

MINUTES OF THE SENATE COMMITTEE ON ASSESSMENT AND TAXATIONThe meeting was called to order by CHAIRMAN PAUL "BUD" BURKE at  
Chairperson11:00 a.m./~~p.m.~~ on MARCH 28, 1983 in room 526-S of the Capitol.All members were present ~~except~~:Committee staff present: Wayne Morris, Research Department  
Tom Severn, Research Department  
Don Hayward, Revisor's Office

Conferees appearing before the committee:

Robert West, Nat'l Elec. Contractors Ass'n., Kansas Chapter  
Dan Morgan, Associated General Contractors  
Al Alderson, Dept. of Revenue  
Bill Edds, Dept. of Revenue

The committee continued the hearing on HB 2154 which pertains to the tax situs of retailers. Robert West, Electrical Contractors Association, appeared in opposition to the current form of HB 2154. He said they support the position that the tax on their services should be based on the site of the work, not upon the site of the contractor's office. He stated that out-of-state contractors and retailers are taxed at the job site and doesn't understand why in-state contractors are not taxed on the same basis. Referring to the Supreme Court decision, which held that the tax on services should be at the site where those services are delivered, he read a letter from Tom Puckett, counsel for Capital Electric Line Builders. (Attachment #1). He said they have an alternative proposal which might correct this situation for both the retail industry and the construction industry. That proposal defines construction services and would apply the tax on construction services at the site where those services are delivered. He said if this proposal can be incorporated into HB 2154, their industry could support the bill. (Proposal attached to distributed material).

Dan Morgan, Associated General Contractors, spoke in opposition to the bill in its current form but said he would support an amendment. He also said the Supreme Court decision held that it does mean tax on services are where the services are rendered. He thinks the decision had more far reaching results than expected and this proposed legislation fails to address their particular problem. This causes two different classes of taxpayers and is unfair. He would support an amendment that would interpret place of business for contractors as the "place of business where the service is actually performed."

Bill Edds said that under the law as exists now those regulations provide the non-resident's place of business was the situs. Wayne Morris said that under the former regulation there were three classes, but the bill has two classes now, and that an out-of-state contractor would be treated the same as an in-state contractor from a jurisdiction without a local sales tax.

Glenn Coulter, Manager, Kansas Contractors' Association, said his testimony would be the same as Dan Morgan's, and he feels that for the fairness of the industry and all contractors, that if an amendment could be placed in this to allow the situs to be where the work is performed, it would be fair to everyone.

Bill Edds expressed reservations about what effect the amendment would have. He said the amendment would appear to not take into consideration minor repair services and the problem is trying to draw the line between repair services or remodeling projects. It is their fear that this would put them back in the same situation and while they are sympathetic to the problem, doubt if this amendment will do it.

Senator Angell asked if the basic problem is deciding when it is a service and when it is construction.

Bob West said the amendment is trying to define a construction project, has nothing to do with repair, and it is difficult to make that distinction. He tried to set a \$25,000 limit, with a lot of consideration as to whether this is a better approach, and this is the best attempt they have come up with.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ASSESSMENT AND TAXATION,  
room 526-S, Statehouse, at 11:00 a.m. ~~xxxx~~ on MARCH 28, 1983.

The chairman would like to address the problem of placing contractors in a competitive position. Perhaps you could get with the Dept. and come up with some language that would arrive at what he perceives is the consensus of the committee. We can leave the bill the way it is and go back to court or we can amend the bill in the general conceptual area here and go back to court, but address the problem.

Senator Angell suggested there is a third option, to do away with the local sales tax.

Ron Gaches said clarification is needed if the bill deals only with the sales tax on services and would not impact at all on the local sales tax, for example, on replacement parts and this is one of the problems for the retailers across the state. Staff said the bill deals only with labor charges for the sales tax. Senator Angell suggested doing away with the local sales tax and enacting a 1¢ sales tax for local government; however, there was the problem with this in that there are some cities that have a combined local rate over 1¢.

