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January 19 2012

ATTORNEY GENERAL OPINION NO. 2012- 3

Honorable Scott Schwab
State Representative, Forty-Ninth District
State Capitol, Room 561-W
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Corporations—Cities' Power of Home Rule

Cities and Municipalities—General Provisions—Countywide and City Retailers' Sales Taxes; City and County Excise Taxes Prohibited

Synopsis: Under the *Executive Aircraft* test, the “transportation utility fee” (TUF) is a tax because it is a forced contribution on the owners of developed real property in the City of Mission levied for the purpose of raising revenue for the maintenance of governmental services offered to the general public, *i.e.*, maintenance of streets. The TUF is not an ad valorem tax because it is imposed by calculating the estimated number of vehicle trips originating from a property using a trip generation model rather than the value of real property. As such, TUF is an excise tax that the City of Mission is specifically, clearly, and uniformly prohibited from levying or imposing under K.S.A. 2011 Supp. 12-194. Cited herein: Kan. Const., Art. 12, Section 5; K.S.A. 2011 Supp. 12-187 *et seq.*; K.S.A. 2011 Supp. 12-194.

* * *

Dear Representative Schwab:

As Representative for the Forty-Ninth District, you ask for an opinion on whether K.S.A. 2011 Supp. 12-194 prohibits the City of Mission from enacting the provisions of Chapter 145 of the Code of the City of Mission, which creates and levies a transportation utility fee that is charged against the owners of all developed real property in the City of Mission. The purpose of the charge is to provide additional revenue to fund the

maintenance of the city's streets. In other words, you are requesting an opinion on whether the transportation utility fee is an excise tax prohibited by the provisions of K.S.A. 2011 Supp. 12-194 or a fee that would not be precluded by the provisions of K.S.A. 2011 Supp. 12-194.

The City of Mission, Kansas is chartered under Kansas statute as a city of the second class.¹ On August 18, 2010, the Mission City Council adopted Ordinance No. 1332 to establish a Transportation Utility Fee (TUF).² The TUF is billed to the owners of all developed real property in the city and is collected annually with ad valorem real estate taxes.³ The TUF, according to the Ordinance, is based upon "the direct and indirect use of or benefit derived from the use of public streets, bicycle lanes and sidewalks generated by the developed property."⁴ Generally, the TUF is calculated by estimating the average number of vehicle trips generated by a property.⁵

The proceeds of the TUF assessments are allocated by the City to a dedicated⁶ "Transportation Fund,"⁷ and are to be used for "Transportation System Maintenance Items"⁸ which includes but is not limited to surfacing and resurfacing, curb and gutter maintenance and repair, bridge maintenance and repair, sidewalk maintenance and repair, trail maintenance and repair, transit facility maintenance and repair, bicycle lane maintenance and repair, landscape enhancements along the rights-of-way, street tree replacement and street lighting.⁹

With these facts in mind, we turn to your question on whether the TUF is an excise tax prohibited under K.S.A. 2011 Supp. 12-194 or a fee as it is named.¹⁰

Test to Distinguish a Tax from a Fee

In Kansas, the test to distinguish a tax and a fee was outlined by the Kansas Supreme Court in *Executive Aircraft Consulting v. City of Newton*.¹¹ In that opinion, the Court clarified the distinction between a tax and a fee as follows:

A tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. In contrast, a fee is paid in exchange for a special service, benefit, or privilege not

¹Mission, Kansas Charter Ordinance No. 1 (October 10, 1962); Mission, Kansas Charter Ordinance No. 2 (September 25, 1968).

²Mission, Kansas Charter Ordinance No. 1332 (August 18, 2010).

³Mission, Kansas, Municipal Code § 145.090 (2010).

⁴Mission, Kansas, Municipal Code § 145.070 (2010).

⁵Mission, Kansas, Municipal Code § 145.080 (2010).

⁶Mission, Kansas, Municipal Code § 145.020 (2010).

⁷Mission, Kansas, Municipal Code § 145.060 (2010).

⁸Mission, Kansas, Municipal Code § 145.020 (2010).

⁹*Id.*

¹⁰ The term used in naming the charge is not always controlling, as it is sometimes used loosely and indiscriminately, and so the language of the ordinance must be reviewed to determine the legislative purpose. *Duff v. Garden City*, 122 Kan. 391, 393 (1927).

