



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 27, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79-157

The Honorable Homer E. Jarchow
State Representative, 95th District
2121 West Douglas
Wichita, Kansas 67213

The Honorable Timothy P. O'Sullivan
State Representative, 104th District
412 First National Center
Hutchinson, Kansas 67501

Re: Kansas Constitution--Finance and Taxation--Statutory
Exemptions of Property from Ad Valorem Taxation

Synopsis: The statutory exemptions provided for in K.S.A.
79-201a, Second, as amended by L. 1979, ch. 307,
§1; 79-201d; and 79-201f, as amended by L. 1979,
ch. 308, §1, cannot be said, as a matter of law,
to be entirely devoid of a rational basis.

Such statutory exemptions are not constitutionally
infirm as a violation of Article 11, Section 1, of
the Kansas Constitution. However, the provisions
of K.S.A. 79-201e, which grant only a partial
exemption of certain real estate from property
taxation conflict with said constitutional provi-
sions which require a uniform and equal rate of
assessment and taxation, and, consequently, are
void.

* * *

Dear Representatives Jarchow and O'Sullivan:

By means of seven, separate letters signed by each of you, you
request our opinions as to the constitutionality of numerous tax
measures. You have asked whether the exemptions from property
(ad valorem) taxes granted in K.S.A. 1978 Supp. 79-201a, Second,

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Two
July 27, 1979

as amended by L. 1979, ch. 307, §1; 79-201d; 79-201e and 79-201f, as amended by L. 1979, ch. 308, §1 violate the requirements of Article 11, Section 1 of the Kansas Constitution. In addition, you request our opinion as to whether the method of determining the fair market value of merchandise inventory prescribed in K.S.A. 79-1001b, and the method of determining the fair market value of farm machinery and equipment prescribed in K.S.A. 1978 Supp. 79-342, as amended by L. 1979, ch. 311, §1, are constitutionally permissible. Lastly, you state that there may be certain constitutional problems inherent in K.S.A. 79-3902 which imposes a tax on all dealers in grain for the privilege of engaging in the business of dealing in grain within the state of Kansas.

As certain rules of law apply to the power of the legislature to grant exemptions from property taxation for property not expressly exempted from taxation by the constitution itself (Kan. Const., Art. 11, §1), in this opinion we shall address all of your inquiries dealing with statutory exemptions.

In regard to your inquiry concerning the method for determining fair market value of merchandise inventory, please be advised that we have been informed that the propriety of K.S.A. 79-1001b, providing for the valuation of merchandise inventory, is currently being tested in several district court cases across the state. For this reason, we will adhere to the long-standing policy of this office and decline issuing an opinion relative thereto. We are confident that timely decisions by the courts regarding this matter will be forthcoming and your inquiry will be answered thereby.

As to your question regarding the method of valuing farm machinery and equipment prescribed by K.S.A. 1978 Supp. 79-342, as amended by 1979 Senate Bill No. 261 (L. 1979, ch. 311, §1), and regarding the excise imposed by the provisions of K.S.A. 79-3901 et seq., we will issue separate opinions addressing the constitutionality of each.

Before turning our attention to the specific provisions of the various statutes upon which you seek our advice, we believe this opinion can best be organized by stating the principles of law which are applicable to all of your inquiries regarding these statutory exemptions.

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Three
July 27, 1979

In the very recent case of State ex rel. Schneider v. Kennedy, 225 Kan. 13 (1978), the Kansas Supreme Court states the following rules which apply in determining the constitutionality of a statute:

"It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby. Hunt v. Eddy, 150 Kan. 1, 90 P.2d 747 (1939); see also Leek v. Theis, 217 Kan. 784, 539 P.2d 304 (1975); Schumacher v. Rausch, 190 Kan. 239, 372 P.2d 1005 (1962); State, ex rel., v. Anderson, 180 Kan. 120, 125, 299 P.2d 1078 (1956).

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Leek v. Theis, 217 Kan. at 784, Syl. ¶2; see also Rogers v. Shanahan, 221 Kan. 221, 223, 565 P.2d 1384 (1976); State, ex rel., v. Bennett, 219 Kan. 285, 289 547 P.2d 786 (1976). Brown v. Wichita State University, 219 Kan. 2, 9-10, 547 P.2d 1015 (1965).

