

TAXATION (SALES & USE):  
CONSTITUTIONAL LAW:  
STATE COLLEGES:  
UNIVERSITIES:

The University of Missouri is subject to the imposition of a sales tax by a municipality on sales made by the University. If the University is delinquent

only on payments owed to the city, the city must bring an appropriate action to collect the tax.

OPINION NO. 45

February 14, 1972

Honorable A. Basey Vanlandingham  
Missouri Senate, District 19  
Room 333 Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Vanlandingham:

In your recent opinion request, you asked whether sales by the University of Missouri are subject to a one-cent sales tax imposed by the City of Columbia pursuant to authority granted by Section 94.500 et seq., RSMo.

Section 94.500 et seq., RSMo, commonly known as the "City Sales Tax Act" permits certain cities in this state to adopt an ordinance imposing a sales tax on transactions deemed to occur within that city. To answer this question, an examination of the relationship between the General Assembly of Missouri, the University of Missouri, and municipalities is required. In addition, attention must be given to the specific language of the city sales tax act and statutes incorporated by reference therein.

The University of Missouri is an entity created by Article IX of the Constitution of Missouri. Section 9(a) vests the government of the State University in a Board of Curators. Section 9(b) of Article IX requires the General Assembly to adequately maintain the State University. Chapter 172 of the Revised Statutes of Missouri delineates a number of powers granted to the University by the General Assembly. Section 172.020, RSMo 1969 states, in relevant part:

"The university is hereby incorporated and created a body politic, and shall be known by the name of 'The Curators of the University of Missouri', . . ."

Honorable A. Basey Vanlandingham

At an early date, the courts of this state were called upon to determine precisely the legal status of the University of Missouri. In 1871, the Supreme Court of Missouri decided the case of Head v. Curators of the University of the State of Missouri, 47 Mo. 220 (1871). In that case, one Bolivar Head sued the university, alleging that an employment contract had been breached. Mr. Head's position had been abolished by the General Assembly. In the Head case, the Court ruled against the plaintiff, stating:

"Whether the university and its affairs are subject to the direction and control of the Legislature, depends upon its character as a corporation, whether public or private. If it is a private corporation, the Legislature has no control over its internal management. On the other hand, if it is a public corporation--a State institution--it is subject to the discretionary control of the lawmaking department of the State government.

"The university is clearly a public institution, and not a private corporation. . . .

". . . By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes-- . . ." (47 Mo. 224, 225).

The decision was appealed to the Supreme Court of the United States, where it was affirmed, 19 Wall. 56, 22 L.Ed. 160 (1874). The Supreme Court of the United States supported the categorization of the university as a state agency by observing that the plaintiff accepted his office subject to the laws then extant and subject to such subsequent laws as should seem wise to the legislature.

The principle established by the Head case, that the university is a state agency and therefore subject, within constitutional limitations, to control by the General Assembly, has been consistently expressed in other decisions concerning the University of Missouri. In the decision of State ex rel. Heimberger v. Board of Curators of the University of Missouri, 188 S.W. 128 (Mo. banc 1916), the University of Missouri contended that a constitutional provision, (now Article IX, Section 9(a)) deprived the General Assembly of all power to legislate with respect to the establishment of new departments or new courses of study in established departments. The Court, after a lengthy discussion, rejected this argument, stating:

Honorable A. Basey Vanlandingham

". . . To say the General Assembly by that language intended to divest itself of the power to legislate respecting the university would be unreasonable. . . ." (188 S.W. 135)

The concept of legislative control of the university was once again recognized in Todd v. Curators of the University of Missouri, 147 S.W.2d 1063 (Mo. 1941). In that case, the Court held the statutory provision (now 172.020) stating that the university may sue and be sued does not authorize a suit against it for negligence. The Court reasoned that the university is a public corporation, performing governmental functions, and thus an agency of the state. As such, the immunity of the institution from suit for negligence would have to be changed by positive legislative enactment.

Other jurisdictions have characterized their universities as "creatures", "agencies", and "arms of the state", and thus subject to absolute control by the legislature, within constitutional limitations. E.g., Board of Regents of the Universities and State College of Arizona v. City of Tempe, 356 P.2d 399 (Ariz. 1960); People ex rel. Board of Trustee of the University of Illinois v. Barrett, 46 N.E.2d 951 (Ill. 1943); Daniel's Administrator v. Hoofnel, 155 S.W.2d 469 (Ky. 1941); Kentucky Institution for Education of Blind v. City of Louisville, 97 S.W. 402 (Ky. 1906); McCready v. Byrd, 73 A.2d 8 (Md. 1950); Egan v. Moore, 235 N.Y.S.2d 995 (Sup. 1962); University of Utah v. Board of Examiners of State of Utah, 295 P.2d 348 (Utah 1956); State ex rel. West Virginia Board of Education v. Sims, 101 S.E.2d 190 (W.Va. 1957).

