, and if the owner of the property can be readily found, the commissioner shall give the owner notice of the determination of the appraised value of the property. The property shall be returned to the owner if, within the time specified in the notice, the owner (a) pays to the commissioner an amount equal to the appraised value, or (b) gives bond in the form, with the sureties, and in the amount as the commissioner prescribes to pay the appraised amount at the time the commissioner determines to be appropriate in the circumstances. If the owner does not pay the amount or furnish the bond in accordance with this section, the commissioner shall as soon as practicable make public sale of the property in accordance with section 270.701.

History: 1982 c 523 art 2 s 18; 1986 c 444

270.703 REDEMPTION OF PROPERTY.

Subdivision 1. Before sale. Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the commissioner at any time prior to the sale thereof, and upon payment the commissioner shall restore the property to the person, and all further proceedings in connection with the levy on the property shall cease from the time of payment.

Subd. 2. Redemption of real estate after sale. The owners of any real property sold as provided in this section, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of the property, at any time within 6 months, or in case the real property sold exceeds 10 acres in size, at any time within 12 months, after the sale thereof. The property or tract of property shall be permitted to be redeemed upon payment to the purchaser (or if not found in the county in which the property to be redeemed is situated, then to the commissioner, for the use of the purchaser, or the purchaser's heirs or assigns) of the amount paid by the purchaser together with interest at the rate specified in section 549.09 from the date of the sale.

Subd. 3. Record. When any lands sold are redeemed as provided in this section, the commissioner shall cause entry of the fact to be made upon the record required by section 270.706 and the entry shall be evidence of the redemption.

History: 1982 c 523 art 2 s 19; 1986 c 444

270.704 CERTIFICATE OF SALE.

In the case of property sold as provided in section 270.701, the commissioner shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property the certificate shall set forth the real property purchased, for whose taxes the property was sold, the name of the purchaser, and the price paid. If real property is declared purchased by the state of Minnesota, the commissioner shall

within ten days from the sale cause the certificate of sale to be duly recorded by the county recorder of the county in which the real property is located.

History: 1952 c 523 art 2 s 20

270.705 EFFECT OF CERTIFICATE OF SALE.

Subdivision 1. Personal property. (a) In all cases of sale pursuant to section 270.701 of personal property, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the right of the commissioner to make the sale, and conclusive evidence of the regularity of the proceedings in making the sale. The certificate shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

(b) If the property consists of stocks, the certificate of sale shall be notice, when received, to any corporation, company, or association of the transfer, and shall be authority to the corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(c) If the subject of sale is securities or other evidences of debt, the certificate of sale shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of the securities or other evidences of debt.

(d) If the property consists of a motor vehicle, the certificate of sale shall be notice, when received, to the registrar of motor vehicles of this state of the transfer, and shall be authority to the registrar to record the transfer on the books and records in the same manner as if the certificate of title to the motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

Subd. 2. Real property. In the case of the sale of real property pursuant to section 270.701, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the facts therein stated, and shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto.

Subd. 3. Junior encumbrances. A certificate of sale of personal property or real property given pursuant to section 270.704 shall discharge the property from all liens, encumbrances, and titles over which the lien of the state of Minnesota with respect to which the levy was made had priority.

History: 1952 c 523 art 2 s 21; 1986 s 444

270.706 RECORDS OF SALE.

The commissioner shall, for the department of revenue, keep a record of all sales of property under section 270.701 and of redemptions of real property. The record shall set forth the tax for which the sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making the sale, the amount of expenses, the names of the purchasers, and the date of the certificate of sale. A copy of the record, or any part thereof, certified by the commissioner shall be evidence in any court of the truth of the facts therein stated.

History: 1982 c 523 art 2 s 22

270.707 EXPENSE OF LEVY AND SALE.

The commissioner shall determine the expenses to be allowed in all cases of levy and sale.

History: 1982 c 523 art 2 s 23

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270.708 APPLICATION OF PROCEEDS OF LEVY.

Subdivision 1. Collection of liability. Any money realized by proceedings under this chapter, whether by seizure, by surrender under section 270.70 (except pursuant to subdivision 9 thereof), by sale of seized property, or by sale of property redeemed by the state of Minnesota (if the interest of the state of Minnesota in the property was a lien arising under the provisions of section 270.69), shall be applied as follows:

(a) First, against the expenses of the proceedings; then

(b) If the property seized and sold is subject to a tax administered by the commissioner of revenue which has not been paid, the amount remaining after applying clause (a) shall next be applied against the tax liability (and, if the tax was not previously assessed, it shall then be assessed); and

(c) The amount, if any, remaining after applying clauses (a) and (b) shall be applied against the tax liability in respect of which the levy was made or the sale was conducted.

Subd. 2. Surplus proceeds. Any surplus proceeds remaining after the application of subdivision 1 shall, upon application and satisfactory proof in support thereof, be credited or refunded by the commissioner to the person or persons legally entitled thereto.

History: 1982 c 523 art 2 s 24

270.709 AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

Subdivision 1. Release of levy. It shall be lawful for the commissioner to release the levy upon all or part of the property or rights to property levied upon if the commissioner determines that the release will facilitate the collection of the liability, but the release shall not operate to prevent any subsequent levy.

Subd. 2. Return of property. If the commissioner determines that property has been wrongfully levied upon, it shall be lawful for the commissioner to return:

(a) The specific property levied upon, at any time;

(b) An amount of money equal to the amount of money levied upon, at any time before the expiration of nine months from the date of the levy; or

(c) An amount of money equal to the amount of money received by the state of Minnesota from a sale of the property, at any time before the expiration of nine months from the date of the sale.

For purposes of clause (c), if property is declared purchased by the state of Minnesota at a sale pursuant to section 270.701, subdivision 5 (relating to manner and conditions of sale), the state of Minnesota shall be treated as having received an amount of money equal to the minimum price determined pursuant to section 270.701, subdivision 5 or, if larger, the amount received by the state of Minnesota from the resale of the property.

History: 1982 c 523 art 2 s 25

270.71 ACQUISITION AND RESALE OF SEIZED PROPERTY.

For the purpose of enabling the commissioner of revenue to purchase or redeem seized property in which the state of Minnesota has an interest arising from a lien for unpaid taxes, there is appropriated to the commissioner an amount representing the cost of such purchases or redemptions. Seized property acquired by the state of Minnesota to satisfy unpaid taxes shall be resold by the commissioner. The commissioner shall preserve the value of seized property while controlling it, including but not limited to the procurement of insurance. For the purpose of refunding the proceeds from the sale of levied or redeemed property which are in excess of the actual tax liability plus costs of acquiring the property, there is hereby created a levied and redeemed property refund account in the agency fund. All amounts deposited into this account are appropriated to the commissioner of revenue. The commissioner shall report quarterly on the status of this program to the chairs of the house taxes and appropriations committees and senate taxes and tax laws and finance committees.

History: 1982 c 523 art 2 s 26; 1986 c 444

4 Tommy Stearns
Div Bureau of Enforcement
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Chenoweth
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Original sponsor(s): SEN. ZHAROFF

1 IN THE SENATE BY THE JUDICIARY COMMITTEE
2 CS FOR SENATE BILL NO. 272 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - SECOND SESSION
5 A BILL

6 For an Act entitled: "An Act imposing taxes on controlled substances; and
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 43 is amended by adding a new chapter to read:

10 CHAPTER 52. TAX ON CONTROLLED SUBSTANCES.

11 Sec. 43.52.010. TAX IMPOSED. (a) There is levied an excise tax
12 in the following amounts on each of the controlled substances set out
13 below that a person possesses in the state:

14 (1) \$ _____ on each gram of a schedule IA controlled sub-
15 stance; *Heroin \$250-350 gram
cocaine \$2 tablet
heroin \$20-65 tablet*

16 (2) \$ _____ on each gram of a schedule IIA controlled
17 substance; *crack \$120-150 gram
LSD \$2-5 bit
amphetamine \$240-300 gram*

18 (3) \$ _____ on each gram of a schedule IIIA or schedule
19 IVA controlled substance if the amount of the schedule IIIA or
20 schedule IVA controlled substance that the person possesses equals or
21 exceeds *iron H2O gram
heroin
heroin
heroin } tablet?*

22 (A) the number of tablets, ampules, or syrettes set
23 out in AS 11.71.040(a)(3)(B); or

24 (B) the aggregate weight set out in AS 11.71.040(a)-
25 (3)(C);

26 (4) \$ _____ on each gram of a schedule VA controlled
27 substance if the amount of the schedule VA controlled substance that
28 the person possesses equals or exceeds *cocaine spray?*

29 (A) the number of tablets, ampules, or syrettes set

1 out in AS 11.71.040(a)(3)(D); or

2 (B) the aggregate weight set out in AS 11.71.040(a)-
3 (3)(E);

4 (5) \$ _____ on each gram of a schedule VIA controlled sub-
5 stance if the amount of the controlled substance that the person
6 possesses equals or exceeds the aggregate weight set out in AS 11.-
7 71.040(a)(3)(F). *1 gram 15 gram*

8 (b) For the purpose of calculating the tax under this section, a
9 quantity of a controlled substance is measured by the weight of the
10 substance, whether pure, impure, or dilute, in the person's posses-
11 sion.

12 Sec. 43.52.020. STAMPS AFFIXED. (a) When a person acquires or
13 imports into the state a controlled substance on which the tax under
14 this chapter is due, if a stamp evidencing payment of the tax has not
15 already been affixed to the container in which the substance is en-
16 closed, the person shall have the stamp permanently affixed on the
17 container immediately upon receiving the substance. If the controlled
18 substance is subdivided into more than one container, a stamp must be
19 affixed to each container.

20 (b) Each stamp may be used only once.

21 Sec. 43.52.030. PAYMENT OF TAX. (a) The tax imposed by this
22 chapter is due and payable by the person immediately upon the person's
23 acquisition of the controlled substance.

24 (b) A person who is liable for the tax imposed by this chapter
25 shall pay the face value for each stamp.

26 (c) If another state or unit of local government has previously
27 levied and collected an excise tax on a controlled substance, subject
28 to the tax imposed by this chapter, the taxpayer must pay the differ-
29 ence between the tax due under AS 43.52.010 and the tax previously

1 paid. If the tax previously paid to the other state or unit of local
2 government was equal to or greater than the tax due under AS 43.52.-
3 010, a tax is not due. If a reduction or exemption is claimed under
4 this subsection, the burden is on the taxpayer to show that an excise
5 tax on the controlled substance has been paid to another state or unit
6 of local government.

7 Sec. 43.52.040. ADMINISTRATION OF CHAPTER. (a) The department
8 shall

9 (1) administer this chapter;

10 (2) collect, supervise, and enforce the collection of taxes
11 due under this chapter and enforce the penalties provided in this
12 title for failure to pay a tax when due; and

13 (3) adopt a uniform system of providing official stamps for
14 controlled substances upon which a tax is imposed.

15 (b) The department may adopt regulations necessary for the
16 administration of this chapter.

17 Sec. 43.52.050. ASSESSMENT OF TAX BY COMMISSIONER. (a) An
18 assessment for a person not possessing valid stamps showing that the
19 tax has been paid shall be considered a jeopardy assessment or col-
20 lection. The commissioner shall

21 (1) assess a tax and applicable penalties based on personal
22 knowledge or information available to the commissioner.

23 (2) mail to the taxpayer at the taxpayer's last known
24 address, or serve in person, a written notice of the amount of tax and
25 penalty;

26 (3) demand immediate payment of the tax; and

27 (4) if payment is not immediately made, collect the tax and
28 penalty by any method prescribed in this title.

29 (b) The tax and penalties assessed by the commissioner in an

1 assessment made under (a) of this section are presumed to be valid and
2 correctly determined and assessed. The burden is upon the taxpayer to
3 show their incorrectness or invalidity. A certificate by the commis-
4 sione. of the amount of tax and penalties determined or assessed is
5 admissible in evidence and is prima facie evidence of the facts it
6 contains.

7 (c) Except for AS 43.20.270(b)(2) and (k), the provisions of
8 AS 43.10.030 and AS 43.20.270 apply to this chapter. However, if the
9 commissioner has reason to believe that collection of the tax is in
10 jeopardy, the commissioner may give notice and demand immediate pay-
11 ment of the tax. If the tax is not promptly paid, the commissioner

12 (1) may proceed to collect by levy under AS 43.20.270(c);

13 (2) may not sell the property seized for collection of the
14 tax until the time has expired for filing an appeal of the assessment
15 of the tax under AS 43.05.240;

16 (3) shall return the property seized if the owner provides
17 a surety bond equal to the appraisal value of the owner's interest in
18 the property, as determined by the commissioner, or deposits with the
19 commissioner security in a form and amount as the commissioner may
20 determine to assure payment of the tax liability.

21 Sec. 43.52.060. TAX PAYMENT REQUIRED FOR POSSESSION. (a) A
22 person who possesses a controlled substance in an amount the posses-
23 sion of which would be a felony under AS 11.71 must pay the tax on the
24 controlled substance imposed under AS 43.52.010 and affix the stamp
25 issued by the department on the controlled substance.

26 (b) A person lawfully in possession of a controlled substance is
27 not subject to the tax required under this chapter.

28 Sec. 43.52.070. CRIMINAL PENALTIES. The penalties provided in
29 AS 43.05.290 apply to the tax levied in this chapter.

1 Sec. 43.52.080. CIVIL PENALTY. A person who is in control of a
2 controlled substance in violation of this chapter is considered to
3 have possession of the controlled substance. A person in possession
4 of a controlled substance in violation of this chapter is personally
5 liable for the tax, plus a penalty of 100 percent.

6 Sec. 43.52.090. CONFIDENTIAL NATURE OF INFORMATION. (a) The
7 commissioner and employees of the department may not reveal facts
8 obtained from a person in the administration of this chapter except in
9 connection with a proceeding involving taxes due under this chapter
10 from the person. This subsection does not prohibit the commissioner
11 from publishing statistics about the tax levied by this chapter that
12 do not disclose the identity of persons who have purchased the stamps
13 as evidence of payment of the tax.

14 (b) Information obtained by the department from a person may not
15 be used against the person in the prosecution of an offense unless the
16 information

17 (1) is obtained independently of the person's acquiring the
18 official stamps; or

19 (2) consists of testimony given or statements made in a
20 proceeding involving taxes due from the person under this chapter.

21 (c) A stamp denoting payment of the tax imposed by this chapter
22 may not be used against the taxpayer in the prosecution of a criminal
23 proceeding.

24 Sec. 43.52.100. ACCOUNTING FOR RECEIPTS. The commissioner of
25 administration shall separately account for money collected under this
26 chapter that the department deposits in the general fund.

