Validity and construction of license tax or fee, or business privilege or occupational tax, on persons renting or leasing out real estate

93 A.L.R.2d 1136 | American Law Reports ALR2d | Originally published in 1964

Search Details

Jurisdiction: National

Delivery Details

Date: June 4, 2019 at 10:13 PM
Delivered By: Daniel Choma
Client ID: SPRING2019
Status Icons: 

93 A.L.R.2d 1136 (Originally published in 1964)

American Law Reports | The ALR databases are made current by the weekly addition of relevant new cases.

ALR2d
A. G. Barnett

Validity and construction of license tax or fee, or business privilege or occupational tax, on persons renting or leasing out real estate

---

TABLE OF CONTENTS

ARTICLE OUTLINE

INDEX

Table of Cases, Laws, and Rules

Tenth Circuit

Alabama
Mobile, City of v. La Clede Hotel Co., 221 Ala. 531, 129 So. 477 (1930) — 5[b], 16
Mobile Battle House v. City of Mobile, 262 Ala. 270, 78 So. 2d 642 (1955) — 6

Arizona
Alvord v. State Tax Commission, 69 Ariz. 287, 213 P.2d 363 (1950) — 12
Arizona State Tax Commission v. First Bank Bldg. Corp., 5 Ariz. App. 594, 429 P.2d 481 (1967) — 12, 13, 14[a]
Bodco Bldg. Corp. v. Arizona State Tax Commission, 5 Ariz. App. 589, 429 P.2d 476 (1967) — 12, 13, 14[a]
Tower Plaza Investments Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973) — 3, 11
White v. Moore, 46 Ariz. 48, 46 P.2d 1077 (1935) — 5[a], 12

California
Clark v. City of San Pablo, 270 Cal. App. 2d 121, 75 Cal. Rptr. 726 (1st Dist. 1969) — 5[b]
Edwards v. City of Los Angeles, 48 Cal. App. 2d 62, 119 P.2d 370 (1st Dist. 1941) — 5[a], 12, 13
Gowens v. City of Bakersfield, 179 Cal. App. 2d 282, 3 Cal. Rptr. 746 (4th Dist. 1960) — 5[b]
Los Angeles, City of v. Lankershim, 160 Cal. 800, 118 P. 215 (1911) — 5[b], 5[c], 9
Los Angeles, City of v. Union Trust Co. of Los Angeles, 160 Cal. 810, 118 P. 217 (1911) — 5[b]

Colorado
Englewood, City of v. Wright, 147 Colo. 537, 364 P.2d 569, 93 A.L.R.2d 1129 (1961) — 4, 5[a], 5[b], 14[a]

Connecticut
Karen v. Town of East Haddam, 146 Conn. 720, 155 A.2d 921 (1959) — 9

Florida
Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950) — 4, 5[a], 5[b], 14[a]
Green v. Panama City Housing Authority, 110 So. 2d 490 (Fla. 1st DCA 1959) — 4
Housing Authority of Plant City, State ex rel. v. Kirk, 231 So. 2d 522 (Fla. 1970) — 4
Lloyd A. Fry Roofing Company v. Industrial National Bank of Miami, 147 So. 2d 567 (Fla. 3d DCA 1962) — 10
Miami, City of v. Schonfeld, 132 So. 2d 767 (Fla. 3d DCA 1961) — 14[e]
Pellicer v. Sweat, 131 Fla. 60, 179 So. 423 (1938) — 5[a], 6, 14[e]

Georgia
Pharr Road Inv. Co. v. City of Atlanta, 224 Ga. 752, 164 S.E.2d 803 (1968) — 3

Illinois
Oak Park Trust & Sav. Bank v. Village of Mount Prospect, 181 Ill. App. 3d 10, 129 Ill. Dec. 713, 536 N.E.2d 763 (1st Dist. 1989) — 3
Paschen, People ex rel. v. Morrison Hotel Corp., 9 Ill. 2d 187, 137 N.E.2d 344 (1956) — 1[a]

Kansas
Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1973) — 4, 14[a]

Kentucky
Martin v. City of Greenville, 312 Ky. 292, 227 S.W.2d 435 (1950) — 9
White v. City of Richmond, 293 Ky. 477, 169 S.W.2d 315 (1943) — 6, 16

Louisiana
State v. Heymann, 178 La. 479, 151 So. 901 (1933) — 4, 5[a], 13, 14[a], 16
State v. United Fruit Co., 152 So. 915 (La. Ct. App., Orleans 1934) — 13, 14[c]

Maryland
McBriety v. City of Baltimore, 219 Md. 223, 148 A.2d 408 (1959) — 4, 5[b], 9

—

I. Preliminary matters

§ 1[a] Introduction—Scope

This annotation collects cases which have considered the questions of the validity and construction of license taxes or fees, or business privilege or occupational taxes, imposed on persons renting out real estate. The cases selected are those in which the fee or tax is imposed on the act of renting or leasing out, or where the fee or tax is directly related to rentals, or to rental units rented or held out to be rented. Cases concerning license fees or taxes levied against businesses or occupations which necessarily involve renting, but which do not specifically base the levies upon the act of renting, nor upon revenues received from renting, nor upon the number of units, such as rooms, apartments, trailer spaces, etc., which are held available for renting, are not considered here. [1] The taxes or fees considered are those which are levied against a landlord, or one managing the property for the landlord, and therefore, levies against one, such as a real-estate agent, who merely procures tenants but does not manage the rental property, are excluded. License fees exacted under the police power, and taxes levied for revenue purposes, are both included. In a number of cases a levy is found by the court to involve both a fee for regulation and a tax for revenue.

§ 1[b] Introduction—Related matters

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 A.L.R.2d 86.

Validity of statute or ordinance requiring real-estate brokers to procure license, 39 A.L.R.2d 606.

Maintenance or regulation by public authorities of tourist or trailer camps, motor courts, or motels, 22 A.L.R.2d 774.

Constitutionality of retroactive statute imposing excise, license, or privilege tax. 146 A.L.R. 1011.

Exception of existing buildings or businesses from statute or ordinance enacted in exercise of police or license taxing power, as unconstitutional discrimination. 136 A.L.R. 207.

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. 134 A.L.R. 841.

Power of municipality to classify for purposes of taxation as affected by classification made by state or its failure to classify. 110 A.L.R. 1203.

