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Validity of statute or municipal ordinance which provides generally that occupations or businesses for which no specific license tax has been imposed, shall be subject to a license tax of a specified amount or rate

[Cumulative Supplement]
The reported case for this annotation is Williams v. City of Richmond, 177 Va. 477, 14 S.E.2d 287, 134 A.L.R. 833 (1941).

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For the purposes of this annotation it may be assumed that the legislative body enacting the statute or ordinance had the power to impose license taxes for the purpose of raising revenue. See generally, as to the nature, extent, and limitations upon such power, 33 Am Jur 330, Licenses, § 7, and 19 RCL 943, Municipal Corporations, §§ 242 et seq, particularly § 253.

The distinction between licensing of businesses and occupations under the police power, as an incident to the regulation thereof, and imposition of a license tax purely as a revenue measure, should be kept in mind. Inasmuch as certain businesses and callings are not properly subject to regulation or licensing under the police power, for the reason that they are, as said in 33 Am Jur 339, Licenses, § 17, "useful or harmless trades or callings, not inimical or injurious to the public health, morals, safety, or welfare," it seems apparent, upon general principles of law, that a licensing statute or ordinance providing generally that occupations or businesses for which no specific license tax had been imposed should be subject to a license tax of a specified amount or rate, cannot, ordinarily, be sustained under the police power, for the reason that there will almost invariably be included within the purview of the general "catch-all" provision certain occupations and businesses not properly subject to regulation or licensing under the police power.

Where the license tax is imposed as a revenue measure, somewhat different considerations are involved. In the case of municipal ordinances, a preliminary question arises as to whether power to impose license taxes upon particular businesses has been delegated to the municipality, but, as heretofore stated, that question can be passed over for purposes of this annotation, and it will be assumed that the body enacting the taxing ordinance or statute possessed power to impose license taxes for the purpose of raising revenue.

A major objection to the validity of a licensing ordinance or statute in general terms lumping together all businesses and occupations not specifically subjected to a license tax by other provisions thereof, and imposing upon such general group a license tax of a definite, substantial sum, applicable to all the heterogeneous occupations and businesses included within a general group, appears to be that the tax imposed thereby, being fixed and unvariable in amount, may be prohibitive and confiscatory as to some very small businesses and modest callings coming within the general terms of the "catch-all" provision, in which case that portion of the statute or ordinance is violative of the Fourteenth Amendment to the Federal Constitution, either as depriving persons engaged in such modest callings of their liberty or property, without due process of law, or as denying to such persons the equal protection of the laws, See, as supporting this view generally, Williams v. Richmond (Va) (reported herewith) ante, 833.

It is, however, possible that this constitutional objection may not apply in case the license tax is but a nominal sum. Nor would it seem to apply where the amount of the tax is in ratio to and dependent upon the amount of income or some such variable factor in the businesses or occupations taxed. As involving statutes imposing what amounted to an occupation tax upon a general class not specifically provided for in other sections of the statute, and fixing the tax at a percentage of the gross income, see State ex rel. Botkin v. Welsh (1933) 61 SD 593, 251 NW 189, and Laing v. Fox (1934) 115 W Va 272, 175 SE 354 (appeal dismissed for want of a substantial Federal question in (1934) 293 US 525, 79 L ed 636, 55 S Ct 126), but note that in each instance the person attacking the statute did not advance any objection to the validity of the general "catch-all" provision, so that, although the decisions do uphold the reasonableness and validity of the classifications and exemptions appearing in the respective statutes before the court, they do not actually pass upon the validity of a general "catch-all" provision of the nature considered in this annotation.

As shown in 33 Am Jur p. 355, Licenses, § 31, a classification for licensing purposes must be reasonable and may not be arbitrary or capricious. In this connection, it is to be noted that in Williams v. Richmond (Va) (reported herewith) ante, 833, the court remarked that if the general provision in the statute before it, resulting in the "unceremonious lumping of the newsboy and the steel magnate, the music teacher and the dental laboratory, could be called a classification at all," it was "certainly whimsical, irrational, capricious, and grossly unjust."

In line with what seems to be intimated by the court in the remarks quoted from the Williams Case, it is suggested that the licensing provision in that case, providing generally that "any" businesses or occupations not specifically taxed in other portions of the ordinance should be subject to a license tax of $50 per annum, might with propriety be considered as a failure to classify rather than as a classification.

Such a proviso in a statute or ordinance imposing a license tax may be subject to the objection that it is not sufficiently certain in identifying the subject of the tax. See Williams v. Richmond (Va) (reported herewith), in which the element of uncertainty may have arisen from the use of "any" rather than "all" in the proviso imposing a license tax upon "any" person, etc., engaged in "any" business, etc., for which no specific license tax was levied.

