

SCHOOLS:
JUNIOR COLLEGES:
CONSTITUTIONAL LAW:-
TAXATION (SALES AND USE):

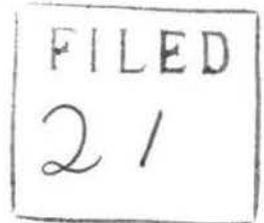
A junior college district in Missouri is an institution of higher education supported by public funds, as that term is used in Section 144.040.2, Senate Bill No. 72, Seventy-sixth General Assembly; and Section

144.040, Senate Bill No. 72, Seventy-sixth General Assembly, which does not exempt institutions of higher education supported by public funds from collecting sales tax on retail sales made by them, is constitutional. Therefore, it is our opinion that every junior college district must collect state sales tax on retail sales it makes after September 28, 1971.

OPINION NO. 21

March 10, 1972

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on whether a public junior college district is required to collect and pay the state sales tax on retail sales it makes after September 28, 1971.

Your request was prompted by a notice sent to all public junior colleges by the Department of Revenue of the State of Missouri on September 9, 1971, stating that institutions of higher education supported by public funds must collect and remit to the Department of Revenue the 3 per cent state sales tax on retail sales. From information you supplied to this office, we understand that most of the retail sales made by junior college districts take place in bookstores and cafeterias located on their campuses.

The Department of Revenue's notice of September 9, 1971, was based on Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly. Senate Bill No. 72 repealed Section 144.040, RSMo 1969, relating to exemptions from the sales tax and enacted a new Section 144.040 in its place. To facilitate comparison, the repealed and new sections are set forth below.

Section 144.040, RSMo 1969 (repealed) stated:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of

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penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly provides:

"1. In addition to the exemptions under section 144.030, there shall also be exempted from the provisions of sections 144.010 to 144.510, all sales made by or to religious and charitable organizations or institutions and all sales made by and to all elementary and secondary schools operated at public expense, in their religious, charitable or educational functions and activities.

"2. There shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made to eleemosynary and penal institutions and industries of the state, and all sales made to any institution of higher education supported by public funds, and all sales made to a state relief agency in the exercise of relief functions and activities."

The repealed section exempted from the sales tax all sales made by or to educational institutions supported by public funds in the conduct of regular educational functions and activities. The new section exempts from the sales tax all sales made by and to elementary and secondary schools operated at public expense, in their educational functions and activities, and exempts all sales made to any institution of higher education supported by public funds. By implication, all sales made by any institution of higher education supported by public funds are no longer exempt from the state sales tax.

Initially, we must decide whether a junior college district is an institution of higher education or a secondary school. If a junior college district is an institution of higher education supported by public funds, it would not be exempt from collecting the state sales tax, assuming Section 144.040 is constitutional.

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As used in the Missouri statutes, the term "secondary school" appears to be synonymous with "high school". "'High school' means a public school giving instruction in two or more grades not lower than the ninth nor higher than the twelfth grade." Section 160.011(6), RSMo 1969. (Emphasis added.) The Elementary and Secondary Education Act of 1965 defines "secondary school" as ". . . a day or residential school which provides secondary education as determined under state law, except that it does not include any education provided beyond grade 12." 20 U.S. C. Section 244 (1970).

In Missouri, a junior college district provides education for students who have completed high school. Among the standards for the organization of junior college districts is "whether there were a sufficient number of graduates of high school. . . ." Section 178.770.1(3), RSMo 1969 (Emphasis added). Junior college districts in Missouri are designed to provide two years of post-high school education (thirteenth and fourteenth year courses). See Sections 178.770.1, 178.780.2 and 178.800, RSMo 1969.

"A junior college district organized under Sections 178.770 to 178.890 shall provide instruction, classes, school or schools for pupils resident within the junior college district who have completed an approved high school course. . . ." Section 178.850, RSMo 1969. (Emphasis added.)

The State Board of Education has defined the public junior college as "a public educational institution offering instruction, beyond a four-year standard high school course, in programs of two years' duration. Primarily, these programs are at the collegiate level. . . ." See "Public Junior Colleges in Missouri", State Board of Education.

Furthermore, the Commission on Higher Education has the responsibility for making various recommendations "to the governing boards of state-supported institutions of higher education, including public junior colleges receiving state support . . ." Section 173.030(3), RSMo 1969. (Emphasis added.)

The Higher Education Act of 1965 defines an "institution of higher education" as "an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, . . . (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable

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for full credit toward such a degree. . . ." 20 U.S.C. Section 403 (1970). (Emphasis added.)

Therefore, we conclude that a junior college district is not a secondary school as that term is used in Section 144.040 and is an institution of higher education as that term is used in subsection 2 of Section 144.040. See, generally, Opinion No. 239, Hearnest, April 26, 1966.

Having determined that junior college districts are institutions of higher education supported by public funds, we must now consider whether Section 144.040 is constitutional as applied to institutions of higher education, including junior college districts. Three primary arguments might be made concerning the constitutionality of this section. The first is that in attempting to tax sales made by institutions of higher education and exempting such sales by secondary schools, the Missouri constitutional provision prohibiting special laws has been violated. Secondly, it could be argued that the legislature is in effect taxing the junior college districts in violation of Article III, Section 39 (10). The third argument would be that the sales tax is in part a tax on the junior college district, a political subdivision of the State, in violation of Article X, Section 6.

In analyzing the constitutionality of a statute, it is important to remember that all legislation enacted by the Missouri General Assembly is presumed to be constitutional and that the burden is on the one seeking to attack the constitutionality to demonstrate its invalidity. State ex rel. Priest v. Gunn, 326 S.W.2d 314, 324 (Mo. en banc, 1959).

