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ATTORNEY GENERAL OPINION NO. 90- 10

The Honorable Lana Oleen
State Senator, Twenty-Second District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--Finance and
Taxation--Classification of Property;
Constitutionality

Synopsis: Past decisions of the Kansas Supreme Court and the broad deference allowed to state legislatures in tax matters by the United States Supreme Court lead to our conclusion that the classifications embodied in article 11, section 1 of the Kansas Constitution are not violative of the equal protection clause of the 14th Amendment to the United States Constitution. We must presume the validity of these classifications and cannot say that a rational basis for such classifications does not exist. Cited herein: K.S.A. 79-501; 79-503a; 79-1439; Kan. Const., Art. 11, § 1; L. 1923, ch. 255, § 1.

* * *

Dear Senator Oleen:

You request our opinion regarding the constitutionality of the classification amendment, article 11, section 1 of the Kansas Constitution. Specifically you question whether this constitutional provision is violative of the equal protection clause of the 14th amendment to the United States Constitution. (Other constitutional questions regarding due

process under the 14th amendment are currently pending litigation and so will not be addressed in this opinion.)

The classification amendment provides as follows:

"(1) The provisions of this subsection (b) shall govern the assessment and taxation of property on and after January 1, 1989, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The provisions of this subsection (b) shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:

"Class 1 shall consist of real property. Real property shall be further classified into four subclasses. Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

- "(A) Real property used for residential purposes including multi-family residential real property . . . 12%
- "(B) Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity pursuant to section 12 of article 11 of the constitution 30%
- "(C) Vacant lots 12%
- "(D) All other urban and rural real property not otherwise specifically subclassified 30%

"Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

- "(A) Mobile homes used for residential purposes 12%
- "(B) Mineral leasehold interests 30%
- "(C) Public utility tangible personal property 30%
- "(D) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 30%
- "(E) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 20%
- "(F) All other tangible personal property not otherwise specifically classified 30%
- "(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used for the production of income, shall be exempted from property taxation." Kan. Const., Art. 11, § 1(b).

Pursuant to this provision all property subject to taxation, except for mineral products, money, mortgages, notes and other evidence of debt, grain and certain motor vehicles, is to be valued on a uniform and equal basis (except as otherwise specifically provided) and subjected to a uniform tax levy within each taxing district. The provision specifically provides for a different basis of valuation for agricultural property and commercial and industrial machinery and equipment. The legislature has determined that all other property subject to taxation, with the exceptions listed above, shall use fair market value as a basis for valuation. K.S.A. 79-501; 79-503a; 79-1439. The different classes of property are assigned different assessment rates to reach their assessed valuations, but the assessment rate is to be uniform within each classification. Clearly, different classes of property are treated differently for taxation purposes.

Differential treatment alone is not sufficient to show a violation of the equal protection clause of the United States Constitution.

"The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666, 16 L.Ed.2d 169, 86 S.Ct. 1079. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-527, 3 L.Ed.2d 480, 79 S.Ct. 437:

'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal system to

ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.'

"In that case we used the phrase 'palpably arbitrary' or 'invidious' as defining the limits placed by the Equal Protection Clause on state power. Id., at 530, 3 L.Ed.2d 480. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution. Magnano Co. v. Hamilton, 292 U.S. 40, 44-47, 78 L.Ed.2d 1109, 54 S.Ct. 599." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L.Ed.2d 351, 354-355, 93 S.Ct. 1001 (1973), reh. den. 411 U.S. 910, 36 L.Ed.2d 200, 93 S.Ct. 1523 (1973) (footnotes omitted).

