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May 8, 1989

ATTORNEY GENERAL OPINION NO. 89- 57

The Honorable Keith Roe
State Representative, One Hundred Ninth District
225 W. Webster
P.O. Box 364
Mankato, Kansas 66956

Re: Cities and Municipalities--General Provisions--Countywide and City Retailers' Sales Taxes; Other City and County Excise Taxes Prohibited; Prohibition Construed; Flowage Fees

Taxation--Motor Vehicle Fuel Taxes--Exempt From Other Taxes; Flowage Fees

Synopsis: Flowage fees imposed by municipal airport authorities that are determined by the gross sales of fuel and are part of the rent charged for the use of airport facilities and property do not constitute a tax. As such, flowage fees are not an excise tax imposed in violation of K.S.A. 12-194 (that prohibits the levy of an excise tax on the transfer of personal and real property) and K.S.A. 79-3424 (that exempts the business of selling motor fuel from any excise, license, privilege or occupation tax). Cited herein: K.S.A. 3-116; 12-194; 79-3424.

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Dear Representative Roe:

As Chairman of the House Committee on Taxation you inquire whether "flowage fees," imposed by some municipal airport

authorities on the per gallon sale of motor fuels, are local excise taxes in violation of K.S.A. 12-194 and K.S.A. 79-3424.

From information provided by the Kansas Department of Transportation (KDOT) , the Salina Airport Authority and the Wichita Airport Authority, we understand that a flowage fee is a user fee imposed by airport operators to meet the cost of operations for use of airport facilities. A contract in the form of a lease agreement establishes the flowage fee as a percentage of gross fuel flow based on cents per gallon or as a fixed charge in lieu of a landing fee.

The lease agreements compute rent by way of a formula that includes ground rental, a percentage of gross income and a fuel flowage fee. The facts of Richland-Lexington Airport Dist. v. VIP Aviation, 183 S.E.2d 448, 449 (S.C. 1979) similarly describe a flowage fee imposed in lieu of a landing fee. See also Blue v. U.S., 2 Cl. Ct. 38, 83-1 U.S.T.C. ¶16,389 (Cl. Ct. 1982). Under such leases, generally the lessee operates what is known as a fixed base operation (FBO) that includes the right to sell gasoline. Lessor (the airport authority) charges a fuel flowage fee based on the amount of fuel delivered to the lessee for lessee's consumption or sale. An example of such a lease provision reads:

> "Gross Sales: In addition to the basic rental, (Lessee) shall pay to the Authority three percent (3%) of the gross sales of all aviation fuels, services and goods loaded into or provided to aircraft at the Salina Municipal Airport or used by (Lessee) in its own aircraft."

The airport authority clearly has the authority (see K.S.A. 3-116) to enter into such contracts leasing the whole or any part of the airport or municipal field for aviation purposes. Our question is whether the flowage fee on the sale of gasoline charged as part of the rent imposes an excise tax on the sale of gasoline in violation of K.S.A. 12-194 (that prohibits the levy of an excise tax upon the sale or transfer of personal or real property) and K.S.A. 79-3424 (that exempts the business of selling motor fuel from any excise, license, privilege or occupation tax).

An excise tax in its original sense was something cut off from the price paid on a sale of goods as a contribution to the support of government. In its modern sense, an excise tax

includes a charge imposed upon the performance of an act, the enjoyment of a privilege or the engaging in an occupation. 71 Am.Jur.2d State and Local Taxation §28 (1973). However, all forms of public revenue, cannot be called taxes. For example, when a city is authorized to provide a service for compensation, the charge imposed is not a tax. 71 Am.Jur.2d State and Local Taxation, §11 (1973). In our instance we have a form of public revenue and a municipal authority that, like a city, has the authority to provide a service for compensation (see K.S.A. 3-116). Thus, central to our issue is whether the payment being exacted by the airport authority is a tax or a rent.

For a distinction between a tax and rent we turn to Sprik v. Regents of Univ. of Mich., 204 N.W.2d 62 (Mich. Ct. App. 1972) a class action brought against university regents for refund of rent collected and distributed as a voluntary payment in lieu of taxes to the local school district. Finding that the rent increase was not an illegal tax the court states:

> "A tax is an enforced proportioned burden, charge or contribution from persons and property, levied by the State, by virtue of its sovereignty, for the support of government in discharge [sic] of its various functions and duties for all public needs. Rent is the return which the tenant makes to the landlord for use of the premises. The two differ in that a tax is an enforced payment to a governmental unit for the public good which is uncertain as to the amount and time of payment." 204 N.W.2d at 66 (citations omitted).

Applying the foregoing analysis to our facts, the airport authority is exacting the charge in its capacity as lessor rather than by virtue of its sovereignty. The payment being exacted is certain, voluntary and in return for the right to remain on the premises. The charge results from the voluntary undertaking of a FBO for the private benefit of conducting a business on the premises. See generally 41 Words and Phrases Tax; Taxation (1965); and compare In re Consolidated Southeastern Group, Inc., (Bkrtcy N.D. Ga.), 75 B.R. 102, 103 (1987), (if fee results from voluntary undertaking for private benefit, such as city water or sewer rents, resultant governmental claim is not "tax" entitled to

bankruptcy status, but rather, is simply a charge for services rendered.)

Additionally, the fact that the rent is in part determined by the gross receipt of sales of gasoline does not render the rent charged a tax on the gasoline, or the selling of same. See Nashville Gas and Heating Co. v. City of Nashville, 152 S.W. 2d 229, 231 (Tenn. 1941) (a contractual obligation of a gas company, under franchise ordinance, to pay city 5 per cent of company's gross receipts from the sale of gas is not a tax within the gas revenue law imposing a tax on the gross receipts of gas and other utilities. Furthermore, the contract obligation is not abrogated by the provision of a general revenue law prohibiting municipalities from imposing any tax upon the privilege covered by the law.)

Accordingly it is our opinion that the charge being imposed by the airport authorities is not a tax, but rather is simply a charge for a service rendered. The airport authorities receive compensation in the form of rent in return for the use of airport property in accordance with K.S.A. 3-116. The flowage fee that is determined by the gross sales of fuel and is part of the rent charged by an airport authority for the use of airport facilities and property does not impose an excise tax in violation of K.S.A. 12-194 and K.S.A. 79-3424.

Very truly yours,

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