Scope and effect of express constitutional provisions prohibiting legislature from imposing taxes for county and corporate purposes, or providing that legislature may invest power to levy such taxes in the local authorities. 46 A.L.R. 609, 106 A.L.R. 906.

Discrimination in license tax regulations based on difference of methods used in same kind of business. 43 A.L.R. 592, 99 A.L.R. 703.

Validity of license statute or ordinance which discriminates against nonresidents. 61 A.L.R. 337, 112 A.L.R. 63.

What constitutes a hotel or inn (as regards licensing). 19 A.L.R. 517, 53 A.L.R. 988.

Related Annotations are located under the Research References heading of this Annotation.

§ 2. Summary

The exaction of fees and taxes levied against the privilege of engaging in a business or occupation is a well-recognized exercise of legislative power, subject only to constitutional limitations and those inherent in the subject of the levy. Such exactions may be generally divided into license fees levied for the purpose of regulation of businesses and occupations under the police power, and taxes levied for the purpose of raising revenue.[2] While there are numerous indicia which tend to distinguish license fees from taxation for revenue,[3] no attempt has been made here to segregate the cases dealing with license fees exacted under the police power for purposes of regulation from those dealing with taxes exacted for purposes of revenue, except as such distinctions are found to be made by the court in each individual case. While some cases make clear distinctions between the two types of exactions, many find that the levy in question is a dual one, fulfilling the purposes of both regulation and revenue.

Whether the renting or leasing out of real estate is an occupation or business which may be taxed under statutes or ordinances providing for the making of such levies is a question of construction of the statute or ordinance in question. It appears to be generally held that where the power given to a municipality is a blanket one applicable to all occupations and businesses, such renting or leasing does constitute an occupation or business subject to levy.

This annotation, subsequent to the introductory material, is separated principally into two main divisions, the first including the cases where attacks were made on the validity of the statutes or ordinances levying taxes on renting or leasing of real estate,[4] and the second grouping the cases where the court was called upon to construe and interpret such enactments.[5]

Concerning questions of validity, the cases are further separated into groups, the first of which collects those cases in which statutes or ordinances were attacked as invalid as constituting property or income taxes[6] instead of excise or license taxes, and then, in order, are to be found groups of cases in which the enactment in question was challenged as discriminatory,[7] as confiscatory or prohibitory,[8] as constituting double taxation,[9] as being either special legislation or the taxation of a natural right,[10] as exceeding the powers delegated to the lawmaking body,[11] or as being invalid in requiring the payment of the debt of another.[12]

Those cases where interpretation and construction were required to be performed by the court are similarly separated into groups, the first of which collects the cases in which it was considered whether specific renting operations were within the scope of the statute or ordinance,[13] and then, in order, are to be found groupings of cases in which the question of applicability of the enactment to specific premises was considered,[14] or the meaning of the term "business" as applied to renting activities was interpreted,[15] or the taxability of services rendered to the government,[16] or the method of computation of the tax was in question.[17]

II. Validity of statutes or ordinances imposing license fees or taxes

§ 3. Attacks on validity; generally

[Cumulative Supplement]

With the exception of objections to taxes as exceeding the delegated powers of the taxing bodies to levy them, all attacks on validity of taxes on rentals have been found to be made on constitutional grounds. Where a tax is challenged on the ground that it is a property tax, the usual contention is that as a property tax it violates constitutional provisions in not being graduated according to value of the property. Taxes have been attacked as discriminatory, and so as violating the

principle of equal protection of the law. This principle is also involved where double taxation is alleged, and where a tax is attacked as constituting special legislation not generally applicable to all. Other attacks have been made, where the landlord is required, or at least expected, to transmit taxes on rentals which are in reality intended to place a burden on the tenant, on the ground that the payment of the debt of another is being illegally required. In a number of cases, taxes have been attacked as arbitrary, confiscatory, or prohibitory. Where any of these various allegations has been sustained by proof, the taxing statute or ordinance concerned has been held to be invalid.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Transactions privilege tax on leasing or renting real property was upheld against landlord's contentions that tax statute had retroactive application and impaired obligations of contract where tax did not reach transactions completed before enactment of statute, statute did not purport to reach or affect terms of leases, and taxable event was receipt of rental payments, rather than leases themselves. Tower Plaza Investments Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973).

Business and occupation license ordinance exempting individual, association, estate, or trust holding securities for personal investment, but subjecting to its provisions any person investing in real property to be offered for rent, was not unreasonable, arbitrary, and discriminatory or violative of federal and state constitution equal protection and due process clauses or state constitution uniformity of taxation clause. Pharr Road Inv. Co. v. City of Atlanta, 224 Ga. 752, 164 S.E.2d 803 (1968).

In action challenging validity of village's landlord-tenant ordinance, trial court erred in holding that village could not act as trustee in escrow for rents withheld by tenants since that provision was within village's constitutional powers to regulate matters relating to its government and affairs; by requiring tenant to pay all accrued and accruing rent to village as trustee, ordinance merely insured that party who ultimately prevailed in dispute, whether landlord or tenant, would receive all money owned, and that provision was clearly intended for public, as opposed to private, purposes, and was related to government and affairs of village. Oak Park Trust & Sav. Bank v. Village of Mount Prospect, 181 Ill. App. 3d 10, 129 Ill. Dec. 713, 536 N.E.2d 763 (1st Dist. 1989).

Township ordinance requiring periodic payment of fee for inspection and licensing of rental units was not illegal tax since fees had reasonable relationship to costs of licensing and inspections. However, ordinance was unenforceable on grounds of vagueness and due process to extent township's related resolutions required payment both biannually and biennially. Northgate Towers Associates v. Charter Tp. of Royal Oak, 214 Mich. App. 501, 543 N.W.2d 351 (1995), order vacated in part on other grounds, 453 Mich. 962, 557 N.W.2d 312 (1996).

