tobacco
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FAX COVER SHEET

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Date: 9/4/98

TO: Tom Freedman

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PAGES: 4 (including cover)

FROM:

- ☐ AUGUST SCHUMACHER
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- ☐ JIM SCHROEDER
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- ☐ JOHN WINSKI
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COMMENTS:

To: Dallas Smith

From: Terry Jackson, IACP/OGC

Subject: Tobacco No Net Cost Assessments – Are they a Tax?

Date: September 4, 1998

File: 5 Leg 7-9 (98)

Dallas, you have asked us to look into the question of whether no-net cost assessments are a tax or not for purposes of the Constitutional requirement that taxes be initiated within the House of Representatives.

I asked John Vos to look into that matter and am forwarding to you the attached paper which we have done based on John's research and John's memo.

As you will see from the paper, it is our conclusion that the assessment is a "fee" not a "tax" and can be considered under the Congress' commerce power, meaning that the procedural requirements that adhere to a "tax" would not apply. This result would be the same whether the issue was the original promulgation of the fee or an amendment to the fee as I understand is contemplated by some in order to have all cost associated with the tobacco program covered, not just those that are presently covered.

Please let me (720-5733) or John (720-9261) know if you need anything further on this.

Disagrees
Ag. Cmte
not
W&M.

Tobacco No Net Cost Assessments – a Tax?

The question involves the "no-net cost" fund assessments made by the Secretary under the tobacco program at 7 U.S.C. §§ 1445-1 & 1445-2, and whether the collection of such producer-funded assessments constitutes a tax for purposes of Constitutional procedural requirements that specify that taxes must originate in the House of Representatives. The settled rule with respect to the collection of revenue is that the mere fact that a statute raises money does not necessarily mean that Congress is using its taxing power. Rather, if the primary purpose of the statute is regulatory in nature, the revenue provisions will be considered to involve a "fee" rather than a tax which can be sustained under the Congress' Commerce Clause powers without engaging the same requirements that would apply to a tax. For example, in *State of South Carolina ex rel. Tindal v. Block*, 717 F2d. 874 (4th Cir.), *cert. denied*, 465 U.S. 1080 (1983), the plaintiffs challenged the constitutionality of a 50 cents per hundredweight dairy program assessment, claiming that the assessments made thereunder were an unconstitutional tax.[1] The court in *Tindal*, found that the primary purpose of the statute was regulatory in nature, thereby implicating commerce clause power. *Id.* at 887.

As the Court noted in Tindal, The Supreme Court has said that the "mere fact that a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised." *Head Money Cases*, 112 U.S. 580 (1884). Accordingly, the imposition of assessments in connection with particular programs for particular purposes have long been held to be a legitimate means of regulating commerce and to be considered a commerce function rather than an exercise of the taxing power. See, e.g., *Wickard v. Filburn* , 317 U.S. 111 (1942). See also, *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943). For tobacco, the "no net cost" fees are regulatory in nature in that the regulate the public investment in one program and are imposed only as needed to accomplish that one function. The fee does not, as would a tax, provide a source of general revenue for the Treasury year after year without regard to the profit or lack of profit on sales of tobacco inventories. That is why this assessment is potentially different from, for example, from the budget deficit assessment imposed on tobacco under 7 U.S.C. § 1445.[2]

Because the analysis would be the same, the result here would be the same irrespective of

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[1]. The plaintiff's argued that Art. I, §7, cl. 1, of the Constitution mandates that all bills for raising revenue shall originate in the House of Representatives, and that Art. I, §8, cl.1, further prohibits the Congress from delegating the power to collect taxes to the executive branch.

[2] See, *San Juan Cellular Telephone Co., v. Pub. Serv. Comm'n of Puerto Rico*, 967 F2d. 683, 685-686 (1st Cir. 1992), holding that an assessment was a fee not a tax in that it defrayed the cost of the regulatory duties performed by the commission, and citing to other cases holding that administrative fees assessed to carry out a regulatory program are not taxes. The Supreme Court has ruled that the courts may invalidate legislation under the commerce clause only if there is no rational basis between the regulatory means and ends selected. *Hodel v. Indiana*, 452 U.S. 314, 323-324 (1981).

whether the issue involved the original promulgation of the assessment or an amendment to the assessment so long as the purpose of the amendment was to regulate who does or does not pay the actual costs of tobacco-related functions.