"In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. Hunt v. Eddy 150 Kan. at 2, Syl. ¶7; see also In re Estate of Diebolt, 187 Kan. 2, 13, 353 P.2d 803 (1960); State, ex rel., v. Urban Renewal Agency of Kansas City, 179 Kan. 435, Syl. ¶1, 296 P.2d 656 (1956); State, ex rel., v. Board of Education, 173 Kan. 780, 790, 252 P.2d 859 (1953).

. . . .

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Four
July 27, 1979

"The propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere. State, ex rel., v. Fadely, 180 Kan. at 659; see also City of Wichita v. White, 205 Kan. 408, 469 P.2d 287 (1970); Republic Natural Gas Co. v. Axe, 197 Kan. 91, 415 P.2d 406 (1966); Tri-State Hotel Co. v. Londerholm, 195 Kan. at 760." Id. at 20, 21.

Many of these same rules are stated and followed in City of Wichita v. Kansas Corporation Commission, 225 Kan. 524 (1979) and NEA-Fort Scott v. U.S.D. No. 234, 225 Kan. 607 (1979).

Regarding the subjects of property taxation and statutory exemptions therefrom, the Kansas Supreme Court has established the following rules:

(1) As a general proposition, all property is subject to taxation except property which is specifically exempted either by constitutional or statutory law. Topeka Cemetery Ass'n v. Schnellbacher, 218 Kan. 39, 41-42 (1975).

(2) The legislature has the authority to provide that property other than that named in Article 11, Section 1 of the Kansas Constitution may be exempt from taxation. Id. at 42; City of Harper v. Fink, 148 Kan. 278, Syl. para. 1 (1938); Alpha Tau Omega v. Douglas County Comm'rs, 136 Kan. 675, 684 (1933); Gunkle v. Killingsworth, 118 Kan. 154, 156 (1925); Wheeler v. Weightman, 96 Kan. 50, 68 (1915); Sumner County v. Wellington, 66 Kan. 590, 593 (1903); Francis, Treas., v. A.T. & S.F. Rly. Co., 19 Kan. 303, 311 (1877); and Comm'rs of Ottawa Co. v. Nelson, 19 Kan. 234, 237 (1877).

(3) However, equally well-settled is that any tax exemption granted by statute must have a public purpose and be designed to promote the public welfare. Topeka Cemetery Ass'n v. Schnellbacher, supra, at 42; Mount Hope Cemetery Co. v. Pleasant, 139 Kan. 417, 421 (1934); Alpha Tau Omega v. Douglas County Comm'rs, supra, at 686; Sigma Alpha Epsilon Fraternal Assn. v. Board of County Comm'rs, 207 Kan. 514 (1971); Gunkle v. Killingsworth, supra, at 156; Wheeler v. Weightman, supra, at 68; and the other cases cited above.

Concerning the property for which the legislature may grant an exemption from taxation, the following judicial statements apply:

(1) "Certain exemptions are . . . prescribed [in Article 11, Section 1 of the Kansas Constitution] which the legislature cannot ignore; but it [Article 11, Section 1] does not forbid the exercise of the inherent power of the legislature to exempt from taxation when in its judgment it may conduce to the public welfare." (Emphasis added.) Sumner County v. Wellington, supra.

(2) "Within the scope of legislative power, the legislature itself is the judge of what exemptions are in the public interest and will conduce to the public welfare." (Emphasis added.) Gunkle v. Killingsworth, supra, at 157.

(3) "In order . . . for the legislature to extend exemptions beyond those expressly designated in the constitution, they must have a public purpose and be designed to promote the public welfare It is the legislature and not the courts, that is charged with the duty of determining what, in its judgment, will best accomplish that purpose and thus be conducive to the public welfare." (Emphasis added.) State, ex rel., v. Board of Regents, 167 Kan. 587, 596 (1949).

