



Office of the Attorney General

State of Texas

July 16, 1996

DAN MORALES

ATTORNEY GENERAL

The Honorable Fred Hill
Chair
Committee on Urban Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 96-073

Re: Whether a municipality which withdraws from a transit authority created under the terms of article 1118y, V.T.C.S., may subsequently levy a sales tax under chapter 321, Tax Code, or under sections 4A or 4B of article 5190.6, V.T.C.S. (RQ-817)

Dear Representative Hill:

You have asked this office whether a city, having withdrawn from a transit authority created under former article 1118y, V.T.C.S.—now chapter 452 of the Transportation Code—may levy a sales tax of the sort created by sections 4A or 4B of article 5190.6, V.T.C.S. or chapter 321 of the Tax Code. Act of May 1, 1995, 74th Leg., R.S., ch. 165 § 24(a), 1995 Tex. Sess. Law Serv. 1025, 1870 (repealing V.T.C.S. art. 1118y for codification in chapter 452 of Transportation Code). You are particularly interested in the question of what bearing the fact that such a city is located in two counties has on this matter. We are given to understand that your concern is with the City of Richardson, Texas ("Richardson"), which may be contemplating an election to consider whether to withdraw from the Dallas Area Rapid Transit ("DART"), a transit authority created under former article 1118y.

The procedures for and effect of withdrawal from a regional transit authority are detailed in subchapter Q of chapter 452 of the Transportation Code. Of particular note is section 452.658, which deals with the collection of the sales and use tax for the authority:

(a) Until the amount of revenue from an authority's sales and use tax collected in a withdrawn unit of election after the effective date of withdrawal and paid to the authority equals the total financial obligation of the unit, the sales and use tax continues to be collected in the territory of the election unit.

(b) After the amount described by Subsection (a) has been collected, the comptroller shall discontinue collecting the tax in the territory of the unit of election.

Your question, as we understand it, is whether, should Richardson choose to leave DART, it may impose a sales and use tax pursuant either to V.T.C.S. article 5190.6 section 4A or 4B or chapter 321 of the Tax Code after the sales and use tax for the authority is no longer being collected in it.

We do not believe Richardson may impose a sales and use tax under V.T.C.S. article 5190.6, section 4A. Section 4A(a) lists the cities to which it applies:

This section applies only to a city:

(1) located in a county with a population of 500,000 or fewer according to the most recent federal decennial census; or

(2) with a population of fewer than 50,000 according to the most recent federal decennial census that [satisfies one of three possible conditions.]

You have asked us whether a city located in two counties, one of which has and one of which has not a population of more than 500,000 may "assume to be governed by the law as it affects the county of less than 500,00 population." This office has taken the position, with respect to this provision, that such a city may not so assume. Since the purpose of the population brackets in section 4A was to limit the applicability of the section to cities in the smaller counties, *see* Economic Dev. Comm., Bill Analysis, H.B. 2297, 73d Leg. 28 (1993), and since moreover the legislature uses the phrase "located in two or more counties" when it deems it necessary elsewhere in the statute, *see* V.T.C.S. art. 5190.6, § 4A(a)(2)(A), we conclude that had the legislature intended to permit such an interpretation as you suggest, and thus defeated in part the purpose of the population bracket, it would have used more explicit language to do so.

Richardson is in part located in Dallas County, whose population is 1,852,810. U.S. Dep't of Commerce, Census 90, General Population Characteristics, Texas 2 (1990). Accordingly, it is not located "in a county with a population of 500,000 or fewer." The population of Richardson is 74,840. *Id.* at 12. Accordingly, it does not have "a population of fewer than 50,000." This being the case, article 5190.6, section 4A does not apply to it.

Article 5190.6, section 4B, however, may apply. An "eligible city" for the purposes of section 4B(a)(1) must meet one of four conditions. Richardson fails to meet three of these conditions. It does not have "a population of 400,000 or more," as section 4B(a)(1)(B) requires. While Dallas County has "a population of more than 1,100,000," and thus partly qualifies for the requirement of section 4B(a)(1)(C), it does not contain the requisite "more than 40 incorporated municipalities."¹ V.T.C.S. art. 5190.6 § 4B(a)(1)(C). Nor, as we have noted, and as section 4B(a)(1)(D) requires, does section 4A apply to Richardson. However, it may qualify under section 4B(a)(1)(A) as a city

that is located in a county with a population of 750,000 or more, according to the most recent federal decennial census and in which the combined rate of all sales and use taxes imposed by the city, the

¹According to the Texas Municipal League, the City of Dallas contains, in whole or in part, 31 municipalities.

state, and other political subdivisions of the state having territory in the city does not exceed 7.25 percent on the date of any election held under or made applicable to this section.²

We do not know what the combined rate of sales and use taxes in Richardson would be on the date of such an election, and cannot therefore be certain of the application of this section. However, assuming that the city has not only left DART but has also paid in full its obligations pursuant to section 452.658 of the Transportation Code, the sales and use tax for DART would no longer be included in the calculation, since section 452.658(b) obliges the comptroller at that point to "discontinue collecting the tax in the territory of the unit of election." If in such circumstances the combined rate of such taxes does not exceed the statutory maximum of 7.25 percent, then the city is an eligible city under section 4B(a)(1)(A).

You have also asked about Richardson's ability to establish a sales and use tax under chapter 321 of the Tax Code. Richardson may, in our view, impose the sales and use tax authorized by section 321.101(a). However, section 321.101(b) by its terms debars Richardson from adopting the "additional sales and use tax" which that section authorizes.

