



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- 158

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: Taxation--Grain--Occupation Tax

Synopsis: The provisions of K.S.A. 79-3901 et seq., impose an excise on harvesting and dealing in grain. Thus, the provisions of Article 11, Section 1, of the Kansas Constitution are inapplicable thereto, and such excise represents a constitutionally valid exercise of legislative authority.

* * *

Dear Representatives Jarchow and O'Sullivan:

As one of several, separate requests made to our office, you request our opinion as to whether the provisions of K.S.A. 79-3902 violate Article 11, Section 1 of the Kansas Constitution which requires, in part, that the legislature provide for a "uniform and equal rate of assessment and taxation." Specifically, you state:

"K.S.A. 79-3902 established an occupational tax in lieu of all general property tax upon grain . . . We would appreciate your opinion as to whether the 'in lieu of' taxes covered in K.S.A. 79-3902 are constitutionally sound without a change in the Kansas Constitution."

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In response to other inquiries submitted by you, we prepared and issued Attorney General Opinion No. 79-157. That opinion contains numerous rules which are applicable in determining the constitutional validity of any statute. Rather than reiterate those many rules, suffice it to say that these same rules are applicable to our consideration of your inquiry regarding K.S.A. 79-3902, which reads as follows:

"(a) For the privilege of engaging in the business of a dealer in grain in this state, there is hereby levied and there shall be collected and paid a tax at the rate of one-half mill per bushel upon all grain received by a dealer in this state during the preceding calendar year, whether such grain is owned by such dealer or not. Said tax shall be paid in the county in which the dealer establishment is located. Said tax shall be in lieu of all general property tax upon grain.

"(b) For the privilege of harvesting grain in the state there is hereby levied and there shall be collected, and paid by the producer in the county in which is located the land producing the grain, the sum of fifty cents and in addition thereto, a tax at the rate of one-half mill per bushel upon all grain harvested in this state over and above one thousand bushels: Provided, That each producer shall pay only one tax upon the bushel basis for the grain harvested by them. Said tax shall be in lieu of all general property tax upon such grain."
(Emphasis added.)

It is the last sentence of each subsection of this statute which prompts your question. Your inquiry is justified in light of Wheeler v. Weightman, 96 Kan. 50 (1915), wherein the Kansas Supreme Court considered an act (L. 1915, ch. 250) whereby the legislature attempted to impose a tax on mortgages based upon the principal amount (value) of mortgages. This tax was declared by the legislature to be a tax "in lieu of" all other property or ad valorem taxes. The Court there concluded that the tax attempted to be levied by the provisions of that act was unconstitutional. However, it is important to consider the other provisions of that

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act which were noted by the Court. First, the Court explained: "No general exemption from taxes is declared. A real estate mortgage is still subject to ad valorem tax unless the registration tax be paid." (Emphasis added.) 96 Kan. at 70. Second, the tax there involved was not a tax imposed upon persons or corporations engaged in the business of making a mortgage, based upon the number of mortgages made by them. It was a tax on the mortgage itself. Id. Third, the basis of that tax was the value of the mortgage (the principal amount thereof). It was upon this system of taxation that the Court declared the act to be a violation of the uniform and equal provisions of Article 11, Section 1, of our constitution, and, consequently, void.

The act which you now ask us to consider does not contain provisions establishing a tax such as was considered in Wheeler. First, K.S.A. 79-3909 provides:

"All grain whether or not retained in the hands of the producer, and which is subject to the grain bushel tax as herein provided, and all grain warehouse receipts given for grain, which grain is subject to the grain-bushel tax as herein provided are hereby exempt from all property tax." (Emphasis added.)

Thus, by the clear and unambiguous provisions of this statute, "all grain" is totally exempted from property taxation. In this regard, it is important to note that the term "grain" is statutorily defined in K.S.A. 79-3901(a) to include "soybeans, cowpeas, wheat, corn, oats, barley, kafir, rye, flax and all other grains" (emphasis added), except that said term does not include grain after it has been milled or processed. With respect to such exemption, we are unable to find as a matter of law that there is no rational basis upon which the legislature made this exemption. Gunkle v. Killingsworth, 118 Kan. 154, 157 (1925). Thus, such exemption, in our opinion, does not create a constitutional infirmity.

