



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

March 30, 1977

Honorable John Wilson
Texas House of Representatives
Committee on Health and Welfare
Austin, Texas 78769

Letter Advisory No. 131

Re: Exemption of Gas and
Electric Service from the
Sales and Use Tax.

Dear Chairman Wilson:

You have requested our opinion regarding the constitutionality of a portion of House Bill 1, presently pending in the 65th Legislature. Section 1 of article II of House Bill 1 proposes to amend Article 20.04(R), Title 122a, Taxation-General, V.T.C.S., to exempt from imposition of the state sales tax

the sale, production, distribution, lease or rental of and the storage, use or other consumption in this State of gas and electricity

for residential use. "Residential use" is defined to include use in a "family dwelling" or

in a nursing or convalescent home licensed by the State of Texas or a multifamily apartment or housing complex or building or portion thereof occupied as a home or residence.

"Commercial use" includes use by most other "persons engaged in selling, warehousing or distributing a commodity or service," with certain specified exceptions. You ask whether the command of article 8, section 1 of the Texas Constitution, that "[t]axation shall be equal and uniform," would prohibit an exemption for residential use, and would further prohibit the classification as "residential use" of the use of gas or electricity by a licensed nursing or convalescent home or by multifamily apartment or housing complex.

It is well established that

in determining classifications for purposes of taxation, [the Legislature] has broad powers, and . . . the courts will interfere only when there is a clear showing that there is no reasonable basis for an attempted classification. . . . In passing upon the constitutionality of a classification, the test applied by the courts is whether the classification made by the Legislature is essentially arbitrary, unreasonable, and not based upon reality.

American Transfer & Storage Co. v. Bullock, 525 S.W.2d 918, 924 (Tex. Civ. App. -- Austin 1975, writ ref'd). As long ago as 1907, the Supreme Court upheld a statute which imposed a higher gross receipts tax upon wholesale dealers in petroleum products than upon wholesale dealers in other commodities. The Court declared that, in determining a basis for classification, the Legislature might consider

[d]ifferences in the profits derived, in the extent of consumption of the articles, and therefore in the facility with which the burdens may in the course of business be distributed among consumers generally. . . .

Texas Co. v. Stephens, 103 S.W. 481, 485 (Tex. 1907).

In Hurt v. Cooper, 110 S.W.2d 896 (Tex. 1937), the Supreme Court approved a tax imposed on chain stores, essentially a tax upon a method of merchandising. The courts might interfere with such legislative classifications only

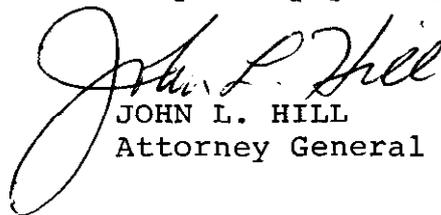
when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the business classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature.

Hurt v. Cooper, supra at 900. Likewise, the Supreme Court has upheld the validity of a statute which classified various

types of amusements and imposed a different admissions tax in each category. Dancetown, U.S.A., Inc. v. State, 439 S.W.2d 333, 336 (Tex. 1969). See also, Calvert v. American International Television, Inc., 491 S.W.2d 455, 458-59 (Tex. Civ. App. -- Austin 1973, no writ).

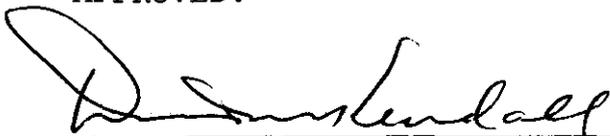
Under standards elucidated by the Supreme Court in these prior opinions, we believe that this exemption of residential users from the sales tax imposed upon the consumption of gas and electricity probably would not conflict with the article 8, section 1 requirement of "equal and uniform" taxation. The Legislature could find that both the purpose and the extent of residential consumption differs sufficiently from that of commercial consumption that the two types of consumption should be treated differently for purposes of the sales tax. Furthermore, we believe that the Legislature might reasonably conclude that nursing and convalescent homes and multi-family dwellings should be classified as "residential" rather than "commercial" users for purposes of gas and electricity consumption, so that the sales tax will not be passed along to the ultimate consumers of these enterprises, and thus discriminate against certain residential users. In any event, we cannot say as a matter of law that either exemption is "arbitrary, unreasonable and not based upon reality," or that there is "no real difference to justify the separate treatment." It is therefore our opinion that these decisions are properly within the province of the Legislature and that those portions of House Bill 1 which would exempt from the state sales tax the "residential use" of gas and electricity and which would define "residential use" to include nursing and convalescent homes and multi-family apartments and housing complexes, are not in conflict with the requirement of article 8, section 1 of the Texas Constitution, that "taxation shall be equal and uniform."

Very truly yours,



JOHN L. HILL
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant

A handwritten signature in cursive script, appearing to read "C. Robert Heath".

C. ROBERT HEATH, Chairman
Opinion Committee

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