Extensive search has disclosed no decision squarely within the scope of this annotation other than Williams v. Richmond (Va) (reported herewith), wherein a licensing ordinance specifically enumerating a great number of businesses, occupations, and professions thereby made liable for a license tax, and providing further, that "any person, firm, association, partnership or corporation engaged in any business, occupation or profession in the City of Richmond for which no specific license tax is levied in this chapter shall pay a license tax of $50 per annum," was held to be, as to such quoted "dragnet" provision, invalid, as being violative of the due process and equal protection clauses of the Fourteenth Amendment, and violative of the state constitutional provision guaranteeing to all citizens of Virginia "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Violation of the due process clause, the court ruled, arose from the fact that the annual tax of $50 imposed by the provision would be, as applied to very small businesses and some modest occupations, prohibitive in amount, the court saying: "It is clear that strict enforcement of § 166 would be a death blow to certain modest callings." Pointing out that the legislative power has wide discretion in making classifications of trades or business which may be made subject to a license tax, but that a classification that is arbitrary or capricious and rests on no substantial or reasonable basis will not be sustained, the court ruled that the classification attempted to be made in the statute before it, grouping together, at a flat rate of tax, all occupations, professions, and businesses not specially designated in other sections of the ordinance, was "certainly whimsical, irrational, capricious, and grossly unjust," and was violative of the equal protection clause of the Federal Constitution. The court, moreover, indicated that in its opinion the statutory provision in question lacked that degree of certainty which is one of the prime requisites of a taxing statute, it being uncertain as to what was meant by "any person, firm, … engaged in any business, occupation or profession." And too, the court seems to have been of the opinion that the provision was invalid as an improper delegation of legislative power to an administrative officer, it being pointed out that the imposition of the tax on any unnamed business rested solely in the hands of the commissioner of revenue.

It may be said, by way of comment, that while there is possibly some room for debate as to whether this ordinance imposing a license tax upon "any" person, etc., engaged in "any" business, etc., for which no specific license tax was levied, should be considered as delegating legislative power to the official charged with collecting the tax, it is clear enough that the practical effect of such an ordinance or statute would ordinarily be to leave the selection of the subject of the tax to the discretion of such administrative official, thus, for all practical purposes, investing that official with legislative power.

With reference to the matter of improper delegation of legislative power, Armour & Co. v. Richmond (1915) 118 Va 217, 87 SE 609, is of particular interest, although it is not exactly within the scope of this annotation. In that case it was held that an ordinance requiring a license tax for the privilege of prosecuting various kinds of business particularly specified in the act "and such other business as cannot, in the opinion of the committee on finance, be reached by the ad

valorem system," was invalid as to the quoted provision, the court holding that the council could not lawfully delegate its legislative duty to determine what businesses cannot be reached by the ad valorem system, such determination being, under the Constitution, a prerequisite to the levying of a license tax.

As treating a matter of collateral interest, attention is directed to the annotation upon the validity of a statute or ordinance vesting discretion in public officials without prescribing a rule of action, in 12 ALR 1435; 54 ALR 1104; and 92 ALR 400.

Somewhat relevant to the present subject is State ex rel. Botkin v. Welsh (1933) 61 SD 593, 251 NW 189, wherein the court upheld the prima facie reasonableness and validity of the classifications appearing in the act commonly known as the Gross Income Tax Law, which statute, after prescribing the various rates of tax to be paid by those engaged in each of several specified occupations, further provided: "Upon every person, located in, or engaging or continuing in any business, trade, profession or occupation within this state other than those businesses included in the four preceding subdivisions of this section, the amount of the tax levied and imposed by this act shall be equal to the gross income of such person multiplied by a rate of one per cent," which rate was less than that prescribed for some specified occupations and higher than that prescribed for some others. Here the objectors to the validity of such statute seem to have complained chiefly of the variance in rates of tax prescribed for the different classifications, and of the exemptions contained in the act, rather than because of the grouping of those engaged in any businesses other than those specified in preceding sections of the act. Much valuable discussion of the general subject of classification for purposes of occupational taxation will be found in this decision.

CUMULATIVE SUPPLEMENT

Under provisions of Alaska Business License Act, newspapers, along with other businesses, are within the Act purview, and consequently letters from Commissioner to newspaper publisher insisting upon payment of the tax were not a directive from Tax Commissioner not authorized under Act. Laws Alaska 1949, c. 43. Territory of Alaska v. Journal Printing Co, 15 Alaska 676, 135 F. Supp. 169 (Terr. Alaska 1955).

