CONSTITUTIONAL CHARTER CITIES:
EARNINGS TAX:
MUNICIPAL CORPORATION:
TAXATION:

The City Charter of Kansas City, Missouri, can not be amended by a vote of the people so as to authorize the imposition of a one per cent earnings tax by Kansas City without enabling legislation by the Missouri General Assembly.

OPINION NO. 252

May 2, 1968

FILED
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Honorable R. D. "Pete" Rodgers
State Representative
Jackson County - 9th District
333 So. Elmwood
Kansas City, Missouri 64124

Dear Representative Rodgers:

This is in answer to your request for an opinion of this office as to whether the City Charter of Kansas City, Missouri, can be amended by a vote of the people so as to authorize the imposition of a one percent earnings tax by Kansas City without enabling legislation by the Missouri General Assembly.

First, it should be stated that we are aware of and have studied the recently issued opinion of the City Counselor of Kansas City answering the very question presented here. That opinion suggests the question should be presented to the courts. The opinion states on page 15:

> "The question of what the rationale of the Supreme Court will be on this issue, if squarely presented, is difficult to say, and there are strong arguments upon either side, so the problem is a most difficult one to answer. I believe the court can and is likely to hold the specific charter amendment is within the power of the electorate to grant in order to increase the rate of tax...."

We agree that the courts will have to decide the matter. We do not agree with the conclusion of the Kansas City Counselor's opinion insofar as it holds that the Supreme Court is likely to hold that the tax rate can be increased by a charter amendment without amendment of the statute.

The answer to the question is determined by Sections 92.210 through 92.300, RSMo Supp. 1967, which provide for an earnings tax for Kansas City. However, before discussing those sections a discussion should be made of the basic powers of constitutional charter cities to tax.

Kansas City adopted its charter under the provisions of what is now Section 19, Article VI, Constitution of Missouri, which reads in part as follows:

> "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state, in the following manner...."

Section 1, Article X, Constitution of Missouri, is the basic grant of power for cities to tax and reads as follows:

> "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

Section 10(a), Article X, Constitution of Missouri, reads as follows:

> "Except as provided in this Constitution, the general assembly shall not impose taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes."

A city has no inherent power to tax. The power to tax is in the state and may be delegated by constitutional provision or statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred. In case of doubt the power is denied. Siemens v. Shreeve, 317 Mo. 736, 296 S.W. 415, [1-3] (1927).

In Kansas City, Mo., v. J. I. Case Threshing Mach. Co., 337 Mo. 913, 87 S.W.2d 195, 198 [1-3] (1935), the Supreme Court of Missouri said:

> "....The first question for determination here, therefore, is the fundamental one of the source of the city's taxing power and control of the Legislature over that power. Since it is well settled that a municipal corporation has no powers which are not derived from and subordinate to the state, Kansas City's powers must come from either a constitutional or legislative grant...."

The Supreme Court of Missouri in Siemens v. Shreeve, supra, discussed the effect of a city charter as follows, l.c. S.W. 416, 417 [4-6]:

> "A city framing its own charter under the Missouri Constitution has been declared by the highest judicial authority in the land to be in a very just sense an imperium in imperio, and to the prescribed extent this is true....A charter framed by a city for itself under direct constitutional grant of power so to do has, within the limits therein contemplated, the force and effect of one granted by an act of the Legislature when unrestrained by constitutional provision....Important restraining provisions, however, appear in clauses of section 16, art. 9, of the Constitution of 1875, the very section that permits cities having a population of more than 100,000 inhabitants to frame charters for their 'own government' and under which this charter was framed, limiting the exercise of this power to the formation of such charters only as shall be 'consistent with and subject to the Constitution and laws of the state,' and 'always be in harmony with and subject to the Constitution and laws of the state.' Both the grant and the limitation must be given effect. If the limitation is construed to mean that the charter must be consistent with every provision of the Constitution and every law of the state, then the limitation simply

> nullifies the grant....On the other hand, to treat the charter as 'out of, and beyond, all legislative influence,' would be to nullify the express constitutional limitation....Either construction would be extreme and unthinkable. Even if the imposition of this license tax be a matter purely local and municipal in character, as to which we express no opinion, we take it that any attempted charter grant of such power is subject to the above restraining clauses of the Constitution...."

