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February 8, 1980

ATTORNEY GENERAL OPINION NO. 80-34

Mr. Roger Peterson
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Re: Taxation -- Intangibles -- Repeal of Intangibles
Tax

Synopsis: An intangibles tax repeal question must be submitted to electors on township, city and county levels in order to totally eliminate all intangibles taxes within the physical bounds of a county.

If a petition signed by a sufficient number of electors is filed in protest to the action of the governing body of a county, city or township repealing the intangibles tax within such governmental entity, such proposition cannot take effect unless approved at an election called and held thereon in the manner prescribed by the general bond law (K.S.A. 1979 Supp. 10-120). If said petition is filed at a time which will permit the governing body to comply with the requirements of K.S.A. 1979 Supp. 10-120, the governing body may call and hold such election at the time of the presidential preference primary.

However, if there is filed with the governing body a sufficient petition requesting the governing body to take action to repeal the intangibles tax, an election on such proposition must be held at the next primary or general

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election within the governmental subdivision. But, a presidential preference primary is not a "primary" or "general" election as defined by K.S.A. 25-2502, and under these circumstances the election on repealing the intangibles tax cannot be held at the same time as the presidential preference primary.

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Dear Mr. Peterson:

You have requested our opinion on two issues concerning the repeal of intangibles taxes pursuant to K.S.A. 1979 Supp. 79-3109. Primarily, you have asked if, in order to totally eliminate the intangibles tax within the physical boundaries of a county, the repeal question must be submitted and approved at the county level, submitted and approved in each township within the county, and submitted and approved in each city within the county. As a secondary matter, you have asked whether the repeal question can be submitted to the electors at the upcoming presidential preference primary.

Turning first to the territorial application of a county resolution to abolish the tax levied for its own benefit upon money, notes, and other evidence of debt having a tax situs therein (intangibles), it is our opinion that such a resolution would serve to repeal only that portion of the intangibles tax levied by the county. K.S.A. 1979 Supp. 79-3109(b) expressly gives to counties, cities and townships the ability to either fix the rate of the tax levied on intangibles for the benefit of the city, county or township, or to elect that no tax shall be levied for the benefit of such county, city or township. By the very language of the statute, it seems clear that each of the separate taxing entities (township, city and county) has the power to fix the rate or to repeal the tax each entity levies on intangible personal property. Logically, therefore, any action taken by any township, city or county can involve only the interest that entity has in the intangibles, and not the interests of the other taxing entities therein. Thus, it is our opinion that to effect a total repeal of intangibles taxes within a county, the procedures outlined in K.S.A. 1979 Supp. 79-3109(b) must be followed by every township and city within a county, as well as by the county itself. This conclusion is in accord with Attorney General Opinion No. 78-352.

It is important to note that K.S.A. 1979 Supp. 79-3109(b) specifies two different types of elections which may be held in connection with

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intangibles tax repeal questions. The first election mentioned in the statute is one held as a result of a taxpayer's petition in protest of repeal action taken by the governing board of a city, county or township. With respect to such action by a board of county commissioners, the statute clearly indicates that the repeal resolution shall not become effective "without first having been submitted to and been approved by a majority of the electors of the county voting thereon at an election called and held thereon." (Emphasis added.) Identical requirements are prescribed for action initiated by the governing bodies of cities and townships. The second type of election required by K.S.A. 1979 Supp. 79-3109(b) is one which is held as a result of the electors of the county, city or township petitioning the governing board to repeal the intangibles tax levied by that entity. After such a petition has been received, the governing board is "required to submit to the electors . . . at the next primary or general election" a proposition concerning the tax repeal issue [K.S.A. 1979 Supp. 79-3109(b)]. (Emphasis added.)