[Top of Section]

[END OF SUPPLEMENT]

§ 4. As constituting property or income tax

[Cumulative Supplement]

Where a city ordinance established and imposed a business and occupational license tax for the purpose of raising municipal revenue and licensing and regulating the carrying on of all businesses, trades, occupations, and professions within the city, and specifically prescribed a tax of $3 per unit per year on any person who rented, leased, or otherwise

provided one or more residential units for hire, and a tax of $4 per unit per year on any person who rented, leased, or otherwise provided any number of commercial rental units for hire, and further provided that the tax should not be construed to be a tax on persons who paid rent or occupied rental units owned or leased for rental purposes by other parties, the ordinance was challenged in Englewood v Wright (1961) 147 Colo 537, 364 P2d 569, 93 ALR2d 1129, on the ground that the tax sought to be collected was not truly a business or occupational tax, but actually was either an income tax in only slight disguise or else a tax on real property, and in either event, under the circumstances, beyond the taxing power of the city. The court below had agreed with these contentions, holding that the right to rent one's property and to derive the monetary advantage therefrom was an inalienable right and incident of the ownership, and as such not subject to the power of the city to impose license tax thereon. The court here, however, rejected all contentions as to unconstitutionality, and found that the city was fully empowered to levy the tax as it had done. It was said that the distinction between a property tax and an excise tax could usually be discovered by the respective methods adopted in weighing them and fixing their amount, and thus where the tax was imposed directly by the legislature without assessment and was measured by the extent to which the privilege was exercised by the taxpayer, without regard to the nature or value of his assets, it was an excise, but where the tax was computed upon evaluation of property and assessed by assessors, although a privilege might be included in the valuation, it was a property tax. Since it had been determined that the tax in question was a true business or occupational tax, said the court, it followed that it was not an income tax or tax on real property, and the fact that the business necessarily involved and concerned realty did not change the nature of the tax.

A state statute declaring it to be the legislative intent that every person was exercising a taxable privilege who engaged in the business of renting, leasing, or letting any living quarters, or sleeping or housekeeping accommodations, for the exercise of which privilege the statute levied a privilege tax in an amount equal to 3 percent of and on the rental charge for the accommodations by the person charging or collecting the rental, and further requiring that the person charging or collecting the rental must pass the same on to the lessee, was held to be constitutional by the court in Gaulden v Kirk (1950, Fla) 47 So 2d 567. The contention of the appellant that the challenged revenue act did not create an excise tax but only established a state property tax, on the theory that a tax was a property tax if the law which ordained it had the raising of revenue as its primary purpose or object, was rejected, the court holding that not every tax created by an act of the legislature for the purpose of raising revenue was by virtue of that fact alone a property tax within the meaning of the words "real or personal property" in the state constitution. It added that a license tax, as such, levied under the police power for the purpose of control and regulation, and not permitted to have production of revenue as its primary object, was not the only tax which came under the general heading of excise taxes, since the modern view was that an excise tax was any tax which did not fall within the classification of a poll tax or a property tax. [18]

In Green v Panama City Housing Authority (1959, Fla App) 110 So 2d 490, cert quashed (Fla) 115 So 2d 560, the court considered whether a housing authority was liable for payment of the excise tax on rentals of 3 percent of the total rental charged, levied under the provisions of the same statute as was considered in the Gaulden Case (1950, Fla) 47 So 2d 567, supra. The court, following the decision of that case, held first that the tax was levied against the landlord and not against the tenant, and then found that the housing authority here was not engaged in the business of renting housing accommodations for the purpose of gain, benefit, or advantage, and therefore did not come within the purview of the statute, and was not subject to the excise tax on rentals. Saying that the word "business" was generally accepted as synonymous with "occupation," the court declared it to be the express legislative intent that the tax in question should be a privilege or occupation tax and the subject of the taxation the privilege of engaging in business within the state, citing authority for the proposition that the right of the legislature to impose an occupational privilege tax for the purpose of raising revenue had been established. The tax here was said to be nonetheless an excise tax because the amount of the tax was measured by the compensation received for the merchandise sold or the services rendered, and therefore not an income tax or a tax upon personal property or services, but a tax on the privilege of selling the same, measured by the extent to which the privilege was enjoyed.

In State v Heymann (1933) 178 La 479, 151 So 901, the court found to be constitutional a statutory provision that any operators of an office building deriving revenue therefrom should pay a license tax equal to one-tenth of one percent

on the gross rent or compensation therefrom, except from the part of the building occupied by the owners in carrying out their own business, and that the latter exemption should also apply where a parent corporation, doing business in the building, owned a subsidiary corporation which in turn actually owned the building. The argument that the tax in question was an income tax because it was based on the gross income from the business was held not to be well founded, since the tax was plainly an excise tax, called a license tax, and was not a direct tax upon office buildings. The contention that the tax was invalid as a license tax because it was not graduated, as required by the state constitution, was rejected, since it was held that any reasonable graduation would suffice, and the exemption of those who derived no revenue from their buildings was said not to be an arbitrary exemption or discrimination.

In McBriety v Baltimore (1959) 219 Md 223, 148 A2d 408, a requirement for the licensing of roominghouses, multiple-family dwelling units of more than two units, and any combination thereof, and prescribing license fees based on the number of units, was held to be valid, since it was said, inter alia, that even if it were assumed, without deciding, that the license fee was a revenue measure, it was not a direct tax on property, but was a tax on the business of renting or leasing housing accommodations. The ordinance was found properly to embrace only one subject matter, the licensing and regulation of renting or leasing housing accommodations in the city, whatever the accommodation might be.

Where a statute required that each mobile home park licensee should collect from each occupied mobile home occupying space in his mobile home park a monthly parking permit fee equal to actual cost of services furnished by the school district, and cost of municipal services, the court in Barnes v West Allis (1957) 275 Wis 31, 81 NW2d 75, held that the parking permit fee was not a property tax, but an excise tax, and hence that a flat tax per month could properly be levied on each trailer, although the trailers differed in value, since as to excise taxes it was said that the term "uniformity of taxation" meant simply taxation which acted alike on all persons similarly situated.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Amendment of taxing statute to specifically refer to rentals of commercial property, parking lots, and boat docks did not repeal by implication exemption from taxation of rentals previously granted to public housing authorities. State ex rel. Housing Authority of Plant City v. Kirk, 231 So. 2d 522 (Fla. 1970).

Revenue ordinance imposing occupation tax of.0035 dollars per square foot of living area leased or subject to being leased imposed on those in business of renting or leasing residential property was not tax upon sale or transfer of real property prohibited by statute and was within power of city to adopt. Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1973).

See Menlove v. Salt Lake County, 18 Utah 2d 203, 418 P.2d 227 (1966), § 5[a].

[Top of Section]

[END OF SUPPLEMENT]

§ 5[a] As discriminatory—Classification according to use of property

[Cumulative Supplement]

Applications of excise and license taxes on rental activities according to differing classifications of uses made of the rented property have been upheld where the classification appears to be reasonable.

