



STATE OF KANSAS

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July 22, 1985

ATTORNEY GENERAL OPINION NO. 85- 86

Hubert Johnson, Mayor  
City of Harper  
10th & Oak  
Harper, Kansas 67058

Re: Cities and Municipalities--General Provisions--  
County and City Retailers' Sales Taxes; Other  
City and County Excise Taxes Prohibited

Synopsis: Pursuant to the provisions of K.S.A. 12-194, the only excise tax (or tax in the nature of an excise) which a city may levy upon the sale of cereal malt beverages is the retailers' sales tax authorized by K.S.A. 12-187 et seq. Cited herein: K.S.A. 12-137, 12-142, 12-187, 12-188, 12-194, 79-3603; L. 1973, ch. 393; L. 1982, ch. 66; Kan. Const., Art. 12, Sec. 5.

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Dear Mr. Johnson:

On behalf of the governing body of the City of Harper, you request our opinion as to whether the city may impose a 5% tax upon sales of cereal malt beverages, in addition to the 3% state sales tax imposed under K.S.A. 79-3603.

Article 12, Section 5 of the Kansas Constitution grants taxing power to Kansas cities, subject to legislative control, as follows:

"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." (Emphasis added.)

The procedure for exercising the home rule power of taxation is prescribed by K.S.A. 12-137, and the legislature has enacted two statutes circumscribing the power of cities to levy sales or excise taxes. The first, K.S.A. 12-142, provides in part that no city shall impose a sales or excise tax (other than a retailers' sales tax authorized by law) upon the sale of cereal malt beverages. However this statute is part of a 1973 enactment (L. 1973, ch. 393) which is nonuniform in its application to cities, contains no classification provision, and is therefore subject to exemption by charter ordinance enacted under Article 12, Section 5 of the Kansas Constitution.

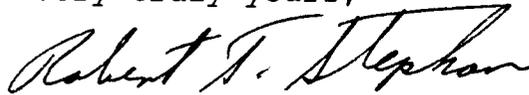
The second statute limiting the power of cities to levy excise taxes is K.S.A. 12-194. That statute was enacted in 1978 as part of an act (L. 1978, ch. 56) which classified cities for the purpose of imposing limitations and prohibitions upon the levy of sales and excise taxes (see K.S.A. 12-188), and which prescribed procedures for imposing city and countywide retailers' sales taxes. The statute was amended in 1982, and now provides as follows:

"No city or county shall levy or impose an excise tax or a tax in the nature of an excise, other than a retailers' sales tax and a compensating use tax, upon the sale or transfer or personal or real property, or the use thereof, or the rendering of a service, but the provisions of this section shall not be construed as prohibiting any city from (a) contracting with a utility for a fixed charge based upon a percentage of gross receipts derived from the service permitted by grant, right, privilege or franchise to such utility; (b) imposing an occupation tax or license fee for the privilege of engaging in any business, trade, occupation or profession, or rendering

or furnishing any service, but the determination of any such license fee shall not be based upon any amount the licensee has received from the sale or transfer of personal or real property, or for the rendering or furnishing of a service, or on the income of the licensee; or (c) levying any occupation tax or license fee imposed by such city prior to the effective date of this act. No license fee described in subsection (b) of this section shall be imposed upon any utility contracting with and subject to a charge, described in subsection (a) of this section, by such city." (Emphasis added.)

The above-quoted statute is part of an enactment (L. 1982, ch. 66) which applies uniformly to all cities, and is therefore not subject to charter ordinance under Article 12, Section 5 of the Kansas Constitution. Accordingly, it is our opinion that the only excise tax (or tax in the nature of an excise) which a city may levy upon the sale of cereal malt beverages is the retailers' sales tax authorized by K.S.A. 12-187 et seq., and that a city may not impose a 5% tax upon sales of cereal malt beverages.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:JSS:TRH:jm