



STATE OF KANSAS

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December 27, 1989

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ATTORNEY GENERAL OPINION NO. 89-150

The Honorable James D. Braden
State Representative, Sixty-Fourth District
1122 Fifth Street, P.O. Box 58
Clay Center, Kansas 67432-0058

The Honorable Clyde D. Graeber
State Representative, Forty-First District
1900 Kingman
Leavenworth, Kansas 66048-4230

Re: Constitution of the State of Kansas--Finance and
Taxation--Classification; Excise Tax on Inventories

Synopsis: An excise tax imposed on merchants, manufacturers, livestock producers and feedlot operators for the privilege of doing business in the state is not a tax on the property of these persons and thus is not violative of article 11, section 1(b)(2) which exempts merchants' and manufacturers' inventories and livestock from property taxation. Cited herein: K.S.A. 79-1001b; 79-1005 (repealed L. 1988, ch. 375, § 9); K.S.A. 79-3612; 79-3617; 1989 House Bill No. 2003, as amended by the House Committee of the Whole; Kan. Const., Art. 11, § 1.

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Dear Representative Braden:

You request our opinion regarding the constitutionality of statutorily imposing an excise tax on merchants' and manufacturers' inventories and livestock. Specifically you

inquire whether such a tax would in effect be a property tax on inventories and livestock which are exempted from property tax pursuant to the Kansas Constitution. Kan. Const., art. 11, § 1(b)(2).

"The proposition that the courts will examine a tax and determine its nature as a property tax or excise for itself, no matter by what name it is designated by the legislative body in the statute imposing it, is well settled. If the tax is in fact imposed on property, no matter what it may be called, it is a property tax, and courts will look through form to substance, and will prevent that from being done by indirection which could not be accomplished directly." 71 Am.Jur.2d State and Local Taxation §25 (1973).
See also Wheeler v. Weightman, 96 Kan. 50, 66 (1965).

We must therefore look to the operation and affect of a particular tax to determine its nature.

A property tax is generally defined as a tax levied on property, real or personal, the amount being dependent on the value of the property. Black's Law Dictionary 1097 (5th Ed. 1979). "An excise tax is a charge imposed upon the performance of an act, enjoyment of a privilege, or the right to engage in an occupation." Director of Taxation v. Kansas Krude Oil Reclaiming Co., 236 Kan. 450, 451 (1984).


House Bill No. 2003, proposed in the 1989 Special Session of the Legislature and as amended by the House Committee of the Whole, sought to impose a one-time excise tax on merchants, manufacturers, feedlot operators and livestock producers "for the privilege of doing business within the state." The tax was to be based on the value of the average inventory of personal property maintained or held during 1989, as established for federal income tax reporting purposes or, alternatively, on the appraised value of average inventory of such property established in 1988. The collection provisions in House Bill No. 2003 are identical to those established for collection of sales taxes. See K.S.A. 79-3612; 79-3617.

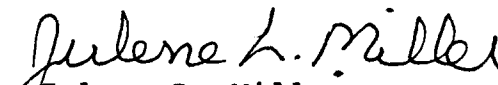
By its terms, the tax imposed by House Bill 2003 is on certain individuals for the privilege of doing business, and not on the inventories or livestock directly. While the legislative

See Also Callaway v. City of Overland Park, 211 Kan. 646, 654 (1973); Maine v. Grand Trunk R. Co., 142 U.S. 217, 12 S.Ct. 121, 35 L.Ed. 994 (1891). In Director of Taxation v. Kansas Krude Oil Reclaiming Co., 236 Kan. 450 (1984), the court found the mineral severance tax to be an excise tax imposed on the privilege of severing specified minerals from the earth and water of this state. 236 Kan. at 450. The court made this finding even though the mineral severance tax was calculated by using the gross value of the mineral severed. 236 Kan. at 453, 454. In City of Newton v. Atchison, 31 Kan. 151 (1883), the court held that a tax which is in its terms a license tax upon merchants does not become a property tax merely because it is graduated by the average amount of stock held by the merchant and thus proportioned in the same manner as a property tax. The court held that the tax was on the privilege of doing business in the state, and that the taxpayer could avoid the tax by reducing or disposing of his stock. As pointed out in Weightman, 96 Kan. at 76, if the taxing entity had "penalized these avenues of escape in such a way that it would have been utterly disastrous to turn to them, it would be nonsense to say, if he paid the fee, that he exercised a voluntary choice to pay in order that he might enjoy the privilege of merchandising." Otherwise, however, the tax would be considered an excise rather than a property tax.

In conclusion, an excise tax imposed on merchants, manufacturers, livestock producers and feedlot operators for the privilege of doing business in the state is not a tax on the property of these persons and thus is not violative of article 11, section 1(b)(2) which exempts merchants' and manufacturers' inventories and livestock from property taxation.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General