Holding that the plaintiffs, who were engaged in the business of renting for mercantile and office purposes, were not liable for a tax levied "on any other business or occupation charging storage fees or rents," which language followed an enumeration of businesses all of which concerned supplying amusement for the public or accommodations for tourists and transients, because, under the rule of ejusdem generis, mercantile renting did not fall within the class of businesses previously enumerated, the court in White v Moore (1935) 46 Ariz 48, 46 P2d 1077, further rejected the contention that to construe the language of the statute to mean that the businesses specifically enumerated were within the provisions of the excise revenue act and that those engaged in renting property for business purposes were not, must cause the entire subdivision of the statute to fall because to compel the former to pay a tax on the income from their business and not require the latter to do so was arbitrary and discriminatory, and therefore denial of equal protection of the law. Opposing this argument, the court said that it must be kept in mind that a privilege tax was not a tax on property but a tax on the right to engage in business, and that the legislature might impose it on any class or classes of business it cared to and decline to apply it to others, and that the only limitation in this respect was that the classification made must be reasonable, not arbitrary or discriminatory, and such that all falling within the same class would be treated alike.

Where a city ordinance established and imposed a business and occupational license tax for the purpose of raising municipal revenue and licensing and regulating the carrying on of all businesses, trades, occupations, and professions within the city, and specifically prescribed a tax of $3 per year on any person who rented, leased, or otherwise provided one or more residential units for hire, and a tax of $4 per unit per year on any person who similarly provided any number of commercial units for hire, and further prescribed that the tax should not be construed to be a tax on persons who paid rent or occupied rental units owned or leased for rental purposes by other parties, the court in Englewood v Wright (1961) 147 Colo 537, 364 P2d 569, 93 ALR2d 1129, rejected all contentions as to unconstitutionality in that the ordinance arbitrarily discriminated between commercial and residential rentals in imposing a higher rate on the former, saying that the distinction between the two types of rentals appeared to be, on its face at least, a most reasonable classification based on a valid difference or distinction. Accordingly, the ordinance, as it applied to the rental of commercial or residential property, was held to be constitutional, valid, and enforceable.

Where a city ordinance provided that every person engaged in the business of renting or letting any rooms in any hotel, roominghouse, boardinghouse, apartment house, or lodginghouse, should pay licensee fees proportioned to gross receipts, the court in Edwards v Los Angeles (1941) 48 Cal App 2d 62, 119 P2d 370, first rejected the contentions of the plaintiff property owner that the practice of a landowner to rent his property did not constitute an occupation or engaging in business, as described in the ordinance, and that the ordinance was so indefinite and uncertain as to be invalid as a penal ordinance, the court saying that the ordinance was not a regulatory penal statute, but upon its face was an occupational license tax for revenue. It then went on to consider the contention of the property owner that there was an illegal and arbitrary classification of those, on the one hand, who rented or let rooms in any hotel, roominghouse, boarding house, apartment house, or lodginghouse, who must pay the tax, and on the other hand, those renting similar accommodations in flats, bungalow courts, duplexes, or single-family residences, who, the plaintiff contended, were not required to pay a tax. The court instead accepted the city's position that the ordinance did not make such classification, and that a flat, bungalow court, etc., might in the circumstances of a particular case constitute an apartment house, hotel, etc., as described in the ordinance. It was said that the evident purpose of the ordinance was to require a license tax upon those engaged in the business of renting rooms for lodging accommodation, that a lodger was one who had no interest in the realty but who occupied part of a tenement which was under the control of another, and that it was immaterial in what form the places used for lodging purposes were built, since the ordinance was intended to be all-inclusive and did in fact reasonably cover all lodgings, as shown by its terms, and that the mention of boardinghouses was no doubt inserted merely to prevent the exemption of any boardinghouse keeper who also rented rooms. It was also said that it was not required in a general occupational tax ordinance, nor in the section thereof here in question, that the legislative body should enumerate specifically by title or name every possible phase of the business of renting rooms or lodgings, and it

was certainly not intended that one engaged in the business of lodging the public should, by the device of operating the place under some name indicating its construction and location, thereby escape payment of the tax.

Where one section of a statute levied a tax of 50 cents for each room in boardinghouses, lodginghouses, or hotels having beds for 10 or more persons, and another section provided that a license tax of $100 should be levied on any place operated for profit where dancing or entertainment was provided, exempting from this latter tax any hotel which paid the occupational tax required by the firstmentioned section, the court in Pellicer v Sweat (1938) 131 Fla 60, 179 So 423, rejected the contention of the defendant, who was operating a place where refreshments were sold and dancing was permitted to the music of a coin-operated music box, that the latter section was unjustly discriminatory and excessive as against her, especially in view of the provisions of the former section, and held that the classifications made by the statute in imposing the taxes were clearly distinct and predicated upon reasonable distinctions in classes, and that the amount of the tax levied on defendant's business was a matter for statutory determination and did not appear to be grossly excessive for the particular business regulated in the interest of the public welfare.

In Gaulden v Kirk (1950, Fla) 47 So 2d 567, the distinction made by the statute in taxing a landlord who rented hotel rooms or apartments to guests who had not resided in them for a period of longer than 6 months, while exempting the landlord from the tax where the guests had occupied the accommodations for a longer period, was held to be a reasonable one, since it was appropriate for the legislature to place the business of the landlord who rents to transients in a different class from that of the landlord who rents to permanent guests or tenants. The distinction made between the two classes of businesses for the purposes of taxation was held a permissible classification and not unreasonable, arbitrary, or unjustly discriminatory, since it was said that the landlord who rents to transients rather than permanent tenants charges higher than permanent tenants charge higher per diem prices and must give strict daily attention and supervision to his business and guests, and the distinction between renting to transients and to permanent guests was one that was well known and accepted.

A contention that a tax placed upon the revenues from the business of operation of office buildings was invalid as a license tax because not graduated was rejected by the court in State v Heymann (1933) 178 La 479, 151 So 901, which said that any reasonable method of graduation was sufficient, and that the omission of the legislature in this instance to fix a minimum tax meant merely that anyone engaged in the business of operating an office building who derived any revenue therefrom must pay the tax, and the exemption of those who derived no revenue from the operation of office buildings was not an arbitrary exemption or discrimination, because those who did not derive any revenue from their business were not in the same class as those who did.