The Court then quoted Section 1, Article X, supra, and stated, l.c. S.W. 417 [9]:

> "Evidently, therefore, when the limitation was written in section 16 of article 9 that such charters should be 'consistent with and subject to the Constitution and laws of the state' and 'always be in harmony with and subject to the Constitution and laws of the state,' it was intended that they should be consistent with and subject to statutes of general application defining the scope of the policy of the law with reference to the all important and jealously guarded power to tax."

Section 16, Article 9, referred to by the Court is now Section 19, Article VI of the 1945 Constitution.

The Court in Kansas City, Mo., v. J. I. Case Threshing Mach. Co., supra, said, l.c. S.W.2d 200:

> "....It is evident that the authority granted by section 16, art. 9, did not make the people of such cities independent of the Legislature in all matters and delegate to them legislative authority to decide all policies concerning the affairs of government to be carried on in their areas...."

And:

> "....It is an essential element of all

> constitutional provisions establishing the principle of municipal home rule that the constitution and general laws of the state shall continue in force within the municipalities which have framed their own charters, and that the power of the municipality to legislate shall be confined to municipal affairs. On the other hand, after the adoption of a home rule charter by a municipal corporation, the Legislature cannot, even by a general law, affect the powers of the municipality with respect to matters of municipal and local concern...."

The tax in question was an occupational tax and the Court held that such tax was a governmental function and thus subject to control of the legislature. The Court said, l.c. S.W.2d 203:

> "There can be no doubt that the power to tax falls within this class. It is a governmental function inherent in the state. It is argued on behalf of the city that it is not necessary for it to go to a statute for authority for every specific tax which it imposes. In a sense, this is true because as said in the Carpenter Case the general power to impose some kind of taxes is implied from the grant to a city of the right to frame a charter for its government. This follows of necessity because no municipal functions can be carried on without revenue from some source. That implication, however, does not justify the conclusion that the city's power to tax is not subject to the control of the Legislature. Kansas City had wide taxing powers, which had been granted to it by the Legislature, before the Constitution of 1875 was adopted....These powers were not abrogated by the adoption of that Constitution, but were by plain implication recognized as remaining in the city....These special charter provisions were enacted by the Legislature and were 'laws of the State.' Therefore, any new charter continuing such taxing powers would be 'consistent with * * * the laws of the State.' However, the constitutional provision (art. 9, § 16) reads,

> 'consistent with and subject to the Constitution and laws of the State,' and the right of the Legislature to change or revoke these powers by statute of general application has been recognized in a number of cases...."

In Kansas City v. Frogge, 352 Mo. 233, 176 S.W.2d 498 (1943), the Supreme Court of Missouri held that a city sales tax was a governmental function and stated, l.c. S.W.2d 503 [9, 10]:

> "The state by granting to plaintiff city the right to adopt and frame a charter for its own government did not confer upon plaintiff city the right to assume under its charter all of the powers which the state may exercise within the city, but conferred the right to assume those powers incident to it as a municipality. There are governmental powers, the exercise of which is essential to the prosperity and welfare of the people of a city, yet are not essentially appertaining to city government. These powers, unless delegated by the state, are reserved in the state to be exercised by it...."

See also Kroger Grocery & Baking Co. v. City of St. Louis, 341 Mo. 62, 106 S.W.2d 435, 111 A.L.R. 589 (1937).

Thus, a constitutional charter city has sole power to control those things purely corporate. As to governmental functions a constitutional charter city must derive its power from either the Constitution or the legislature and is subject to control of the Constitution or the legislature.

The distinction between corporate and governmental functions was discussed in Coleman v. Kansas City, 353 Mo. 150, 182 S.W.2d 74 (1944). The Supreme Court of Missouri said, l.c. S.W.2d 77:

> "....We discussed the matter fully in those cases and our ruling is to the effect that as to matters pertaining to private, local corporate functions the city holds its power independent of control by the General Assembly, but as to governmental functions the State retains control. On this point

> the city's argument is wholly based on the fact that the license taxes are used exclusively for municipal purposes. That fact is not determinative. The distinction is not between local and general concern, but between corporate and governmental functions. The power of taxation is a governmental function which the constitution authorizes the General Assembly to delegate to the city as to municipal taxes but only in a manner 'consistent with and subject to the Constitution and laws of the State.'"

