



STATE OF KANSAS

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November 14, 1983

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ATTORNEY GENERAL OPINION NO. 83- 166

Samuel L. Schuetz
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Hiawatha, Kansas 66434

Re: Cities and Municipalities--General Provisions--
Tax Upon Gross Earnings; Reimposition of Tax

Synopsis: The 1983 Legislature amended the provisions of K.S.A. 12-1,101 to provide specifically that the governing body of a city, county or township could reimpose the local-option gross earnings tax after rejection of the tax by referendum. Such action is within the constitutional power of the legislature. Cited herein: K.S.A. 12-1,101 as amended by L. 1983, ch. 61, §1.

* * *

Dear Mr. Schuetz:

Due to a number of inquiries from residents of Horton, Brown County, Kansas, you seek our opinion "on the constitutionality of the amendment to K.S.A. 12-1,101(e)" made by the 1983 Legislature.

The inquiries to your office and your request for our opinion are based upon the following facts. Residents of the city of Horton circulated a petition calling for a vote of the city's electors on the question of whether the city's gross earnings

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tax on earnings derived from money, notes and other evidence of debt should be repealed and the governing body of the city authorized to impose property taxes in such amount as necessary to offset the loss of revenue. The petition was found to meet the requirements of law and, consequently, the governing body submitted the question to the city's electors at the April 5, 1983, city election. A majority of the persons voting responded to the question in the affirmative.

At the time of the election, K.S.A. 12-1,101(e) [Ensley, 1982] provided that, if such a proposition was approved by a majority of city electors voting on the proposition, the governing body of the city "shall provide by ordinance that no tax shall be levied upon gross earnings derived from money, notes or other evidence of debt . . . in the calendar year following the year of such election and in each year thereafter" Due to the vote of the city's electors and the above-quoted provisions of K.S.A. 12-1,101(e) [Ensley, 1982], it was assumed that no gross earnings tax on earnings derived from money, notes or other evidence of debt would be imposed in the city of Horton in 1984 ("the calendar year following the year of such election") or in any year thereafter.

However, on April 8, 1983, the Legislature enacted House Bill No. 2023, which subsequently was approved by the governor and became effective on its publication in the Kansas Register on April 14, 1983. While not amending the above quoted provisions of K.S.A. 12-1,101(e) concerning the duty of the governing body of a city after an election, the following sentence was added to the subsection:

"Notwithstanding the provisions of this subsection to the contrary, the governing body of a county, city or township may either reimpose or submit to the electors of such subdivision a proposition to reimpose a tax on gross earnings derived from money, notes or other evidence of debt in the manner and at the rate prescribed by this section."
L. 1983, ch. 61, §1(e).

Pursuant to these provisions of the statute and notwithstanding the vote of the city's electors on April 5, 1983, the governing body of the city of Horton, on August 15, 1983, adopted an ordinance reimposing the gross earnings tax, to be levied in 1984 and each year thereafter. The inquiries to your office and your request for our opinion followed this action by the city's governing body.

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In seeking our opinion on whether the addition of the above-quoted sentence to K.S.A. 12-1,101(e) by the 1983 Legislature is constitutional, you do not indicate any theory upon which this action would be unconstitutional and we are not aware of any such theories.

While we may entertain misgivings and doubts as to the wisdom of the 1983 amendments, such misgivings and doubts have nothing to do with the constitutional validity of the statute. As was said in State ex rel., v. City of Pittsburg, 188 Kan. 612 (1961), at page 623:

"From a purely legal standpoint, the rule in this state, as elsewhere, is that courts are concerned only with the power [of the legislature] to enact statutes and cannot concern themselves with the wisdom of legislative acts. Courts neither approve nor condemn legislative policy, and their sole function is to determine the validity of a challenged act when measured by applicable constitutional provisions. (State, ex rel., v. Sage Stores Co., 157 Kan. 404, 413, 141 P.2d 655, 323 U.S. 32, 89 L.Ed. 25, 65 S.Ct. 9; State, ex rel., v. Board of Regents, 167 Kan. 587, 596, syl. 4, 207 P.2d 373; State, ex rel., v. Russell, 171 Kan. 709, 237 P.2d 363.) For the removal of unwise laws from the statute books, appeal lies not to the courts but to the ballot and to the processes of democratic government."

This same theme was more recently expressed by the Supreme Court in State ex rel. Tomasic v. Kansas City, Kansas Port Authority, 230 Kan. 404 (1981), where, at pages 413-414, the Court said:

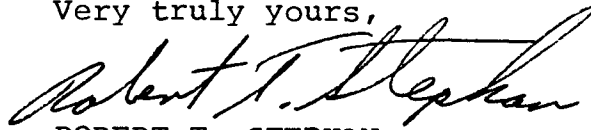
"If the people fear harsh or inequitable results under . . . [a] statutory scheme, their recourse is to the legislative body since the court has determined the provisions constitutionally valid. Wulf v. Kansas City, 77 Kan. 358, 375, 94 Pac. 207 (1908). In this, as in all judicial review of legislative action, the court's position is to determine the constitutionality, not the wisdom, of legislation. State, ex rel., v. City of Overland Park, 215 Kan. 700, 710,

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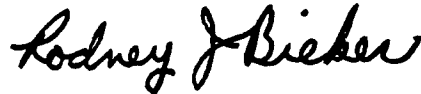
527 P.2d 1340 (1974); State, ex rel., v. City of Pittsburg, 188 Kan. 612, 623, 364 P.2d 71 (1961); State, ex rel., v. Fadely, 180 Kan. 652, 659, 308 P.2d 537 (1957); State, ex rel., v. City of Topeka, 176 Kan. 240, 244, 270 P.2d 270 (1954)."

Thus, as we discern no specific constitutional inhibition to the new statutory provisions, we are constrained to conclude that such provisions are within the authority possessed by the legislature under the state constitution.

Very truly yours,



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Attorney General of Kansas



Rodney J. Bieker
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RTS:BJS:RJB:jm