27 Sec. 43.52.110. RELATIONSHIP OF CHAPTER TO OTHER LAW. (a) At
28 the request of the taxpayer, the superior court shall stay the pro-
29 ceedings in an action to enforce the assessment, levy, and collection

1 of the tax imposed by this chapter until the conclusion of criminal
2 proceedings related to the controlled substance for which the tax is
3 imposed.

4 (b) This section does not prohibit the department from immedi-
5 ately seizing assets or collecting taxes.

6 (c) A court or the department may not grant a taxpayer immunity
7 for testimony given, or statements made, in connection with a proceed-
8 ing involving taxes due from the person under this chapter.

9 Sec. 43.52.199. DEFINITIONS. In this chapter

10 (1) "controlled substance" has the meaning given in AS 11.-
11 71.900;

12 (2) "schedule IA controlled substance" means a controlled
13 substance included in the schedule in AS 11.71.140;

14 (3) "schedule IIA controlled substance" means a controlled
15 substance included in the schedule in AS 11.71.150;

16 (4) "schedule IIIA controlled substance" means a controlled
17 substance included in the schedule in AS 11.71.160;

18 (5) "schedule IVA controlled substance" means a controlled
19 substance included in the schedule in AS 11.71.170;

20 (6) "schedule VA controlled substance" means a controlled
21 substance included in the schedule in AS 11.71.180;

22 (7) "schedule VIA controlled substance" means a controlled
23 substance included in the schedule in AS 11.71.190;

24 (8) "tax" means the tax levied by AS 43.52.010.

25 * Sec. 2. AS 43.05.230(a) is amended to read:

26 (a) It is unlawful for a current or former officer, employee, or
27 agent of the state to divulge facts obtained in the administration of
28 a tax levied by AS 43.52, or the amount of income or the particulars
29 set out or disclosed in a report or return made under this title,

1 except

2 (1) in connection with official investigations or proceed-
3 ings of the department, whether judicial or administrative, involving
4 taxes due under this title;

5 (2) in connection with official investigations or proceed-
6 ings of the child support enforcement agency, whether judicial or
7 administrative, involving child support obligations imposed or impos-
8 able under AS 25 or AS 47;

9 (3) as provided in AS 38.05.036 pertaining to audit func-
10 tions; and

11 (4) as otherwise provided in this section.

12 * Sec. 3. This Act takes effect January 1, 1990.
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Original sponsor: Zharoff

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 272 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act imposing taxes on controlled substances; and
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 43 is amended by adding a new chapter to read:

10 CHAPTER 52. TAX ON CONTROLLED SUBSTANCES.

11 Sec. 43.52.010. TAX IMPOSED. (a) Except as provided in (b) of
12 this section, there is levied an excise tax in the following amounts
13 on the following controlled substances that a person possesses in the
14 state:

15 (1) \$100 on each one-tenth gram of a schedule IA controlled
16 substance;

17 (2) \$10 on each one-tenth gram of a schedule IIA controlled
18 substance;

19 (3) \$3.50 on each gram of a schedule IIIA, IVA, VA, or VIA
20 controlled substance.

21 (b) If a controlled substance is in the form of a dosage unit,
22 the excise tax levied on the controlled substance is \$20 per dosage
23 unit.

24 (c) For the purpose of calculating the tax under this section, a
25 quantity of a controlled substance is measured by the weight of the
26 substance, whether pure, impure, or dilute, in the person's pos-
27 session. If the controlled substance is normally dispensed or used in
28 the form of a dosage unit, for the purpose of calculating the tax
29 under this section, the quantity of the controlled substance shall be

1 determined by the number of dosage units.

2 Sec. 43.52.020. STAMPS AFFIXED. (a) When a person acquires or
3 imports into the state a controlled substance on which the tax under
4 this chapter is due, if a stamp or other indicia evidencing payment of
5 the tax has not already been affixed, the person shall have the stamp
6 or other indicia permanently affixed on the controlled substance imme-
7 diately upon receiving the substance.

8 (b) Each stamp or other indicia may be used only once.

9 Sec. 43.52.030. PAYMENT OF TAX. (a) The tax imposed by this
10 chapter is due and payable by the person immediately upon the person's
11 acquisition of the controlled substance.

12 (b) A person who is liable for the tax imposed by this chapter
13 shall pay the face value for each stamp or other indicia of purchase.

14 (c) For purposes of calculating the tax due under this chapter,
15 the controlled substance is measured by the weight or number of dosage
16 units of the substance in the person's possession.

17 Sec. 43.52.040. ADMINISTRATION OF CHAPTER. (a) The department
18 shall

19 (1) administer this chapter;

20 (2) collect, supervise, and enforce the collection of taxes
21 due under this chapter and enforce the penalties provided in this
22 title for failure to pay a tax when due; and

23 (3) adopt a uniform system of providing official stamps or
24 other official indicia for controlled substances upon which a tax is
25 imposed.

26 (b) The department may adopt regulations necessary for the
27 administration of this chapter.

28 Sec. 43.52.050. ASSESSMENT OF TAX BY COMMISSIONER. (a) An
assessment for a person not possessing valid stamps or other official

1 indicia showing that the tax has been paid shall be considered a
2 jeopardy assessment or collection. The commissioner shall

3 (1) assess a tax and applicable penalties based on personal
4 knowledge or information available to the commissioner;

5 (2) mail to the taxpayer at the taxpayer's last known
6 address, or serve in person, a written notice of the amount of tax and
7 penalty;

8 (3) demand immediate payment of the tax; and

9 (4) if payment is not immediately made, collect the tax and
10 penalty by any method prescribed in this title.

11 (b) The tax and penalties assessed by the commissioner in an
12 assessment made under (a) of this section are presumed to be valid and
13 correctly determined and assessed. The burden is upon the taxpayer to
14 show their incorrectness or invalidity. A statement filed by the
15 commissioner with the court administrator, or any other certificate by
16 the commissioner of the amount of tax and penalties determined or
17 assessed is admissible in evidence and is prima facie evidence of the
18 facts it contains.

19 (c) Except for AS 43.20.270(b)(2), the provisions of AS 43.10.-
20 030 and AS 43.20.270 apply to this chapter.

21 Sec. 43.52.060. TAX PAYMENT REQUIRED FOR POSSESSION. A person
22 may not possess a controlled substance subject to the tax imposed by
23 this chapter unless

24 (1) the tax has been paid on the controlled substance; and

25 (2) a stamp or other official indicia issued by the depart-
26 ment has been affixed to the controlled substance.

27 Sec. 43.52.070. CRIMINAL PENALTIES. The penalties provided in
28 AS 43.05 apply to the tax levied in this chapter.

29 Sec. 43.52.080. CIVIL PENALTY. A person who is in control of a

1 controlled substance in violation of this chapter is considered to
2 have possession of the controlled substance. A person in possession
3 of a controlled substance in violation of this chapter is personally
4 liable for the tax, plus a penalty of 100 percent.

5 Sec. 43.52.090. CONFIDENTIAL NATURE OF INFORMATION. (a) The
6 commissioner and employees of the department may not reveal facts
7 obtained from a person in the administration of this chapter except in
8 connection with a proceeding involving taxes due under this chapter
9 from the person. This subsection does not prohibit the commissioner
10 from publishing statistics about the tax levied by this chapter that
11 do not disclose the identity of persons who have purchased the stamps
12 as evidence of payment of the tax.

13 (b) Information obtained by the department from a person may not
14 be used against the person in the prosecution of an offense unless the
15 information is obtained independently of the person's acquiring the
16 official stamps or other official indicia required by this chapter.

17 (c) A stamp denoting payment of the tax imposed by this chapter
18 may not be used against the taxpayer in the prosecution of a criminal
19 proceeding.

20 Sec. 43.52.100. ACCOUNTING FOR RECEIPTS. The commissioner of
21 administration shall separately account for money collected under this
22 chapter that the department deposits in the general fund.

23 Sec. 43.52.110. RELATIONSHIP OF CHAPTER TO OTHER LAW. (a) The
24 superior court may stay the proceedings in an action to enforce the
25 assessment, levy, and collection of the tax imposed by this chapter
26 until a criminal prosecution based on possession of controlled sub-
27 stances subject to the tax has been determined.

28 (b) This chapter does not in any manner provide immunity for a
29 person from criminal prosecution under state law.

1 Sec. 43.52.199. DEFINITIONS. In this chapter

2 (1) "controlled substance" has the meaning given in AS 11.-
3 71.900;

4 (2) "schedule IA controlled substance" means a controlled
5 substance included in the schedule in AS 11.71.140;

6 (3) "schedule IIA controlled substance" means a controlled
7 substance included in the schedule in AS 11.71.150;

8 (4) "schedule IIIA controlled substance" means a controlled
9 substance included in the schedule in AS 11.71.160;

10 (5) "schedule IVA controlled substance" means a controlled
11 substance included in the schedule in AS 11.71.170;

12 (6) "schedule VA controlled substance" means a controlled
13 substance included in the schedule in AS 11.71.180;

14 (7) "schedule VIA controlled substance" means a controlled
15 substance included in the schedule in AS 11.71.190;

16 (8) "tax" means the tax levied by AS 43.52.010.

17 * Sec. 2. This Act takes effect January 1, 1990.
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STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
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OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
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PHONE: (907) 279-7424

July 27, 1989

The Honorable Fred F. Zharoff
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Zharoff:

As we discussed at the end of the session, the Criminal Division has continued to work on a committee substitute for SB 272. Taking the April 25, 1989 Chenoweth work draft as a starting point, we prepared the amendments set out in this letter. Although the amendments substantially improve the bill, and there is authority from other jurisdictions suggesting that taxation of controlled substances is constitutional, we cannot guarantee that this legislation will withstand a court challenge in Alaska.

In additions to the specific amendments offered below, I have a number of observations.

1. In developing the above amendments, I spoke with both a lawyer in the Minnesota Department of Revenue (Therese Koenig-Smith, 612-296-3438), and the person responsible for the drug tax program in Minnesota (Chris Sanft, 612-296-1940). We discussed the reasons why Minnesota chose to limit application of the drug tax law to dealers (defined as persons in possession of more than a specified quantity of drugs). Minnesota made this decision for two reasons: (1) since failing to pay the drug tax is a felony offense, the legislature did not want to turn a misdemeanor (e.g. possession of one gram of marijuana in an automobile) into a felony based solely on the drug tax law, and therefore, made the law applicable to possession of felony quantities of controlled substances; and (2) the cost of pursuing a tax action against a person in possession of one gram of marijuana is high and would not be offset by the tax revenues collected, therefore, the law was made applicable to persons in possession of a sufficient quantity of drugs to make the tax action cost-effective.

We share the concerns of the Minnesota policy makers, and believe a better approach would be to make the law

applicable only to "dealers." The definition of "dealer" in Minnesota is a person in possession of a felony quantity of controlled substances. We encourage you to amend SB 272 to make it applicable only to persons in possession of a felony quantity of controlled substances as set out in AS 11.71.040. In addition, based on the cost of pursuing tax assessments, it may be wise to raise the threshold quantity for imposition of taxes above what is set out in AS 11.71.040.

2. A recent case, State v. Durrant, 769 P.2d 1174 (Kan. 1989) (copy attached), upheld the constitutionality of the Kansas drug tax statute in the face of a challenge based on infringement of the right against self-incrimination. The court in Durrant at pages 1180-81 discussed the necessity for imposing penalties on any person who discloses confidential tax information as a way to protect against the use of self-incriminating statements in criminal prosecutions. Under AS 43.05.230, it is a crime punishable by a \$5000 fine, or by two years in jail, to divulge "the particulars set out or disclosed in a report or return made under this title." However, the drug tax law does not provide for either reports or returns. Therefore, either AS 43.05.230 needs to be amended to cover the situation presented in cases involving drug taxes, or criminal penalties for disclosure of confidential information should be written into AS 43.52.090. Although our recommendation would be to add a section to AS 43.52.090, you should discuss this issue with the Department of Revenue to see which alternative would make administration of the chapter easier.

3. We are concerned about the amount of tax imposed on Schedule IA controlled substances. Since the tax is set at \$100 on each one-tenth of a gram, the tax on a gram of substances such as opium, codeine, and heroin would be \$1000 a gram, or \$28,000 an ounce. This high rate of taxation opens the door to the argument that the tax is punitive, and therefore, criminal in nature and an impermissible exercise of taxing powers. See, e.g., Zwak v. United States, 848 F.2d 1179 (11th Cir. 1988); Sonzinsky v. United States, 300 U.S. 506, 81 L.Ed 772, 57 S.Ct. 554 (1937); and Annot. 81 L.Ed. 776 (1937). If an Alaska court found that the measure was punitive, it might mean, for example, that the protections normally available to criminal defendants, such as court appointed counsel, would be available to persons involved in tax proceedings. It could also mean that the state would be precluded, based on constitutional due process considerations, from both collecting a tax and pursuing

a criminal prosecution. See, e.g. United State v. Halper, ___ U.S. ___, 45 Cr.L.Rptr. 3033 (May 15, 1989).

We suggest that the amount of tax imposed on Schedule IA controlled substances be reduced to a more reasonable amount.

4. The statute is silent on the issue of whether a defendant would be entitled to retain sufficient assets to hire a private attorney. I assume this is because you did not intend to provide an exception to the law allowing seizure of all assets necessary to meet the entire tax liability. The United States Supreme Court recently determined, based in part on an analysis of legislative intent, that assets to pay attorney's fees can be forfeited without infringing on a criminal defendant's constitutional right to an attorney. See, United States v. Monsanto, ___ U.S. ___, 45 Cr.L.Rptr. 3133 (June 22, 1989) and Caplin & Drysdale v. United States, ___ U.S. ___, 45 Cr.L.Rptr. 3143 (June 22, 1989). In order to clarify the intent of the Alaska legislature on this issue, it would be prudent that the bill be accompanied by a statement of legislative intent to allow seizure of assets that could otherwise be used to pay attorney's fees.

5. The law does not make any provision for credit for previously paid taxes, and as a result, may impermissibly allow for double taxation. Minnesota amended its drug tax law this year to avoid this problem with the following language:

If another state or local unit of government has previously assessed an excise tax on the marijuana or controlled substances, the taxpayer must pay the difference between the tax due under [the section of law requiring payment of drug taxes] and the tax previously paid. If the tax previously paid to the other state or local unit of government was equal to or greater than the tax due under [the section of law requiring payment of drug taxes], no tax is due. The burden is on the taxpayer to show that an excise tax on the marijuana or controlled substances has been paid to another state or local unit of government.

6. As written, on page 3, lines 19 - 20, the bill requires that existing distraint procedures be used to collect drug tax assessments. However, we understand that you want authority to immediately seize property, and do not want there to be a ten day delay (or longer if a person

files an appeal). In its present form, the legislation does not provide this authority. For the sake of comparison, a copy of Minnesota's tax procedures is attached for your information, and may provide a helpful model for the legislative drafters. In subdivision 2 of section 270.70, for example, a specific waiver of the ten-day notice period is included.