A statute levying an annual tax or excise for the privilege of engaging in the business of rendering or performing services, professional or otherwise, exempting, inter alia, gross income derived from the lease or rental of real estate, but not excepting gross income derived from engaging in a hotel, warehouse, or storage business, or from any business wherein a mere license to use or enjoy real property was granted, was challenged in Supply Laundry Co. v Jenner (1934) 178 Wash 72, 34 P2d 363. It was contended, among other things, that the classifications made in the act discriminated between those engaged in renting office buildings and those operating hotels, warehouses, and storage houses. The court, however, held that there was a clear distinction between the business of renting offices and those of operating hotels, warehouses, and storage places, since the income of the former was connected directly with the lease or rental of real estate, which was not within the spirit of the act, but the latter businesses were purely commercial ones apart from the real estate itself and contemplated a variety of services other than those connected with the rental of office space.

In Barnes v West Allis (1957) 275 Wis 31, 81 NW2d 75, the court considered the levying on the operator of a trailer park of a flat monthly parking-permit fee for each trailer in the park, and, holding the fee proper as an excise tax, also held that it was proper to tax one citizen for occupying a house trailer while omitting to tax another for occupying an apartment or a house, since the burden of supplying municipal services was placed on the community where the trailer happened to be located and it would be difficult to collect a property tax on a trailer because of its mobility. Because

of this and the circumstances of its use, said the court, it was proper to levy an excise tax upon use of a trailer without levying the same tax upon occupancy of a permanent home.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Transient room tax imposed by ordinance uniformly upon all owners or operators of public accommodations in the case of room rentals for fewer than 30 consecutive days was an occupation tax with express purpose of raising revenue for benefit of all businesses generally; and did not deny innkeeper equal protection or due process of law; 30-day classification was not discriminatory, and, being an occupation tax, constitutional requirements of equality and uniformity of taxation of property had no application. Menlove v. Salt Lake County, 18 Utah 2d 203, 418 P.2d 227 (1966).

Ordinance levying license tax upon those engaged in renting residential property, which exempted certain types of residential property, was not proven discriminatory, where city counsel could have had reasonable purpose in exempting certain types of property, and where presumption of reasonableness was not overcome by clear and convincing proof. City of Portsmouth v. Citizens Trust Co., 216 Va. 695, 222 S.E.2d 532 (1976).

[Top of Section]

[END OF SUPPLEMENT]

§ 5[b] As discriminatory—Classification by size of premises rented

[Cumulative Supplement]

Classification of the renting of property as taxable or nontaxable according to the size of the premises used has in one state at least been held to be an arbitrary discrimination between those engaged in the same business.

Where the city ordinance required hotel owners to collect from transients a tax of 4 percent of the compensation paid by the latter for lodging rentals, and, under the ordinance, a transient was defined as any person requiring lodging for not more than 7 consecutive days, and a hotel was defined as any lodging place offering lodging for five or more persons for compensation, it was held in Gowens v Bakersfield (1960) 179 Cal App 2d 282, 3 Cal Rptr 746, that the tax here was not an occupational tax but a tax on the privilege of occupancy of a single lodging, and that while classifications based on the size of a business might under some special conditions be reasonable and valid, such a classification when viewed from the standpoint of the consumer, the lodger, did not appear to have any reasonable basis whatever, and that the ordinance clearly violated the constitutional requirements of uniformity of intended application, since there was no reasonable distinction for tax purposes, from the viewpoint of a lodger, between one seeking and using a large hotel and one using a small one.

Where a city ordinance required that a license be obtained for the conducting or carrying on of a number of enumerated professions, trades, callings, or occupations, and stated specifically that for everyone maintaining, managing, or conducting a building for the purpose of letting office rooms or storerooms the license fee should be, for every building containing more than 30 rooms, one dollar per year for each office room and $3 per year for each storeroom contained in the building, the court in Los Angeles v Lankershim (1911) 160 Cal 800, 118 P 215, rfeused to consider whether such renting could properly be called an occupation for which a license tax might be exacted, since it found that the ordinance here was certainly obnoxious to the general law and to the charter provisions of the city in its unjust discrimination

between persons engaged in the same business, and in imposing a burden upon one owner which it did not impose upon another in the same class. It was said that it was distinctly forbidden by the city charter, as it was by the general law of the state, to discriminate in the matter of licenses between persons engaged in the same business, unless the discrimination took the form of regulating the amount of the license in proportion to the amount of the business done, and conceding, for the purpose of this decision, that the renting by an owner and the receiving of rents from his own property was an "occupation," and that the owners of office buildings who rented rooms therein for office purposes formed a class which might be segregated for the purposes of license taxation, it was still claimed that no valid distinction existed based upon the size of the building or the number of offices for rent, since it would appear that the man who owned a building with 30 offices for rent engaged in no different occupation than the man owning an office building with 29 office rooms to rent. The contention that for the purposes of taxation the municipal council might draw a class line of 30 rooms and declare that those who rented 30 rooms and over were engaged in an occupation, while those who rented less than 30 rooms were not engaged in the same occupation, was said to be purely fanciful. The court mentioned also that the well-settled rule that every intendment was to be indulged in favor of the validity of a municipal ordinance imposing a license fee for the carrying out of a particular business meant that a court would be zealous in its search for any substantial ground for upholding such an ordinance when attacked, but it did not mean that the court must shut its ears to reason and declare in every case that because an ordinance had been passed there must be valid reasons for its existence, and the principle must be followed that the legislature had absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and excepting others, or imposing a tax not operating uniformly upon all.

Without giving any statement of facts or other opinion, the court in Los Angeles v Union Trust Co. (1911) 160 Cal 810, 118 P 217, said that the case was in all respects identical with the case of Los Angeles v Lankershim (1911) 160 Cal 800, 118 P 215, supra, and that the decision of the former case, decided the same day, would be followed.

In some other jurisdictions the courts have recognized a reasonable distinction between small premises and larger ones, particularly where two units or less were rented.

