



STATE OF KANSAS

## Office of the Attorney General

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*Curt T. Schneider*  
Attorney General

October 15, 1976

ATTORNEY GENERAL OPINION NO. 76-327

Mr. Myron Krenzin  
Administrator  
Kansas Wheat Commission  
1020 North Main  
Hutchinson, Kansas 67501

RE: Agriculture--Kansas Wheat Act--Collection of Excise  
Tax on Colorado Grown Wheat

Synopsis: There exists no statutory authorization by which the Kansas Wheat Commission or Kansas grain elevators may collect and remit to the Colorado Wheat Administrative Committee the five (5) mill tax levied by the State of Colorado on production of each bushel of Colorado wheat purchased by Kansas grain elevators.

The Kansas Wheat Commission is vested with authority by virtue of K.S.A. 2-2606(11) to promulgate rules and regulations requiring the first purchasers of wheat to list the name of the seller, quantity of wheat sold and state of origin for all wheat purchases. Furthermore, K.S.A. 2-2606(7) is construed so as to permit the Kansas Wheat Commission to transmit this information concerning Colorado grown wheat to the Colorado Wheat Administrative Committee.

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Dear Mr. Krenzin:

You have inquired as to whether Kansas grain elevator operators may collect upon wheat produced in Colorado but sold in Kansas, the five mill excise tax assessed pursuant to the Colorado Wheat Marketing Order. As facts presently appear, Kansas elevators purchasing Colorado wheat collect only the two mill levy required by the Kansas Wheat Act, K.S.A. 2-2601, et seq. Secondly, you have inquired as to whether either the Kansas Wheat Commission or Kansas

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elevator purchasing Colorado Wheat may furnish the Colorado Wheat Administrative Committee with information as to the seller and the quantity of Colorado wheat sold in Kansas.

Before endeavoring to answer these questions, a brief review of both the applicable Kansas and Colorado statutory and regulatory provisions is appropriate. The pertinent Colorado authority, Colorado Revised Statutes (C.R.S.) 35-28-102, et seq., commonly referred to as the Marketing Act of 1939, provides at C.R.S. 35-28-113:

"(1) For the purpose of providing funds to defray necessary expenses, the board of control shall prepare a budget for the administration and operating costs and expenses, including advertising and sales promotion when same are requested in any marketing agreement or order executed under this article, which budget shall be approved by the commissioner. The collection of such necessary fees and the times and conditions of payment, in no case to exceed five percent of the gross dollar volume of such sales or dollar volume of purchases or amounts handled, shall become a part of any marketing order upon adoption as provided in this article.

(2) Every person engaged in the production, processing, distributing, or the handling of any marketable agricultural product produced in this state and directly affected by any marketing order issued pursuant to this article for such commodity shall pay to the commissioner at such time and in such manner as prescribed by the order as adopted an assessment covering the budget provided by this article, such percentage of the gross dollar volume of such sales or dollar volume of purchase or amounts handled, or distribution of any commodity affected by such marketing order, as is necessary to defray the expenses of the enforcement of this article, but in no case to exceed five percent of the gross dollar volume."

Authority for creation and operation of the Colorado Wheat Administrative Committee is found at C.R.S. 35-28-107 which provides as follows:

"...Any marketing order pursuant to this article shall provide for the establishment of a board of control to administer such order in accordance with its terms and provisions..."

C.R.S. 35-28-104(11) defines "producer" to mean:

"...any person engaged within this state in the business of producing, or causing to be produced for market, any agricultural commodity."

In essence, the Colorado Marketing Act of 1939 provides a comprehensive means by which to regulate commodities grown within the borders of Colorado. Towards this objective, the commissioner of agriculture is given authority to promulgate, by a detailed procedure set out therein, marketing orders--that is, an order prescribing rules and regulations governing the processing, distributing sale of, or handling in any manner of any agricultural commodity in Colorado. As part of this marketing order, C.R.S. 35-28-113, set out above, delegates to the commissioner of agriculture the authority to prescribe rates of assessment upon the commodity which are levied to meet the budgeting expenditures of the board of control, herein known as the Colorado Wheat Administrative Committee. Under the Commissioner's current marketing order affecting Colorado provided wheat, Section III(c) provides:

"(c) FUND FOR EXPENSES AND RATE OF ASSESSMENT

(1) Upon the issuance of any research plan, the Commissioner shall approve a budget and rate of assessment based upon the recommendation and information submitted by the Wheat Administrative Committee and shall promptly notify the Wheat Administrative Committee of his action thereon.