One point of caution: in drafting jeopardy assessment procedures it is important to provide the level of procedural due process required by the state and federal constitutions. The specific issue is whether a judicial proceeding after the seizure of assets and before their sale, coupled with a full hearing on the merits later, is sufficient to meet the due process hearing requirement. A lengthy discussion of this issue is set out in Sisson v. Triplett, 428 N.W.2d 565, 568-571 (Minn. 1988). In Minnesota, the court approved the immediate seizure of assets because the statute specifically provided an opportunity for a judicial hearing and other relief prior to sale of the property by: (1) allowing property to be returned upon posting a bond; (2) providing for an injunction to prohibit the enforcement of a levy or sale upon a showing of irreparable injury; and (3) creating an action for "equitable relief" for release of the property.

7. We reviewed the bill from the perspective of the Criminal Division. However, we do not have special expertise in the field of taxation. In addition to our review, we strongly suggest that the next work draft of the bill be reviewed by an attorney familiar with Alaska's tax laws.

The specific amendments we suggest to the April 25, 1989 Chenoweth work draft are:

Amendment 1: "Dosage unit" could be interpreted to mean either one tablet, or multiple tablets, of a controlled substance. The amendment clarifies the intent of the legislation.

Page 1, line 21: The term "dosage unit" should either be defined, or replaced with the phrase "tablet, ampule, or syrette."

Page 1, line 28: The term "dosage unit" should either be defined, or replaced with the phrase "tablet, ampule, or syrette."

Page 2, line 1: The term "dosage units" should either be defined, or replaced with the phrase "tablets, ampules, or syrettes."

Page 2, lines 15 - 16: The term "dosage units" should either be defined, or replaced with the phrase "tablets, ampules, or syrettes."

Amendment 2: As currently drafted, the bill requires that the stamp be affixed to the controlled substance, which is a physical impossibility. The amendment corrects this problem.

Page 2, lines 2 - 8: The existing section should be deleted and replaced with the following:

Sec. 43.52.020. STAMPS AFFIXED. (a) When a person acquires or imports into the state a controlled substance on which the tax under this chapter is due, if a stamp evidencing payment of the tax has not already been affixed to the container in which the substance is enclosed, the person shall have the stamp permanently affixed on the container immediately upon receiving the substance.

(b) If the controlled substance is subdivided into more than one container, a stamp must be affixed to each container.

(c) Each stamp may be used only once.

Amendment 3: Since the legislation requires purchase of stamps, and affixing of stamps, and makes no provision for alternative indicia of purchase, the reference does not make sense and should be deleted from the bill.

Page 2, line 13: Delete the phrase "or other indicia of purchase".

Page 2, lines 23-24: Delete the phrase "or other official indicia".

Page 2, line 29 and Page 3, line 1: Delete the phrase "or other official indicia."

Amendment 4: This phrase was taken from the Minnesota statute, does not make sense in Alaska, and should be deleted from the bill.

Page 3, lines 14 - 15: Delete phrase "Statement filed by the commissioner with the court administrator, or any other".

Amendment 5: As written, the tax law would apply to drugs lawfully obtained by prescription, possessed for research approved under federal law, or possessed by doctors, pharmacies and hospitals. The amendment adds an exception for possession of controlled substances under these circumstances, and is modelled on a similar provision in the Minnesota law.

Page 3, lines 21 - 26: The existing section should be deleted and replaced with the following:

Sec. 43.52.060. TAX PAYMENT REQUIRED FOR POSSESSION. (a) A person may not possess a controlled substance subject to the tax imposed by the chapter unless

(1) the tax has been paid on the controlled substance; and

(2) a stamp issued by the department has been affixed to the controlled substance.

(b) A person lawfully in possession of a controlled substance is not subject to the tax required under this chapter.

Amendment 6: There are two criminal penalty provisions in AS 43.05. The amendment clarifies which penalty provision applies to drug tax cases.

Page 3, line 28: The reference to "AS 43.05" should be changed to "AS 43.05.290".

Amendment 7: Although an exception is made in AS 43.52.090(a) for release of information obtained in connection with a proceeding involving drug taxes, a similar exception is not contained in AS 43.52.090(b). If proposed amendment 8 is incorporated into the bill, and the taxpayer is given the option of staying the tax proceedings until conclusion of related criminal cases, there is no reason to prohibit prosecution use of testimony

given during the course of tax enforcement actions. The following amendment would authorize such use:

Page 4, lines 13 - 16: The existing subsection (b) should be deleted and replaced with the following:

(b) Information obtained by the department from a person may not be used against the person in the prosecution of an offense unless the information

(1) is obtained independently of the person's acquiring the official stamps or other official indicia required by this chapter; or

(2) consists of testimony given, or statements made, in connection with a proceeding involving taxes due under this chapter from the person.

Amendment 8: As mentioned in the materials I sent you on April 11, 1989, the Criminal Division has deep concerns about the effect of tax proceedings on our ability to prosecute drug offenders. In order to avoid conflicts between the civil and criminal proceedings, the amendment provides for a mandatory stay of civil proceedings until conclusion of the underlying criminal case upon request of the taxpayer, and prohibits a court or the Department of Revenue from granting immunity for testimony given during tax proceedings. However, we cannot say with assurance that this solution is adequate to avoid the constitutional issues raised by the Alaska Supreme Court in Resek v. State, 706 P.2d 288 (Alaska 1985).

Page 4, line 23 - 27: The existing subsection (a) should be deleted and replaced with the following:

(a) Upon request of the taxpayer, the superior court shall stay a hearing on the merits of a tax action brought under this chapter until the conclusion of related criminal proceedings. Nothing in this section shall be interpreted as prohibiting the department from immediately seizing assets or collecting taxes. A court or the department may not grant a taxpayer transactional, use, or derivative-use immunity for testimony given, or statements made, in connection with a proceeding involving taxes due under this chapter from the person.

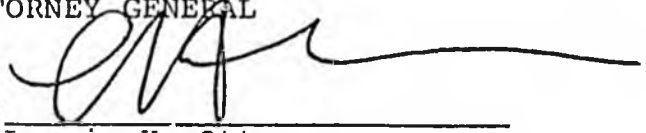
The Honorable Fred F. Zharoff

July 27, 1989
Page 8

If you have any questions, please feel free to call. If a new work draft is prepared, I would very much appreciate receiving a copy.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
Laurie H. Otto
Assistant Attorney General

Attachment

cc: ✓ The Honorable Jan Faiks
Douglas B. Baily
Bob Evans
Royce Weller

LHO:me-103

by the commissioner within five years after the date of assessment of the tax. A notice of lien filed in one county may be transcribed to any other county within ten years after the date of its filing, but the transcription shall not extend the period during which the lien is enforceable. A notice of lien may be renewed by the commissioner before the expiration of the ten-year period for an additional ten years. The taxpayer must receive written notice of the renewal.

Subd. 5. [Repealed, 1985 c 101 s 17]

Subd. 6. **Enforceability of lien.** The lien imposed by this section shall be enforceable by levy as authorized in section 270.70, or by judgment lien foreclosure as authorized in chapter 550.

Subd. 7. **Notice of mortgage foreclosure or contract termination.** If a lien has been filed by the commissioner of revenue against real property pursuant to this section, and, subsequent to the recording of the lien, a mortgage foreclosure upon the real property is commenced under chapter 580, or a termination of contract of sale of the real property is commenced under section 559.21, notice of the mortgage foreclosure or termination of contract of sale shall be mailed to the commissioner not less than 25 days prior to the foreclosure or termination. Provided, notice need not be given pursuant to this subdivision if the lien of the commissioner has been filed within 30 days or less prior to the foreclosure or termination. The contents of the notice shall be as prescribed in section 7425(c)(1) of the Internal Revenue Code of 1954, as amended through December 31, 1982.

Subd. 8. **Filing entitlement.** Execution of notices of liens or of other notices affecting state tax liens by the commissioner of revenue or a delegate entitles them to be filed, and no other attestation, certification, or acknowledgment is necessary.

Subd. 9. **Lien search fees.** Upon request of any person, the filing officer shall issue a certificate showing whether there is on file, on the date and hour stated in the certificate, any notice of lien or certificate or notice affecting any lien filed after June 30, 1979, naming a particular person, and giving the date and hour of filing of each notice or certificate naming the person. The fee for a certificate shall be as provided by section 336.9-407 or 357.18, subdivision 1, clause (3). Upon request, the filing officer shall furnish a copy of any notice of state lien, or notice or certificate affecting a state lien, for a fee of 50 cents per page.

Subd. 10. **Limitation for homestead property.** A lien imposed under this section upon property defined as homestead property in chapter 510 may not be enforced against homestead property by levy under section 270.70, or by judgment lien under chapter 550.

History: 1982 c 523 art 2 s 8; 1983 c 180 s 3-6; 1985 c 101 s 6-9; 1985 c 281 s 2; 1986 c 444; 1Sp1986 c 1 art 7 s 11-14

270.70 LEVY AND DISTRAINT.

Subdivision 1. **Authority of commissioner.** If any tax payable to the commissioner of revenue or to the department of revenue is not paid when due, such tax may be collected by the commissioner of revenue within five years after the date of assessment of the tax, or if the tax judgment has been filed, within the statutory period of enforcement of a valid tax judgment, by a levy upon all property and rights to property of the person liable for the payment or collection of such tax (except that which is exempt from execution pursuant to section 550.37) or property on which there is a lien provided in section 270.69. For this purpose, the term "tax" shall include any penalty, interest and costs properly payable. The term "levy" includes the power of distraint and seizure by any means.

Subd. 2. **Notice and demand; jeopardy collection.** Before a levy is made, notice and demand for payment of the amount due shall be given to the person liable for the payment or collection of the tax at least ten days prior to the levy. If the commissioner has reason to believe that collection of the tax is in jeopardy, notice and demand for immediate payment of the tax may be made by the commissioner. If the tax is not paid,

*Mina
Collection
Statute*

the commissioner may proceed to collect by levy without regard to the ten day period provided herein.

Subd. 3. Manner of execution and sale. In making the execution of the levy and in collecting the taxes due, the commissioner shall have all of the powers provided in chapter 550 and in any other law for purposes of effecting an execution against property in this state. The sale of property levied upon, and the time and manner of redemption therefrom, shall, to the extent not provided in sections 270.701 to 270.709, be governed by chapter 550. The seal of the court, subscribed by the court administrator, as provided in section 550.04, shall not be required. The levy for collection of taxes may be made whether or not the commissioner has commenced a legal action for collection of such taxes.

Subd. 4. Stay of sale. (a) Where a jeopardy assessment or any other assessment has been made by the commissioner, the property seized for collection of the tax shall not be sold until the time has expired for filing an appeal of the assessment with the tax court pursuant to chapter 271. If an appeal has been filed, no sale shall be made unless the taxes remain unpaid for a period of more than 30 days after final determination of the appeal by the tax court or by the appropriate judicial forum.

(b) Notwithstanding clause (a), seized property may be sold if

- (i) the taxpayer consents in writing to the sale, or
- (ii) the commissioner determines that the property is perishable or may become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense.

Subd. 5. Probate court jurisdiction. Where a levy has been made to collect taxes pursuant to this section and the property seized is properly included in a formal proceeding commenced under sections 524.3-401 to 524.3-505 and maintained under full supervision of the court, such property shall not be sold until the probate proceedings are completed or until the court so orders.

Subd. 6. Bond or security to release seizure. The property seized shall be returned by the commissioner if the owner gives a surety bond equal to the appraised value of the owner's interest in the property, as determined by the commissioner, or deposits with the commissioner security in such form and amount as the commissioner deems necessary to insure payment of the liability, but not more than twice the liability.

Subd. 7. Injunction. Notwithstanding any other provision to the contrary, if a levy or sale pursuant to this section would irreparably injure rights in property which the court determines to be superior to rights of the state in such property, the district court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

Subd. 8. Surrender of property subject to levy. Any person who fails or refuses to surrender without reasonable cause any property or rights to property subject to levy, upon demand by the commissioner, shall be liable personally to the state of Minnesota in an amount equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made. Any amount recovered under this subdivision shall be credited against the tax liability for the collection of which such levy was made.

Subd. 9. Penalty. In addition to the personal liability imposed by subdivision 8, if any person required to surrender property or rights to property fails or refuses to surrender the property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 25 percent of the amount recoverable under subdivision 8. No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

Subd. 10. Person defined. The term "person" as used in subdivision 8 includes an officer or employee of a corporation or a member or employee of a partnership who, as such officer, employee or member is under a duty to surrender the property or rights to property or to discharge the obligation. The personal liability imposed by subdivision 8 and the penalty imposed by subdivision 9 may, after demand to honor a levy

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has been made, be assessed by the commissioner within 60 days after service of the levy. An assessing tax order under this subdivision shall be appealable to the tax court without payment of the tax, penalty, or interest in the manner provided by law, but an appeal shall not preclude the commissioner from exercising any collection action the commissioner deems necessary to preserve the interests of the state while the matter is pending.

Subd. 11. **Optional remedy.** Any action taken by the commissioner pursuant to this section shall not constitute an election by the state to pursue a remedy to the exclusion of any other remedy.

Subd. 12. **Equitable relief.** After the commissioner has seized the property of any person, that person may, upon giving 48 hours notice to the commissioner and to the court, bring a claim for equitable relief before the district court for the release of the property to the taxpayer upon such terms and conditions as the court may deem equitable.

Subd. 13. **Levy and sale by sheriff.** If any tax payable to the commissioner of revenue or to the department of revenue is not paid as provided in subdivision 2, the commissioner may, within five years after the date of assessment of the tax, delegate the authority granted by subdivision 1, by means of issuing a warrant to the sheriff of any county of the state commanding the sheriff, as agent for the commissioner, to levy upon and sell the real and personal property of the person liable for the payment or collection of the tax and to levy upon the rights to property of that person within the county, or to levy upon and seize any property within the county on which there is a lien provided in section 270.69, and to return the warrant to the commissioner and pay to the commissioner the money collected by virtue thereof by a time to be therein specified not less than 60 days from the date of the warrant. The sheriff shall proceed thereunder to levy upon and seize any property of the person and to levy upon the rights to property of the person within the county (except the person's homestead or that property which is exempt from execution pursuant to section 550.37), or to levy upon and seize any property within the county on which there is a lien provided in section 270.69. For purposes of the preceding sentence, the term "tax" shall include any penalty, interest and costs properly payable. The sheriff shall then sell so much of the property levied upon as is required to satisfy the taxes, interest, and penalties, together with the sheriff's costs; but the sales, and the time and manner of redemption therefrom, shall, to the extent not provided in sections 270.701 to 270.709, be governed by chapter 550. The proceeds of the sales, less the sheriff's costs, shall be turned over to the commissioner, who shall then apply the proceeds as provided in section 270.708.

