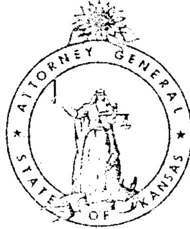

STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

March 10, 1975

Opinion No. 75-100

Senator Jack Janssen
State of Kansas
Box 626
Lyons, Kansas 67554

Dear Senator Janssen:

You inquire concerning 1975 Senate Bill No. 203, section 1 of which provides thus:

> "From and after the effective date of this act, any individual, corporation, partnership, association or other legal entity who sells any real property located in this state or stock in a domestic corporation of this state to the government of any member nation of the organization of petroleum exporting countries shall be subject to a conveyance charge equal to five percent (5%) of the sale price of such property."

Under section 2, the proceeds are to be used by the State Geological Survey "for the purpose of study, research and development of energy producing resources." The use of the proceeds from the proposed tax is irrelevant to the constitutional question raised by the first section, whether a state may impose a tax upon the business transactions, its citizens and others respecting real property in this state or stock in a domestic corporation, based upon the nationality of the party to such transaction.

The bill is apparently designed to enact retribution from member countries of the Organization of Petroleum Exporting Countries on the ground that it is believed to have acted unfairly in relation to the interests of the United States. The bill, however, proposes to enact the tax not from foreign nationals, but any seller, including Kansas citizens, of real property located in this state or of stock in any domestic corporation, when the purchaser is the government of any OPEC member. Any able Kansas lawyer should be able to assist a

client contemplating such a sale to avoid the tax, by assuring that the purchaser is not a member country government itself, but a holding company, nominee or other like entity acting separately, albeit in behalf of, the government.

The protection of the United States Constitution does not extend to aliens not within the territorial jurisdiction of the United States, Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 72 S. Ct. 936 (1950), nor to the governments of foreign countries. They do extend, however, to United States citizens, many of whom own Kansas real estate and stock in Kansas domestic corporations, and it is upon these parties, when dealing in transactions of sale of same to the government of any member of the Organization of Petroleum Exporting States upon whom the liability for the tax must fall.

For the purposes of taxation under the bill, sellers of realty and stock under the bill are divided into two (2) classes, those who engage in transactions with any of the enumerated governments, and those who engage in transactions of sale to other parties. The class is defined, essentially, by the nationality of the purchaser. Those citizens who choose to engage in a sale transaction to the government of certain foreign countries are liable for the tax, while others, who choose to sell to the government of any other country, for example, are not. A Kansas citizen becomes subject to the tax merely on the basis of the nationality of the other party to a commercial transaction. In Graham v. Richardson, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971), the Court pointed out thus:

> "Under traditional equal protection principles a state retains broad discretion to classify as long as its classification has a reasonable basis... But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 371-372, 29 L. Ed. 2d at 541. [Citations omitted]

A half century ago, the Supreme Court upheld the right of a state to deny to aliens the right to acquire and own land. See, e.g., Terrace v. Thompson, 263 U.S. 197, 68 L. Ed. 255, 44 S. Ct. 15 (1923). It is not at all clear, however, that the same breadth of discrimination would be upheld today. See, e.g., Oyama v. California, 332 U.S. 633, 92 L. Ed. 249, 68 S. Ct. 269 (1948).

As indicated above, the proposed tax is not imposed directly upon aliens as a class, but upon any person who sells Kansas real property and domestic corporation stock to certain foreign governments. The classification is based on alienage once removed, as it were, and is

to that extent unlike those direct classifications of aliens which the courts are most commonly called upon to review, such as the statutory ineligibility of aliens for civil service positions held invalid in Sugarman v. Dougall, 413 U.S. 634, 37 L. ED. 2d 853, 93 S. Ct. 2842 (1973). There is, very frankly, a lack of clear and compelling precedent upon which to formulate a conclusive opinion that the bill imposes a constitutionally forbidden classification. A classification which operates directly against aliens must be justified in terms of a well-defined and justified legitimate state purpose, and the classification must be no broader than that strictly required to accomplish that purpose. To the extent that the determinative factor governing imposition of the tax is the nationality of the purchasing government, it may be that the tax must be justified in the strict terms applied to direct classifications of aliens. Nothing on the face of the bill suggests what state interest is sought to be served by the tax, except to raise money for energy research, which is certainly an insufficient purpose to support a classification based directly on alienage.

As stated above, over fifty (50) years ago, the Supreme Court upheld the right of a state to deny to aliens the right to acquire and own land. These decisions have not yet been directly overruled, although the vitality of that precedent is seriously in doubt today. Assuming they were to be overruled, the question would be raised whether a state may impose discriminatory taxes upon the transfer of property within the state to an alien, or an alien government, for which the seller, and not the alien purchaser, is liable. We have discussed this question at this length to demonstrate the absence of any clear precedent for a definitive conclusion that the tax is imposed on an impermissibly discriminatory basis. Needless to say, the bill is open to very substantial objection on this score, and on the basis of the existing precedent, we can only say that we view the bill with the gravest reservations of its validity on this particular ground.

There is a second objection to be considered. In Zschering v. Miller, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968), the Court considered an Oregon statute which provided for escheat of real or personal property claimed by a nonresident alien heir unless the foreign country provided certain reciprocal privileges to United States citizens, and if the foreign heir were entitled to receive the proceeds of Oregon estates "without confiscation." The Court held the statute to be an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." The Court states, with particular pertinence to this issue as follows:

"It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy . . . [E]ven in the absence of a treaty, a State's policy may disturb foreign relations . . . . 'Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'"

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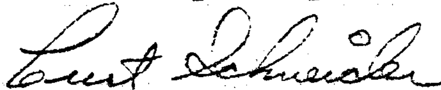
"The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy." 389 U.S. at 440-441, 19 L. Ed. 2d at 692.

Actions by the Organization of Petroleum Exporting Countries are of vital concern to the United States, with major economic, diplomatic, and according to the Secretary of State, military implications. Action by a state to impose a tax directly, solely and exclusively on commercial transactions on the sole basis that one party thereto is a member government itself of that Organization, is an action which, considered separately or as a pattern of action by a number of states, could have a direct impact upon the power of the central government to deal with those international problems which are entrusted to it alone. It is on this basis that we cannot but conclude that Senate Bill 203 is unconstitutional under the doctrine of Zschering v. Miller, supra.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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