(2) Each producer's pro-rata share of the expenses that may be incurred during a fiscal year in connection with any research plan established pursuant to this section shall be based upon the rate of assessment recommended by the Wheat Administrative Committee and shall be that proportion of such expenses which the total quantity of wheat sold by each producer during such fiscal year is of the total quantity of all wheat sales by all producers during said fiscal year and shall be remitted by such producer as otherwise provided in Section V (c).

(3) The rate of assessment may be adjusted from time to time by the Wheat Administrative Committee, in order to cover any later findings by the Wheat Administrative Committee of the estimated expenses or actual expenses that may be incurred in connection with any research, marketing, and utilization plan."

Section IV(e) provides in nearly identical terms the authority to make assessments for sales, promotions, public relations and educational programs. Finally, Section V(b) (1) states:

"Each producer's pro-rata share shall be based upon the rate of assessment fixed by the Commissioner and shall be that proportion of such expenses which the total quantity of wheat sold by such producer is of the total quantity of wheat sold by all producers during said fiscal year. No assessments covering the budgets established by the Wheat Administrative Committee under this Order shall exceed one-half cent (1/2¢) per bushel for wheat produced in the counties of Colorado covered by this Order, in any one fiscal year...."

Section V(c) (3) establishes the producer's liability for the tax regardless of where the commodity is sold by providing:

"Any producer who by virtue of his activities or circumstances shall be within the meaning of the term 'handler' as herein defined, or who shall sell, ship, or otherwise dispose of wheat to a handler or other person or store wheat outside the jurisdiction of this Order, shall forthwith remit to the Commissioner the full amount of the assessment due. Any producer who fails to pay or remit such assessment as herein provided shall be deemed guilty of a violation of this Order."

Pursuant to authority contained in these sections of the Wheat Marketing Order, the Colorado Department of Agriculture, on March 23, 1976, promulgated regulation 14-5-1 which established the rate of assessment needed to meet the proposed expenditures of the

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Wheat Administrative Committee for fiscal year 1976. Although several sources are listed, revenue for this fiscal year will be derived primarily from a five (5) mill levy on wheat produced in Colorado.

This state's counterpart, the Kansas Wheat Act, K.S.A. 2-2601, et seq., delegates to the Kansas Wheat Commission the following relevant powers:

"In the administration of this act the commission shall have the following duties, authorities and powers:

...

(7) To cooperate with any local, state or national organization or agency, whether voluntary or created by the law of any state, or by national law, engaged in work or activities similar to the work and activities of the commission, and to enter into contracts and agreements with such organizations or agencies for carrying on a joint campaign of development, education and publicity;..."

Funding for the Kansas Wheat Commission is derived from K.S.A. 2-2608 which imposes a two (2) mill excise tax on the sale of each bushel of wheat sold in Kansas. The first purchaser, normally a grain elevator company, is responsible for deducting the two (2) mills from the price paid the grower. As referred to earlier, Kansas grain elevator operators are presently collecting only the two mill excise tax required by Kansas law, irrespective of the wheat's origin. Due to a substantial savings in freight costs, if shipped from inside the Kansas border, Colorado wheat growers are increasingly transporting and selling Colorado grown wheat to western Kansas grain elevators thereby depriving the Colorado Wheat Administrative Committee of a significant portion of anticipated operating revenues.

In response to your first question, the Court in Shiver v. Board of County Commissioners, 189 Kan. 548, 555, 370 P.2d 124 (1962) stated:

"...The constitution of Kansas does not prescribe the method of levy, assessment and collection of taxes, or of determining

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whether property is exempt; those matters are wholly statutory, and whatever remedies or procedures are available in connection therewith are to be found in the statutes. (Sherman County Comm'rs v. Alden, 158 Kan. 487, Syl. ¶1, 148 P.2d 509, and cases cited therein; Phillips Petroleum Co. v. Moore, 179 Kan. 482, 490, 491, 297 P.2d 183.)..."

The Court further articulated the point in Board of County Commissioners v. Mallock, 192 Kan. 272, 387 P.2d 211 (1963) wherein it stated:

"...the methods prescribed for the recovery of delinquent taxes are wholly statutory, no methods exist apart from the statute, and whatever procedures, whatever remedies are available are to be found in the tax statutes. (Ness County v. Light & Ice Co., 110 Kan. 501, 204 Pac. 536; Sarver v. Sarver Oil Co., 141 Kan. 246, 248, 40 P.2d 394; Cunningham v. Blythe, 155 Kan. 689, 695, 127 P.2d 489; Mitchell County Comm'rs v. Allen, 156 Kan. 701, 706, 137 P.2d 143.)"

