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ATTORNEY GENERAL OPINION NO. 90- 42

The Honorable Bob Vancrum
State Representative, Twenty-Ninth District
State Capitol, Room 112-S
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--Finance and Taxation--System of Taxation; Classification; 1990 House Concurrent Resolution No. 5061

Synopsis: 1990 House Concurrent Resolution No. 5061, subsection (a)(4), does not violate the uniform and equal provision of the Kansas Constitution or the equal protection clause of the United States Constitution. Cited herein: Kan. Const., Art. 11, §1; 1990 H.C.R. No. 5061; U.S. Const., Amend. XIV.

* * *

Dear Representative Vancrum:

You request our opinion regarding the constitutionality of 1990 House Concurrent Resolution No. 5061 under the equal protection clause of the United States Constitution, and article 11, section 1 of the Kansas Constitution.

H.C.R. No. 5061 provides in part:

> "(a) The provisions of this subsection shall govern the assessment and taxation of property on and after January 1, 1990, 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 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 six 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:

"(1) Real property used for residential purposes including multi-family residential real property 12%

"(2) 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%

"(3) Vacant lots 12%

"(4) Real property used for commercial and industrial purposes which shall be assessed, to the extent of $50,000 of its appraised valuation, at the rate of 15%, and to the extent of its appraised valuation exceeding $50,000, at the rate of 30%. The legislature may increase or decrease such dollar amount if two-thirds of all members elected, or appointed, and qualified of each house shall approve such increase or decrease.

> "(5) Real property which is owned and operated by a taxpayer which is organized for not-for-profit purposes and is not subject to federal income taxation pursuant to section 501(c)(8) or section 501(c)(10) of the federal internal revenue code as in effect on January 1, 1990 . . . . . 12%
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> "(6) All other urban and rural real property not otherwise specifically subclassified . . . . . 30%"
> (Italics and strike type omitted).

This proposed amendment to article 11, section 1 of the Kansas Constitution would continue to provide for uniform assessment within each subclass. You question whether this provision is violated by new subsection (a)(4) which authorizes different rates of assessment for the class of commercial property depending upon the property's value.

The Kansas Supreme Court has discussed the requirement of uniformity within classifications. Voran v. Wright, 129 Kan. 601, 607 (1930); VonRuden v. Miller, 231 Kan. 1, 9, 10 (1982); see also Attorney General Opinion No. 89-144. These opinions discussed alleged statutory distinctions between properties within one constitutional classification. H.C.R. NO. 5061 is an attempt to build the distinction into the constitution itself. We believe that the specific provision for assessment found in subsection (a)(4) of H.C.R. No. 5061 would override any arguable requirement to assess uniformly across the board within the classification of commercial property. In any event, the cases cited above stand for the proposition that the uniform and equal requirement may be altered by constitutional amendment. See also, Wheeler v. Weightman, 96 Kan. 50, 58 (1915), Stephan v. Martin, 227 Kan. 456, 461 (1980). We believe the addition of subsection (a)(4) is sufficient to alter the uniform and equal requirement as far as the assessment rate of the property specified therein is concerned. Nevertheless, in order to avoid any question in this regard, H.C.R. no. 5061 could be amended to read:

> "Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass, except as otherwise herein specifically provided, at the following percentages of

> value. . . ." (Emphasis indicates added language).

You also question whether the classification established in subsection (a)(4) of H.C.R. No. 5061 would violate the equal protection clause of the United States Constitution by treating owners of commercial property valued at $50,000 or less differently than owners of commercial property value in excess of $50,000. You state in your request letter that "[t]his is on a per parcel basis, so one taxpayer owning two $50,000 parcels would be treated substantially better than a taxpayer with one $100,000 parcel."

In Attorney General General Opinion No. 90-10 we discussed the constitutionality of the classification amendment under the equal protection clause. Since the same discussion is germane to a consideration of H.C.R. No. 5061, we quote at length from that opinion:

> "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:
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> "'"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. 55, § 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 91982), 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."

Thus, whether H.C.R. No. 5061(a)(4) violates the equal protection clause requires a determination whether the distinction contained therein rests upon some reasonable consideration of difference or policy and is rationally related to the purpose of the legislation. In Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510, 511, 81 L.Ed. 1245, 1253, 1254, 57 S.Ct. 868 (1936), the Court noted that differences of degree, often stated in numbers, marks many legal distinctions, and upheld one such distinction for purposes of determining which employer had to pay excise tax to fund an unemployment compensation program. The court held that the distinction must be clearly arbitrary before the courts will strike it down. "[T]here is no warrant in the Constitution for setting the tax aside because a court thinks that it could have drawn a better statute or could have distributed the burden more wisely. Those functions are reserved for the legislature." Carmichael, 301 U.S. at 525. Similarly, the United States Supreme Court upheld a chain store tax which was graduated by brackets according to the number of retail units in the state. Fox v. Standard Oil Co. of New Jersey, 294 U.S. 87, 79 L.Ed. 780, 55 S.Ct. 333 (1935). "In sustaining the tax, the Court emphasized three factors: (1) the scope of legislative power; (2) the difference in economic power as between large chains and small chains; and (3) the fact that all taxpayers of the same class (or size) were taxed in the same manner." Rotunda, Nowak, Young, Treatise on Constitutional Law and Substantive Procedure, § 13.7(b) (West 1986). In Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 79 L.Ed. 1054, 55 S.Ct. 525 (1935) the Court struck down an annual gross sales tax imposed on a graduated basis finding it arbitrary and a violation of equal protection. One commentator notes that this decision was contrary to the Court's otherwise consistent rule to leave the wisdom of a particular approach to the legislative branch. "An objective appraisal of Stewart Dry Goods leads one to doubt whether the majority view would prevail today." Newhouse, Constitutional Uniformity and Equality in State Taxation 396, 397 (1959).

Based on the foregoing, we cannot say as a matter of law that subsection (a)(4) of 1990 House Concurrent Resolution No. 5061 is devoid of any rational basis. It appears to be an effort to relieve the non-machinery, non-inventory small businesses

which were hardest hit by the classification provision of 1989. We are unable to say that this is not a rational basis.

Very truly yours,

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