When the legislature repealed the blanket exemption of all sales made by or to educational institutions supported by public funds, it created a distinction between elementary and secondary schools operated at public expense and institutions of higher education supported by public funds. As has previously been pointed out, the legislature distinguished between elementary and secondary schools and institutions of higher education by refusing to exempt from the state sales tax retail sales made by institutions of higher education. Does this distinction infringe on the Missouri prohibition against the enactment of special legislation contained in Article III, Section 40(30)?

"Limitations on passage of local and special laws. The general assembly shall not pass any local or special law:

* * *

"(30) where a general law can be made applicable, and whether a general law

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could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." Article III, Section 40, Missouri Constitution, 1945.

Neither the Equal Protection Clause of the United States Constitution nor Article III, Section 40 of the Missouri Constitution prevents the legislature from making reasonable classifications of persons or things in furtherance of the purpose of a particular piece of legislation. In St. Louis Union Trust Co. v. State, 155 S.W.2d 107, 112 (Mo., 1941), the Court set forth the general rules governing legislative classifications:

". . . 'That part of the Fourteenth Amendment to the Federal Constitution reading as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" -- has been construed to prevent the enactment of state statutes which make any unreasonable or arbitrary discrimination between different persons or different classes of persons. [Citations omitted.] Neither the Federal Constitution or section 53, article 4 [prohibiting special and local laws], of the Missouri Constitution prevents the making of reasonable classifications of persons or things for the various purposes of legislation. [Citations omitted.] If there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid. [Citations omitted.] The question of classification being primarily one for the Legislature, it is the duty of the courts to sustain it if there is any reasonable basis for the classification. [Citations omitted.] An act of the Legislature should not be declared unconstitutional unless it appears beyond a reasonable doubt that it is in contravention of the Constitution. [Citations omitted.]'" Id. at 112.

In State v. Smith, 184 S.W.2d 593 (Mo. en banc, 1945), the Court stated as follows:

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". . .The question of classification is a practical one. A law may be directed to that class which is deemed to have the greater need for it. There may be omissions from the application of the law; the entire possible field does not have to be covered. There is bound to be some inequality resulting from any classification but unless it is unreasonable and arbitrary the classification must be approved. . . ." Id. at 596.

We do not believe that a court would find that beyond a reasonable doubt this statute violates Article III, Section 40(30). There would appear to be ample basis for a court to find that the legislature reasonably distinguished between elementary and secondary schools, and institutions of higher education. The legislature could have found that many institutions of higher education have significant retail selling operations such as bookstores which directly and significantly compete with businesses. The legislature might have concluded that this loophole in the coverage of the sales tax should be closed. On the other hand, the legislature could have concluded that most elementary and secondary schools do not have significant retail selling operations directly competing with retail businesses in their communities. Therefore, we believe that under the rules set forth by the Missouri Supreme Court in the St. Louis Union Trust Co. case, the exemptions in Section 144.040 do not violate either Article III, Section 40, Missouri Constitution, or the Equal Protection Clause, Fourteenth Amendment, United States Constitution.

With reference to the second possible argument which could be made against the constitutionality of Senate Bill No. 72, the Missouri Constitution prohibits the general assembly from imposing "a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision." Article III, Section 39(10). We have concluded in another context that a junior college district is a political subdivision of the State of Missouri. See Opinion No. 425, Norris, December 14, 1971, and Section 178.770.2, RSMo 1969.

However, the state sales tax to be collected and remitted on retail sales made in bookstores and cafeterias located on campuses of junior college districts is not a tax on the use (as that term is used in the Compensating Use Tax Law, Section 144.500, et seq.), purchase or acquisition of property, so the prohibition of Section 39(10) is not violated.

This conclusion is not altered by consideration of the 1965 amendments to the Sales Tax Act (Sections 144.020, 144.021, 144.080) which made the sales tax a gross receipts tax and im-

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posed it on the seller for the privilege of engaging in business. The tax is still not assessed on the "use, purchase or acquisition of property" by the political subdivision. At the very most, it is a tax on the privilege of selling at retail which is not prohibited by Section 39(10), Article III.

Similarly, requiring the junior college districts of the State of Missouri to collect this tax does not amount to taxation of the property of a political subdivision of the state in violation of Article X, Section 6. Article X, Section 6 provides:

"Exemptions from taxation. All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

No property of the junior college district is being taxed by requiring the district to collect a sales tax from a consumer. See State ex rel. Missouri Portland Cement Co. v. Smith, 90 S.W.2d 405, 407 (Mo. en banc, 1936), where the Court concluded that the sales tax is not a property tax. Furthermore, the incidence of this tax, regardless of whether it is an excise tax or gross receipts tax, falls on the consumer. See Opinion No. 365, McGhee, October 26, 1967, in which this office concluded that the 1965 amendments to Chapter 144 did not relieve a public water district from collecting sales tax from consumers to whom it sells water and remitting same to the Department of Revenue.

In addition, the theory underlying exemption of state property from taxation -- that such taxation would merely be taking money out of one pocket and putting it into another -- would not apply here as it did in the Missouri Portland Cement case. In the instant situation, the sales tax will be paid by the consumer and will furnish additional revenue to the state.

CONCLUSION

We conclude that a junior college district in Missouri is an institution of higher education supported by public funds, as

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that term is used in Section 144.040.2, Senate Bill No. 72, Seventy-sixth General Assembly; and that Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly, which does not exempt institutions of higher education supported by public funds from collecting sales tax on retail sales made by them, is constitutional. Therefore, it is our opinion that every junior college district must collect state sales tax on retail sales it makes after September 28, 1971.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and "D".

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 239, Hearnest, 4-26-66
Opinion No. 365, McGhee, 10-26-67
Opinion No. 425, Norris, 12-14-71