A statute levying a privilege tax in an amount equal to 3 percent of and on the rental charge on persons engaged in the business of renting, leasing, or letting any living quarters, or sleeping or housekeeping accommodations, was held to be constitutional in Gaulden v Kirk (1950, Fla) 47 So 2d 567, where the court found to be without merit objections of the appellant that the law unreasonably and arbitrarily discriminated against him as an owner of an apartment building which provided separate accommodations for more than two families living independently of each other, while exempting two-family apartments, saying that unquestionably the legislature had determined that the owner of a two-family apartment building should not be considered as engaging in the business of renting apartments, and that this was a reasonable classification, because the renting of accommodations in a two-family apartment building was engaging in the business of renting apartments in such a trivial and inconsequential manner as to be negligible, and that presumably the exemption was also made in view of the fact that one who rents no more than two family units in a single building is not substantially engaging in a commercial enterprise.

Where a city ordinance, in addition to requiring licenses for rooming-houses, multiple-family dwellings, or any combination thereof, defining a multiple-family dwelling as a structure used for more than two dwelling units or for two dwelling units and any other occupancy, provided, inter alia, for annual license fees of $3 per rooming unit and $5 per dwelling unit, with a maximum fee of $200, but not prescribing any license fee for dwellings of only one or two units, the court in McBriety v Baltimore (1959) 219 Md 223, 148 A2d 408, held the ordinance to be valid, since it found that the city had full power, under its charter, not only to license for regulatory purposes, but also to tax for revenue purposes the dwellings defined in the ordinance, that the exclusion of one and two-dwelling units was not an abuse of police power nor was it discriminatory, that the classification was reasonable, since it was found that dangers were more prevalent in buildings containing more than two dwelling units than in those having only one or two dwelling units, and that the license fees were not discriminatory merely because there was a maximum fee stated and because some units of different

sizes were assessed the same fee. The license fees also were held to bear a reasonable relation to the expense of licensing and to the inspection services rendered under the ordinance.

In Fulgum v Nashville (1881) 76 Tenn (8 Lea) 635, the court held that exempting small hotels having less than 10 rooms did not render a tax law objectionable, since the city was not bound to tax all hotels the same amount for the privilege, regardless of the privilege granted as measured by the amount of business done, or capable of being done, by reason of the extent of accommodations possessed, since it was settled that the legislature might classify parties engaged in business, and then must tax all of the class alike, but might graduate the amount of the tax applicable to each class, and said that the fact that others, not belonging to the class of hotels having 10 or more rooms, were not taxed at all, was no more a subject of complaint than if they were taxed at a much smaller sum, since the tax would be unequal in the latter case and the inequality was only increased by a total exemption. The court concluded by stating the principle that all persons in the same class must pay the same tax for a privilege, but that the municipal corporation might grade the tax, adapting it to each class, while observing the principle of equality as to each member of the class, and so a party in one class could not complain that another of a different class was not taxed either as much as himself or not taxed at all.

While, as noted supra, there appears to be conflict in the decisions as to whether the rental of premises may be designated as taxable or non-taxable on the basis of the number of units rented, the graduation of license taxes by the number of units available to be rented appears to be proper.

In St. Louis v Bircher (1879) 7 Mo App 169, affd 76 Mo 431, the court said that there was nothing unreasonable or oppressive in graduating the amount to be paid for a hotel license by the number of rooms which might be devoted to the accommodation of the public.

See also Englewood v Wright (1961) 147 Colo 537, 364 P2d 569, 93 ALR2d 1129, where there was held to be no discrimination between differing rates of tax per unit for residential and commercial units provided for rental.

It has also been held that a schedule of licenses based on the number of rooms in a hotel was presumptively valid, although the ordinance fell because of omissions of certain classes from the schedule.

Where an ordinance fixed the rates of licenses for hotels according to five different scales, each depending on the number of rooms in the hotel, it was first held in Mobile v La Clede Hotel Co. (1930) 221 Ala 531, 129 So 477, that the schedule of licenses was based upon the classification as to the number of rooms in a hotel and was presumptively reasonable and valid, but it was then held that because, in order to sustain the ordinance, there must be uniformity of the tax burden upon those in the same class and there must be no arbitrary or capricious classification, the fact that the ordinance, apparently by an oversight, had completely omitted a schedule of fees for hotels of 15 rooms, and for those of from 30 to 35 rooms, which therefore could not be taxed, must cause the ordinance to be condemned as arbitrary and capricious, and thus invalid. The suggestion by the city that the plaintiff came within a higher class on the schedule than those classes omitted and was not affected by the omission, and was therefore not in a position to complain, was rejected, and it was held that the plaintiff was affected by such arbitrary and capricious discrimination because of exemption from taxation of those similarly situated in the business world, and that such discrimination sufficed to invalidate the ordinance in its entirety.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Classification in license tax on business of operating apartment house which exempted dwellings with less than four rental units was not so arbitrary or discriminatory as to invalidate tax as violation of federal and state equal protection mandates. Clark v. City of San Pablo, 270 Cal. App. 2d 121, 75 Cal. Rptr. 726 (1st Dist. 1969).

Ordinance imposing monthly license fee on mobile home parks based upon graduated classification of mobile home spaces was not invalid on grounds that license fees were unreasonable and confiscatory since evidence before trial court showed that revenue realized from license fees imposed on the mobile home parks was reasonably related to municipal expense associated with parks and that such fees were not confiscatory. Monmouth Junction Mobile Home Park, Inc. v. South Brunswick Tp., 107 N.J. Super. 18, 256 A.2d 721 (App. Div. 1969).

[Top of Section]

[END OF SUPPLEMENT]

§ 5[c] As discriminatory—Classification as to revenue or amount of business

From the cases found, it appears that regulating the amount of license fees in proportion to the business done is an acceptable method of distinguishing between those in the same business, and not to be considered discriminatory.

It was noted in Los Angeles v Lankershim (1911) 160 Cal 800, 118 P 215, supra § 5[b], that it was distinctly forbidden by the city charter, as it was by the general law of the state, to discriminate in the matter of licenses between persons engaged in the same business unless the discrimination took the form of regulating the amount of the license in proportion to the amount of the business done.