The chairman said this is a substantial question and he would not like to utilize this vehicle for that purpose. Senator Angell suggested amending the bill by putting a moratorium on the bill on any further enactment of local sales taxes above 1¢. Senator Kerr said if this goes past this year there will be far more cities and counties going above 1¢ and the problem will get worse.

The chairman said this is a major policy decision, there may be people who might not like it, and there would be no chance for hearings. There was some discussion of requesting Ways and Means Committee to have a bill to establish a moratorium and then refer back to Assessment and Taxation Committee.

Al Alderson said they have spent hours with the contractors and there is no amendment they can draw that will be acceptable to the Department and still meet either administrative or equal protection objections. Bob West said he thinks this amendment would work and they had discussed it with their attorney. He said he believes the entire intent of HB 2154 is wrong, and both they and the retailers are having problems.

The committee considered HB 2166 which authorizes a mill levy increase for the regional library system.

Senator Chaney moved and Senator Mulich seconded a motion to report HB 2166 favorable for passage. The motion passed.

The chairman adjourned the meeting at 12 noon. The next meeting of the committee will be on adjournment of the Senate.

*Ham*

ASSESSMENT AND TAXATION

OBSERVERS  
(PLEASE PRINT)

DATE	NAME	ADDRESS	REPRESENTING
MARCH 28	Lori Shufelberger	307 Nelson	Visitor
	Diane & Meyer	RR#1 Union	Visitor
	Beth Wilkin	Topeka	<i>Girl Scout</i> THE ELECTRIC CO'S ASSOC OF KS.
	D. WAYNE ZIMMERMAN	TOPEKA	
	JANET STUBBS	"	KBAK
	Dan Ramlow	Topeka	KS Contractors Assn.
	Open Counter	Topeka	KS Contractors Assn.
	Ron Daches	TOPEKA	KACI
	Parr Hubbell	TOPEKA	KANSAS RAILROAD ASSN
	Bob West	Topeka	Ad / Elec. Contr. Assn.
	DAN MORGAN	Topeka	AEC of KS
	JANICE MARCUM	Topeka	PVD
	Philip Martin	"	"
	Michael Byington	Topeka	KABVI Inc and TILRC Inc.
	Bill Eads	"	REVENUE
	M. Berheard	"	"
	A. Alderson	"	"

TESTIMONY  
BEFORE THE  
SENATE ASSESSMENT & TAXATION COMMITTEE  
ON  
H.B. 2154: TAX SITUS FOR THE SALES OF SERVICES  
MARCH 28, 1983  
ROBERT A. WEST  
KANSAS CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSN.

Mr. Chairman and Members of the Committee:

My testimony here today is on behalf of the members of the Kansas Chapters of the National Electrical Contractors Association, in opposition of the current format of H.B. 2154, which addresses the tax situs of retailers.

The bill provides that retailers, which includes electrical and other construction contractors, shall be taxed for their labor services according to the site of their office. This means that if their office lies within a local taxing jurisdiction, they will add that local tax to the tax on their services whether those services are performed within that local taxing jurisdiction or outside of that local taxing jurisdiction.

We can understand that the retailer who provides services of a small dollar amount per service call, quite possibly has an administrative headache to keep track of when he provides services in or outside of local taxing jurisdictions.

*Attch. 1*

Construction contractors, however, have a viewpoint quite contrary to this position. Many of our contractors are in the same position as retailers. We have electrical contractors who might employ five electricians, each of whom goes on five service calls in different localities during the course of a day. But for our industry, we support the position that the tax on our services should be based upon the site of the work, not upon the site of the contractor's office.

We feel we have many points to justify this position.

First of all, we feel that this position is the right position in regard to the imposition of local taxes.

Secondly, we are on the receiving end of the wrath of customers such as Mrs. Dodge, who appeared before you on Friday. Those customers sometimes take their wrath out by refusing to pay a local tax, which many times is much higher than the \$4.40 Mrs. Dodge quoted.