Subd. 14. **Priority of levy.** Notwithstanding section 52.12, a levy by the commissioner made pursuant to the provisions of this section upon a taxpayer's funds on deposit in a financial institution located in this state, shall have priority over any unexercised right of setoff of the financial institution to apply the levied funds toward the balance of an outstanding loan or loans owed by the taxpayer to the financial institution. A claim by the financial institution that it exercised its right to setoff prior to the levy by the commissioner must be substantiated by evidence of the date of the setoff, and shall be verified by the sworn statement of a responsible corporate officer of the financial institution. Furthermore, for purposes of determining the priority of any levy made under this section, the levy shall be treated as if it were an execution made pursuant to chapter 550.

Subd. 15. **Effect of honoring levy.** Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the commissioner, surrenders the property or rights to property (or who pays a liability under subdivision 8) shall be discharged from any obligation or liability to the person liable for the payment or collection of the delinquent tax with respect to the property or rights to property so surrendered or paid.

Subd. 16. **Notice of levy.** Notwithstanding any other provision of law to the contrary, the notice of any levy authorized by this section may be served by mail or by delivery by an employee or agent of the department of revenue.

History: 1975 c 377 s 6; 1976 c 134 s 78; 1977 c 307 s 29; 1982 c 523 art 2 s 9-16; 1983 c 180 s 7-9, 1985 c 101 s 10, 11; 1986 c 444; 1Sp1986 c 3 art 1 s 82

270.701 SALE OF SEIZED PROPERTY.

Subdivision 1. Notice of seizure. As soon as practicable after seizure of property, notice in writing shall be given by the commissioner of revenue to the owner of the property (or, in the case of personal property, the possessor thereof), and shall be served in like manner as a summons in a civil action in the district court. If the owner cannot be readily located, or has no dwelling or place of business within this state, the notice may be mailed to the last known address. The notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

Subd. 2. Notice of sale. The commissioner shall as soon as practicable after the seizure of the property give notice of sale of the property to the owner, in the manner of service prescribed in subdivision 1. In the case of personal property, the notice shall be served at least 10 days prior to the sale. In the case of real property, the notice shall be served at least four weeks prior to the sale. The commissioner shall also cause public notice of each sale to be made. In the case of personal property, notices shall be posted at least 10 days prior to the sale at the post office nearest the place where the seizure is made, and in not less than two other public places. In the case of real property, six weeks' published notice shall be given prior to the sale, in a newspaper published or generally circulated in the county. The notice of sale provided in this subdivision shall specify the property to be sold, and the time, place, manner and conditions of the sale. Whenever levy is made without regard to the ten-day period provided in section 270.70, subdivision 2, public notice of sale of the property seized shall not be made within the ten-day period unless section 270.702 (relating to sale of perishable goods) is applicable.

Subd. 3. Sale of indivisible property. If any property liable to levy is not divisible, so as to enable the commissioner by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of the property shall be sold.

Subd. 4. Time and place of sale. The time of sale shall be after the expiration of the notice periods prescribed in subdivision 2. The place of sale shall be within the county in which the property is seized, except by special order of the commissioner.

Subd. 5. Manner and conditions of sale. (a) Before the sale the commissioner shall determine a minimum price for which the property shall be sold, and if no person offers for the property at the sale the amount of the minimum price, the property shall be declared to be purchased at the minimum price for the state of Minnesota; otherwise the property shall be declared to be sold to the highest bidder. In determining the minimum price, the commissioner shall take into account the expense of making the levy and sale. The announcement of the minimum price determined by the commissioner may be delayed until the receipt of the highest bid.

(b) The sale shall not be conducted in any manner other than:

- (i) by public auction, or
- (ii) by public sale under sealed bids.

(c) In the case of seizure of several items of property, the items may be offered separately, in groups, or in the aggregate, and shall be sold under whichever method produces the highest aggregate amount.

(d) Payment in full shall be required at the time of acceptance of a bid, except that a part of the payment may be deferred by the commissioner for a period not to exceed 30 days.

(e) Other methods (including advertising) in addition to those prescribed in subdivision 2 may be used in giving notice of the sale.

(f) The commissioner may adjourn the sale from time to time for a period not to exceed 30 days.

(g) If payment in full is required at the time of acceptance of a bid and is not then and there paid, the commissioner shall forthwith proceed to again sell the property in the manner provided in this section. If the conditions of the sale permit part of the

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within ten days from the sale cause the certificate of sale to be duly recorded by the county recorder of the county in which the real property is located.

History: 1982 c 523 art 2 s 20

270.705 EFFECT OF CERTIFICATE OF SALE.

Subdivision 1. Personal property. (a) In all cases of sale pursuant to section 270.701 of personal property, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the right of the commissioner to make the sale, and conclusive evidence of the regularity of the proceedings in making the sale. The certificate shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

(b) If the property consists of stocks, the certificate of sale shall be notice, when received, to any corporation, company, or association of the transfer, and shall be authority to the corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(c) If the subject of sale is securities or other evidences of debt, the certificate of sale shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of the securities or other evidences of debt.

(d) If the property consists of a motor vehicle, the certificate of sale shall be notice, when received, to the registrar of motor vehicles of this state of the transfer, and shall be authority to the registrar to record the transfer on the books and records in the same manner as if the certificate of title to the motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

Subd. 2. Real property. In the case of the sale of real property pursuant to section 270.701, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the facts therein stated, and shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto.

Subd. 3. Junior encumbrances. A certificate of sale of personal property or real property given pursuant to section 270.704 shall discharge the property from all liens, encumbrances, and titles over which the lien of the state of Minnesota with respect to which the levy was made had priority.

History: 1982 c 523 art 2 s 21; 1986 c 444

270.706 RECORDS OF SALE.

The commissioner shall, for the department of revenue, keep a record of all sales of property under section 270.701 and of redemptions of real property. The record shall set forth the tax for which the sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making the sale, the amount of expenses, the names of the purchasers, and the date of the certificate of sale. A copy of the record, or any part thereof, certified by the commissioner shall be evidence in any court of the truth of the facts therein stated.

History: 1982 c 523 art 2 s 22

270.707 EXPENSE OF LEVY AND SALE.

The commissioner shall determine the expenses to be allowed in all cases of levy and sale.

History: 1982 c 523 art 2 s 23

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payment to be deferred, and if the part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or that part thereof as has not been paid, together with interest at the rate specified in section 549.09 from the date of the sale; or, in the discretion of the commissioner, the sale may be declared by the commissioner to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in this section. In the event of a readvertisement and sale, any new purchaser shall receive the property or rights to property free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by the defaulting purchaser shall be forfeited.

History: 1982 c 523 art 2 s 17; 1986 c 444

270.702 SALE OF PERISHABLE GOODS.

If the commissioner determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that the property cannot be kept without great expense, the commissioner shall appraise the value of the property, and if the owner of the property can be readily found, the commissioner shall give the owner notice of the determination of the appraised value of the property. The property shall be returned to the owner if, within the time specified in the notice, the owner (a) pays to the commissioner an amount equal to the appraised value, or (b) gives bond in the form, with the sureties, and in the amount as the commissioner prescribes to pay the appraised amount at the time the commissioner determines to be appropriate in the circumstances. If the owner does not pay the amount or furnish the bond in accordance with this section, the commissioner shall as soon as practicable make public sale of the property in accordance with section 270.701.

History: 1982 c 523 art 2 s 18; 1986 c 444

270.703 REDEMPTION OF PROPERTY.

Subdivision 1. Before sale. Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the commissioner at any time prior to the sale thereof, and upon payment the commissioner shall restore the property to the person, and all further proceedings in connection with the levy on the property shall cease from the time of payment.

Subd. 2. Redemption of real estate after sale. The owners of any real property sold as provided in this section, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of the property, at any time within 6 months, or in case the real property sold exceeds 10 acres in size, at any time within 12 months, after the sale thereof. The property or tract of property shall be permitted to be redeemed upon payment to the purchaser (or if not found in the county in which the property to be redeemed is situated, then to the commissioner, for the use of the purchaser, or the purchaser's heirs or assigns) of the amount paid by the purchaser together with interest at the rate specified in section 549.09 from the date of the sale.

Subd. 3. Record. When any lands sold are redeemed as provided in this section, the commissioner shall cause entry of the fact to be made upon the record required by section 270.706 and the entry shall be evidence of the redemption.

History: 1982 c 523 art 2 s 19; 1986 c 444

270.704 CERTIFICATE OF SALE.

In the case of property sold as provided in section 270.701, the commissioner shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property the certificate shall set forth the real property purchased, for whose taxes the property was sold, the name of the purchaser, and the price paid. If real property is declared purchased by the state of Minnesota, the commissioner shall

within ten days from the sale cause the certificate of sale to be duly recorded by the county recorder of the county in which the real property is located.

History: 1982 c 523 art 2 s 20

270.705 EFFECT OF CERTIFICATE OF SALE.

Subdivision 1. Personal property. (a) In all cases of sale pursuant to section 270.701 of personal property, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the right of the commissioner to make the sale, and conclusive evidence of the regularity of the proceedings in making the sale. The certificate shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold.

(b) If the property consists of stocks, the certificate of sale shall be notice, when received, to any corporation, company, or association of the transfer, and shall be authority to the corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(c) If the subject of sale is securities or other evidences of debt, the certificate of sale shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of the securities or other evidences of debt.

(d) If the property consists of a motor vehicle, the certificate of sale shall be notice, when received, to the registrar of motor vehicles of this state of the transfer, and shall be authority to the registrar to record the transfer on the books and records in the same manner as if the certificate of title to the motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

Subd. 2. Real property. In the case of the sale of real property pursuant to section 270.701, the certificate of sale given pursuant to section 270.704 shall be prima facie evidence of the facts therein stated, and shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto.

Subd. 3. Junior encumbrances. A certificate of sale of personal property or real property given pursuant to section 270.704 shall discharge the property from all liens, encumbrances, and titles over which the lien of the state of Minnesota with respect to which the levy was made had priority.

History: 1982 c 523 art 2 s 21; 1986 c 444

270.706 RECORDS OF SALE.

The commissioner shall, for the department of revenue, keep a record of all sales of property under section 270.701 and of redemptions of real property. The record shall set forth the tax for which the sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making the sale, the amount of expenses, the names of the purchasers, and the date of the certificate of sale. A copy of the record, or any part thereof, certified by the commissioner shall be evidence in any court of the truth of the facts therein stated.

History: 1982 c 523 art 2 s 22

270.707 EXPENSE OF LEVY AND SALE.

The commissioner shall determine the expenses to be allowed in all cases of levy and sale.

History: 1982 c 523 art 2 s 23

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270.708 APPLICATION OF PROCEEDS OF LEVY.

Subdivision 1. Collection of liability. Any money realized by proceedings under this chapter, whether by seizure, by surrender under section 270.70 (except pursuant to subdivision 9 thereof), by sale of seized property, or by sale of property redeemed by the state of Minnesota (if the interest of the state of Minnesota in the property was a lien arising under the provisions of section 270.69), shall be applied as follows:

(a) First, against the expenses of the proceedings; then

(b) If the property seized and sold is subject to a tax administered by the commissioner of revenue which has not been paid, the amount remaining after applying clause (a) shall next be applied against the tax liability (and, if the tax was not previously assessed, it shall then be assessed); and

(c) The amount, if any, remaining after applying clauses (a) and (b) shall be applied against the tax liability in respect of which the levy was made or the sale was conducted.

Subd. 2. Surplus proceeds. Any surplus proceeds remaining after the application of subdivision 1 shall, upon application and satisfactory proof in support thereof, be credited or refunded by the commissioner to the person or persons legally entitled thereto.

History: 1982 c 523 art 2 s 24

270.709 AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

Subdivision 1. Release of levy. It shall be lawful for the commissioner to release the levy upon all or part of the property or rights to property levied upon if the commissioner determines that the release will facilitate the collection of the liability, but the release shall not operate to prevent any subsequent levy.

Subd. 2. Return of property. If the commissioner determines that property has been wrongfully levied upon, it shall be lawful for the commissioner to return:

(a) The specific property levied upon, at any time;

(b) An amount of money equal to the amount of money levied upon, at any time before the expiration of nine months from the date of the levy; or

(c) An amount of money equal to the amount of money received by the state of Minnesota from a sale of the property, at any time before the expiration of nine months from the date of the sale.

For purposes of clause (c), if property is declared purchased by the state of Minnesota at a sale pursuant to section 270.701, subdivision 5 (relating to manner and conditions of sale), the state of Minnesota shall be treated as having received an amount of money equal to the minimum price determined pursuant to section 270.701, subdivision 5 or, if larger, the amount received by the state of Minnesota from the resale of the property.

History: 1952 c 523 art 2 s 25

270.71 ACQUISITION AND RESALE OF SEIZED PROPERTY.

For the purpose of enabling the commissioner of revenue to purchase or redeem seized property in which the state of Minnesota has an interest arising from a lien for unpaid taxes, there is appropriated to the commissioner an amount representing the cost of such purchases or redemptions. Seized property acquired by the state of Minnesota to satisfy unpaid taxes shall be resold by the commissioner. The commissioner shall preserve the value of seized property while controlling it, including but not limited to the procurement of insurance. For the purpose of refunding the proceeds from the sale of levied or redeemed property which are in excess of the actual tax liability plus costs of acquiring the property, there is hereby created a levied and redeemed property refund account in the agency fund. All amounts deposited into this account are appropriated to the commissioner of revenue. The commissioner shall report quarterly on the status of this program to the chairs of the house taxes and appropriations committees and senate taxes and tax laws and finance committees.

History: 1982 c 523 art 2 s 26; 1986 c 444

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

CRIMINAL DIVISION CENTRAL OFFICE
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OFFICE OF SPECIAL PROSECUTIONS
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1031 WEST 4TH AVENUE, SUITE 318
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PHONE: (907) 279-7424

May 1, 1989

The Honorable Fred Zharoff
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Zharoff:

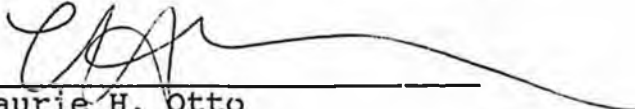
We have been working with Pennelope Goforth of your staff to develop a piece of legislation that would impose taxes on controlled substances in a manner that is constitutional and that does not interfere with criminal prosecutions for possession or sale of controlled substances. The issues presented are complicated and involve criminal, constitutional and tax law.

