

PROPOSED SALES TAX ACT: Senate Amendment No. 7 to Senate Committee Substitute for House Committee Substitute for House Bill No. 7, prohibits cities from passing a sales tax act; does not prevent cities from passing other forms of excise tax now in force or hereafter enacted.

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May 24, 1937

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Honorable Michael Kinney  
Missouri Senate  
Jefferson City, Missouri



Dear Senator Kinney:

We acknowledge receipt of your communication of May 18 wherein you request an opinion regarding the Sales Tax Bill now under consideration by the Senate. Your letter is as follows:

"The Senate placed an amendment on the Sales Tax Bill prohibiting cities or municipalities from aiding or passing ordinances to collect city sales taxes. Will you kindly give me your opinion as to whether this will interfere, as for instance, ad valorem tax, now collected by cities."

We assume that you refer to Senate Amendment No. 7 being an amendment to Senate Committee Substitute for House Committee Substitute for House Bill No. 6, and designating the amendment as a new section, and to be known as Section 44-a, as follows:

"No city, town or village, whether organized by general law or by special charter, shall, either directly or indirectly, levy, impose or collect any tax upon the sale of or charge for any tangible personal property taxed by the state under the provisions of this act, or, upon the sale of or charge for any service or other thing taxed by the state under the provisions of this act."

The purport of the amendment is to prohibit all cities in the State of Missouri from passing, by ordinance, what may be termed a "city sales tax act." All classes of cities receive their powers of taxation from the Legislature, the Legislature being empowered to grant cities the power of taxation by the Constitution of Missouri and especially Sections 1 and 10 of Article X. Section 1 being as follows:

"The taxing power may be exercised by the General Assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

Section 10 is as follows:

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

In accordance with the above provisions the General Assembly has from time to time delegated to cities of all classes the power to enact certain forms of taxation including merchants' licenses, occupation taxes and ad valorem taxes. The power of cities to levy taxes of every nature must be granted by the Legislature, and, if the authority can only be granted by the Legislature, then by the same logic the General Assembly can deny cities of any class or classes from enacting certain forms of taxation. In the instant case the Legislature is attempting to prevent cities from enacting a sales tax, which we are of the opinion is within the scope of authority of the General Assembly.

City of Los Angeles v. Riley, 59 Pac. (2d) 137.

Coming closer to your question to the effect does the proposed amendment No. 7, quoted supra, conflict or prevent cities from exacting other forms of taxation which are now in existence, it will be necessary to analyze and define and differentiate briefly the various forms of taxation which now exist in municipalities, as well as the present contemplated sales tax act. Broadly speaking, there are two forms of taxation; property taxes, being the original and most common form wherein the tax at a certain rate is exacted on assessment of an individual's property. Missouri Portland Cement Co. v. Smith, 90 S. W. (2d) 1. c. 407; Viquesney v. Kansas City, 305 Mo. 488.

The Constitution of Missouri refers chiefly to what we commonly refer to as "property taxation." The other broad form of taxation is known as excise taxation. No reference to excise taxes is contained in our Constitution. It has been ruled by the Supreme Court in many instances that an excise tax does not violate our Constitution because the sections referring to taxation in the Constitution referred to property taxation. The Sales Tax Act of 1935, Laws of Missouri 1935, page 411 et seq., has been denominated by the Supreme Court in the decision of State ex rel. Missouri Portland Cement Company v. Forrest Smith, 90 S. W. (2d) 405, as an excise tax. The decision in the Smith case defines an "excise tax" as follows:

"If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise."

By the above definitions clearly the proposed amendment would not in anywise prevent, interfere or conflict with cities levying property taxes. There are

various forms of excise taxes, and the proposed sales tax act being identical in its form of exacting the tax as the Act of 1935, said act being declared in the Smith decision as an excise tax, likewise, the contemplated act is an excise tax. Therefore, your question finally resolves itself into: Does the denial of cities the right to enact a sales tax act (an excise tax) interfere or conflict with other forms of excise taxation. Many cities have ordinances valid under statutes passed by the General Assembly under which occupations and merchants are licensed.