Although both types of elections are required to be held after a petition is submitted to the governing board by a portion of the electorate, the provisions describing each election are different. The election held pursuant to what is, in effect, a protest by the electorate to an action of the governing body may be held at an election called to resolve the issue. The election to be held as a result of members of the electorate taking the initiative to request the governing body to act on the tax repeal question is required to be held at the next "primary or general election" which takes place within the governmental subdivision. Therefore, the issue of when the repeal question can properly be presented to the voters depends first on the receipt of a petition signed by at least 5% of the qualified electors of the governmental subdivision, and second on the proper characterization of the petition as either one in protest of action already taken by the governing body, or one asking the governing body to take action. The proper time for the election to be held is necessarily determined by the type of petition received by the governing body.

You have asked whether the repeal question can be presented to the voters at the presidential preference primary. Assuming the election is being held pursuant to a petition received requesting the governing body take action to repeal the intangibles tax, it is our opinion that the presidential preference primary would not be a "primary or general election" contemplated by K.S.A. 1979 Supp. 79-3109(b). Because of the use of the word "primary" in K.S.A. 1979 Supp. 25-4501 et seq., it is easy to assume

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that the election to be held on the first Tuesday in April of 1980 would qualify as a "primary election" and so be a proper time at which to present any other proper issue to the electors. However, a closer examination of the general election statutes -- K.S.A. 25-101 et seq. -- reveals that this is not the case.

Several provisions of the election statutes seem to conflict, or at least confuse, particularly K.S.A. 25-2502(b) which defines "primary election" and K.S.A. 1979 Supp. 25-4501 et seq., which create and explain the "presidential preference primary election." K.S.A. 25-2501 specifically states that, unless the context of a statute requires a different meaning, the election definitions of general application set out in K.S.A. 25-2502 to 25-2507 shall apply to all provisions of the Elections Act. K.S.A. 25-2502 defines the terms "general election" and "primary election" as follows:

"(a) 'General election' means the election held on the Tuesday succeeding the first Monday in November of even numbered years, the elections held for officers on the first Tuesday in April, and in the case of special elections of any officers to fill vacancies, the election at which any such officer is finally elected.

"(b) 'Primary election' means the election held on the first Tuesday in August of even numbered years, the election held four (4) weeks preceding the election on the first Tuesday in April, and any other preliminary election at which part of the candidates for special election to any national, state, county, township, city or school office are eliminated by the process of the election but at which no officer is finally elected."

Other definitions of primary and general elections found within the elections laws concur with those in K.S.A. 25-2502. See K.S.A. 25-2102, 25-2006 and 25-203 and K.S.A. 1979 Supp. 25-101.

The presidential preference primary, according to K.S.A. 1979 Supp. 25-4501, is to be held on the first Tuesday in April of 1980. The purpose of this election, as expressed in K.S.A. 1979 Supp. 25-4502(a), is to give every registered elector who has declared his or her party affiliation the opportunity to vote for his or her preference for the person to be the candidate for nomination by his or her party for president of the United States, or to express a preference for an uncommitted delegation from Kansas to the national convention of the elector's party.

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There are two immediately apparent reasons that the presidential preference primary does not qualify as a primary election as defined by K.S.A. 25-2502(b): First, because it is not held on either of the dates included in that statute; and second, because it is not an election by which candidates for office are eliminated. In addition, the presidential preference primary is not a "general election" within the meaning of the elections laws. Although the definition of "general election" in K.S.A. 25-2502(a) includes "the elections held for officers on the first Tuesday in April," the scope of the term "officers" within that provision is controlled by K.S.A. 1979 Supp. 25-2505(a). The office of the president is not included within the definition of "national office" or "national officer" prescribed therein. Furthermore, the rules of statutory construction contained in K.S.A. 77-201 define "general election" at clause Twenty-sixth thereof as the election held on the Tuesday succeeding the first Monday in November; no mention is made of any other election date as falling within that definition.

Did the 1979 Legislature intend to include the presidential preference primary within the meaning of the words "next primary or general election" in the intangibles tax repeal provisions? We think not. It is our opinion that the legislature intended the presidential preference primary to be a different kind of election than those statutorily defined. Had such a result not been contemplated by the legislature, the definition of "primary election" could easily have been modified to include the presidential preference primary. It is significant to note that, although the legislature has amended several definitional statutes pertaining to the Election Act (see K.S.A. 1979 Supp. 25-2503, 25-2505 and 25-2506), it has not changed any part of K.S.A. 25-2502 since it was originally enacted. In addition, the legislature could have phrased K.S.A. 1979 Supp. 79-3109(b) to specifically include presidential preference primaries by adding those words to "primary or general election"; those words are conspicuous because absent, and even more so because both the most recent amendments to the intangibles tax statute and the statutory provisions creating the presidential preference primary were enacted during the same legislative session.

