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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-611
	:	
of	:	<u>November 7, 1980</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Anthony S. Da Vigo	:	
Deputy Attorney General	:	
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SUBJECT: TIME DEPOSITS—The State Treasurer may not borrow against time deposits placed with banks and savings and loan associations pursuant to Sections 16500–16635 of the Government Code.

The Honorable Jesse M. Unruh, State Treasurer, has requested an opinion on the following question:

May the State Treasurer borrow against time deposits placed with banks and savings and loan associations pursuant to sections 16500–16635 of the Government Code?

CONCLUSION

The State Treasurer may not borrow against time deposits placed with banks and savings and loan associations pursuant to sections 16500–16635 of the Government Code.

ANALYSIS

The State Treasurer is required to receive and keep in the vaults of the state treasury or deposit in banks all moneys belonging to the state not required to be received and kept by some other person. (§ 12320.)¹ The State Treasurer is authorized to deposit to the credit of the state in eligible banks and eligible savings and loan associations moneys in the state treasury or under the control of the State Treasurer belonging to or in the custody of the state; any sum in the state treasury so deposited is deemed to be in the state treasury, while any other amount so deposited is deemed to be held in trust by the State Treasurer. (§§ 16502, 16601.) Such moneys may be deposited as time deposits or as demand deposits. (§§ 16503, 16614.)

The question presented is whether the State Treasurer may borrow against such time deposits in banks or savings and loan associations. We are advised that in view of fluctuating interest rates, money might be borrowed against time deposits yielding a lower rate of interest, and invested for higher returns.

In § 44 Ops. Cal. Atty. Gen. 140 (1964) it was concluded that the State Treasurer may enter into simultaneous purchase-sale agreements under sections 16474 and 16480.4 authorizing the State Treasurer to invest and reinvest state money and to exchange and sell securities under the surplus money and pooled money investment programs. In spite of the simultaneous resale feature of the agreement the state became an owner of a negotiable instrument. The transaction did not constitute a loan. (*Id.*, at p. 143.) The situation here presented on the contrary is clearly a loan secured by a time deposit evidenced by a non-negotiable certificate of deposit.

As in the case of an administrative agency, of constitutional origin or otherwise, which has only such powers as have been conferred upon it, expressly or by implication, by the law of its creation (*Ferdig v. State Personnel Board* (1969) 71 Cal. 2d 96, 103–105), public officers, including constitutional officers, have special and limited jurisdiction. (56 Ops. Cal. Atty. Gen. 365, 366 (1973); 62 Ops. Cal. Atty. Gen. 365, 367–368 (1979).) This analysis is predicated upon the assumed premise, implicit in the question presented, that the State Treasurer be in the first instance statutorily authorized to borrow against time deposits for the described purposes. No such authority has been found. The real issue, then, is whether the Legislature could authorize the State Treasurer to borrow such funds.

The fundamental law of the state regarding the creation of a debt is found in article XVI, section 1, of the California Constitution:

¹ All section references are to the Government Code unless otherwise indicated.

“The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars (\$300,000), except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged, and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability; but no such law shall take effect unless it has been passed by a two-thirds vote of all the members elected to each house of the Legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. . . .”

The language of article XVI, section 1, of the California Constitution is so plain and unambiguous as to “defy the ingenuity of the most subtle intellect to invent a consistent interpretation, other than that which naturally suggests itself from the words of the article.” (*People v. Johnson* (1856) 6 Cal. 499, 501; *Nougues v. Douglass* (1857) 7 Cal. 65, 66–67.) By its terms, the Legislature may not, without a vote of the people, except in the case of invasion or insurrection, create any debt or liability so that the aggregate of indebtedness or liability of the state exceeds \$300,000. This prohibition was intended to prevent the state from running into debt and to keep its expenditures within its revenues. (*State of California v. McCauley* (1860) 15 Cal. 429, 455.) As stated in *People v. Johnson, supra*, at pages 503–504:

“This feature of our Constitution was admirably designed to check the improvident expenditure of money, and the accumulation of taxes. The people refused to part with the exclusive right, and therefore restricted the authority of the Legislature within certain bounds, reserving to themselves the power of determining beyond such limits.

“That the Article was not intended simply as a limitation on the power to borrow money, is evident from its language; the words are: ‘shall not in any manner create any debt or debts, liability or liabilities, which singly, or

in the aggregate,' etc., A debt or liability may be created, in other ways than by the borrowing of money; it may [be] created by appropriation, where there is no money to meet it; it may be created by drawing on a fund where there is no cash in the treasury, or incoming revenue, to satisfy such drafts; it may be done in various ways; yet the stern letter of the Constitution imperatively forbids the Legislature from creating, in any manner, except in the mode pointed out, such debts or liabilities.