(4) "Having concluded the exemption of this property from taxation would advance the public welfare, the legislature was competent to make it. (Ryan v. State Tax Commission, 132 Kan. 1, 4, 294 Pac. 938.) With the wisdom of legislation touching the public interest courts have no concern. [Emphasis added.] (State, ex rel., v. Kansas City, 140 Kan. 471, 37 P.2d 18; State, ex rel., v. State Highway Comm., 163 Kan. 187, 182 P.2d 127.) While courts may entertain different views on the subject it is not their privilege to supersede the judgment of the law-making body unless its judgment is entirely devoid of a rational basis. (State, ex rel. v. Sage Stores Co., 157 Kan. 404, 413, 141 P.2d 655.)" (Emphasis added.) State, ex rel., v. Board of Regents, supra.

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Six
July 27, 1979

Other rules promulgated by the Court which are relevant to your inquiries are stated in Topeka Cemetery Corp. v. Schnellbacher, supra, at 42. There the Court states:

"The constitutional exemptions provided for in Article 11, Section 1, of the Kansas Constitution extend to all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes and all household goods and personal effects not used for the production of income. We have held that the constitutional exemptions depend solely upon the exclusive use made of the property and not upon the ownership or the character, charitable or otherwise, of the owner. (Lutheran Home, Inc., v. Board of County Commissioners, supra.)

. . . .

"Some statutory exemptions have been based upon public ownership of property by the United States government. Without congressional action there is immunity from state and local taxation, implied from the United States Constitution itself, of all properties, functions and instrumentalities of the federal government. (Smith v. Davis, 323 U.S. 111, 89 L.Ed. 107, 65 S.Ct. 157.) Statutory exemptions also have been created to apply to property owned by the state or one of its political subdivisions. (City of Harper v. Fink, supra; City of Newton v. Board of County Commissioners, 209 Kan. 1, 495 P.2d 963.) In City of Harper v. Fink, supra, this court stated that under statutes granting tax exemptions to city property, ownership rather than exclusive use is the test of exemption from taxation. It is obvious that statutory exemptions based upon public ownership of property may have a rational basis and that a public purpose may be served thereby.

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Seven
July 27, 1979

"Throughout our judicial history a different test has been applied in situations where public property is not involved and where the statutory tax exemption pertains to property owned by private individuals or corporations. We have consistently held that where public property is not involved, a tax exemption must be based upon the use of the property and not on the basis of ownership alone." [Emphasis by the Court.]

From the above, it can be seen that (1) there is a judicially prescribed presumption as to the validity of all the statutory provisions about which you inquire; (2) it is settled that the legislature can exempt from taxation property other than that mentioned in Article 11, Section 1; and (3) the Court makes only a limited inquiry into whether a particular exemption is conducive to the public welfare; and the purpose of said inquiry is to determine whether there is any "rational basis" to support the legislative conclusion that to exempt certain property would "advance the public welfare."

In stating the above, we have not overlooked cases in which the Court has declared certain statutes exempting property from taxation to be unconstitutional. See Topeka Cemetery Corporation v. Schnellbacher, supra; Mount Hope Cemetery Co. v. Pleasant, supra; and Alpha Tau Omega v. Douglas County Comm'rs, supra. However, a review of these cases reveals that certain exemptions were held unconstitutional, not because the Court was substituting their judgment for that of the legislature's regarding the basis upon which the exemption was granted, but rather, because the legislation was discriminatory. For example, in Topeka Cemetery Ass'n v. Schnellbacher, supra, the Court struck down an amendment to K.S.A. 79-201, Second (L. 1969, ch. 429, §1), which would have exempted cemetery lots owned by "individual owners," but not those owned by corporations. A similar discrimination is shown in each of the other cases. Thus, in no case we have found does the Court supercede the legislature's judgment that there is a "rational basis" for granting the type of property sought to be exempted.

Turning then to the statutory provisions which you question, we begin with the exemption granted in K.S.A. 1978 Supp. 79-201a, Second, as amended by L. 1979, ch. 307, §1. Briefly stated, this

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Eight
July 27, 1979

statutory provision exempts any property constructed or purchased with the proceeds of industrial revenue bonds. However, the exempt status of the property is removed after a period of time, depending upon the date on which the bonds were issued. If the proceeds were generated by revenue bonds issued on or after July 1, 1963, the property constructed or purchased therewith is exempt "only for a period of ten (10) calendar years after the calendar year in which the said bonds were issued." It is this provision which you question.