Another refusal from the customer brings us to our next reason for supporting the position of being taxed at the site of the work. That refusal is the customer's refusal to give work to a contractor because of the local tax on a bid. This point is most simply illustrated by the fact that contractors in a local taxing jurisdiction carry a bid of as high of 1 1/2 - 2% higher than competitors in a non-local taxing jurisdiction. On jobs such as the retrofit going on at Goodyear presently, the electrical contract alone may approach \$1 million, which would mean a \$10,000 - \$20,000 bid disadvantage to a locally taxed contractor.

You should also remember that out of state contractors and retailers are taxed at the jobsite. Why, then, are in-state contractors not taxed on the same basis?

Finally, the Kansas Supreme Court, in a decision rendered late last year, agreed with our interpretation, and placed the tax on services at the site where those services are delivered - the jobsite. H.B. 2154 would reverse the action taken with that decision.

At this point, I would like to read a letter from Tom Puckett, the counsel from Capital Electric Line Builders, the firm which successfully challenged the application of the tax situs. That letter is addressed to Chairman Burke and is enclosed with my handout material. It reads as follows: (See attached correspondence.)

We do feel that we have an alternative proposal which might correct this situation for both the retail industry and the construction industry. That proposal defines construction services and would apply the tax on construction services at the site where those services are delivered. Retailers could base their tax upon the site of their office, as per H.B. 2154.

This proposal is also enclosed with my distributed material and reads as follows: (See enclosed)

If this proposal can be incorporated into H.B. 2154, our industry could support the bill. If not, we will have to stand in opposition to the bill as currently written.

HARDESTY & PUCKETT

CHARTERED  
ATTORNEYS AT LAW  
2201 WEST 29TH STREET  
TOPEKA, KANSAS 66611  
TELEPHONE 266-4595  
AREA CODE 913

MURRAY F. HARDESTY  
THOMAS F. PUCKETT  
DAVID PRAGER, III

March 24, 1983

OUR FILE NUMBER

1197.01

Senator Paul Burke  
Room 143 North  
State Capitol Building  
Topeka, Kansas 66612

In re: House Bill 2154 - Tax Situs of Sales of  
Services for Local Sales Tax

Dear Bud:

Enclosed please find the Kansas Supreme Court Decision of Capital Electric Line Builders, Inc., et al. v. Michael Lennen, Secretary of Revenue. This was the decision that gave rise to the introduction of House Bill 2154.

Also enclosed please find a copy of the brief that I drafted at the District Court level in the District Court of Shawnee County, Kansas, Second Division. I have referenced the portion of the brief that deals with the constitutionality of the statute.

I would emphasize that when we appealed the case from the District Court to the Supreme Court the appeal did not raise as an issue the constitutionality of the enabling statute.

The reason that we did not do this was that we felt that we could still have a local sales tax so long as the situs of the tax with regard to services was the location in which the services were performed.

At no time have any of the contractors attempted to change the fact that there should be a local sales tax on services. Quite the contrary, their only intention was to equalize the tax burden so that one contractor residing in one location would have the identical tax obligation of another contractor residing in a non-tax jurisdiction when bidding on a job that was in a third location outside of their principal places of business.



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CURRENT STATUS.

The current status of the local sales tax situs is, subsequent to the Capital Electric case, that the situs for purposes of local sales tax is the place in which the service is performed.

EFFECT OF HOUSE BILL 2154

The effect of House Bill 2154 would be to totally circumvent the Capital Electric case and make it so that the statute itself indicates that the situs is the place where the principal office is located rather than the place where the services are actually performed.

CONSTITUTIONALITY OF HOUSE BILL 2154

Having lived with this issue for approximately three years, and having gone through the entire appellate process, all the way from the hearings before the Director of Taxation through the Kansas Supreme Court, I have no doubt but that a challenge of the statute, as amended by House Bill 2154 would be successful. In short, I believe that the Kansas Supreme Court would uphold its earlier decision and declare that the statute itself is unconstitutional. In the earlier instance, the Supreme Court had the ability to declare the enforcement regulation as unconstitutional and interpret the statute in a manner in which allowed it to be constitutional.