I do have some ideas about this legislation, and have solicited input from other prosecutors (both in Alaska and Minnesota), but given the volume of work that we have at this time of year, we are unfortunately unable to provide the amount of attention to the bill drafting that it demands. The most recent work draft of the bill we feel, however, has significant problems. Since the likelihood that SB 272 will pass both houses of the legislature this year is not high, we suggest that we work together over the interim to develop a sound piece of legislation that accomplishes the goals you had in mind when introducing SH 272.

We trust this suggestion will meet with your approval. If not, please let us know.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Jan Faiks
The Honorable C.E. Swackhammer
Royce Weller
Bob Evans

STATE OF ALASKA
THE LEGISLATURE


POUCHY STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 25, 1989

SUBJECT: Draft CSSB 272 ()
TO: Senator Fred Zharoff
ATTN: Penelope Goforth
FROM: Jack Chenoweth
Legislative Counsel



This version of the draft committee substitute incorporates various additions and changes. You have indicated that you would like a summary of the changes comparing the original bill to this committee substitute.

*

TAX IMPOSED [AS 43.52.010 in both versions]: The bill as introduced taxed possession of cocaine, heroin, dilaudids, and marijuana. The draft committee substitute broadens the incidence of the tax by levying on all controlled substances, as those substances are identified in AS 11.71, and by applying differing tax rates dependent on the principal physical characteristic and schedule classification of the substance. The change was apparently prompted by the Attorney General's letter of March 14 to Representative C.E. Swackhammer, sponsor of a companion measure in the House. At your suggestion, the rates are linked to the six classifications of controlled substances set out in the controlled substances schedules. The committee substitute also adds the alternative characteristic form of a controlled substance, the "dosage unit," and incorporates new material indicating how the tax is to be determined.

STAMPS AFFIXED [AS 43.52.020 in both versions]: There are no differences in this section between the original bill and the draft committee substitute.

Senator Fred Zharoff
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April 25, 1989

PAYMENT OF TAX [AS 43.52.030 in both versions]: There is only one technical difference in this section, picking up a reference to "dosage units," between the original bill and the draft committee substitute.

ADMINISTRATION OF CHAPTER [AS 43.52.040 in both versions]: The differences between the original bill and the draft committee substitute are in the nature of technical changes and corrections.

ASSESSMENT OF TAX BY COMMISSIONER [AS 43.52.050 in the committee substitute]: This section, new in the committee substitute, is included at the direction of your April 24 memo that I "specifically state the jeopardy assessment procedure as listed in the Minnesota statutes." That direction is based on the instruction or suggestion of the Department of Law. The section, in my judgment, replicates AS 43.10.030, authorizing the remedy of distraint on property for the collection of all taxes and fees, and AS 43.20.270, the section that fully describes the distraint process. It is apparently of significance to someone that, because AS 43.20.270 says that "the department may collect taxes . . . by distraint and sale . . .," the distraint provisions must be repeated in this specific tax.

The requested exception, AS 43.20.270(b)(2), is included, per your request.

TAX PAYMENT REQUIRED FOR POSSESSION [AS 43.52.050 in original; AS 43.52.060 in committee substitute], CRIMINAL PENALTIES [AS 43.52.060 in original; AS 43.52.070 in committee substitute], and CIVIL PENALTIES [AS 43.52.070 in original; AS 43.52.080 in committee substitute]: There are no substantive differences in these sections between the original bill and the draft committee substitute.

CONFIDENTIAL NATURE OF INFORMATION [AS 43.52.080 in the original; AS 43.52.090 in the committee substitute]: Subsection (a) of the committee substitute adds the second sentence, making an exception for statistical information. I did so because you specifically indicated it should be drawn from the Minnesota statute and included.

In the same section, subsection (c), relating to the use of the stamp in other proceedings, is new in the committee substitute. It is included at the suggestion of Assistant Attorney General Laurie Otto who, citing the Minnesota

Senator Fred Zharoff

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supreme court decision, Sisson v. Triplett, 428 N.W. 565 (Minn. 1988), upholding that state's tax statute against a constitutional challenge, indicated that the inclusion of the language would better position the state to defend against a claim based on asserted self-incrimination.

ACCOUNTING FOR RECEIPTS [AS 43.52.090 in the original; AS 43.52.100 in the committee substitute]: The sections are identical in the two bills.

RELATIONSHIP OF CHAPTER TO OTHER LAW [AS 43.52.110 in the committee substitute]: This is a new provision, added at your request. I do not know whether this provision is intended to try to address the question of the relationship of the tax proceedings under this chapter and criminal prosecutions under AS 11, the subject of the first part of the Attorney General's March 14 letter. We agreed, that the matter of immunity is better handled in another manner. We also agreed that the trial courts enjoy authority to stay the administrative or tax proceeding in deference to a criminal proceeding if so requested by the state, but I have added language to that effect.

DEFINITIONS [AS 43.52.099 in original; AS 43.52.199 in the committee substitute]: The definitions are extensively redrafted to respond to the broadening of the controlled substances subject to tax.

JC:gc
WKG9/113

Enclosure

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: "An Act imposing a tax on
certain controlled substances"
Sponsor: Zharoff
Requestor: _____

Agency Affected: Revenue
BRU: Income and Excise Audit Division
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
OPERATING						
PERSONAL SERVICES	65.0	65.0	65.0	65.0	65.0	65.0
TRAVEL	10.0	10.0	10.0	10.0	10.0	10.0
CONTRACTUAL	20.0	20.0	20.0	20.0	20.0	20.0
SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	14.0	0.0	0.0	0.0	0.0	0.0
LANDS & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	111.0	97.0	97.0	97.0	97.0	97.0
CAPITAL	-	-	-	-	-	-
REVENUE	1000.0	1000.0	1000.0	1000.0	1000.0	1000.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	111.0	97.0	97.0	97.0	97.0	97.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	111.0	97.0	97.0	97.0	97.0	97.0

POSITIONS:

FULL-TIME	2.0	2.0	2.0	2.0	2.0	2.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel, Director *Steven E. Kettel* Phone: (907) 465-2320
Division: Income and Excise Audit Division Date: April 14, 1989

Approved by Commissioner: Hugh Malone *Hugh Malone* Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SB 272
 Prepared by:
 Steven E. Kettel
 Income and Excise Audit Division
 April 13, 1989

FISCAL IMPACT

Facts and Assumptions

- 1) All statistics based on 6/30/87 annual drug report of Alaska State Troopers
- 2) Quantities of taxable drugs seized in FY87:
 - Cocaine 86.9 pounds
 - Marijuana 626 pounds
 - Marijuana plants 3,649; assume 1/4 oz. per plant
 - Heroin 90 grams
 - Dilaudid 697 tablet; assume 1 gram per tablet
- 3) Street value of seized taxable drugs
 - Cocaine \$8,573,326
 - Marijuana 3,394,140
 - Heroin 50,642
 - Dilaudid 54,180
- 4) Cash and property seized \$994,991
- 5) No voluntary compliance
 Revenue estimate based on FY 87 seizures

<u>Cocaine</u>	86.9 pounds=39,713 grams or 397,130 1/10 gram units	
Tax Rate	\$10.00/1/10 gram	
Total Tax		\$3,971,300

<u>Marijuana</u>	702,980 grams	
tax rate	3.50/gram	
Total Tax		\$2,460,430

<u>Heroin</u>	90 grams = 900 1/10 grams	
tax rate	\$100/ gram	
Total Tax		\$90,000

<u>Dilaudid</u>	697 grams	
tax rate	\$100/gram	
Total Tax		\$69,700

Grand Total		\$6,591,430
-------------	--	-------------

Add: 100% penalty (AS 43.52.070)		\$6,591,430
Potential tax revenue		<u>\$13,182,860</u>

Assume: Collection limited
 to property seized \$995,000

SB 272
Prepared by:
Steven E. Kettel
Income and Excise Audit Division
April 13, 1989

BILL ANALYSIS

Section 1

Levies on excise tax on four different illegal drugs. The bill suggests voluntary compliance by requiring a stamp be purchased in advance of a person acquiring or importing drugs into the state. The tax rate is set out in statute and based upon weight and type of the substance purchased or imported.

The department will administer the chapter by printing and selling the stamps and otherwise enforcing the collection of tax against those persons not complying with the law.

Failure to comply with the law will subject the drug dealer/user to pay a penalty of 100% of the tax. Both the tax and the penalty will be deposited in the general fund.

The department is aware that similar legislation has been enacted in other states with a varying degree of success. In those states, such as Minnesota, where collection exceed \$600,000/yr. resources have been devoted to confiscation and sale of seized property owned and used by drug dealers to carry out their trade, and for coordination between the Department of Revenue and police agencies throughout the state.

April 25, 1989

LIST OF ATTACHMENTS

- 1) Supreme Court Decision Sisson vs. Triplett
- 2) NCSL Summary of States with Drug Taxes
- 3) Financial Report Minnesota Dept. of Rev.
- 4) News articles regarding drug taxes
 - a) GOVERNING
 - b) STATE LEGISLATURES
 - c) THE FISCAL LETTER (unpublished draft)

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-632

Ramsey County District Court

William Charles Sisson,
Appellant,

WAHL, J.

vs.

Filed August 26, 1988
Office of Appellate Courts

Mr. Thomas Triplett, Minnesota
Commissioner of Revenue, et al.,
Respondents.

S Y L L A B U S

Minn. Stat. ch. 297D (1986) does not violate procedural or substantive due process rights or the right against self-incrimination guaranteed by the fifth and fourteenth amendments of the United States Constitution and article 1, section 7 of the Minnesota State Constitution.

Affirmed.

Heard, considered and decided by the court en banc.

O P I N I O N

WAHL, Justice.

This appeal arises from an action brought by William Charles Sisson, pursuant to 42 U.S.C. § 1983 (1982), challenging the constitutionality of the Minnesota Marijuana and Controlled Substance Taxation Act, Minn. Stat. ch. 297D (1986). The statute imposes a tax on marijuana and controlled substances, Minn. Stat. § 297D.08 (1986), and provides that assessment and collection of the tax be made pursuant to jeopardy procedures, Minn. Stat. § 297D.12 (1986). The trial court found the act constitutional and granted partial summary judgment for the state. We affirm.

By notice dated September 16, 1986, the Minnesota Department of Revenue (Department) assessed Sisson \$113,600 for taxes and penalties due on controlled substances. On September 17, 1986 the Department levied upon a recreational vehicle, travel trailer and lawn tractor owned by Sisson and located near Baudette, Minnesota. The Department notified Sisson by certified mail that these items would be sold at a public sale on October 17, 1986. On October 16, 1986, Sisson filed an appeal with the Minnesota Tax Court which was still pending when this case was argued. At the same time, in district court, Sisson applied for a temporary restraining order which was granted that same day after he posted a \$1,200 bond to cover the costs of cancelling the sale. The restraining order was continued by a temporary injunction dated November 10, 1986.

Sisson moved for partial summary judgment declaring Minn. Stat. ch. 297D (1986) unconstitutional. He alleged that jeopardy assessments made pursuant to chapter 297D authorized the seizure and forfeiture of property without due process of law, and also violated his right against self-incrimination by mandating that an alleged dealer of controlled substances affix to those substances a tax stamp as evidence of payment of the tax. He also argued that the act causes irreparable injury in that it deprives him of his property without due process of law and does not provide an adequate legal remedy by which to challenge the basis of the jeopardy assessment.

Respondents brought a cross-motion for partial summary judgment declaring chapter 297D constitutional and enforceable.

The district court granted summary judgment for respondents holding, first, that since the act provides an opportunity to obtain a judicial hearing after seizure and

prior to the sale of seized property, it fully meets the requirements of procedural due process. Regarding Sisson's substantive due process challenge, the court found that the act was not void-for-vagueness. Finally, the court determined that, since no information is required from the taxpayer and any volunteered information is subject to nondisclosure and use-immunity, the act does not violate rights against self-incrimination.

After briefing and oral argument, the court of appeals certified Sisson's appeal to this court for review pursuant to Minn. R. Civ. App. P. 118. Our review focuses on the following issues:¹ whether chapter 297D denies procedural due process as required by the fourteenth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution; whether chapter 297D violates substantive due process; and whether chapter 297D violates an individual's right against self-incrimination as contained in the fifth and fourteenth amendments to the United States Constitution and in article I, section 7 of the Minnesota State Constitution.

I.

Minn. Stat. ch. 297D (1986) imposes a tax upon marijuana and controlled substances. Minn. Stat. § 297D.08. No dealer² may possess such substances unless the

¹ Respondents raise an immunity defense in their answer, which if successful, would ordinarily bar only damages. Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975). Therefore, this court will consider that portion of Sisson's complaint which prays for injunctive relief based on the statute's constitutionality.

² Minn. Stat. § 297D.01, subd. 3 (1986), states:

"Dealer" means a person who in violation of Minnesota law manufactures, produces, ships, transports, or imports into Minnesota or in any manner acquires or possesses more than 42-1/2 grams of marijuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight.

tax has been paid and stamps, issued upon payment, have been permanently affixed to the substances. Minn. Stat. §§ 297D.04, 297D.11, subd. 1 (1986).

Assessment and collection of this tax are made pursuant to jeopardy procedures. Minn. Stat. § 297D.12 (1986). That is, the commissioner of revenue need not first request voluntary payment from the dealer and then delay taking further action. Rather, the commissioner may assess the tax, demand payment and enforce collection immediately.³ The seized property may be sold during the time an appeal of the assessment may be filed or while the appeal is pending. Minn. Stat. § 297D.12, subd. 1 (1986); Minn. Stat. § 270.70, subd. 4 (1986). However, a person whose property is sold may obtain the proceeds of the sale should the commissioner's assessment be reversed. Minn. Stat. § 270.709, subd. 2(c) (1986). Because the act incorporates Minn. Stat. § 270.70 (1986), certain equitable remedies are also available to the taxpayer. For example, although § 297D.12, subd. 2 provides that injunctions against the assessment or collection of any taxes or penalties are prohibited, a taxpayer can obtain injunctive relief to prevent irreparable injury. Minn. Stat. § 270.70, subd. 7 (1986). The taxpayer can also obtain release of the levied property upon such equitable terms and conditions as the court determines. Id., subd. 12. Finally, a person may obtain relief from an actual or potential seizure and/or sale by posting a surety bond or other security. Id., subd. 6.

The only requirement for issuance of the stamps is payment of the appropriate tax. Affidavit of Don Trimble, Acting Manager of Alcohol, Tobacco and Special Taxes Unit, Minn. Dept. of Revenue, Jan. 9, 1987. It is not required that the stamps be

³
These procedures are similar to provisions for jeopardy assessment and collection of certain other types of taxes. See, e.g., Minn. Stat. § 290.48 (1986) (income tax); Minn. Stat. § 297A.33, subd. 2 (1986) (sales tax). See also Minn. Stat. § 270.70, subd. 2 (1986) (levies generally).

purchased by the dealer himself or that the purchaser appear in person. Id. Although chapter 297D does not provide immunity to a dealer from criminal prosecution, any information which is supplied to the Department of Revenue cannot be disclosed and its use in a criminal proceeding is barred. Minn. Stat. § 297D.13 (1986).⁴ Any dealer who fails to pay the tax is liable both for the tax and a 100% penalty. Minn. Stat. § 297D.09, subd. 1 (1986).