“The framers of our State Constitution were mostly men fresh in the experience of the errors into which other States had fallen. They had witnessed the unhappy results that followed extravagant legislation, and were anxious to rear a bulwark here, which would protect us against similar disasters. They were thoroughly acquainted with the history of the gigantic schemes of internal improvements entered into by the South and West; of the establishment of banks; of the expansion of their circulating medium; of the inflation of everything; of the general demoralization, which resulted from an uncontrolled power of legislation; and, in fact, of the weakness of human nature itself. They had witnessed ruin like an avalanche overwhelm them, destroying visionary hopes of wealth and greatness, and leaving them to sink beneath the crushing weight of debt and taxation, or driving them to the more dishonorable alternative of repudiation. They were aware that years would scarcely repair the follies of a single day, and that the high rate of taxes imposed in many of the States, to pay the interest of the debts so improvidently contracted, had the effect to drive capital and population from their shores.

“With these examples before them, in a country whose very atmosphere was heavy with gold, and knowing, that by the immutable laws of trade, the necessary consequences of a plethoric circulating medium would be the inflation of the price of everything, carrying in its train as attendant evils, speculation and improvidence, can it be wondered that the framers of our Constitution should have attempted to prevent the evil consequences which they foresaw, by constitutional checks and barriers? No one can doubt their intention, and it is only to be regretted that that which was so wisely begun, has been so rashly departed from.”

Article XVI, section 1, of the California Constitution refers to indebtedness which would constitute a legally enforceable obligation against the state's general funds or taxing power. (*California Housing Finance Agency v. Elliott* (1976) 17 Cal. 3d 575, 588;

California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 607.)² In spite of its purpose and object, such is the nature of the proposed indebtedness for the repayment of the principal and interest on the amount to be borrowed.³

Would the borrowing of funds secured by time deposits or other state property for the purposes specified result in the creation of an indebtedness of a nature prohibited by the constitution?⁴ Constitutional provisions, like statutes, should be so construed as to promote their intended effect while avoiding absurd or unfair consequences. (*Stanton v. Panish* (1980) 28 Cal. 3d 107.)

It may be argued that the constitutional provision, the purpose of which is to preclude improvident expenditures, should not be so construed as to prevent the borrowing of funds against time deposits for purposes of investment at higher rates where neither the purpose nor effect thereof is to dilute the state's assets or to increase the attendant risks. (*Cf.* 44 Ops. Cal. Atty. Gen. 140, 142, *supra.*) Given these assumptions, we are nevertheless persuaded to the contrary.

In connection with a constitutional limitation on the power of a state to incur "debts" or "liabilities," such terms "are not employed in a technical sense, but have specific reference to the basic warrant and legislative authority on which a state contract must rest and on which alone a public debt must find its sanction in order to obligate a state to pay." (*Rankin v. State Board of Examiners* (1921) 59 Mont. 557, 197 P. 988, 992; *Lewis v. Brady* (1909) 17 Idaho 251, 104 P. 900, 901.) The California Supreme Court has observed that the constitutional limitation on indebtedness pertains not to the total amount of indebtedness, but to the manner in which such indebtedness beyond the designated limit may be created. (*Bickerdike v. State* (1904) 144 Cal. 681, 695.) Regardless of whether the

² No, such debt is created if the funds to repay an obligation are to be derived solely from revenue from a special fund. (*California Housing Finance Agency v. Elliott, supra*, 17 Cal. 3d at p. 587; 27 Ops. Cal. Atty.' Gen. 115, 119–120 (1956).) This exception does not pertain to the present inquiry.

³ It is assumed for purposes of this analysis that the time deposits referred to in the inquiry are of moneys of the general fund.

⁴ *Flournay v. Priest* (1971) 5 Cal. 3d 350 concerned an urgency measure enacted to deal with temporary insufficiencies of funds in the state treasury to meet current operating expenses of the state government. The Legislature authorized the State Treasurer to issue and sell notes of the State of California, and appropriated sufficient revenues in anticipation of their receipt to pay the principal and interest of the notes. The court concluded that no indebtedness is created within the meaning of the debt limitation provisions of the constitution where the Legislature, at the time of authorizing an obligation, appropriates sufficient funds for payment. (*Id.*, at p. 354; see also *Riley v. Johnson* (1936) 6 Cal. 2d 529.) The present inquiry does not contemplate an appropriation.

state would be otherwise directly liable to make payment on the loan, the encumbering of existing state property as security for such loan constitutes a debt within the purview of the constitutional provision. (*Slate ex rel. Thomson v. Giessel* (1954) 267 Wis. 331, 65 N.W.2d 529, 537–540.) In the absence of compliance with the constitutionally prescribed manner by which a debt may be created, any such contracted obligation is void. (*Veterans' Welfare Board v. Jordan* (1922) 189 Cal. 124, 134.)

It is concluded, even assuming the existence of statutory authority, that the State Treasurer may not borrow against time deposits placed with banks and savings and loan associations, whether for purposes of investment or otherwise, without compliance with the procedures set forth in article XVI, section 1, of the California Constitution, except as therein otherwise provided.