¹¹252 Kan. 421 (1993).

automatically conferred upon the general public. A fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege. Payment of a fee is voluntary--an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered.¹²

Tax or Fee Analysis

Under the *Executive Aircraft* test, a tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public.

The TUF is a forced contribution. The Ordinance requires owners of developed real property in the City of Mission to pay the TUF.¹³ Although the Ordinance provides for an administrative appeal, the appeal is limited to challenges to the City Administrator's interpretation of all terms, provisions, and requirements of the Ordinance and to determine the appropriate charges.¹⁴ In other words, a property owner can appeal the land use classification and request a change in the classification, but the Ordinance does not authorize the City Administrator to waive the levying or collection of the TUF.¹⁵

Additionally, the manner in which the transportation utility fee is billed and collected on an annual basis with ad valorem real estate taxes provides strong support to conclude the TUF is a forced contribution.¹⁶ The City of Mission is authorized by the Transportation Utility Fee Manual created by the City Administrator to utilize a collection procedure that allows it to charge late fees for past due amounts and to place a lien on the property for unpaid amounts due under the transportation utility fee ordinance.¹⁷ With a fee, the refusal to pay or the tardiness of payment results in the loss of the service, benefit, or privilege until the fee is paid. It does not result in the institution of collection proceedings.

The TUF is created as an additional source of revenue for the maintenance of governmental services, *i.e.*, maintenance of public streets in the City of Mission.¹⁸ In its

¹²*Id.* at 427. In *National Cable Television Association, Inc. v. United States*, the United States Supreme Court created a test to distinguish between a tax and a fee. In *National Cable*, the Independent Offices Appropriation Act (Act) authorized federal agencies to impose fees for agency services. A fee would be imposed based upon a determination of "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." Pursuant to the Act, the Federal Communication Commission imposed a fee upon community antenna television systems. *National Cable*, a trade association, moved to set aside the fee. The Supreme Court remanded the case, holding that "value to the recipient" is the appropriate determination in assessing a fee because, unlike a tax, a fee "presumably, bestows a benefit on the applicant, not shared by other members of society." "Taxation," according to the U.S. Supreme Court, "is a legislative function."

¹³Mission, Kansas, Municipal Code § 145.070 (2010).

¹⁴Mission, Kansas, Municipal Code §§ 145.100 and 145.110 (2010).

¹⁵*See Id.*

¹⁶Mission, Kansas, Municipal Code § 145.090 (2010).

¹⁷Mission, Kansas, Transportation Utility Fee Manual, page 21.

¹⁸Mission, Kansas, Municipal Code § 145.020 (2010).

legislative history section of the Ordinance,¹⁹ the City stated it historically has not had a dedicated funding source for transportation related improvements.²⁰ These items were paid for by special highway funding and by the County Assistance Road System (CARS) sponsored by Johnson County, Kansas.²¹ The monies collected from the TUF, however, are intended to be a source of funding for these transportation related improvements as the funds are dedicated, pursuant to the Ordinance, to “Transportation System Maintenance Items.”²²

Even though the City of Mission considers the maintenance of its streets to be a “proprietary function,”²³ the Kansas Supreme Court held that a city, being duty bound to maintain its streets in reasonable repair for public use, is engaged in a governmental function in the process of their repair and improvement.²⁴ The public streets are utilized not only by the owners of real property located within the boundaries of the City of Mission, but also by city inhabitants who do not own developed real property and members of the general public who visit or pass through the City of Mission for various business or personal reasons. It is clear that the maintenance of city streets is a government function undertaken for the benefit of the general public as opposed to bestowing a benefit on an identified group that is not shared by other members of society.

We conclude the TUF is a tax, rather than a fee, because it meets the test set out in *Executive Aircraft*. Having concluded the TUF is a tax, we do not need to engage in the analysis of whether the TUF is a fee. The test for whether the charge is a fee is in direct contrast to a tax—a fee is voluntary whereas a tax is not; a fee is not a revenue measure whereas a tax is; and a fee is assessed to an identified group which obtains the benefit of the fee whereas a tax is levied on the public. As discussed previously, none of the test factors for a fee are applicable in the case of the TUF.