Where a statute, as interpreted by the court, provided, inter alia, that all hotels whose gross receipts were over $1,000 and less than $2,000 should pay a license fee of $10 for the privilege of carrying on the business, and that those hotels having gross receipts over $2,000 should in addition pay ½ of one percent on all gross receipts in excess of $2,000, it was first decided in Cobb v Commissioners of Durham County (1898) 122 NC 307, 30 SE 338, that the corporation owning the hotel in question was not excused from paying the license tax merely because it had already paid a corporation franchise tax, the court pointing out that the franchise tax was for the privilege of doing business as a corporation but not for the privilege of conducting a hotel business. To the contention of the plaintiff hotel company that the tax was discriminatory in that it placed no tax on those hotels receiving less than $1,000 in gross receipts, the court said that there was no doubt that the legislature might in its discretion impose either a specific tax or one graduated to the extent of the business done, and that such a tax was uniform and consistent with the constitution and was equal on all persons in the same class, and that, as regards the exemption of hotels having less than $1,000 in gross receipts, it was of the opinion that the legislature had the right to make such an exemption, provided the exemption was not palpably against the spirit of the constitution, noting that it was customary to make certain exemptions of persons or property otherwise coming under the general rule, which, for reasons of general policy, the legislature deemed it wise not to tax.

The method of imposition of a license or privilege tax, for the privilege of keeping a hotel, imposed by a city ordinance in the amount of a flat fee of $40 plus one percent on the actual rental or estimated value of the rental, and providing that hotels having less than 10 rooms should pay no privilege tax, was held to be reasonable and nondiscriminatory in Fulgum v Nashville (1881) 76 Tenn (8 Lea) 635, since it was pointed out that this method of determining the amount of tax was commonly used in the state, where the license taxes of merchants and traders were regulated by the amount of their sales, so that the privilege of keeping a hotel might thus well be charged on the basis of the value of the privilege enjoyed, to be ascertained in part or in whole by the rental value of the hotel thus kept.

§ 5[d] As discriminatory—Discrimination as to method of assessment

Contentions as to methods of assessment of taxes have appeared in the case of excise or license taxes on the use of house trailers, where it has been objected that they are levied on in a different manner than other dwellings, and where the courts have upheld the distinction.

In Konya v Readington Twp. (1959) 54 NJ Super 363, 148 A2d 868, affd 30 NJ 556, 154 A2d 580, the court rejected the plaintiff's suggestion that there was an element of discrimination in imposing a monthly license fee, payable by the park operator charging the rentals for them on trailers parked in a trailer camp, while those located on private land, and which were of a more permanent nature, were taxed on an ad valorem basis, saying that if the latter method were used, the amount levied would be less than the $72 which the municipality could collect for the license fee for 12 months. It pointed out the administrative difficulty of assessing and collecting a tax on trailers which might enter and leave at varying times and which could only be assessed if located in the camp on the first of October of any year, and the difficulty of collecting the tax from a trailer owner who, without notice to the tax collector, could overnight drive his trailer to some distant municipality or state, in which case the trailer park operator could not be held responsible for personal property tax, since the trailer belonged to its owner and not to him. It was mentioned further that ad valorem taxation and the imposition of license fees for revenue stood on separate and distinct constitutional and statutory bases, so that a license fee should be judged for reasonableness or excessiveness of burden in relation to other license fees and not in relation to ad valorem taxes on other property, and that the license fee was exacted in relation to the privilege of doing business while the ad valorem tax was exacted on the mere presence of the property in the taxing district and in consideration of the general benefits of government extended to it.

See also Barnes v West Allis (1957) 275 Wis 31, 81 NW2d 75, supra § 5[a], where the court pointed out that because of differences in mobility and circumstances of use, it was proper to levy a license tax upon the use of a trailer while taxing a permanent home by means of a property tax on its value.

§ 5[e] As discriminatory—Discrimination between similar localities

It has been held to be discriminatory to levy license taxes on rentals in one location in differing amounts from those levied in other locations having substantially the same conditions existing.

In County Board of Supervisors v American Trailer Co. (1951) 193 Va 72, 68 SE2d 115, infra § 8, a taxing statute was held invalid as a special law where it authorized higher tax rates per trailer on trailer camp operators in areas of the state having a population density of over 1,000 per square mile. The court noted that this effectively permitted the higher tax rate in only one county in the state, but that would not have been objectionable, were it not for the fact that there were other suburban areas having locally as high or higher population densities, and thus similar trailer camp problems where the higher tax rates were not authorized to be levied because none of the counties in which they were located had a population density as high as 1,000 per square mile for the county as a whole.

§ 6. As oppressive and confiscatory

[Cumulative Supplement]

Where a license tax on renting is challenged as prohibitory or confiscatory, the courts appear to give considerable leeway to the taxing body where the tax is for revenue, but to be strict as to the amount which may be levied under the police power. Each revenue tax case appears to be decided on its own merits after an examination of the revenues and costs of the taxpayer.

Where an ordinance for the licensing of trailer parks, placing a license fee of $5 a year on each parking unit, defined the unit as a plot of ground consisting of 600 square feet of unoccupied space designed for the accommodation of one trailer coach, the court in White v Richmond (1943) 293 Ky 477, 169 SW2d 315, rejected the contention of the park owner that

a tax of $5 a year for each unit of 600 square feet on his 5-acre tract of land would amount to $1,815 annually and would be confiscatory, saying that the tax was to be paid only on each unit used for parking purposes. Since it appeared that the revenue from rents for each trailer was from $3 to $4 a week, an annual license tax of $5 a year on each unit was held not confiscatory, and the rule was stated that ordinarily the amount of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion unless the tax amounts to a prohibition of a useful and legitimate business.

Where a city ordinance imposed on all engaged in the business of operating hotels, motels, tourist courts, tourist cabins, lodginghouses, and roominghouses, in addition to all license taxes otherwise imposed, an additional license tax equal to 3 percent of the gross income received by each such person, firm, etc. from the renting of rooms within the city limits, it was held in Mobile Battle House, Inc. v Mobile (1955) 262 Ala 270, 78 So 2d 642, that the municipality had legislative authority to so frame their ordinances as to make gross receipts the basis of the computation of a license, and that the tax, which was a revenue-raising measure, was not so exorbitant and discriminatory as to be unconstitutional. Because the tax was principally a revenue measure, and not a police measure, the fact that the business of the complainants here, who were operators of a hotel, was useful and legitimate, was said to be not material to the inquiry as to whether the license charged for revenue purposes was excessive, provided it was not prohibitive or oppressive, and the court did not find the tax to be so vastly greater than that imposed upon other classes of business as to make it an arbitrary and capricious exercise of the power of the city to raise revenue by that means.