Second, pursuant to the provisions of K.S.A. 79-3902, above quoted, the grain-bushel tax is imposed upon persons engaged in certain occupations; grain dealers and persons harvesting grain. Third, the basis upon which this tax is assessed is not the value of the grain, but rather, the number of bushels received by a dealer or harvested by a producer. Thus, the grain-bushels tax can in no way be deemed an ad valorem tax. Instead, as stated in Attorney General Opinion No. 75-99, dated March 7, 1975, it is an "excise tax at the rate of one-half mill per bushel."

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Thus, the mortgage registration tax considered in Wheeler must not be confused with the excise (occupation) tax imposed pursuant to K.S.A. 79-3900 et seq. You also should be advised that Wheeler was decided prior to the 1924 amendment to Article 11, Section 1, of our constitution, which amendment allows the separate classification and taxation of real estate mortgages. The fact remains, however, Wheeler is not controlling on the issue of whether K.S.A. 79-3902 is constitutional.

In 79-3902, the legislature imposes a tax on two privileges: (1) the privilege of engaging in the business of a dealer in grain, as provided in subsection (a); and (2) the privilege of harvesting grain, pursuant to subsection (b). The tax is one imposed on the enjoyment of a privilege. Even the Court in Wheeler, supra, states: "The legislature may exact a tribute or fee or tax on the enjoyment of . . . privileges, and other sources and means of benefit, emoluments and profit." 96 Kan. at 64. This fact has been repeatedly acknowledged not only in the Supreme Court of Kansas, but in the United States Supreme Court. For example, in the early case of City of Newton v. Atchison, 31 Kan. 151 (1883), the Kansas Court states:

"In the absence of any inhibition, express or implied, in the constitution, the legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation.

"In the constitution of this state there is no such inhibition, express or implied. Section 1 of article 11 applies exclusively to taxation of property, and does not refer to license taxes; neither does it impliedly prohibit the collection of such taxes."
(Syl. para. 1, 2.)

Although, technically, this case involved the propriety of the city imposing a license tax upon hardware merchants, the Court relies upon Savings Society v. Coite, 6 Wall. 594, 606, 607 (1868).

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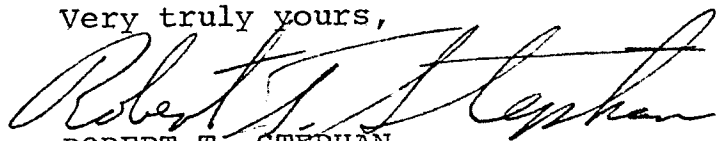
"'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government.' (Hamilton Co. v. Massachusetts, 6 Wall. 638; Cooley on Taxation, 384 to 392, 410.) On page 384 the author observes: 'The same is true of occupations; government may tax one, or it may tax all. There is no restriction upon the power in this regard unless one is expressly imposed by the constitution.'" (Emphasis added.) 31 Kan. at 153.

Over the years, Atchison has been cited with approval numerous times by our Supreme Court with the most recent such citation occurring in Callaway v. City of Overland Park, 211 Kan. 646, 653 (1973).

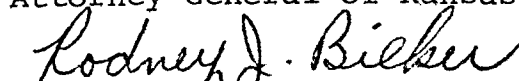
Thus, as the tax imposed by 79-3901 et seq. is not an ad valorem tax, Article 11, Section 1, of our constitution has no application to it. Said constitutional provision relates only to taxes on property. City of Newton v. Atchison, supra; State, ex rel., v. Barton County Comm'rs, 142 Kan. 624 (1935) and State, ex rel., v. Commission of Revenue and Taxation, 163 Kan. 240 (1947). Moreover, the Court in Callaway v. City of Overland Park, supra, cites many cases which have held that, in determining the amount of a business or occupation tax, without imposing a tax on the property itself. 211 Kan. at 653. Thus, the fact that the occupation tax imposed by K.S.A. 79-3902 is measured by the number of bushels of grain received or harvested, does not mean that it is a tax on the grain itself, which, of course, is exempt from all property tax by the provision of K.S.A. 79-3909.

In light of the foregoing, it is our opinion that the provisions of Article 11, Section 1 of the Kansas Constitution are not applicable to the provisions of K.S.A. 79-3902 and the tax imposed therein is not unconstitutional.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:gk