Thus, if a tax classification does not employ a suspect classification (such as race, nationality, etc.) or burden a fundamental right (such as freedom of speech, right to travel, etc.), the classification will be upheld as long as it has a rational relationship to a legitimate governmental interest. See Allied Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 485, 79 S.Ct. 437 (1959); State ex rel. Tomasic v. Kansas City, Kansas Port Authority, 230 Kan. 404, 425-426 (1981). This test, by its very nature, is not susceptible to precise application, making a determination of the outcome of a court decision less than definite. However,

the courts and commentators have generally agreed that "a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." Allied Stores, 32 L.Ed.2d at 486. See also Carmichael v. Southeran Coal & Coke Co., 301 U.S. 495, 81 L.Ed. 1245, 1253 (1937) (courts cannot assume legislature's action is capricious); State ex rel. Tomasic v. City of Kansas City, 237 Kan. 572, 584 (1985) (legislature is "presumed to act within its constitutional power despite the fact the application of its law may result in some inequity"); Lehnhausen, 410 U.S. at 364 (presumption of constitutionality can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.")

"[The] rationale basis standard involves a high degree of judicial deference to legislative bodies. Under this deferential standard it can be expected that virtually all state classifications setting different taxes or tax rates on various classes of property or activity within the state will be upheld." Rotunda, Nowak, Young, Treatise on Constitutional Law and Substantive Procedure, § 13.7(a) (West 1986).

See also Newhouse, Constitutional Uniformity and Equality in State Taxation 603 (1959).

The Kansas Constitution has provided for classifications of property for tax purposes since 1924 when article 11, section 1 was amended by adding the language, "except that mineral products, money, mortgages, notes and other evidence of debt may be classified and taxed uniformly as to class as the legislature shall provide." L. 1923, ch. 255, § 1. This amendment, authorizing intangibles to be valued, assessed and taxed differently than tangible property, was in response to the Kansas Supreme Court's decision in Wheeler v. Weightman, 96 Kan. 50 (1915) which held that the uniform and equal clause, without the amendment, precluded the legislature from statutorily classifying intangibles for differential tax treatment. Subsequent to the amendment, statutory classifications and differential tax treatment of the listed intangible properties have been upheld. See Von Ruden v. Miller, 231 Kan. 1 (1982), Commercial

National Bank v. Board of County Commissioners, 201 Kan. 280 (1968); Missouri Pacific Railroad Co. v. Deering, 184 Kan. 283 (1959); Stevenson v. Metsker, 130 Kan. 251 (1930).

These past decisions of the Kansas Supreme Court and the broad deference allowed to state legislatures in tax matters by the United States Supreme Court lead to our conclusion that the classifications embodied in article 11, section 1 of the Kansas Constitution are not violative of the equal protection clause of the 14th amendment to the United States Constitution. The classifications do not employ a suspect class or burden a fundamental right. We must presume the validity of these classifications and cannot say that a rational basis for such classifications does not exist.

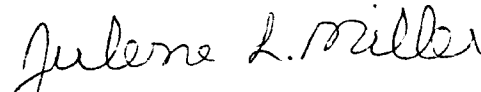
In closing, we note that a great deal of emphasis has been placed on the recent Nebraska Supreme Court decision finding a particular tax unconstitutional on equal protection grounds. Northern Natural Gas Co. v. Board of Equalization and Assessment, 443 N.W.2d 249 (Neb. 1989). The facts leading to the Nebraska decision are substantially different than the situation existing in Kansas. The Nebraska case involves the constitutionality of a statutory exemption rather than a constitutional classification scheme. Further, "[a]rticle VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, '[taxes shall be levied by valuation uniformly and proportionately upon all tangible property. . . .]' " Id., at 255. Thus, the Nebraska Constitution apparently does not authorize classification of the property in question in Northern Natural Gas. Finally, the Nebraska court relied heavily upon a 1923 United States Supreme Court case, Sioux City Bridge v. Dakota County, 260 U.S. 441, 67 L.Ed. 340, 43 S.Ct. 190, in finding the tax scheme violative of the equal protection clause. The Supreme Court has since indicated that state courts should be hesitant to rely on pre-1937 cases invalidating state tax classification under an equal protection analysis. Lehnhausen, 410 U.S. at 360-365. See Rotunda, Nowak, Young, Treatise on Constitutional Law and Substantive Procedure, § 13.7(a), footnote no. 5. We therefore do not believe the Nebraska case is indicative of the general rule

currently followed by the United States Supreme Court in determining the constitutionality of a tax classification.

Very truly yours,



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