II.

The first issue to be decided is whether Minn. Stat. ch. 297D (1986) denies procedural due process as required by the fourteenth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution. We conclude that it does not. The basic requirements of those due process clauses are notice and an opportunity for a hearing appropriate to the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The right to notice and the opportunity to be heard must be "at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

In the present case, Sisson argues that Minn. Stat. ch. 297D (1986) is constitutionally defective because it fails to provide a meaningful hearing. He asserts that the statute provides no opportunity to litigate the basis for the tax assessment. He also argues that the statute's incorporation of equitable provisions contained in Minn. Stat. § 270.70, subs. 6, 7, 12 (1986) does not rescue it from unconstitutionality because

⁴

Minn. Stat. § 297D.13 (1986) provides:
Neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the taxpayer making the return.

they do not allow an opportunity to actually litigate the taxpayer's liability.

He claims that the district court, in reaching the opposite conclusion, relied erroneously on Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931), a United States Supreme Court case which involved neither a jeopardy assessment nor irreparable injury to the taxpayer. He points out that the United States Supreme Court has specifically held Phillips inapplicable to cases where jeopardy assessments would cause irreparable injuries. Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 631-32 (1976). Like the plaintiff in Shapiro, Sisson claims irreparable injury because he has been deprived of the use and enjoyment of his property, and argues that Shapiro should govern the present case.

Although Sisson is correct that Phillips did not involve a jeopardy assessment, that case simply stands for the undisputed principle that a taxing authority can seize property prior to a hearing on the validity of the tax. In Phillips, the plaintiff was a transferee of a dissolved corporation's tax liability. He challenged the constitutionality of a statute which allowed the government to assess and collect taxes before judicial review of the liability occurred. In upholding the right of the government to proceed summarily against a taxpayer, the Court reasoned that "[d]elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." Phillips, 283 U. S. at 597. The Court gave other examples of justifiable summary proceedings: destruction of property causing a public health hazard; seizure of property needed in wartime; property acquired by eminent domain. Id. Thus, Phillips stands for the proposition that mere postponement of a hearing until after seizure of the property is not a denial of due process, "if the opportunity given for the ultimate judicial determination of the liability

is adequate." Id. at 596-597. The Court found that the alternative remedies offered by the statute, a suit for a refund or immediate redetermination of liability by the tax court, were adequate. Id. at 597-98.

The Shapiro case, on the other hand, did involve a jeopardy assessment. In Shapiro, the commissioner of internal revenue determined that Shapiro's imminent departure for Israel under an extradition order to stand trial for criminal charges jeopardized the agency's collection of income taxes. Thus, the commissioner made a jeopardy assessment, filed liens and served notices of levy on various banks. Shapiro brought suit either to enjoin his extradition or, alternatively, to enjoin the jeopardy assessment. The Supreme Court determined that the injunction would be legitimately barred by the federal Anti-Injunction Act, 26 U.S.C. § 7421 (a) unless Shapiro's case fell within the exception to the act formulated in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962).⁵

Contrary to Sisson's assertions, however, the Shapiro court did not dismiss the Phillips case as wholly inapplicable to jeopardy assessment. Rather, the Shapiro court quoted and emphasized those portions of the Phillips dicta most relevant to the concerns in Shapiro:

Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings

5

The Shapiro court held that relief from the federal Anti-Injunction Act could only be granted where:

- (1) [I]t is 'clear that under no circumstances could the government ultimately prevail' and
- (2) '[E]quity jurisdiction' otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury.

Shapiro, 424 U.S. at 627 (quoting, Enochs v. Williams Packing Company, 370 U.S. at 7).

to secure prompt performance of pecuniary obligations to the government have been consistently sustained.

* * * *

Where only property rights are involved, more postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate * * * .

Shapiro, 424 U.S. at 631-632 (quoting Phillips, 283 U.S. at 595, 596-597 (emphasis in original)). The Shapiro court went on to point out that "neither the holding nor the dicta in Phillips support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor." Shapiro, 424 U.S. at 632 (emphasis added).

The Shapiro court was focusing on factors which were peculiarly relevant to that case. The Court noted that Shapiro had no right to start a proceeding before a tax court for 60 days following the jeopardy seizure. Shapiro, 424 U.S. at 630, n. 12. In fact, the IRS under the statute could wait 60 days before issuing Shapiro a deficiency notice which would, in effect, give him his "ticket to the tax court." Id., citing to 26 U.S.C. § 6861. Further, the actual seizure of his funds caused Shapiro irreparable injury because without money, he could not litigate his tax liability. Thus, without money, his only remedy was wholly unavailable.

In contrast, the seizure of Sisson's assets has not prevented him from pursuing any of his remedies. Therefore, the seizure itself cannot be said to have caused irreparable injury. The district court determined that only the sale of Sisson's property might cause irreparable injury as Sisson was not likely to recover the reasonable market value for

the property in a successful suit for refund. Unlike Shapiro then, irreparable injury might result here only from Sisson's assets being sold, not seized.

Further, Sisson is entitled to directly appeal the commissioner's assessment to the Minnesota Tax Court within 60 days from the date of his notice. Minn. Stat. § 271.06, subos. 1, 2 (1986). Only when the tax court proceedings and subsequent appeals are concluded will Sisson be finally deprived of any assets levied upon and held by the commissioner. With respect to any assets sold prior to this final determination, Sisson has the right to return of the proceeds of the sale in the event that the commissioner's assessment is reversed. Minn. Stat. § 270.709 (1986). Finally, Minn. Stat. § 297D.12 incorporates by reference the levy and sale provisions of section 270.70, thereby allowing Sisson a number of alternatives for pursuing equitable relief. Indeed, proceeding under section 270.70, subdivision 7, Sisson obtained the currently imposed injunction against the sale of his property. In addition, the procedures established in Minn. Stat. ch. 297D (1986) do not differ markedly from tax law provisions applicable to sales (Minn. Stat. § 297A.33 (1986)) and income/excise taxes (Minn. Stat. § 290.48 (1986)). Those taxes also authorize jeopardy assessments, contain anti-injunction provisions, and allow the commissioner to proceed on the basis of his own knowledge and information.

Furthermore, Minnesota provisions for equitable relief present a lower barrier to obtaining an injunction than exists within the federal courts. As previously noted, the United States Supreme Court has adopted a two-step test by which to establish an exception to the federal Anti-Injunction Act. See footnote 5, supra. Under this exception, equity considerations are secondary, and tax collections will not be enjoined merely because the collection would cause irreparable injury, "such as the ruination of the taxpayer's enterprise." Enochs, 370 U.S. at 6. In contrast, Minn. Stat. § 270.70, subd. 7 (1986), focuses on the harm to the taxpayer and allows an injunction where levy

or sale "would irreparably injure rights in property which the court determines to be superior to rights of the state in such property * * * ." Minn. Stat. § 270.70, subd. 7 (1986).

In summary, Sisson is arguing that the statute is constitutionally defective because it fails to provide any meaningful hearing. Under Phillips, however, a hearing need not take place before a seizure of assets. Further, under Shapiro, a prompt judicial inquiry must occur only when the injury cannot be adequately remedied by a later tax court judgment in the plaintiff's favor. Finally, a remedy is not inadequate because it relegates the taxpayer to a suit for refund.

In the present case, the facts establish that Sisson received notice, was given an opportunity to appeal and did appeal the assessment to the Minnesota Tax Court, and has been able, pursuant to incorporated equitable provisions under Minn. Stat. ch. 297D (1986), to successfully delay the single event that would cause the only irreparable injury that the district court was able to identify. Minn. Stat. ch. 297D (1986) does not deny procedural due process required by the fourteenth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution.

III.

We determine next whether Minn. Stat. ch. 297D (1986) violates federal and state constitutional guarantees of substantive due process. This court has held that where an economic regulation is involved:

Due process demands only that (1) the act serve to promote a public purpose, (2) it is not an unreasonable, arbitrary or capricious interference, and (3) the means chosen bear a rational relation to the public purpose sought to be served.

Contos v. Herbst, 278 N.W.2d 732, 741 (citing Federal Distillers, Inc. v. State, 304 Minn.

28, 229 N.W.2d 144, appeal dismissed sub nom. Heaven Hill Distilleries, Inc. v. Novak, 423 U.S. 908 (1975)). Sisson argues that Minn. Stat. ch. 5 297D (1986) violates substantive due process because it fails to provide standards or guidelines which prevent the arbitrary or capricious assessment of a tax against an individual. Further, he asserts that the act allows the commissioner of revenue to assess a tax and seize property solely on the basis of unsubstantiated allegations that a party possesses a taxable amount of a controlled substance.

Sisson does not develop his argument, however, nor does he address the framework we set forth in Contos for judging the substantive validity of a statute. Even though the district court interpreted Sisson's argument as embodying a "void for vagueness" concern, the act itself makes clear the standards for determining who is a dealer and what is a controlled substance. Minn. Stat. § 297D.01, subs. 1, 2, 3 (1986). The act does allow the assessment of a tax based on the commissioner's personal knowledge or information, Minn. Stat. § 297D.12, subd. 1 (1986), but this does not differ from statutory provisions governing the collection of income, excise and sales taxes (see Minn. Stat. § 290.48, subd. 4 (1986); Minn. Stat. § 297A.33, subd. 2 (1986)), nor does it allow the commissioner to proceed on the basis of unsubstantiated allegations. Minn. Stat. ch. 297D (1986) does not violate federal and state constitutional guarantees of substantive due process.

IV.

The final issue is whether Minn. Stat. ch. 297D (1986) violates an individual's right against self-incrimination as contained in the fifth and fourteenth amendments to the United States Constitution and article I, section 7 of the Minnesota State Constitution.

The United States Supreme Court has considered the impact of tax laws on fifth amendment guarantees against self-incrimination in a trio of cases decided in the late

1960's. Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968). The Court identified the following criteria for determining the constitutionality of a tax statute challenged on fifth amendment grounds: (1) whether the regulated activity is in an area "permeated with criminal statutes," and the tax aimed at individuals "inherently suspect of criminal activities," Marchetti, 390 U.S. at 47, (2) whether an individual is required, under pain of criminal prosecution, to provide information which the individual might reasonably suppose would be available to prosecuting authorities, id. at 48, (3) whether such information would prove a significant link in a chain of evidence tending to establish guilt. Id. The Court noted that "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Id. at 53.

Sisson claims that the trial court, in finding that the second and third elements of the Marchetti test were absent in the present case, erred in two ways. First, he argues that the purchase of a drug tax stamp is in itself a compelled inculpatory act; i.e., the physical act of a dealer presenting him or herself to the revenue department offices for the purpose of purchasing a stamp constitutes a compelled disclosure of information. Further, even if a dealer obtains the stamps by mail or by courier, he is required to disclose his address and status as a dealer. He would also be subjecting a courier to a charge of criminal conspiracy under Minn. Stat. § 609.175 (1986).⁶ Second, Sisson

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We have determined that a conscious and intentional purpose to break the law is an essential element of the crime of conspiracy. State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943). A person having no knowledge of a conspiracy is not a conspirator. Id. at 186, 9 N.W.2d at 521. Thus, it is highly unlikely that an innocent courier could be criminally implicated, and Sisson's argument in this regard appears to be a "trifling" hazard of incrimination. Marchetti, 390 U.S. at 54.

maintains that the stamp itself is information which could prove to be a significant link in an evidence chain. He points out that Minn. Stat. ch. 297D (1986) does not prohibit use of drug tax stamps against an individual in a criminal proceeding.⁷

In Marchetti, the Supreme Court reaffirmed the longstanding rule that the congress can tax an unlawful activity. Marchetti, 390 U.S. at 42. The issue raised in that case, as well as in Grosso and Leary, was whether the methods employed by the congress were constitutionally defensible. Marchetti and Grosso, which were argued together, concerned the wagering tax system; Leary involved the federal Marihuana Tax Act, 26 U.S.C. §§ 4741-4746 (1954) (repealed 1970).

In Marchetti and Grosso, the Supreme Court reviewed the provisions of the wagering tax law system. The Court noted first that section 4401 of title 26 imposed an excise tax on all accepted wagers. Marchetti, 390 U.S. at 42. Those liable for payment of that tax were required to submit monthly returns which detailed the taxpayer's wagering activities. Grosso, 390 U.S. at 65. The Court observed that the congress imposed no restrictions upon the use of this return information, and in fact, the IRS made it a practice to tender the information to prosecuting authorities. Id. at 66. In addition, section 4411 imposed an occupational tax on all bookmakers, and section 4412

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Congress cured the constitutional deficiencies contained in early wagering tax statutes by enacting 26 U.S.C. § 4424 (1982) subsequent to the Supreme Court's decisions in Marchetti and Grosso. That statute provides in part that

"(1) any stamp denoting payment of the special tax under this chapter, * * * shall not be used against such taxpayer in any criminal proceeding."

26 U.S.C. § 4424 (c) (1) (1982). Minnesota has no statutory counterpart to this explicit prohibition. However, we will not resolve issues not formally before this court. The possession of drug stamps is not raised by the facts of the present case and Sisson's concern here is purely speculative.

required that those liable for the tax register each year, providing the IRS with their residence and business addresses as well as the names and addresses of their employees or agents. Marchetti, 390 U.S. at 42. Moreover, section 6107 required the IRS to furnish prosecuting authorities with the names of those individuals who had paid the occupational tax. Id. at 43-44. When the bookmaker registered and paid the occupational tax, he was issued a stamp which section 6806 (c) required that he display "conspicuously" in his place of business, or, lacking such, keep on his person to present upon demand of any treasury officer. Id. at 43.

The Court concluded that every element of the statutory requirements had the consequence of incriminating petitioner. Id. at 50. The Court observed that evidence of possession of a wagering tax stamp, as well as payment of the taxes, had often been admitted at trials in both federal and state gambling prosecutions. Further, the Court noted that a former commissioner of the IRS admitted that the Service made the names and addresses of wagering taxpayers available to law enforcement personnel, and fully cooperated with the U. S. Attorney General's efforts to prosecute organized gambling. Marchetti, 390 U.S. at 47-48.