Under section 321.101(a), "A municipality may adopt or repeal a sales and use tax authorized by this chapter, other than the additional municipal sales and use tax, at an election in which a majority of the qualified voters of the municipality approve the adoption or repeal of the tax." Section 321.101(a) makes no mention of rapid transit authorities, and therefore does not debar any city from adopting a sales and use tax, whether or not it is or has ever been a part of such an authority. Such an adoption would, however, be subject to the provision of section 321.101(f) that the combined rate of all sales and use taxes levied in the municipality may not exceed two percent.

Under section 321.101(b) of the Tax Code, a city is disqualified from adopting the additional sales and use tax if it

is wholly or partly located in a county that contains territory within the boundaries of a regional transportation authority created under Chapter 683, Acts of the 66th Legislature, Regular Session, 1979

²It might be argued that the logical consequence of holding that Richardson cannot avail itself of section 4A because it is partly in a county of more than 500,000 people, is that it also cannot avail itself of section 4B because it is partly in a county of less than 750,000 people. That would mean that any city which was partly, but not wholly, within one of the largest counties would be precluded from adopting any sales and use tax under article 5190.6. We can see no principled reason why the legislature might be supposed to single out such cities, and only such cities, for such discriminatory treatment. Accordingly, without some evidence of such a legislative intent, we decline to read the statutes to reach what appears to us an anomalous result.

(article 1118y, Vernon's Texas Civil Statutes), by a principal city having a population in excess of 800,000, unless:

(A) the city is a contiguous city; or

(B) the municipality is not included within the boundaries of the authority and is located wholly or partly in a county in which fewer than 250 persons are residents of both the county and the authority according to the most recent federal census; or

(C) the municipality is not and on January 1, 1993, was not included within the boundaries of the authority. . . .

Richardson is located in Dallas and Collin Counties, both of which contain territory within the boundaries of DART. DART was created by former article 1118y, V.T.C.S. Its principal city, Dallas, has a population in excess of 800,000.

Richardson is not, within the terms of the act, a contiguous city. Section 321.101(c) notes that "contiguous city" has "the meaning assigned by [former article 1118y]." Article 1118y has been repealed and recodified as part of the Transportation Code, section 452.001(3) of which defines "contiguous municipality" as

a municipality that has a boundary contiguous with a principal municipality and having:

(A) a population of more than 250,000. . . ; or

(B) boundaries extending into two or more adjacent counties, two of which counties include a principal municipality.

Richardson does not have a population of more than 250,000. While its boundaries do extend into two counties--Dallas and Collin--both do not "include a principal municipality," which is to say a municipality "having a population of at least 300,000." Transp. Code § 452.001(8).³

So far as we can determine, Richardson is also not within the exception described in Tax Code section 321.101(b)(3)(B). In Letter Opinion No. 90-65, this office took the view that, for the purposes of section 321.101, a city which had not joined a rapid transit authority was not 'included within the boundaries' of such an authority even though it was physically situated within the geographical limits of the authority. The letter opinion concluded that a city is "within the boundaries" if it "actually participates in and is therefore located within the actual boundaries of the authority." Letter Opinion No. 90-65 (1990) at 2. It follows that once a city such as Richardson has withdrawn from a rapid

³It might be argued that Dallas, which extends into Collin County, is a "principal municipality" included in both counties. In our view, however, such an argument is hypertechnical, and is belied by section 452.001(4), which defines the county of a principal municipality as "the county having a majority of the territory of a principal municipality." *Id.*

transit authority, it is not included within the boundaries, as certainly as if--as in the case of Letter Opinion No. 90-65--it had never joined.

However, while Richardson would in that case not be within DART's boundaries, that would not mean it was located in a county "in which fewer than 250 persons are residents of both the county and the authority," as section 321.101(b)(3)(B) requires. Certainly Dallas is not such a county. Nor, in all probability, is Collin County, since part of the City of Dallas extends into it. We cannot determine in the opinion process the factual question of whether there are more than 250 Dallas residents in that part of the city which extends into Collin County. But unless there are fewer than 250 such residents--which appears highly unlikely--section 321.101(b)(3)(B) does not apply to the City of Richardson.

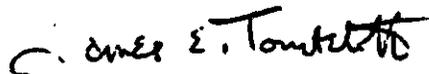
Nor does section 321.101(b)(3)(C), since while, as we have pointed out, the city would not after the withdrawal election be "included within the boundaries," the city was included within the DART boundaries on January 1, 1993.

Accordingly, should the City of Richardson decide by election to withdraw from DART, it would be able--presuming it met the qualifications of V.T.C.S. article 5190.6, section 4B(a)(1)(A) or Tax Code section 321.101(f) for the ceiling on its sales and use taxes--to adopt sales and use taxes pursuant to V.T.C.S. article 5190.6, section 4B or Tax Code section 321.101(a). However, the city is not eligible to adopt a sales and use tax under article 5190.6, section 4A, or the "additional sales and use tax" created by Tax Code section 321.101(b).

S U M M A R Y

Should the City of Richardson decide by election to withdraw from the Dallas Area Rapid Transit (DART), it would be able--presuming it met the qualifications of article V.T.C.S. 5190.6, section 4B(a)(1)(A) or Tax Code section 321.101(f) for the ceiling on its sales and use taxes--to adopt sales and use taxes pursuant to article 5190.6, section 4B or Tax Code section 321.101(a). However, the city is not eligible to adopt a sales and use tax under V.T.C.S. article 5190.6, section 4A, or the "additional sales and use tax" created by Tax Code section 321.101(b).

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee