



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

September 16, 1976

ATTORNEY GENERAL OPINION NO. 76- 287

Mr. Edward F. Horne
City Attorney of Manhattan
Union National Bank Tower
Manhattan, Kansas 66502

Re: Cities--Taxation--Sales Taxes

Synopsis: K.S.A. 12-172 *et seq.*, and amendments thereto, are ineffective to oust Kansas cities from the power to authorize by local municipal legislation the levy of retailers' sales taxes. The Secretary of Revenue is empowered and authorized to provide for the enforcement and collection of such taxes.

* * *

Dear Mr. Horne:

You advise that there is some interest in Riley County in the adoption of a county-wide one percent sales tax. You inquire, specifically, what effect the adoption of a county-wide retailers' sales tax would have on the existing city-wide one-half percent sales tax in that portion of the City of Manhattan which is located in Pottawatomie County.

In 1961, the same year that article 12, § 5 of the Kansas Constitution became effective, conferring the constitutional power of self-government upon Kansas cities including the power to levy taxes, the legislature stripped all cities of the power to levy excise taxes by a law applicable uniformly to all cities. K.S.A. 12-139 provided thus:

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"No city shall impose an excise tax, or tax in the nature of an excise, upon a sale or transfer of personal or real property, or the use thereof, or the rendering or furnishing of a service."

In 1970, the legislature permitted cities, as well as counties, to levy retailers' sales taxes, in each instance only after approval by the voters. See ch. 402, §§ 15 *et seq.*, L. 1970. The authority granted by that act was temporary, for the act was provided to expire on December 31, 1972. For its duration, the prohibition in K.S.A. 12-139 was suspended.

In 1972, new statutory provisions regarding municipal retailers' sales taxes was enacted. See ch. 380, §§ 2 *et seq.*, L. 1972. The prohibition of K.S.A. 12-139 was again suspended until December 31, 1973. In 1972, for the first time, the legislature chose to classify Kansas cities as it may do under article 12, § 5, of the Kansas Constitution, for the purpose of imposing limitations upon the power of Kansas cities to levy certain taxes. Section 10, ch. 380, L. 1972, created two classes of cities:

"The following classes of cities are hereby established for the purpose of imposing limitations and prohibitions upon the levying of excise taxes or taxes in the nature of an excise upon sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities as authorized and provided by article 12, section 5, of the constitution of the state of Kansas:

Class 1. All cities in the state of Kansas levying and collecting excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities on March 1, 1972.

Class 2. All cities of the state of Kansas not levying and collecting excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities on March 1, 1972."

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The latter class was prohibited from levying such taxes from and after January 1, 1973. See §§ 10, 11, ch. 380, L. 1972.

Once again, in 1973, statutory authority for municipal retailers' taxes was reenacted. See ch. 393, §§ 17 *et seq.* Once again, also, the classification of cities quoted above was also reenacted, and all those cities in class 2, those not levying excise taxes or taxes in the nature of excise upon sales and the furnishing of services on March 1, 1972, were prohibited from doing so from and after April 30, 1973. Thus, the authority which was reenacted in 1973 was no authority at all except for those three cities whose voters had earlier approved retailers' sales taxes, Topeka, Manhattan, and Lawrence.

In 1976, there was enacted, once again, authority for Kansas cities to levy retailers' sales taxes. Ch. 70, § 1, L. 1976, amended K.S.A. 12-172 to provide in pertinent part thus:

"(a) No city shall impose a retailers' sales tax under the provisions of this act unless more than one-half of the area of such city is located within a county in which a proposition to levy a countywide retailers' sales tax has been submitted to and rejected by the electors of the county on or after the effective date of this act and without the governing body of such city having first submitted such proposition to and having received the approval of a majority of the electors of the city voting thereon"

As to those cities in which such a tax was levied on March 1, 1972, *i.e.*, Manhattan, Topeka, and Lawrence, subsection (d) of this provision was amended thus:

"Any city retailers' sales tax in the amount of one-half of one percent (.5%) in effect on March 1, 1972, shall continue in effect until repealed in the manner provided herein for the adoption and approval of such tax or until the adoption of a countywide retailers' sales tax in the amount of one percent (1%) in the county in which such city is entirely or primarily located."

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The question which is presented is whether the legislature has effectively ousted Kansas cities from the exercise of their constitutional home rule powers regarding taxation. Article 12, § 5(b) of the Kansas Constitution provides thus, in pertinent part:

"Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: *Provided*, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions."

Cities shall exercise their constitutional powers of self-government regarding taxation subject to three different kinds of legislative restrictions:

"[1] enactments of the legislature of statewide concern applicable uniformly to all cities, [2] to other enactments of the legislature applicable uniformly to all cities, [and 3] to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction"

Stated otherwise, the legislature may constitutionally limit or prohibit cities in the exercise of their constitutional power to levy taxes only by an enactment applicable uniformly to all cities, or by an enactment applicable uniformly to all cities of the same class, as those classes are defined by the legislature.

As stated earlier, in 1972 and in 1973, the legislature established two classes of Kansas cities for the purpose of imposing limitations or prohibitions upon the levy of retailers' sales taxes. *See* K.S.A. 12-173. That classification, and the prohibition imposed upon class 2, was repealed by ch. 71, § 4, L. 1976. No new classification was enacted in its stead. Hence, in order to oust cities from the exercise of their constitutional taxing power, ch. 70, L. 1976, must apply uniformly to all cities of the state.

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Clearly, it does not. Three cities, Topeka, Manhattan, and Lawrence, are permitted to continue to levy retailers' sales taxes. Of the remaining cities, the only cities which are permitted to levy a retailers' sales tax are those more than one half the area of which is located in a county in which a county-wide retailers' sales tax has been submitted to and rejected by the voters on or after April 26, 1976. All other cities may not levy a retailers' sales tax under the act. Moreover, any city which does levy a retailers' sales tax is prohibited from doing so whenever the county in which such city is located thereafter approves a retailers' sales tax. K.S.A. 12-178. Further, no city, except those three already doing so, may levy a retailers' sales tax unless the board of county commissioners of the county in which more than half the city is located chooses to submit the question of a county-wide retailers' sales tax levy or a petition is filed requiring such submission, and the voters reject it.

Section 3 of ch. 70, L. 1976, is a further instance of the nonuniform application of the act. In cities initiating retailers' sales taxes under the act, from and after April 26, 1976, "all sales of farm machinery and equipment, repair and replacement parts therefor and services performed in the repair and maintenance of such machinery and all sales of machinery and equipment for use in manufacturing plants located in the state of Kansas" shall be exempt from cities' retailers' sales taxes levied under the act. Like transactions located in Topeka, Manhattan, and Lawrence remain subject to the retailers' sales taxes in those cities.

It may be argued nonetheless, that it was the legislative intent in the enactment of K.S.A. 12-172 *et seq.*, and amendments thereto, to regulate exclusively the levy of municipal retailers' sales taxes, and that this intent must be respected in the construction of the residual city powers in the area, if there be any, indeed. In *Claflin v. Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973), the court stated thus:

"In view of the liberal construction provision of Section 5(d) [of Article 12, § 5 of the Kansas Constitution], in determining whether a legislative enactment is applicable uniformly to all cities such a legislative intent should be clearly evident before the courts should deny a city the right to exercise home rule power in that area.

In some cases the legislative intention has been made clear and unequivocal. By specific language the legislative intent is shown to be that the statute is to be applied uniformly to all cities

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"The difficulty is that in many statutes the legislative intention to have uniformity throughout the state is not expressly stated. In that situation courts are required to glean legislative intent by applying established rules of statutory construction." 212 Kan. at 7-8.

There is no occasion to resort to rules of statutory interpretation here. Assuming, arguendo, that it was the intent of the legislature to preempt all powers of municipal excise taxation, it did not say so, either expressly or impliedly. Secondly, and more important, the legislature may preempt the constitutional municipal powers of taxation only in a manner prescribed by the constitution itself, *i.e.*, by enactments applicable uniformly to all cities, or applicable uniformly to all cities of a class. Chapter 70, L. 1976, falls far short. The legislature has repealed the classes of cities which it formerly created for the purpose of imposing such prohibitions or limitations, it adopted no new classifications, and it has not enacted a new law applicable uniformly to all cities of the state.

Accordingly, it is my judgment that, although K.S.A. 12-172 *et seq.*, and ch. 70, L. 1976, constitute valid enactments of the legislature, they are constitutionally ineffective to strip Kansas cities of the power to levy by local municipal legislative action retailers' sales taxes upon transactions within such cities. Thus, the City of Manhattan is not ousted, in my judgment, from the levy of a retailers' sales tax by the adoption of a county-wide retailers' sales tax, and the city may continue to levy its tax throughout the city, including that portion located in Pottawatomie County.

The remaining question concerns the enforcement and collection of such a tax as the city might authorize by local legislation, adopted in accordance with K.S.A. 12-137. K.S.A. 12-175, as amended by ch. 70, § 2, L. 1976, states in pertinent part thus:

"The rate of any city retailers' sales tax proposed to be levied shall be fixed in the amount of one-half of one percent (.5%). . . . Any county or city levying a retailers' sales tax is hereby prohibited from administering or collecting such tax locally, but shall utilize the services of the state department of revenue to administer, enforce and collect such tax. Except as otherwise specifically provided in section 3 of this act such tax shall be identical in its application, and exemptions therefrom, to the Kansas retailers' sales

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tax act and all laws and administrative rules and regulations of the state department of revenue relating to the retailers' sales tax shall apply to such local sales tax insofar as such laws and regulations may be made applicable. The state secretary of revenue is hereby authorized to administer, enforce and collect such local sales taxes and to adopt such rules and regulations as may be necessary for the efficient and effective administration and enforcement thereof."

These provisions constitute a legislative recognition of the obvious economy and efficiency which result from state collection of local sales taxes, thus avoiding the necessity of costly collection efforts by cities which merely duplicate the established efficient and effective resources already available in the Kansas Department of Revenue. The provisions for state collection of local retailers' sales taxes do not specify that they apply only to sales taxes levied pursuant to statutory authority, as distinguished from constitutional authority. While the legislature failed to oust cities from the exercise of their constitutional municipal excise and sales taxing powers, these provisions are effective to relieve cities from the burden of enforcing and collecting locally authorized retailers' sales taxes, and to empower the Secretary of Revenue, pursuant to this section, to administer, enforce and collect such taxes for Kansas cities. The Secretary of Revenue has no responsibility, however, to collect retailers' sales taxes unless such tax is at a rate prescribed by section 2, *i.e.*, one-half of one percent (.5%), and is identical in its application and exemptions therefrom to the Kansas retailers' sales tax act.

To recapitulate, it is my opinion that K.S.A. 12-172 *et seq.*, and amendments thereto, including ch. 70, L. 1976, are constitutionally ineffective to oust Kansas cities from the power to authorize by local municipal legislation, in accordance with K.S.A. 12-137, the levy of retailers' sales taxes. The Secretary of Revenue is empowered and authorized to provide for the administration, enforcement and collection of such taxes as cities may authorize by local legislative action in the exercise of their home rule powers, provided such tax is at the rate prescribed by ch. 70, § 2, L. 1976, and identical in its application to the Kansas retailers' sales tax act.

Yours very truly,



CURT T. SCHNEIDER
Attorney General