Similarly, in Leary, the Court reviewed federal statutes governing traffic in marijuana. That act imposed a tax on marijuana transfers, as well as an occupational tax upon those who dealt in the drug. It required that all marijuana transfers be carried out in pursuance of written order forms obtained by the transferee. Leary, 395 U.S. at 14-15. In addition, it was virtually assured that any information that was included in the order form would be available to law enforcement officials. Id. at 15. Also, the IRS was required to keep duplicate order forms and make them available for inspection by both treasury personnel and state and local officials charged with enforcement of

marijuana laws. Id. Upon payment of a fee, such officials could receive copies of the form. The Court determined that transmittal of this information would surely prove a significant link in a chain of evidence tending to establish the petitioner's guilt under both state, and possibly federal, laws, as well. Leary, 395 U.S. at 16.

In all three cases, the Court refused to avoid constitutional issues and impose use restrictions on information obtained through tax law compliance because it found "that the furnishing of information to interested prosecutors was a 'significant element of Congress' purposes in adopting' the statutes therein involved." Leary, 395 U.S. at 26 (quoting Marchetti, 390 U.S. at 59). In regard to the Marihuana Tax Act specifically, the Court stated that "we think the conclusion inescapable that the statute was aimed at bringing to light transgressions of the marihuana laws." Leary, 395 U.S. at 27.

Unlike the federal or state statutes discussed above, Minn. Stat. ch. 297D (1986) contains a confidentiality provision which states:

Neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the taxpayer making the return.

Minn. Stat. § 297D.13 (1986).⁸ In addition, Minnesota Revenue Department regulations explicitly relieve a dealer of submitting any information when purchasing a stamp, and otherwise protect a dealer's anonymity. It is not necessary for a dealer to file in person or to give his name or address when acquiring drug tax stamps. See Trimble

8

In 1987 the legislature strengthened the confidentiality provision as follows:

Disclosure Prohibited. Notwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts

Affidavit, supra. The stamps can be mailed to any address or picked up by any other individual. Id. In 1987, these departmental procedures were incorporated into the statutes themselves. Minn. Stat. § 297D.02 (Supp. 1987) now provides that dealers are not required to give their name, address or other identifying information. Thus, chapter 297D does not have the constitutional pitfalls which were evident in the federal Marihuana Tax Act or the early wagering tax statutes.

In Marchetti, Grosso, and Leary, the United States Supreme Court refused to impose restrictions on the government's use of information obtained from the taxpayer because it found that a "significant element of Congress' purposes in adopting" those statutes was the furnishing of such information to prosecutors. Leary, 395 U.S. at 26. A similar purpose is not evident in Minn. Stat. ch. 297D. Under the Minnesota statutes as well as revenue department regulations, a dealer is assured anonymity. Minn. Stat. ch. 297D does not violate rights against self-incrimination protected by the fifth amendment to the United States Constitution and article I, section 7 of the Minnesota State Constitution.

(footnote 8 continued)

contained in a report or return required by this chapter or any information obtained from a dealer; nor can any information contained in such a report or return or obtained from a dealer be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer making this return.

Minn. Stat. § 279D.13, subd. 1 (Supp. 1987).

In addition, the 1987 legislature established a penalty for disclosure. Minn. Stat. § 297D.13 (Supp. 1987) now provides:

Subdivision 2. Penalty for Disclosure. Any person violating this section is guilty of a gross misdemeanor.

In conclusion, we hold that Minn. Stat. ch. 297D (1986) does not violate procedural or substantive due process rights or the right against self-incrimination guaranteed by the fifth and fourteenth amendments of the United States Constitution and article I, section 7 of the Minnesota State Constitution. We affirm the judgment of the district court granting partial summary judgment for respondents.

Affirmed.

1050 17th Street
Suite 2100
Denver, Colorado 80265
303/623-7800

President Ted Strickland
President of the Senate
Colorado

William T. Pound
Executive Director

DATE: NOVEMBER 1988
TO: INTERESTED PARTIES
FROM: MARTHA FABRICIUS, DENVER

Illegal Drug Tax Summary

1. States that have taxes on illegal drugs

Arizona (1983)
Colorado (1988)
Illinois (1987)
Kansas (1987)
Maine (1987)
Minnesota (1986)
Nevada (1987)
Utah (1988)

2. States that have proposed legislation

Texas
Indiana
Michigan
Florida
Georgia
S. Carolina

3. States that tax illegal drugs under different tax laws (e.g., sales tax)

Alabama
California
Florida
Georgia
Illinois
S. Carolina

4. States that repealed law

S. Dakota

5. What the law is

The law places an excise tax on illegal drugs. Requires that dealers of illegal drugs pay a tax on each ounce of marijuana and on any other controlled substance which they are planning to sell.

Range of taxes:

\$20-\$100 per ounce of marijuana

\$20-\$1000 per ounce of controlled substance

6. License provision

Some states require that dealers license with the state. This provision was developed essentially so that the state can track the dealers down quickly if they have failed to pay taxes on their drugs.

Range of license fees:

S. Dakota \$500 marijuana
\$1000 controlled substances

Nevada \$250

Arizona \$100

Licensing of drug dealers appears to be the most controversial of all aspects of illegal drug taxation because it gives the image of professionalizing the career of drug dealers. Most states have started with the provision in the legislation but have amended the bill and deleted the licensing section. S. Dakota's law was found unconstitutional based on the right not to self-incriminate: dealers required to register were, in a sense, turning themselves in. States that still have the licensing provision have included a provision stating that the information collected by the state taxation departments is confidential and cannot be released even to law enforcement personnel. In fact, Nevada just put into place a provision which makes it a misdemeanor to release that information.

7. Pros:

a. Provides additional revenue to states. Any person who fails to pay taxes is subject to a civil penalty of 100% of the tax in addition to the actual tax imposed. Arizona has already received \$92,000. *Note: Earmarking of confiscated money is another option that legislators are using to help validate the law. States are using the money towards enforcement and treatment programs.

b. Places additional penalties on drug dealers

c. Gives police yet another way to convict drug dealers

-Quote: This is not an unusual procedure for catching criminals--Al Capone went to jail for income tax evasion and for not paying the excise tax on his bootleg liquor.

8. Cons:

a. Initial response is that people think marijuana is being legalized.

Attachment #3

STATE OF MINNESOTA
OFFICE MEMORANDUM

DEPARTMENT OF REVENUE

TO:

DATE: April 04, 1989

FROM:

PHONE:

SUBJECT: CONTROLLED SUBSTANCES TAX REPORT FOR THE MONTH ENDED MARCH 31, 1989

	STAMP SALES #	ASSESSMENTS #	COLLECTIONS
Fiscal 87	\$1,150.00 (151)	\$ 8,923,764.20 (121)	\$ 66,794.84
Fiscal 88	666.00 (143)	\$ 6,683,969.90 (184)	\$ 314,749.50
Fiscal 89	\$0.00	\$ 9,441,109.50 (109)	\$ 269,515.91
New	\$0.00	\$ 757,887.50 (48)	\$ 23,712.84
Total 89	\$0.00	\$ 10,198,997.00 (157)	\$ 293,229.75
Total	\$ 2,018.00 (294)	\$ 25,806,731.10* (462)	\$ 674,773.09

*Assessments	#	Total Paid	Current Balance	Total Assessed
Under \$ 20,000	334	233,563.18	1,582,223.61	1,863,569.60
Between 20,000 & 100,000	92	190,359.82	3,800,046.98	4,037,666.00
Over \$ 100,000	36	250,850.09	17,531,703.25	19,905,495.50

Office Memorandum

DATE :
July 11, 1987

TO :

FROM :

PHONE :

SUBJECT :
CONTROLLED SUBSTANCES TAX REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1988

Assessments:	6,683,969.90 / 184		
Stamp Sales:		508.00 / 143	
Collections:		<u>314,749.50</u>	
Total revenue collected in fiscal 1988:		<u>315,257.50</u>	
Estimated expenses for fiscal 1988:		40,000.00	
Cases closed by payment:	9		
Cases closed by compromise:	5	Amount of compromises:	125,170.38
Abatements granted:	0	Amount of Abatement:	0.00
Payment agreements:	11		
Estimate collection for fiscal year 1988:			220,000.00
Estimated expense for fiscal 1988:			40,000.00
Hours spent in training police officers in 1987:		17	
Hours to be spent in training police officers in 1988:		25	

NEWS BRIEFS

FEDS SUE L.A. COUNTY OVER HISPANIC SEATS

Maybe it's principles, and maybe it's politics. The Reagan administration long resisted charging local governments with voting rights violations just because the way they conducted their elections resulted in all-white governments. The administration argued that there must be evidence that the government intended to discriminate against minority voters before such a suit was viable.

Both Congress and the U.S. Supreme Court firmly disagreed, however, and just weeks after Richard L. Thornburgh replaced Edwin Meese III as U.S. attorney general, the U.S. Justice Department sued the Los Angeles County board of supervisors, seeking a stronger voice for Hispanic voters in local government.

Los Angeles County is home to the largest Hispanic community in the United States — more than two million — but it is divided among the county's five electoral districts and has never elected one of its own to county office.

The Justice Department says this is a violation of the

1965 Voting Rights Act. Along with the Mexican American Legal Defense and Education Fund and the American Civil Liberties Union, which have filed a similar suit, it seeks immediate redrawing of district lines, which is expected to result in making Hispanics a majority in at least one district.

The suit was filed as a last resort, after several months of negotiations produced no commitment to redistricting, according to Mark Weaver, a Justice Department spokesman.

Others suggest that the administration was seeking

Hispanic votes, and still others that Thornburgh takes a different view from his predecessor.

The presidential election will provide no escape hatch for the county. Thornburgh is expected to remain in office if Vice President George Bush is elected in November, and a Dukakis administration would be likely to enforce the voting rights law even more emphatically than the Republicans.

And so, the Los Angeles County supervisors seem to be moving down the road to a settlement rather than contesting the charges. They have hired a private firm to begin drawing alternative district maps.

However, the board does not wish to redistrict before 1990, says the board of

supervisors' chairman, Deane Dana, only to be forced to draw new district lines after the 1990 census. It's hard to project what the census will show, "but we're going to try to do it," he says. —Elder Witt

MINN. FIRST TO UPHOLD 'GRASS TAX'

Law enforcement officials nationwide are applauding the Minnesota Supreme Court, which has affirmed the state's right to impose taxes on illegal drugs and prosecute dealers who don't pay them. The decision marks the first such ruling on the so-called grass tax, now being used in at least seven other states.

Under the two-year-old law, dealers who do not buy tax stamps for their packages of drugs are subject to five years in prison and a \$10,000 fine, plus a 100 percent civil penalty.

The plaintiff in the Minnesota case, William Sisson, sued the state after it had assessed \$113,000 against him in unpaid drug taxes. The court, however, ruled against him, holding that the tax does not violate the U.S. Constitution's Fifth Amendment guarantee against self-incrimination because it ensures confidentiality for those buying the stamps.

So far, the law has paid



off in Minnesota, which has collected \$444,000 in drug taxes and prosecuted "at least" 10 cases, says Chris Sanft, a state tax collection officer. Sanft says he expects the law to become a model for other states because of its Fifth Amendment safeguards.

"We're looking at it strictly from a revenue angle," says Sanft. "As long as they pay their taxes, we don't care who they are." —Carol Clurman

CLEMSON TRAINING RURAL LEADERS

Clemson University is training rural leaders by getting them to look — with expert help — at some of the worst problems in their counties. The land-grant university's extension service is picking four counties to participate in its pilot Rural Leader Training Program. Dozens of leaders in each county will team up to decide on the most pressing problems they face. Clemson will then send in experts from the university and state government to help the counties find solutions.

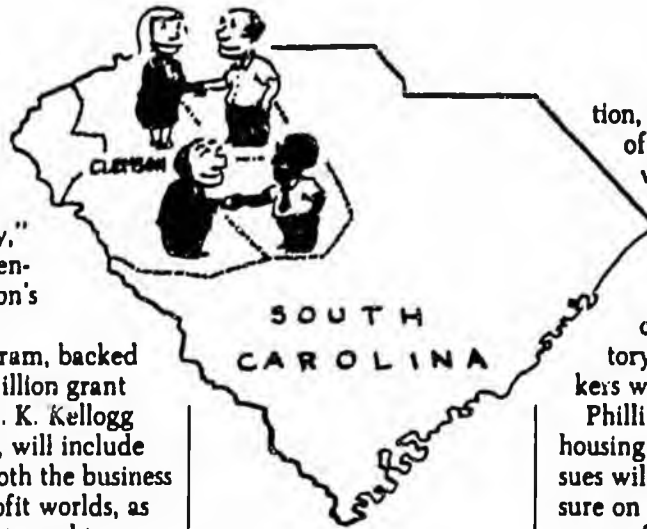
As work continues in the four pilot counties, more will be pulled in to participate. "We want the program to be a model nation-

wide for preparing rural leaders for the 21st century," says Max Lennon, Clemson's president.

The program, backed by a \$1.1 million grant from the W. K. Kellogg Foundation, will include leaders in both the business and non-profit worlds, as well as county and town government. It will ultimately reach hundreds statewide, says Lennon.

"Naturally, a major segment of those we choose will be elected and appointed officials," says Elwyn Deal, an assistant director with Clemson's extension service. "But we also want people from the business community, volunteer groups, churches and charities; we want old and young folks, black and white, male and female, rural and downtown."

Once the current crop of



leaders has been trained, Clemson is asking that they continue to work with future leaders in their communities. "The idea is to create continuity," says Deal. "In the past you'd have a generation of leaders who knew how to pursue economic development or fill out grant applications, then they'd die off or move along and it would take five or six years to bring along the next generation. This way, that next generation will be ready."

—Jonathan Walters

tion, especially because of escalating land values. Anyone who suggests housing be put in poorer areas is going to be accused of discriminatory intent," as Yonkers was, he predicts.

Phillips adds that the housing and land-cost issues will put severe pressure on municipalities to rezone for higher-density development in areas where such rezoning won't always be welcome.

David Tatel, a civil rights attorney and a partner with the Washington, D.C., law firm of Hogan & Hartson, takes a somewhat different view, predicting that "a lot of it depends on who wins the [presidential] election." The Reagan Justice Department has indicated it has no plans to pursue any new housing discrimination cases, at least against municipalities, and Tatel thinks a Bush administration would continue that course. In fact, the Yonkers case was filed in the late stages of the Carter administration.

Some municipalities, however, are defusing potentially explosive situations right now, says Tatel, by facing up to the housing issue as part of school desegregation case settlements. "The settlement in Milwaukee, for example, has a housing provision that is very creative and is even supported by a conservative governor [Republican Tommy G. Thompson]," says Tatel.

IS THERE ANOTHER YONKERS WAITING TO HAPPEN?

The question looms in the wake of the divisive Yonkers housing discrimination case: How many more Yonkers-like battles are waiting to happen nationwide?