Furthermore, we can find nothing in the statutes pertaining to the presidential preference primary -- K.S.A. 1979 Supp. 25-4501 et seq. -- which indicates that the legislature intended the presidential preference primary to expand the meaning of "primary" as set out in K.S.A. 25-2502(b) and therefore include it as such. The statutes which control primary elections -- K.S.A. 25-202 et seq. -- are not referred to, directly or indirectly, in the presidential preference primary provisions. In fact,

the date of the election, voting eligibility and procedure, form of election ballots, certification of delegates, and method of payment of election expenses are regulated by the presidential preference primary statutes in Article 45 of Chapter 25. The only statute contained within that article that seems to contemplate another election being held at the same time as the presidential preference primary is K.S.A. 1979 Supp. 25-4508, which in pertinent part, provides:

"In the event any election is held on the same day as the presidential preference primary election the direct costs solely attributable thereto shall be paid by the county and the subdivision responsible therefor shall reimburse the county"

We do not believe this reference shows the intent of the legislature was to authorize the holding of other elections on that date. It is our opinion that the legislature contemplated merely the sharing of expenses incurred by other elections which are required already or authorized by another law to be held on the first Tuesday in April of 1980.

One such election which could be held on the same date as the presidential preference primary is a bond election called and held pursuant to K.S.A. 1979 Supp. 10-120. The statute specifies that an election must be held within forty-five days after compliance with the necessary legal prerequisites or within ninety days if a general election is to be held within the longer period. The presidential preference primary, if to be held within the forty-five days required by the general bond law, would be an appropriate time to present a bond issue to the voters.

✓ Another example of elections held at the time of the presidential preference primary are general elections of certain cities. Although K.S.A. 25-2107 provides for general elections of city officers to be held on the first Tuesday in April in odd-numbered years, some cities have adopted charter ordinances which provide for such elections on that date in even-numbered years, the time prescribed for the presidential preference primary.

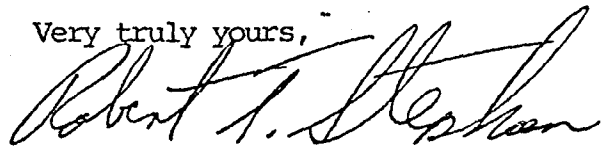
Similarly, it is possible that an election held under K.S.A. 79-3109(b) as a consequence of a petition of electors which protests action of the governing body of a county, city or township repealing the intangibles tax could be called and held at the time of the presidential preference primary. As previously noted, 79-3109(b) makes no specific requirements as to the time for holding such election, except that it requires such

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election to be "called and held in the manner prescribed for the calling and holding of elections under the general bond law" (K.S.A. 1979 Supp. 10-120). Thus, if such protest petition is filed at a time which will permit the governing body of the county, city or township to comply with the requirements of K.S.A. 1979 Supp. 10-120, we find no impediment to such governing body calling and holding the election authorized by K.S.A. 1979 Supp. 79-3109(b) at the same time as the presidential preference primary.

It is our opinion, therefore, that the terms "primary or general election" referred to throughout K.S.A. 1979 Supp. 79-3109(b) are those elections defined by K.S.A. 25-2502; as the presidential preference primary is not within the statutory definitions of "primary" or "general" election, it is not one in which the question of intangibles tax repeal may be properly submitted to the electors of any township, city or county if such election is required in response to a petition of electors seeking the governing body to take repeal action. However, if the election is required as a result of a petition protesting a resolution passed by the governing body to repeal the intangibles tax, the presidential preference primary and tax repeal election could be held concurrently.

Very truly yours,



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