The principal point to be gleaned from these and related cases is that the assessment and collection of taxes is contingent upon statutory authorization. The power to levy and collect the tax must be conferred by an express grant of power from the legislature. In this instance, no such authorization has been granted by the Kansas Legislature for collection of any foreign commodity or wheat tax or other charge by Kansas state agencies.

The assertion that the authorization exists by virtue of the Colorado enactment ignores the rule that the tax levies of a state can have no extraterritorial operation. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36 (1904); 71 Am. Jur.2d State and Local Taxation, §85. Thus, while the Colorado enactments operate fully within the borders of that state, they are without force or effect in Kansas.

In this regard, K.S.A. 79-2910a provides:

"...That any state of the United States of America or any political subdivision thereof shall have the right to sue in the courts

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of Kansas to recover any tax which may be owing to it when the like right is accorded to the state of Kansas and its political subdivisions by such state, whether such right is granted by statutory authority or as a matter of comity."

The clear implication of this statute is that without such a comity provision, there exists no authority to enforce Colorado tax laws in Kansas. Even with such a similar enactment, no authorization exists for Kansas governmental agencies to collect wheat excise taxes. K.S.A. 79-2910a provides Colorado authorities only with access to the Kansas courts as a judicial forum for determination of tax liability. Accordingly, it is my opinion that there exists no statutory authorization by which the Kansas Wheat Commission or Kansas grain elevators may collect and remit to the Colorado Wheat Administrative Committee the five (5) mill tax levied by the State of Colorado on the production of each bushel of Colorado wheat purchased by Kansas grain elevators.

You have further inquired as to the propriety of the Kansas Wheat Commission transmitting to the proper Colorado state agency information relative to the sale of Colorado wheat in Kansas. As noted earlier, K.S.A. 2-2606(7) empowers the Kansas Wheat Commission to:

"...(7) to cooperate with any local, state or national organization or agency, whether voluntary or created by the law of any state, or by national law, engaged in work or activities similar to the work and activities of the commission, and to enter into contracts and agreements with such organizations or agencies for carrying on a joint campaign of development, education and publicity;..."

Subsection (11) further provides:

"...(11) to adopt, rescind, modify and amend all necessary and proper orders, resolutions and regulations for the procedure and exercise of its powers and the performance of its duties, and all rules and regulations shall be filed in the office of the revisor of statutes as provided in article 4 of chapter 77 of the Kansas Statutes Annotated...."

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In my view, construing these two subsections together, the Kansas Wheat Commission may, in the exercise of their discretion, furnish to the Colorado Wheat Administrative Committee pertinent information concerning the sale of Colorado wheat in Kansas. The powers conferred upon the Kansas Wheat Commission by subsection (7) are written conjunctively. Significant here, the authority "to cooperate" is not limited to contracts "for carrying on a joint campaign of development". Although no exact parameters to the word "cooperate" are provided by the statute, it is reasonable to assume that assisting another state's wheat agency by providing information for the ascertainment of that state's wheat producers subject to or liable for taxes in that state does come within the meaning contemplated by subsection (7). This does not inject any Kansas agency or official into the collection, levy or assessment of another's state taxes. It cannot be gainsaid that the Kansas Legislature intends the word "cooperate" to be so narrowly construed as to assist certain individuals in the evasion of a sister state's tax levies. Worthy of note, all matters pertaining to the enforcement and collection are to the sole responsibility of the appropriate Colorado authorities.

Naturally, questions arise as to the procedure by which such information may be provided. Subsection (11) gives the Wheat Commission authority to:

"...(11) to adopt, rescind, modify and amend all necessary and proper orders, resolutions and regulations for the procedure and exercise of its powers and the performance of its duties...."

As an incident of collecting the two mill tax levy required by K.S.A. 2-2609, the Kansas Wheat Commission has authority to promulgate those rules and regulations necessary to implement the conclusions contained in this opinion. Without promulgation of appropriate rules and regulations, the furnishing of information bearing upon the seller and origin of wheat sold in Kansas is voluntary on the part of western Kansas grain elevators purchasing Colorado wheat.

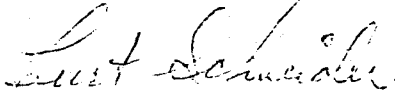
In view of this discussion, it is my opinion that the Kansas Wheat Commission is vested with authority by virtue of K.S.A. 2-2606(11) to promulgate rules and regulations requiring the first purchasers of wheat to list the name of the seller, quantity of wheat sold and state of origin for all wheat purchases. Furthermore,



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K.S.A. 2-2606(7) is construed so as to permit the Kansas Wheat Commission to transmit this information concerning Colorado grown wheat to the Colorado Wheat Administrative Committee.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General

CTS/HTW/cgm