"You won't see any soon," says Carter Phillips, partner in the Washington, D.C., office of the Chicago law firm of Sidley & Aus-

tin and co-counsel to the city of Yonkers in the case. "The next round is going to be in the 1990s. There's little question that in the 1990s . . . there will be a big call for subsidized public housing." The problem of where, in a city, to place public housing "in the wake of Yonkers, is going to be a very tough ques-

ON FIRST READING

Deterring Illegal Drug Traffic Through The Tax Code

Drug dealers are meeting their match in two states that have revived an old federal strategy. Arizona and Minnesota have enacted legislation that places excise taxes on illegal drugs. Arizona has taken its provision one step further by requiring drug dealers to purchase licenses.

Taxing and licensing illegal drugs are attempts to give law enforcement officials tools to combat drug trafficking in a most unconventional manner—through the tax code. Since trafficking is an all-cash industry, it is often difficult to differentiate between income and assets derived from illegal drug sales and income and assets obtained through legitimate means.

These new laws address that problem not by presupposing guilt or innocence under criminal statutes, but by determining whether the tax code has been violated. For example, if an individual is arrested for possession of illegal drugs on which revenue stamps have not been affixed, he is guilty of tax evasion, independent of his guilt or innocence under criminal statutes.

Although this method of drug enforcement is new at the state level, taxing marijuana is not a new approach from the federal government's point of view. The Federal Marijuana Tax Act of 1937 required people possessing marijuana to file and pay for tax stamps. The law was repealed in 1970, partially due to violations of the Fifth Amendment—freedom from self-incrimination.

The states have attempted to avoid Fifth Amendment problems by ensuring strict confidentiality for persons who purchase licenses and stamps. In South Dakota, however, similar legislation was ruled unconstitutional in April by the state Supreme Court. Under the South Dakota statute, information regarding licensees could be provided to law enforcement officials upon request. Consequently, the state Supreme Court found the statute was incriminatory and violated the Fifth

Amendment. The South Dakota Attorney General's office will not appeal the decision to the U.S. Supreme Court.

In addition to the civil liberties issue, questions arise as to how states can tax illegal goods. But there is precedent. Federal and state income tax laws require that all income, whether obtained legally or illegally, be reported for income tax purposes. Although the precedent originated from income tax law, it is not limited to that area of taxation since a variety of illegal goods and activities are subject both to federal and state taxation.

Arizona, the first state to implement this unusual excise tax, has levied taxes on controlled substances since 1983. The revenue derived from the tax has been low, and it has not offset implementation costs. From fiscal year 1984 through January 1986, \$4.8 million has been assessed, but only \$177,650 has been collected. Col-

the purpose of the law. "The primary intent of the Legislature was simply to provide a deterrent to drug trafficking, particularly since Arizona is a border state," he says.

Senator Jeffrey Hill, sponsor of the legislation, agrees. "The tax is one more way to take the profit out of drug dealing. It forces drug activity to other states and thus shifts the enforcement burden."

In Minnesota, legislation to tax illegal drugs—based on a recommendation by the Minnesota Tax Study Commission—was introduced this session. In its review of similar laws, the Commission determined that taxing controlled substances could be justified for three reasons: The tax creates another way to prosecute drug dealers, it reduces the tax evasion that takes place in the underground economy and it sends out signals to drug dealers to deal elsewhere.

Representative William Schreiber, sponsor of the bill, stresses the importance of the increased enforcement element of the law. "Hitting drug dealers hard in the pocketbook may be a more effective enforcement tool than trying to put them behind bars," he says.

The states are definitely aiming at drug dealers' pocketbooks. Under the Arizona law, drug dealers are required to purchase a \$100 license and affix revenue stamps to their products—a \$10 revenue stamp per ounce of cannabis (marijuana) and a \$125 revenue stamp per ounce of any other illegal controlled substance (cocaine, heroin, hashish, etc.). Minnesota, which eliminated the license provisions before passing its law, taxes marijuana at \$100 per ounce and other illegal drugs at a whopping \$5,670 per ounce.

Public response to the new laws has been mixed. Public officials report that citizens who understand the law are supportive, but some think the law legalizes illegal drug sales or provides

Photo: Martin Jeong



Double trouble: Drugs without stamps mean dealers face tax evasion charges.

lections are low because frequently persons arrested for possession are hired hands, commonly called "mules," who do not have the money to pay the tax assessments against them. In these cases there is no property to seize either.

However, according to Kevin DeMenna, staff economist for the Arizona Senate, increased revenue was not

the first step toward legalization. In fact, legislation introduced in Indiana would have required that drug dealers affix tax stamps to their goods, but the bill was intentionally held up in the House by its sponsor, Representative Paul Robertson. "We did not want anyone to misconstrue marijuana as an acceptable drug or give credence [to the notion] that drugs are legal," explains Robertson. He expects that after a study of other state laws, legislation will be introduced again next year.

At least three other states—Florida, Georgia and South Carolina—are also addressing the possession and sale of illegal drugs, but through existing sales and use tax provisions. For example, if an individual is arrested for possession and cannot prove that he paid sales tax on his goods, he is taxed at current sales and use tax rates based

on the street value of the drugs. He also is assessed a penalty for failure to remit the sales and use tax.

The laws in these three states do not explicitly include illegal drugs in the list of taxable items, but they also do not prohibit their taxation. Florida has taken steps to make its provision explicit, however, by specifically stating that marijuana and other illegal controlled substances are subject to the sales and use tax. If passed, House Bill 91 would add a 300 percent penalty to the existing sales and use tax rate. Tax officials say they do not want to run the risk of not having explicit statutory authority behind them in their drug enforcement efforts.

Opposition toward laws that tax illegal drugs have come from a variety of sources. One citizen testifying against the law in Arizona stated that cigarettes are more dangerous than drugs,

so until cigarettes were treated like marijuana, he would not have respect for the government.

Opposition has also come from the National Organization for the Reform of Marijuana Laws. According to NORML executive director Kevin Zeese, "It's nice that state legislatures recognize the economic value of marijuana to raise revenue. We generally oppose laws which further legalize marijuana, however."

Laws that tax illegal drugs may not indicate a trend, but a number of state legislators believe these new approaches will help curtail drug trafficking. In the words of Representative Schreiber, "Al Capone was not put in jail because of his racketeering activities, but because of tax evasion."

—Corina Eckl, senior research analyst, NCSL's Fiscal Affairs Program.

Are Unfit Physicians Going Undisciplined?

In the 1960s, just a few years after he started practicing medicine in Lovell, Wyo., rumors began to drift around the little town about Dr. John Story's questionable behavior with his women patients. Although a smattering of reports was made to authorities over the years, it wasn't until November of 1983 that the Wyoming State Board of Medical Examiners set a date for a hearing to determine whether Dr. Story's license should be revoked for unethical and unprofessional conduct.

At the hearing, in March of 1984, the Board did vote to revoke Dr. Story's license. In June, the doctor appealed to a district court for a stay of the revocation. The stay was granted. He continued to practice until his spring 1985 trial, when a Big Horn County jury convicted him on two counts of rape, three counts of assault and battery and one second-degree sex assault. The doctor voluntarily surrendered his license while he appealed both the criminal conviction and license revocation to the state

Supreme Court. A decision is pending.

The tale of Dr. Story illustrates an aspect of the medical malpractice crisis that has so far received relatively little attention—medical discipline. While lawmakers scramble to solve the problems competent doctors are having in obtaining liability insurance, they have scarcely had time to address the problem of incompetent doctors. And according to a series of recently published reports, there may be many doctors with questionable ethics who go on practicing for years.

Many of the reports are blunt in their criticism. A report by the Public Citizen Health Research Group, for instance, charges that "states have been wholly ineffective in disciplining malpracticing doctors. This lack of regulation has made a significant contribution to the so-called malpractice crisis."

A draft report by the U.S. Department of Health and Human Services (HHS) says state medical boards often are forced to negotiate lesser disciplinary actions and end up, in effect, plea

bargaining. These actions are "a practical response by boards faced with insufficient investigatory resources and with the memory of many cases that have lingered during the hearing and judicial process for two or more years, while the physicians involved have continued to practice."

More evidence of the need to discipline doctors comes from the Professional Review Organizations, which have been formed in each state at the behest of the federal government to review the quality and cost effectiveness of doctors and hospitals providing Medicare services. In their first 7½ months of existence, the PROs began disciplinary actions against 950 doctors and 183 hospitals. Of those, 744 cases involved doctors allegedly providing poor-quality care, and the rest involved doctors consistently prescribing unnecessary treatment.

Most experts agree that without state action, unfit doctors will continue to practice. Advocates of improving medical disciplinary procedures agree

A BAD BUSINESS CLIMATE FOR ILLEGAL DRUGS

The sign on the wall of the Hennepin County (Minneapolis) Sheriff's Department says, "Remember to Call Chris!"

HC

Chris Snaft is the Minnesota Revenue Department's person in charge of enforcing the Minnesota "grass tax," a special excise tax levied on the possession of illegal drugs.

That phone call is just the first step in what has become a very serious piece of business for both revenue and police officials. In August 1986 the state began requiring drug dealers to buy stamps for their supplies of marijuana, cocaine, and other illegal drugs.

The grass tax is good news for revenue officials, state and local police, and the general public alike. On the revenue side, the collections to cost ratio is nearly 5:1, a respectable record for most any tax collector. Some police officials consider the grass tax to be one of the best pieces of anti-narcotics legislation to come along in years. And, Minnesota residents get to send out a clear message to the pushers--find another place to do business.

Minnesota is not the first state to enact a specific excise tax on controlled substances. Arizona (1983) and South Dakota (1984) were a couple of years ahead. But two aspects of the Minnesota experience make it particularly noteworthy. First, Minnesota is the first state to make a serious effort to coordinate local police and state tax collector activities. In contrast, Arizona officials have had only limited success gaining local cooperation. Second, the tax has passed the civil liberties test. In August 1988 the Minnesota law became the first such tax in the nation to survive a constitutional challenge before a state supreme court--a decision that has not been appealed by the defendants. Unlike the South Dakota law, which was ruled unconstitutional by its state court in 1986, the Minnesota statute was carefully drafted to safeguard the right against self-incrimination.

The Process

The Minnesota law is quite simple. It says that drug dealers--people who are in illegal possession of amounts exceeding specified minimums of marijuana and/or controlled substances (thereby exempting licensed pharmacists, people with prescriptions, and casual users)--must pay an excise tax as follows: \$3.50 per gram of marijuana, \$200 per gram of controlled substances, and \$400 per 10 dosage units of controlled substances sold by weight. In Minnesota, casual use is defined as possession of less than seven grams of cocaine, nine grams of LSD, and 42 1/2 grams of marijuana. In terms of a pound of cocaine, for example, the tax amounts to \$90,000.

When the tax has been paid it will be evidenced by a tax stamp printed and sold by the state. In order to ensure protection against self-incrimination, no information of any sort is required of the taxpayer. If the taxpayer elects to provide information regarding his or her name or address, very strict confidentiality rules prohibit the Revenue Department from revealing that information to any person. Thus, not only is the stamp sale confidential, but the tax records are off limits to police and interstate data exchange services.

When arrested in Minnesota, drug dealers are now subject to two actions. First, the usual criminal proceedings from arrest to bail to plea bargaining begin. This includes Minnesota's use of its recently beefed-up forfeiture law, which, like the federal forfeiture statute, permits the police to seize all materials or property used to produce, contain, or transport controlled substances as well as all proceeds traceable to the

transaction. Unlike most state laws, this administrative forfeiture puts the burden of appeal to repossess the property on the owner rather than on the police.

In addition to the usual judicial proceedings, the state can now prosecute for felony tax evasion if tax stamps are not affixed to the illegal drugs, and, at the same time, pursue civil remedies to collect tax plus penalty.

Here is how it works. At the time of arrest police call tax officials who can impose a 100 percent penalty on the unpaid tax. The tax and penalty are due whether or not the dealer is convicted on other criminal charges. This is the same process that can be used if one evades any other tax, such as, the income tax.

The tax officials then immediately issue an assessment on the pusher's assets and begin to collect the tax and the penalty. This means that when a pusher selling drugs is caught and has no evidence of the tax stamps, tax officials can bill that person for the amount of the tax and the penalty due, and then initiate collection efforts anywhere in the state by seizing motor vehicles, bank accounts, real estate, or other assets, and any state (and, soon, perhaps, federal) tax refunds due. Since the law's enactment in 1986 the Minnesota Revenue Department has assessed \$25 million. Although collections (\$651,000) are well below the amount of assessment (few dealers have the income or wealth to pay the amount due), so is the total cost of the Department's operations (about \$55,000 per year). For FY 1989, Minnesota collections are running at \$269,000. Total costs of administration for FY 1989 are \$55,000.

For the dealer, this all hits where it matters most--in the pocketbook.

Tax Policy Considerations

Are taxes on the illegal drug trade an appropriate use of tax policy? Yes. There are three primary justifications:

Equity. The tax addresses one part of a growing problem--tax evasion in the underground economy. Illegal drug dealing is a growing and economically important activity or industry. As such, it can and should be taxed. It surely makes no sense to provide preferential treatment to drug dealers over those who engage in legal market transactions.

Efficiency. Throughout history and at all levels of government, taxes have been imposed for "sumptuary" reasons--to discourage consumption of products held to be morally or ethically undesirable. Although the Minnesota grass tax does generate some state revenues, from a social policy perspective the tax also serves the important role of discouraging illegal drug dealing within the taxing jurisdiction.

Support for the System of Law. The tax adds another tool to the nation's fight against drug abuse. Drug traders can now be charged with felony tax evasion in addition to current criminal statutes. To paraphrase Justice Oliver Wendell Holmes, taxes are a tool for providing for a civilized society.

A State Concern

At present, 11 states have special taxes on illegal drug transactions, and at least six others are considering Minnesota-style legislation (see map). In addition, at least six other states tax illegal drugs through other tax mechanisms such as the general sales tax.

That a "grass tax" is largely a state (or multistate compact) initiative makes good policy sense. For the policy to be effective, a broad jurisdictional authority needs to be combined with an established tax administration process. These requirements tend to rule out most, though not all, local governments. The federal government could also enact the grass tax, but it would not add much to existing federal drug enforcement policy. The federal government not only has had a broad forfeiture law in place since 1978, but also maintains a significant effort with regard to enforcement of the federal income tax, which does not exempt income from illegal drug activity.

Final Comment

The "grass tax" will certainly not bring victory to a state's war on drugs, but it is an important tool in support of that effort. Moreover, the policy is sound from the twin perspectives of tax policy and tax administration. Drug dealers may be odious characters, but they are also entrepreneurs who must buy, sell, and turn a profit to stay in business. This basic commercial aspect of the business creates a weak spot in the dealers' defenses against the law. This is one case where a bad tax climate makes good business sense.