I would draw your attention to the enclosed Syllabus of the Kansas Supreme Court, page 8.

In this unanimous Supreme Court Decision, the Justices clearly note that there are serious constitutional questions about the statute itself. Should the Legislature enact House Bill 2154, the Supreme Court, in its Decision, has already laid down the ground work for declaring the entire statute unconstitutional.

Should the entire statute be declared to be unconstitutional, the result would be that the citizens of the State of Kansas would of course be without a taxing statute for local sales tax.

RECOMMENDATION

It is my recommendation that the House Bill 2154 not be enacted as it currently exists. Rather than my attempting to make additional suggestions as to how it should be enacted, I will simply indicate that the State of Kansas would be better off with



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a taxing statute and an interpretation of the same that creates some additional paper work as opposed to being in a position where there is in fact not a constitutionally valid taxing statute.

I would emphasize at this point that there was unfortunately a great deal of expense to the State of Kansas for the transition from the change of the situs being interpreted as the main place of business to the place where the services are performed. If the Legislature amends the enabling statute, the Department of Revenue again will be forced to undergo the expense in changing back to the method they were previously using. Should there then be a successful constitutional challenge to the statute, the Department of Revenue would not only have the expense of amending back a third time the procedures that each of the taxpayers are to follow, but would be forced into what inevitably would be a potential refund and certainly a maximum expense to the Department in administrative costs.

I hope all of this is of some assistance to your committee, and am extremely sorry that my schedule will not allow me to testify at the same.

Sincerely yours,



Thomas F. Puckett

TFP:skf  
Enclosures as stated  
cc: Senate Assessment & Taxation Committee

Pursuant to K.S.A 1981 Supp. 79-3603 the sales tax is imposed on the "privilege of . . . rendering or furnishing any of the services taxable under this act." Thus it would seem consistent with legislative intent that "place of business" is the place where services are actually rendered. Further, K.S.A. 1981 Supp. 12-189 states the local sales tax shall be "collected within the boundaries of such taxing subdivision . . . ." Since sales tax is "collected" by the retailer (K.S.A. 79-3604) it is logical to believe the legislature intended "place of business" to mean the place where the services are rendered. To construe the phrase otherwise is to allow the retailer to collect sales taxes outside the boundaries of the taxing subdivision. Such a construction also allows the creation of the three classes of retailers about which appellants complain, raising a serious constitutional question about the statute. It is this court's duty, however, to construe a statute in such a way as to make it constitutionally valid if there is any reasonable way to do so. State ex rel. Murray v. Palmgren, 231 Kan. 524, 532, 646 P.2d 1091 (1982); Von Ruden v. Miller, 231 Kan. 1, 3, 642 P.2d 91 (1982). Thus, in constitutional terms, a "place of performance" construction is preferred.

Finally, K.S.A. 1981 Supp. 12-191 provides in pertinent part:

"Retail sales involving the use, consumption, or furnishing of gas, water, electricity and heat, for the purposes of this act, shall be considered to have been consummated at the situs of the user or recipient thereof, and retail sales involving the use or furnishing of telephone service, shall be considered to have been consummated at the situs of the subscriber billed therefor."

PROPOSED AMENDMENT

RE: LOCAL SALES TAX SITUS, HB 2154

Add following line 0044:

For the purpose of determining the situs of retail sales involving the replacement, remodeling, restoration or reconstruction of a building or facility not deemed 'original construction' as defined in K.S.A. 79-3603 (p) (1), the place of business of the retailer of such services shall be the situs of the replacement, remodeling, restoration, or reconstruction of the building or facility. For the purpose of this section:

'Building' shall mean only those enclosures within which individuals customarily live or are employed, or which are customarily used to house machinery, equipment or other property, and including the land improvements immediately surrounding such building; and

'Facility' shall mean a mill, plant, refinery, oil or gas well, water well, feed lot, or any conveyance, transmission or distribution line, including the land improvements immediately surrounding such facility.