A municipal corporation exercises only delegated powers and has no inherent power to levy a tax by way of a license or otherwise, or to exact a license fee for conducting any business or occupation. City of Anchorage v. Brady's Floor Covering, 13 Alaska 741, 105 F. Supp. 717 (Terr. Alaska 1952).

City revenue ordinance levying an occupational tax of $25 upon every business in the city except any business exempt by federal or state laws and any business already licensed by city under state or federal law or any other city ordinance, was not discriminatory, confiscatory and prohibitive of small business and did not violate the due process clause of federal and state Constitutions and did not deny equal protection of the law. U.S.C.A.Const. Amend. 14, § 1; Const. art. 2, §§ 3, 25. Ping v. City of Cortez, 139 Colo. 575, 342 P.2d 657 (1959).

License required by police regulation, defining a mechanical amusement machine to mean any machine, device, or appliance, except music machine, offered for use by the public, as a game, entertainment, or amusement which may be operated or caused to operate by the insertion of a coin, and providing that owners or operators of establishments in which mechanical amusement machines are offered for public use shall obtain an annual license and pay annual license fee of $12 for first three machines, plus $12 for each additional three machines or fraction thereof, was one for regulation and not for revenue. D.C.Code 1951, §§ 47"2301 et seq., 47"2344. Abdow v. District of Columbia, 108 A.2d 374 (Mun. Ct. App. D.C. 1954).

To require businesses and professional persons in the small quasi-municipalities remaining within the consolidated city of Jacksonville to pay occupational license taxes to such quasi-municipalities in addition to county and municipal taxes payable to the consolidated government while their neighbors would pay only the latter two taxes would be unconstitutionally discriminatory and in denial of due process unless it should be clearly shown that a higher quality of

governmental services was being furnished them than in other parts of the consolidated government. Albury v. City of Jacksonville Beach, 295 So. 2d 297 (Fla. 1974).

Licensing ordinance requiring warm air heating contractors to pay $10 examination fee and $50 annual license fee and requiring warm air heating journeymen to pay $10 examination fee and $10 annual license fee was not unreasonable, even though master plumbers paid $10 examination fee and $25 annual license fee and journeymen plumbers paid $5 examination fee and $5 annual license fee and pipe fitters paid $10 examination fee and $5 license fee and journeymen pipe fitters paid $5 examination fee and $1 license fee and refrigeration contractors paid $10 examination fee and $5 license fee and gas fitters paid $5 examination fee and $5 license fee and journeymen gas fitters paid $1 and boilermakers paid $10 examination fee and $5 license fee and master electricians paid $75 for Class I license and $45 for Class II license and $45 for Class III license. V.A.M.S.Const. art. 1, § 2. Ross v. City of Kansas City, 328 S.W.2d 610 (Mo. 1959).

Ordinance pertaining to granting of licenses for conduct of business, trade, occupation, profession or calling within city is uniform in its application to all who are similarly situated, in view of the "Exception' exempting a business conducted incidental to and as a part of any general business for which a license has been issued, and in view of the provision in the ordinance grouping bakeries and bakery distributors together and requiring license of residents and nonresidents alike. Const. art. 1, § 20. Davidson Baking Co. v. Jenkins, 216 Or. 51, 337 P.2d 352 (1959).

Nonresident partnership which dealt only with governmental securities and which maintained branch office in Philadelphia was financial business within Philadelphia Municipal Ordinance imposing tax and fee on certain businesses and professions, including financial businesses. Tax Review Bd. v. C. J. Devine & Co., 184 Pa. Super. 297, 134 A.2d 238 (1957).

Power conferred upon courts of quarter sessions to reduce rates of taxes imposed under Tax Anything Act by application of reasonableness standard did not attempt to confer upon court power to tax nor attempt to unlawfully delegate power to tax nor violate separation of powers doctrine. 53 P.S. § 6906; P.S.Const. art. 2, § 1. Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 11 Pa. Commw. 507, 314 A.2d 322 (1974).

State's business and occupation tax applies to health care services. West's RCWA 82.04.322, 82.04.4297, 82.04.431. Washington Imaging Services, LLC v. Washington State Dept. of Revenue, 153 Wash. App. 281, 222 P.3d 801 (Div. 2 2009).

Ordinance requiring holders of liquor licenses to receive at least one-half of their income from liquor sales was not unconstitutional as unreasonable and arbitrary exercise of police power in that ordinance was rationally related to objective of limiting number of licenses in fashion which encouraged licensees to obey liquor regulations. State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, 102 Wis. 2d 208, 306 N.W.2d 255 (Ct. App. 1981).

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[END OF SUPPLEMENT]