Specifically, you call our attention to the Note found at 24 K.L.R. 723, entitled "Constitutionality of Kansas Statutes Annotated Section 79-201a [sic] Providing a Ten Year Property Tax Exemption for Any Property Constructed or Purchased with the Proceeds of Industrial Revenue Bonds." The author thereof concludes that the ten-year industrial revenue bond tax exemption provision is of "questionable constitutional validity." 24 K.L.R. at 738. However, he does not cite, nor mention, the rule that under statutes granting tax exemption to city property, "ownership rather than exclusive use is the test of exemption from taxation." (Emphasis by the Court.) Topeka Cemetery Corp. v. Schnellbacher, supra, at 42, citing with approval City of Harper v. Fink, 148 Kan. 278 (1938). Any property "constructed or purchased with the proceeds derived pursuant to statutory provisions cited in 79-201a, Second, is property owned either by a city or other public corporation, and is merely leased, or leased with the option to purchase, to a person, firm or corporation (K.S.A. 1978 Supp. 12-1741) or is owned, operated and managed by the city or public corporation itself. (See, for example, K.S.A. 13-1235.) Since the Note fails to consider the above rule, it should not be relied upon, but rather the rule espoused in Fink should be followed.

Thus, in light of the foregoing and the numerous rules hereinabove stated, it is our opinion that the exemption provided in K.S.A. 1978 Supp. 79-201a, Second, as amended by L. 1979, ch. 307, §1, is not constitutionally impermissible.

The next statutory exemption provisions about which you inquire are those contained in K.S.A. 1978 Supp. 79-201d. This statute consists of three subsections, each of which grants tax exempt status to certain kinds of personal property. In 79-201d, First, horses, cattle and asses less than twelve (12) months old, and sheep, hogs and goats less than six (6) months old are exempt from taxation. 79-201d, Second, exempts all "hay and silage" and defines said terms, while 79-201d, Third, grants exempt status to:

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Nine
July 27, 1979

"All farm storage and drying equipment meeting eligibility requirements, as provided in Title 7, Chapter XIV, Subchapter B, 1474 of the Code of Federal Regulations and as in effect on December 31, 1977, for loans under the federal farm storage and drying equipment loan program, whether financed or not, which equipment is used exclusively for the storage or drying of corn, oats, barley, grain sorghum, wheat, rye, soybeans, flaxseed, rice, dry edible beans or sunflower seed, for a period of eight (8) years from and after the calendar year in which such equipment is acquired or construction thereof is completed." (Emphasis added.)

Concerning the exemption granted in 79-201d, Second, you inform us: "This inventory item was exempted by recent legislation because of testimony that it was expensive and difficult to appraise." We have no difficulty in assuming that the same statement may be made with respect to the exemption granted in 79-201d, First. In this regard, we call your attention to State, ex rel., v. Dwyer, 204 Kan. 3 (1969), where the Court said:

"One element to be considered in determining subjection of various kinds of personal property to tax liability is the expense attendant to the listing and assessment procedure. Long ago, this factor was recognized in Francis, Treas., v. A.T. & S.F. Rld. Co., 19 Kan. 303, when this court rejected a contention of lack of equality and uniformity in taxation in violation of article 11, section 1, in a situation where expense of the machinery for collection of certain taxes might well have exceeded the amount of taxes collected.

"Certainly the state is not obliged to tax property when the cost of discovery and assessment would be greater than the amount received." Id. at 8.

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Ten
July 27, 1979

Given these statements of the Court, we cannot conclude as a matter of law, that the judgment of the legislature to grant the exemptions provided in 79-201d, First and Second, is entirely devoid of a rational basis. Thus, in regard to these exemptions, we are constrained to conclude that these exemptions are constitutionally permissible.

Regarding the exemption granted in 79-201d, Third, we rely on that which is said in Gunkle v. Killingsworth, supra, where the Court states:

"Within the scope of legislative power, the legislature itself is the judge of what exemptions are in the public interest and will conduce to the public welfare. The public has a deep interest in agricultural prosperity. The purpose of the exemption is obviously in the interest of the public, the classification is not unreasonable and the act is not deemed to be in conflict with the constitution." Id. at 157.

On the basis of this judicial pronouncement, and for the reasons stated above with respect to the first two exemptions granted in this statute, we also are unable to conclude that the exemption granted in K.S.A. 79-201d, Third, lacks a rational basis, and we do not otherwise find any constitutional impropriety with respect thereto.

Next, you inquire as to the propriety of the exemption granted in K.S.A. 79-201e, which, in relevant part, provides:

"The following described property, to the extent herein specified, shall be and is hereby exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:

"All real property upon which surface mining operations were conducted prior to January 1, 1969, but which has been reclaimed and returned to productive use, to the extent of the increase in the valuation of such property resulting from reclamation and conservation practices performed upon such property by the owner thereof"
(Emphasis added.)

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Eleven
July 27, 1979

In our judgment, the underscored language of this statute renders it to be in violation of Article 11, Section 1 of the Kansas Constitution, because it grants only a partial exemption from taxation. A similar question was addressed in Attorney General Opinion No. 79-31, dated March 19, 1979, where we stated:

"In Addington v. Board of County Commissioners, 191 Kan. 528 (1963), 531, the Court makes the following statement regarding uniformity:
'Uniformity in taxing implies equality in the burden of taxation, and this equality cannot exist without uniformity in the basis of assessment as well as in the rate of taxation.'

"Clearly, a partial exemption created by altering the assessed value of certain property, such alteration being accomplished by means of 'exempting' a stated percentage of said assessed value, destroys 'uniformity in the basis of assessment.'
In reality, such a partial exemption amounts to putting the subject property in a class by itself. In our judgment, Article 11, Section 1, does not allow 'partial exemptions'; if the legislature chooses to exempt certain property, it must do so totally."

We concur with our prior opinion and, consistent therewith, we conclude that the exemption granted in K.S.A. 79-201e violates the uniformity and equality requirements of Article 11, Section 1 of the Kansas Constitution.

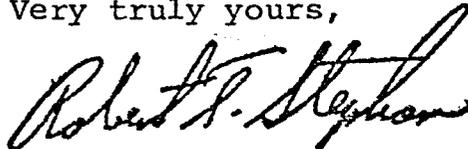
Lastly, you request our opinion as to the constitutionality of K.S.A. 79-201, the "freeport exemption." As amended by L. 1979, ch. 308, §1, the exemption provisions contained in subsections (a) and (b) of that statute are, in our judgment, constitutional. The Commerce Clause of the United States Constitution prohibits state taxation of property in transit as interstate commerce. 71 Am. Jur. 2d, State and Local Taxation, §246. Subsection (a) is, therefore, simply a restatement of such prohibition. Although

The Honorable Homer E. Jarchow
The Honorable Timothy P. O'Sullivan
Page Twelve
July 27, 1979

the property exempted by subsection (b) may be subject to state taxation, 71 Am. Jur. 2d, State and Local Taxation, §247, the legislature has chosen to exempt the class of property therein specified, and as previously stated in this opinion, it is well settled that the legislature may exempt property other than that which is specifically enumerated in Article 11, Section 1 of the Kansas Constitution, so long as there is a rational basis to support the conclusion that the exemption will be conducive to the public welfare. State ex rel. v. Board of Regents, supra. We are unable to conclude as a matter of law that subsection (b) lacks a rational basis for the exemption set forth therein.

Likewise, subsection (c) of 79-201f is not, in our opinion, constitutionally infirm. As we construe the exemption, it creates a total exemption for a percentage of the items of personal property stored in a warehouse or storage area. It does not create a partial exemption, stated as a percentage of the assessed value of specified items of personal property, which partial exemption would violate Article 11, Section 1 of the Kansas Constitution. See Attorney General Opinion No. 79-31. We therefore conclude, for the reasons set forth above relative to subsections (a) and (b), that the exemption prescribed by subsection (c) is constitutionally permissible.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:gk