



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

August 20, 1976

ATTORNEY GENERAL OPINION NO. 76-261

The Honorable Jim Parrish
Senator, 19th District
2209 East 21st Street
Topeka, Kansas 66605

RE: Taxation--Sales Tax--Exemptions

Synopsis: A sales tax is not a property tax. It is an excise tax levied upon the privilege of engaging in the business of selling tangible personal property or services at retail. The 1970 narrowing of sales tax exemptions to non-profit public or private schools and hospitals, and removing sales tax exemptions on purchases for religious, charitable and benevolent exclusive uses, does not violate the United States or Kansas Constitutions.

*

*

*

Dear Senator Parrish:

You request our opinion as to whether the Kansas Sales Tax Law, K.S.A. 1975 Supp. 79-3606(b), amended in 1970 to deny sales tax exemptions on purchases of tangible personal property and services for the exclusive use of religious bodies, violates the First Amendment of the United States Constitution, and Article II, Section of the Kansas Constitution. You advise that the Kansas sales tax is now being imposed on such purchases by churches as Sunday School supplies, duplicating equipment and furniture used exclusively for its religious functions. You ask if this tax violates the constitutional limitations above.

Honorable Jim Parrish
August 20, 1976
Page 2

The Kansas Constitution, Article II, Section 1, provides in pertinent part: "All property used exclusively for...religious... purposes...shall be exempted from taxation." However, when this language was adopted in the Constitution, excise taxes were not being utilized in Kansas. Thus, the Kansas Supreme Court has held that this section applies only to property taxes and not to "excise" taxes which are not taxes on property. State ex rel. v. State Comm. of Rev. & Taxation, 163 Kan. 240, 248, 181 P.2d 532, (1947). A sales tax is an excise tax. See also City of Chanute v. State Comm. of Rev. & Taxation, 156 Kan. 538, 134 P.2d 672 (1943). Accordingly, the withholding of an exemption from the provisions of the sales tax statutes does not violate the Kansas Constitution.

Kansas decisions indicate that there are instances in both ad valorem and excise taxes when churches are denied tax exemptions. They assert a discretion on the part of the state to grant, deny or limit religious exemptions from taxation. Sunday School Board of the Southern Baptist Convention v. McCue, 179 Kan. 1 290 P.2d 293 (1956); Seventh Day Adventist Kansas Convergence Ass'n. v. Board of County Comm's., 211 Kan. 683, 508 P.2d 911 (1973); Midwest Solvents v. State Comm. of Rev. & Taxation, 183 Kan. 104, 110, 325 P.2d 511, (1958); Russell v. Cogswell, 151 Kan. 14, 19, 98 P.2d 179 (1940); Burrow v. Pleasant, 136 Kan. 670, 673-674, 17 P.2d 833, (1933); Assembly of God v. Sangster, 178 Kan. 678, 683, 290 P.2d 1057, (1955); Eighth Street Baptist Church v. United States, 291 F. Supp. 603, 604, 295 F. Supp. 1400, 1401. (D.C. Kan. 1969).

The United States Supreme Court had before it an appeal from a conviction of members of Jehovah's Witnesses for violating an ordinance of the City of Jeannette, Pennsylvania, which prohibited canvassing and soliciting without a license fee being paid. Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870 87 L. Ed. 1292 (1943). The imposition of the "peddlers" license fee was struck down by the Court as forbidden by the First Amendment.

Very shortly after Murdock, the Supreme Court of South Dakota handed down a decision in State v. Van Daalan, 69 S.D. 466, 11 N.W. 2d 523 (1943) and quoted from it at length. South Dakota had enacted a "privilege or occupation tax", which was based on sales made. Members of Jehovah's Witnesses failed to register and report sales, or remit the statutory tax thereon. The Court held that an occupation tax was a tax on the privilege of engaging in an occupation, and when that occupation was that of preaching a religion, the tax is prohibited by the First Amendment, following Murdock.

In 1947 the Jehovah's Witnesses contested a personal property tax on literature and pamphlets stored for future use in California. The Court cited Murdock at page 112:

Honorable Jim Parrish
August 20, 1976
Page 3

"We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon."

It gave emphasis to the words: "a tax on property used or employed in connection with those activities." Watchtower Bible & Tract Society v. Los Angeles County, 30 Cal. 2d 426, 182 P.2d 178, cert. den. 332 U.S. 811, 68 S. Ct. 112, 92 L. Ed. 389 (1947).

Still persisting, a second suit was filed, asking a declaratory judgment, in the California Federal District Court, and again, the decision gave this reply: "If carried to its logical conclusion, the "stream of worship" theory would prevent a city or state from taxing the linotype machines which the plaintiff organization might own and on which the books are printed, and any component parts of the books, such as paper, type, lead, and, for that matter, the income of persons who may be engaged in writing the religious books. The First Amendment does not go to that length. It merely protects the act of worship." Watchtower Bible & Tract Society v. Los Angeles County, 84 F. Supp. 352, 354 (Ca. D.C. 1949); affirmed 181 F.2d 739; cert. den. 340 U.S. 820, 71 S. Ct. 51, 95 L. Ed. 602.

Then in 1964, in Alabama under a Retailers Sales Tax Law and Use Tax Law, similar to the ones currently existing in Kansas, the Alabama State Department of Revenue audited the records of St. Mary's Catholic Church and found purchases for sacramental wine for use in celebration of Mass, the central act of worship in the Catholic faith, candles, leaflet missals in English for the congregation to follow the Mass, envelopes, holy cards, rosaries, medals, and sheet music for use by the organist and choir. Other such audits had been made of all denominational churches of Alabama and this was a test case.

The Alabama Supreme Court distinguished the Van Daalan case of South Dakota, reviewed the Watchtower cases in the California state and federal Courts, cited Murdock, and then found the tax was "uniform, nondiscriminatory, levied on all sales alike regardless of the use to which the property may be put, applies at the same

Honorable Jim Parrish
August 20, 1976
Page 4

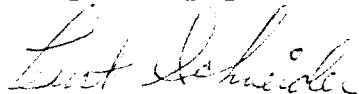
rate to purchases of rich and poor, individuals, partnerships and corporations alike." The defense had cited an Alabama law which specifically exempted Sunday School and Bible class supplies. But the Court answered "We think it took positive action by the Legislature to exempt those publications, and we think it will require such action to exempt the items contested in the instant case." State v. Toolen, 277 Ala. 120, 167 So. 2d 546, 54 AL. 3 1208. The last annotation of Alabama statutes reveals that this specific exemption remains unamended. Code of Ala. Title 51, Sec. 789(2).

In 1970 the United States Supreme Court upheld the granting of tax exemptions to real estate used exclusively for religious purposes, denying the contention that such exemptions constituted an "establishment of religion" in violation of Amendment 1. Walz v. Tax Commission, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697. The Court found that there was no vested right to a tax exemption:

"Qualification for tax exemption is not perpetual or immutable;..." (P. 673)

When the sales tax law was first enacted, it provided for an exemption of all sales of tangible personal property and services to "educational, religious, benevolent or charitable institutions" when used exclusively for their purposes. K.S.A. 79-3606(b)(d). However, in 1970, by Chapter 389, Section 4, the Kansas Legislature amended this exemption by striking out of these subsections the word "religious", and narrowed the exemption to public and private non-profit schools and hospitals. In our opinion the Legislature has the power to grant, deny or restrict exemptions under the Kansas sales tax law. The Legislature, according to its wisdom and discretion, may grant exemptions, so long as it treats all members in a class equally. Wheeler v. Weightman, 96 Kan. 50-61, 149 Pac. 977, (1915).

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS/CJM/cgm