It is clear from the above that the power to tax is a governmental function. An earnings tax is not a licensing or regulatory measure but is essentially a revenue measure and is a species of income or excise tax. Carter Carburetor Corp. v. City of St. Louis, 356 Mo. 646, 203 S.W.2d 438, 440 [1] (1947); Lawyers' Association of St. Louis v. City of St. Louis, Mo. App., 294 S.W.2d 647, 682 (1956).

In Carter Carburetor Corp. v. City of St. Louis, supra, St. Louis by ordinance had enacted an earnings tax without enabling legislation. The city claimed that statutory authority was unnecessary because the earnings tax is purely a matter of local or municipal concern as distinguished from state concern so that the city had the unfettered power to impose the tax under its charter citing Kansas City v. J. I. Case Threshing Mach. Co., supra. l.c. S.W.2d 439. The taxpayer contended the earnings tax is not purely a matter of local concern and so there must be statutory authority or a specific provision in the charter. The Supreme Court of Missouri discussed Kansas City v. Frogge, supra, and implied that a charter provision alone would be sufficient to impose the tax but held that the specific charter provision in issue was too indefinite to support the tax. l.c. S.W.2d 444 [3]. The Court also stated that the earnings tax is not a matter of purely local concern. l.c. S.W.2d 444 [4].

Therefore, it appears that a constitutional charter city has the power without enabling legislation to specifically provide for an earnings tax. However, for purposes of this opinion it is not necessary to so hold and we do not do so. We are aware of Walters v. City of St. Louis, 364 Mo. 56, 259 S.W.2d 377 (1953), affirmed 347 U. S. 231, 74 S.Ct. 505, 98 L.Ed. 660, where the Supreme Court of Missouri said, l.c. S.W.2d 382:

> "....By the clear implication of that provision, legislative permission to any city or other political subdivision to enact an earnings tax ordinance can only be granted by a general law...."

In that case there was specific legislation purporting to grant power to St. Louis to impose an earnings tax.

The same St. Louis ordinance was under attack in Lawyers' Assn. of St. Louis v. City of St. Louis, supra, where the St. Louis Court of Appeals said, l.c. 683:

> "....The plain and rational meaning of this section of the statute does confer upon defendant City the power to impose the earnings tax on the professional earnings of lawyers...."

In neither of the above two cases did the Courts discuss the question whether St. Louis could by specific charter provision provide for an earnings tax without legislation since there was in fact enabling legislation.

The question here is what effect Sections 92.210 through 92.300, supra, have on Kansas City's power to impose an earnings tax.

Section 92.210 authorizes Kansas City to impose by ordinance an earnings tax. However, Section 92.300 requires an amendment to the charter of Kansas City before such an ordinance can be enacted. Section 92.230 limits the amount of the tax to one-half of one per cent a year.

Thus, Kansas City is given the power to tax by the legislature but it must also be granted by the people of Kansas City through a charter amendment. There is no question that Kansas City can impose an earnings tax by specifically providing for the tax with such a charter amendment. It is our opinion, however, that Kansas City has no authority to provide by charter or ordinance an earnings tax in excess of one-half of one per cent a year unless the legislature removes the restriction of Section 92.230, supra.

From the cases and constitutional sections discussed above, it is clear that the earnings tax is a general revenue provision and is a governmental function. Since it is a governmental function, a constitutional charter city can only provide

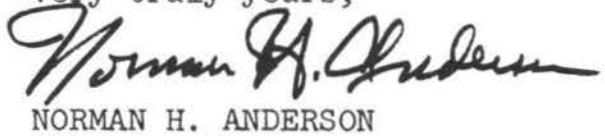
for an earnings tax if there is legislative authority or a specific charter provision. Furthermore, the crucial point is that an earnings tax must be consistent with the laws of the state and is subject to the control of the legislature. Section 19, Article VI, supra; and Kansas City v. Threshing Mach. Co., supra.

CONCLUSION

It is the opinion of this office that the City Charter of Kansas City, Missouri, can not be amended by a vote of the people so as to authorize the imposition of a one per cent earnings tax by Kansas City without enabling legislation by the Missouri General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



NORMAN H. ANDERSON
Attorney General