In the case of *Ex parte Andrews*, 334 Mo. 254, the court makes the statement that the term

" 'license tax' may include occupation tax and is used indiscriminately to designate impositions exacted for exercise of privileges of all kinds."

A license tax is primarily intended to regulate particular business and not to raise revenue, while an occupation tax is primarily to raise revenue.

In the recent case, which will be hereinafter referred to again, of *Kroger Grocery and Baking Company, et al. v. City of St. Louis* (unreported), it was held that a license or occupation tax may be placed on chain stores based on the amount of sales or business done by said chain stores.

Section 7584, Revised Statutes Missouri 1929, referring to cities having a population of more than 500,000 inhabitants, construes "license" and "license tax" to include licenses for all purposes authorized or required by law or ordinance and also the tax on telegraph and telephone poles, the dog tax, the merchants' ad valorem tax, the vehicle license tax and the special tax on foreign insurance companies.

Section 10077, Revised Statutes Missouri 1929, refers to the taxation of merchants, or, as you have mentioned in your letter as an example, ad valorem tax. The section, in substance, is as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year."

Construing the above statute the Kansas City Court of Appeals, in the case of Monett v. Hall, 128 Mo. App. 91, decided that the State may collect an ad valorem tax on property used in a calling and at the same time impose a tax on the pursuit as a condition to carry it on and the power may be delegated to a municipal corporation, and to the effect that the tax is a personal property tax and not on the occupation.

The very recent case of Kroger Grocery and Baking Company, et al. v. city of St. Louis (unreported by our Supreme Court), analyzes the power of cities of over 300,000 population, under Section 7596, Revised Statutes Missouri 1929, with reference to exacting license taxes under said section, and, included in the decision, are examples of various ordinances in force by cities and the constitutionality thereof, all of which we deem to be of a different nature than the contemplated sales tax act. We have attempted to define the different forms of excise taxes and at the same time bearing in mind that the contemplated sales tax act is also a form of excise tax but that it differs in form, manner and effect from the other excise taxes.

The decision in State ex rel. Missouri Portland Cement Company v. Smith, contains the general rule that the substance of a taxing act rather than the name given to the tax determines its type or kind.

By Section 5 of the proposed act the tax "is upon the sale, service or transaction and shall be

collected by the person making the sale or rendering the service at the time of making or rendering such service, sale or transaction. The other forms of excise taxation herein mentioned in nowise exacts a tax on the sale of a commodity or service.

The nearest approach or conflict of any form of excise tax which the amendment referred to in your letter is that of the license or occupation tax which has been enacted by many cities. While sounding somewhat similar to the contemplated Sales Tax Act, yet, there is a vast difference in the mechanics of the exaction of the tax. The Sales Tax Act places the payment of the tax on the purchaser or consumer; each individual sale is subject to the tax; the merchant is liable to the administrative officer for the collection and remittance of the tax to the State of Missouri; the license or occupation tax is not based on each individual sale, but the amount of business done by the merchant may be used as a measuring stick to determine the amount of tax he should pay as a license or occupation tax for the privilege of doing business; it is not exacted directly from the public and the merchant, in the case of a sales tax act, is not granted the privilege of conducting a business as in a license or occupation tax, but performs services for the State in the collection of the tax. *Wiseman v. Phillips*, 84 S. W. (2d) 91.

#### CONCLUSION

It is, therefore, the opinion of this Department that Section 44-a of the proposed sales tax act only prohibits cities, towns and villages from levying and collecting taxes upon the sale of or charge for any tangible personal property or upon the sale of or charge for any services or other thing taxed by the State under the provisions of the Sales Tax Act, and does not prohibit cities, towns or villages from levying or collecting a license or occupation tax and fixing the amount of said tax on the amount or volume of business

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done, nor from levying and collecting any other excise tax, and neither does said section prohibit cities from levying or collecting an ad valorem tax.

Respectfully submitted,

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APPROVED:

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