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ATTORNEY GENERAL OPINION NO. 92- 96

The Honorable Lana Oleen
State Senator, Twenty-Second District
1631 Fairchild Avenue
Manhattan, Kansas 66502

The Honorable Audrey Langworthy
State Senator, Seventh District
6324 Ash
Prairie Village, Kansas 66208

The Honorable Kent Glasscock
State Representative, Sixty-Second District
1921 Crescent
Manhattan, Kansas 66502

Mr. Robert J. Watson
Overland Park City Attorney
City Hall, 8500 Santa Fe Drive
Overland Park, Kansas 66212

Re: Cities and Municipalities--General
Provisions--Countywide and City Retailers' Sales
Taxes; Exemptions; Original Construction Services;
Home Rule

Constitution of the State of
Kansas--Corporations--Cities' Powers of Home Rule;
City Retailers' Sales Tax; Exempting Original
Construction Services

Synopsis: A city may, pursuant to home rule powers, exempt
original construction services from application of
its local retailers' sales tax. Cited herein:
K.S.A. 12-187, as amended by L. 1992, ch. 198, §

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5 and ch. 251, § 1; 12-188, as amended by L.
1992, ch. 279, § 2; 12-189, as amended by L.
1992, ch. 198, § 6 and ch. 251, § 2; 12-189a;
12-190 (repealed L. 1989, ch. 302, § 2); 12-191;
L. 1992, ch. 280, § 59.

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Dear Senator Oleen, Senator Langworthy,
Representative Glasscock and Mr. Watson:

You have each requested our opinion regarding the authority of
a city to exempt original construction services from the
application of that city's local retailers' sales tax.

K.S.A. 12-187 et seq. authorizes cities and counties to
impose local retailers' sales tax. K.S.A. 12-189, as amended
by L. 1992, ch. 198, § 6 and ch. 251, § 2, provides in
part:

"Except as otherwise specifically provided
in K.S.A. 12-189a, and amendments thereto,
such tax shall be identical in its
application, and exemptions therefrom, to
the Kansas retailers' sales tax act. . . ."

Original construction services are now subject to a reduced
sales tax pursuant to L. 1992, ch. 280, § 59. K.S.A.
12-189a was not amended to exempt such services from
application of a local retailers' sales tax. Further, K.S.A.
12-191 provides in part:

"All retail transactions consummated
within a county or city having a retail
sales tax, which transactions are subject
to the Kansas retailers' sales tax, shall
also be subject to such county or city
retail sales tax, except as otherwise
expressly provided in K.S.A. 12-190, and
amendments thereto."

K.S.A. 12-190 does not "otherwise expressly provide[]," as it
was repealed in 1989. L. 1989, ch. 302, § 2.

Thus, it appears the legislature intended to subject original
construction services to any local retailers' sales tax.

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Our analysis cannot end here, however. In City of Junction City v. Griffin, 227 Kan. 332 (1980) the Kansas Supreme Court stated:

"The grant of home rule power to cities under Article 12, § 5 of the Kansas Constitution has [] added a new dimension to be considered in determining whether the legislature has occupied a field. Legislative intent to preempt a field is alone insufficient. It is now necessary to examine the provisions of the State enactment to determine whether the constitutional standard of uniform application to cities has been met. If not uniform, legislative intent as expressed within the enactment will not overcome the constitutional requirement for uniform application." 227 Kan. at 336. See also Blevins v. Hiebert, 227 Kan. 1, 8-9 (1990); Clark v. City of Overland Park, 226 Kan. 609, 616 (1979).

With regard to cities' powers to levy taxes, the constitution allows the legislature to establish up to four classes of cities for the purpose of imposing limitations or prohibitions on such power. Kan. Const., art. 12, § 5(b). If the legislature enacts limitations or prohibitions on a city's power to tax, and those limitations or prohibitions are part of an enactment applicable uniformly to all cities of the same class, the city is precluded from using its home rule powers to opt out of or alter those limitations or prohibitions. Otherwise, if statutory limitations or prohibitions on a city's power to tax are part of an enactment which is not uniformly applicable to all cities of the same class, cities may exercise their home rule powers to avoid such limitations and/or prohibitions.

K.S.A. 12-188 was part of the original local retailers' sales tax enactment (L. 1978, ch. 56). As amended by L. 1992, ch. 279, § 2, K.S.A. 12-188 establishes four classes of cities "for the purpose of imposing limitations and prohibitions upon the levying of sales and excise taxes . . . as authorized and provided by article 12, section 5, of the constitution of the state of Kansas. . . ." Thus, limitations and prohibitions in the local retailers' tax act that apply

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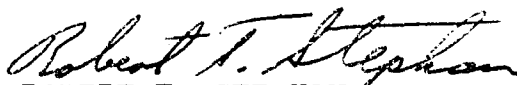
uniformly to all cities of the same class, although cities in different classes are treated differently, cannot be avoided pursuant to city home rule.

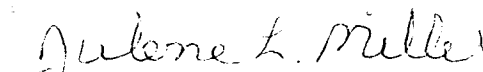
It has been suggested that a 1992 amendment to K.S.A. 12-187, also a part of the original local retailers' sales tax enactment (L. 1978, ch. 56), is nonuniform, causing the entire local retailers' sales tax act to become nonuniform by treating cities of the same class differently. L. 1992, ch. 251, § 1(a) provides in part:

"(2) The governing body of any city located in any county which does not impose a county-wide retailers' sales tax pursuant to paragraph (5) of subsection (b) may submit the question of imposing a retailers' sales tax at the rate of .25%, .5%, .75% or 1% and pledging the revenue received therefrom for the purpose of financing the provision of health care services, as enumerated in the question, to the electors at an election called and held thereon."

The classification established by this provision does not parallel the classes established in K.S.A. 12-188, as amended. Cities within the same class are treated differently depending on whether the county in which they are located imposes a county-wide retailers' sales tax. Thus, K.S.A. 12-187, as amended, is not uniformly applicable to all cities of the same class. This lack of uniform applicability subjects all provisions of the local retailers' sales tax enactment to cities' powers of home rule. See Clafren v. Walsh, 212 Kan. 1, 8 (1973); Griffin, 227 Kan. at 335-336; Blevins, 247 Kan. at 6. A city may therefore, pursuant to its home rule powers, exempt original construction services from application of its sales tax notwithstanding the provisions of K.S.A. 12-189, 12-189a and 12-191.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

RTS:JLM:jm