Numerous decisions have held that a municipal corporation has no inherent authority to impose a tax. The authority for a municipal corporation to impose a tax must be based ultimately on a specific or clearly implied grant of power from the state legislature. E.g., Carter Carburetor Corporation v. City of St. Louis, 203 S.W.2d 438 (Mo. banc 1947); Kansas City v. Frogge, 176 S.W.2d 498 (Mo. 1944). Absent a specific grant of authority, a municipal corporation is powerless to impose any obligation upon a state agency, including the university. Board of Regents of the Universities and State College of Arizona v. City of Tempe, *supra*; State ex rel. Curators of the University of Missouri v. McReynolds, 193 S.W.2d 611 (Mo. banc 1946); James A. Finch, Jr. v. City of Kansas City (unreported decision of the Circuit Court of Jackson County, Missouri 1964, Case No. 659578).

It is also well established that the power to tax is a sovereign function and may be exercised or delegated by the legislature, subject only to constitutional and statutory limitations. E.g.,

Honorable A. Basey Vanlandingham

General Installation Company v. University City, 379 S.W.2d 601 (Mo. banc 1964); State ex rel. Missouri Portland Cement Company v. Smith, 90 S.W.2d 405 (Mo. banc 1936). It has also been held that it is within the power of the legislature to impose certain taxes upon state agencies. State ex rel. Missouri Portland Cement Company v. Smith, supra.

The decision of Kansas City v. School District of Kansas City, 201 S.W.2d 930 (Mo. 1947) discussed the relationship between the state and its agencies. That decision observed:

"[The] City's and School District's powers stem from the same sovereignty. The State (subject to constitutional limitation) can exercise its powers or delegate and apportion them to and between its agencies as it desires. . . ." (201 S.W.2d 932)

Thus, the General Assembly of the State of Missouri can authorize its "agencies" or "creatures" to impose certain obligations upon each other.

Section 94.540, RSMo 1969, is the section of the "City Sales Tax Act" that lists the exemptions from the imposition of this tax. That provision states, in relevant part:

"1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.500 to 94.570:

"(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax shall apply to the collection of the tax imposed by sections 94.500 to 94.570, except as modified in sections 94.500 to 94.570;

"(2) All exemptions granted to agencies of government, organizations, persons and to the sale of certain articles and items of tangible personal property and taxable services under the provisions of sections 144.010 to 144.510, RSMo, are hereby made applicable to the imposition and collection of the tax imposed by sections 94.500 to 94.570."

The above quoted statutory provision is a reference statute, incorporating the exemptions as stated in the sales tax act (Chapter 144). Such incorporation by reference is a permissible legislative device in Missouri. General Installation Company v. University City, supra.

Honorable A. Basey Vanlandingham

When the City Sales Tax Act was enacted, Section 144.040, one of the sales tax exemption provisions, exempted ". . . all sales made by or to, . . . educational institutions supported by public funds . . ." In 1971, Senate Bill No. 72 changed Section 144.040 to read as follows:

"(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." (RSMo Supp. 1971)

Thus, as far as the state sales tax is concerned, the change in Section 144.040 changes the exemption of state universities by exempting them from the sales tax act only on sales made to such institutions.

In light of the foregoing, the critical inquiry is whether the change in the exemption wrought by Senate Bill No. 72 removes the exemption from the City Sales Tax Act on sales made by an educational institution supported by public funds. The general rule governing the effect of a change in a statute incorporated by reference in another statute is that where an adopting statute incorporates another statute by a specific reference to the statute adopted, the incorporation does not include subsequent modifications or repeals of the adopted statute but where the reference is to the general law, the reference will be regarded as including not only the law on that subject in force at the date of the adopting act, but also the law as it exists subsequently. This rule of construction has been said to apply only in the absence of any indication of the adopting statute of a contrary legislative intent. Professional and Business Men's Life Insurance Company v. Banker's Life Company, 163 F.Supp. 274 (D. Mont. 1958); Note, Legislation By Reference, 1950 Wis. L.Rev. 726; Annotation, 168 A.L.R. 627 (1947).