Excise Tax Analysis

It is well settled in Kansas that the power to levy taxes is inherent in the power to govern, but the exercise of that power is dependent upon the existence of legislation designating the kinds of property to be taxed. Nothing is taxable unless clearly within the grant of the power to tax.²⁵

Although cities have home rule authority “to determine their local affairs and government” granted by the Constitution of the State of Kansas,²⁶ the State can

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *Foster v. Capital Gas & Electric Co*, 125 Kan. 574 (1928).

²⁵ *Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank & Trust Co.*, 229 Kan. 511, 512, (1981).

²⁶ Kan. Const., Art. 12, Section 5(b).

preempt cities (and counties) from acting in a particular area by clearly preempting local legislation.²⁷ One of the ways of doing so is by enacting a uniform law:

The legislature with some frequency has preempted home rule by passage of uniform laws that also contain preemptive language. Some uniform laws, however, do not need to contain any preemptive language because, by simply prohibiting actions like the levying of certain types of tax or the licensure or regulation of certain activities, they expressly forbid local action in the area.²⁸

K.S.A. 2011 Supp. 12-194 is part of a uniform law pertaining to local retailers' sales tax²⁹ which specifically and clearly provides, subject to exceptions that do not apply here, "no city or county shall levy or impose an *excise tax or a tax* in the nature of an excise, other than a retailers' sales tax and a compensating use tax...."³⁰ Therefore, if the TUF is an excise tax or a tax in the nature of an excise, the City of Mission is preempted from using its home rule authority to enact or enforce this tax.

Black's Law Dictionary defines an excise tax as "a tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)."³¹ The term "excise tax" means and includes "practically any tax that is not an ad valorem tax."³² "An ad valorem tax is tax imposed on the basis of the value of the article or thing being taxed. An excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege."³³

We already have concluded the TUF is a tax. The facts prove the TUF is not imposed based on the value of real property, but rather is imposed by calculating the estimated number of vehicle trips originating from a property using a trip generation model.³⁴ Since the TUF does not use value of real property as the basis of its imposition, it cannot be an ad valorem tax and instead must be an excise tax or a tax in the nature of an excise. The TUF is imposed on the performance of an act or the enjoyment of a privilege which is either the act or privilege of owning real property within the boundaries of the City of Mission. As a result, the owner of every developed real property in the

²⁷*Zimmerman v. Board of County Comm'r*, 218 P.3d. 400 (2009) (Court rejects argument that state law preemption of a particular field can be implied, preemption must be expressed by clear statement in the law); See also Attorney General Opinion 2010-07.

²⁸Heim, *Home Rule: A Primer*, 74 J. Kan. Bar Ass'n 26, 31-32 (2005); Heim, *Home Rule Power for Cities and Counties*, 66 J. Kan. Bar Ass'n 26, 35 (1997). See also *McCarthy v. City of Leawood*, 257 Kan. 566, 570 (1995) (Cities are specifically and clearly prohibited from passing any ordinance enacting a tax, excise, fee, charge or other exaction when the levying of that tax, fee, charge or other exaction has been limited or prohibited by a statute passed by the Kansas Legislature which is applicable uniformly to all cities of the same class).

²⁹K.S.A. 12-187 *et seq.*

³⁰Emphasis added.

³¹Black's Law Dictionary (9th ed. 2009).

³²*Callaway v. City of Overland Park*, 211 Kan. 646, 651 (1973).

³³*Id.*

³⁴Mission, Kansas, Municipal Code § 145.020 (2010).

City of Mission is required to pay a transportation utility fee for the performance of the act or the enjoyment of the privilege of owning such developed real property in the City of Mission.

We conclude the TUF is an excise tax. The City of Mission is specifically, clearly, and uniformly prohibited from levying or imposing such tax under K.S.A. 2011 Supp. 12-194.

Conclusion

Under the *Executive Aircraft* test, the TUF is a tax because it is a forced contribution on the owners of developed real property in the City of Mission levied for the purpose of raising revenue for the maintenance of governmental services offered to the general public, *i.e.*, the maintenance of public streets. The TUF is not an ad valorem tax because it is imposed by calculating the estimated number of vehicle trips originating from a property using a trip generation model rather than the value of real property. As such, the TUF is an excise tax that the City of Mission is specifically, clearly, and uniformly prohibited from levying or imposing under K.S.A. 2011 Supp. 12-194.

Sincerely

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