The Missouri rule on incorporation by reference was stated in the decision of State v. Rogers, 161 S.W. 770 (Mo. 1913). The Missouri rule is:

Honorable A. Basey Vanlandingham

"When a reference statute specifically designates the section or article of the statute of which it is made a part, such reference statute will not be changed or modified by any subsequent change in the statute to which it refers. . . . where the reference statute pertains only to a method of procedure and refers generally to some statute which defines how certain things may be done, such reference statute will be expanded, modified, or changed every time the statute referred to is changed by the Legislature." (161 S.W. 772)

In the Rogers case, the statutory provision referred to was one dealing with appeals. The statutory reference was found to be a general one in that case. In the decision of Gaston v. Lamkin, 21 S.W. 1100 (Mo. 1893), the specific versus general language distinction was drawn. The decision of Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455 (Mo. 1940) also expressed the view that when a reference is made to a general statute, subsequent amendments are to be given full force. The statute in that case dealt with limitations of actions and was held to be a general one.

Other jurisdictions have wrestled with the problem of what constitutes a specific or general statute, for the purposes of reference by incorporation. In addition to the sources cited supra, the following decisions have followed the principles expressed by the Missouri courts: Carruba v. Meeks, 150 So.2d 195 (Ala. 1963); Byrd v. Short, 307 S.W.2d 871 (Ark. 1957); State of Iowa v. District Court in and for Delaware County, 114 N.W.2d 317 (Ia. 1962); Western Casualty & Surety Co. v. Young, 339 S.W.2d 277 (Tex.Civ.App. 1960); Union Cemetery v. City of Milwaukee, 108 N.W.2d 180 (Wis. 1961). The Union Cemetery case, supra, distinguished between a specific and general reference by observing that a specific reference referred specifically to a particular statute by its title or section number and incorporates only a part of the law on a subject. A general reference statute refers generally to the law on a subject and incorporates the entire subject matter.

In applying the above-stated rules of construction, it is the opinion of this office that the rules governing incorporation by general reference apply in this instance. The provision of the City Sales Tax Act incorporating the exemptions of the sales tax act does so in broad terms. Its reference to statutory sections includes the entire range of the applicable provisions of the state sales tax act--Sections 144.010 to 144.510. There is no reference to a particular provision of the sales tax act. The language used in Section 94.540, paragraph 1, subsections (1) and (2) also clearly indicate that the provisions incorporated are ones generally dealing with sales tax and exemptions thereto. Paragraph 1 of Section 94.540 states as follows:

Honorable A. Basey Vanlandingham

"1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.500 to 94.570:

"(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax shall apply to the collection of the tax imposed by sections 94.500 to 94.570, except as modified in sections 94.500 to 94.570;

"(2) All exemptions granted to agencies of government, organizations, persons and to the sale of certain articles and items of tangible personal property and taxable services under the provisions of sections 144.010 to 144.510, RSMo, are hereby made applicable to the imposition and collection of the tax imposed by sections 94.500 to 94.570."

An examination of subparagraph 1 reveals that the law incorporated by that provision is the general law contained in the sales tax chapter pertaining to the collection of tax. Subparagraph 2 also refers to the general law concerning exemptions. The use of the numerical references in these subsections (144.010 to 144.510) is the same as stating the sales tax act. As such, the language does not contain the specificity required to compel a holding that a specific provision of law was incorporated. In addition, it is apparent that the legislative intent was not to establish a standard for the city sales tax exemption that differed from those of the state sales tax. Section 94.530, RSMo 1969 requires the state director of revenue to bear the administrative burdens of collecting this tax. In light of this, the intent of the legislature is clear that the standards applicable to the state sales tax should be in conformity with those of the city sales tax.

Your opinion request also asks the following question:

"B. If the University is subject to the State statute and city ordinance, which of the following is obligated and/or entitled to enforce the law as per Section 94.570?

- (1) The City of Columbia
- (2) The State Director of Revenue
- (3) The State of Missouri Attorney General"

Section 94.570, RSMo 1969 provides the answer to this question. Where a person is delinquent in the payment of sales taxes to both the state and city, the Director of Revenue is required to notify

Honorable A. Basey Vanlandingham

the tax collector of the city affected and turn the case over to the Attorney General for collection. When the Attorney General brings an action for the collection of the delinquent tax, the city may join in such suit as a party plaintiff.

The statute further provides that, in the event a person pays the state sales tax but is delinquent in the payment of the city sales tax, ". . . the director of revenue shall promptly notify the tax collector of the city to which the tax would be due so that appropriate action may be taken by the city." Section 94.570, RSMo 1969. Thus, if sales taxes allegedly are owed only the city, the city must maintain an action for their collection.

#### CONCLUSION

It is the opinion of this office that the University of Missouri is subject to the imposition of a sales tax by a municipality on sales made by the University. If the University is delinquent only on payments owed to the city, the city must bring an appropriate action to collect the tax.

The foregoing opinion which I hereby approve was prepared by my assistant, Peter H. Rager.

Very truly yours,



JOHN C. DANFORTH  
Attorney General