Where a municipality had been authorized by the legislature to license "hotels, boardinghouses, lodging and roominghouses," with a general clause embracing "all other places," as well as "buildings used for sleeping and lodging purposes, restaurants and all other eating places, and the keepers thereof," the court in Edwards v Moonachie (1949) 3 NJ 17, 68 A2d 744, first decided that this statutory wording could be interpreted to include trailer camps and campsites, since the validity of the ordinance must be determined by the wording of the enabling statute in force when the ordinance was passed, and not by a subsequent statute specifically granting the power to license such camps and campsites. It then went on to hold proper a license fee of $200 a year on trailer camps, plus $1 per week per trailer, stated to be imposed for the purpose of revenue, saying that there was no showing that the prescribed license fee deprived the camp operators of a fair return upon their investment, since the usual rent charged was only $5 per week per trailer, and it was pointed out that the rates charged were generally lower than those charged by other camp operators in the area. There was said to be no showing that the burden of the tax was such that a profitable operation could not be had under a fair and reasonable rate for the service rendered, and the principle was stated that the operator of a business made subject to an excise could not subvert or delegate the state's delegated power to tax by undervaluing the service. It was further noted in this connection that it had been shown that, upon the adoption of the ordinance, the respondent trailer camp operator here had raised her weekly rates from $5 to $6 to cover the challenged tax, and had promised to return the added $1 if this attack upon the ordinance should succeed. The court said that there was a presumption that the tax assessed was reasonable in amount, that the burden rested upon the challenger to overthrow that presumption, and that the respondent had not borne the burden of proving that the rate of taxation was not consonant with the value of the privilege and was therefore prohibitive and unreasonable. An additional tax levied for the storage of trailers was refused consideration by the court, since it was said that if this provision were deemed objectionable that part of the ordinance would be severable and the remainder of the ordinance would stand unaffected.

Where a township, upon the objections of the plaintiff trailer camp operator, and on the suggestions of the court below, had amended its comprehensive ordinance passed for the purpose of licensing and regulation of trailer coach parks, and the plaintiff had accepted as satisfactory the amended ordinance with the exception of a section relating to license fees, which were the subject of the appeal here, the court in Konya v Readington Twp. (1959) 54 NJ Super 363, 148 A2d 868, affd 30 NJ 556, 154 A2d 580, considered the reasonableness of the fee in question, which was stated to be imposed for the purpose of raising revenue and which prescribed an annual trailer park license fee of $50 and a fee of $6 per trailer per month, or $1.50 per week, payable by the camp operator, but which was not challenged by the plaintiff as regarding the annual license fee. The plaintiff claimed that the monthly fee imposed upon each trailer site far exceeded the regulatory

cost, and that it was prohibitory or confiscatory, bearing no reasonable relation to the value of the privilege conferred, and also complained of it as a special tax having no lawful or reasonable justification. The municipality admitted that the monthly fee was a means of indirectly collecting from each trailer owner the fair share of the cost of the municipal services furnished to him to the same extent as persons residing in conventional homes, and there was evidence that the average homeowner paid a tax of $200 to $250 per year, while a comparable charge under the monthly license fee per trailer would be $72. Although the plaintiff had attempted to show that he was operating at a loss or on a very small margin of profit, the court agreed with the finding of the trial judge that even if that were so, the amount of the fee, which was not on its face disproportionately large compared to the revenue, need not be governed by the operating figures of one particular trailer camp owner who might or might not be a good business man, and held that the license fee schedule here was neither prohibitive nor confiscatory.

But see the Hoffman Case (1948) 137 NJL 485, 60 A2d 798, infra, holding a similar tax to be confiscatory.

See also People v Stewart (1953) 204 Misc 490, 122 NYS2d 843, where a license fee of $5 annually for each unit and trailer plot in a trailer park was held not to be unreasonable or excessive nor to exceed the cost of issuance of the license and the inspection of the licensed property. It did not, however, appear that this fee was based upon any consideration of rentals received but merely upon the cost of regulation of each unit.

See Pellicer v Sweat (1938) 131 Fla 60, 179 So 423, supra § 5[a], where the plaintiff had alleged discrimination in the amount of tax levied against her entertainment business, and in the exemption of hotels paying another type of license tax from the tax levied against her, and had also alleged that the amount of the tax was excessive, the court holding against her on all these contentions.

Where the license fee or tax is set at such a high figure that it becomes confiscatory, and in effect amounts to the prohibition of a lawful and useful business, it appears that it will be struck down by the courts.

Where a municipality had first adopted an ordinance providing for a monthly fee of $5 payable by the owner or occupant of any trailer on any trailer camp located within the confines of the borough, had later changed the ordinance to eliminate the fee payable by the owner or occupant and providing that the owner or operator of a trailer camp should pay a license fee of $5 per month for an occupied trailer and $2 per month for an unoccupied trailer, and had still later again amended the ordinance to increase the monthly fee payable by the owner or operator of the camp to $10 per month per trailer, whether occupied or not, the ordinance was challenged in Hoffman v Neptune City (1948) 137 NJL 485, 60 A2d 798, as unreasonable, oppressive, and confiscatory, and therefore invalid. It appeared that if the average number of trailers located on the premises of the prosecutor here remained as heretofore, he would be obliged to pay annual fees of some $2,400, which would amount to two-thirds of his gross revenues, and if added to his regular operating expenses would result in a deficit, which deficit would be substantially increased if due consideration were given to the value of his investment and his services in conducting the camp. The respondent here, the borough, acknowledged that the primary purpose of its ordinance was for revenue, and that, in seeking to tax the business of operating trailer camps, it was charged with the burden of arriving at a tax which was not confiscatory, but contended that the license fee or tax imposed by its ordinance was reasonable, and also referred to the fact that its municipal operating costs had risen considerably. The court, however, found that the evidence did not indicate that the operation of the prosecutor's trailer camp had, in any significant sense, contributed to the increased municipal budget, but that in any event such increased budget could not justify the singling out of the business of operating a trailer camp and the imposition thereon of a confiscatory license fee or tax. It rejected the contention of the respondent that the prosecutor could pass on the tax or license fee to his patrons, since the prosecutor had testified that if he attempted to increase his charges his patrons would go elsewhere where the municipal fees were lower. Saying that a license fee or tax which was confiscatory could not be justified upon the possibility which presumably would be present in every instance that the taxpayer could thereafter attempt to pass it on to patrons, the court therefore held that the ordinance as amended was unreasonable, oppressive, and confiscatory, and must be declared invalid, without awaiting a conviction under the ordinance. As the issues pertaining to the earlier

ordinance, before the last amendment, were not fully presented in the record, and it appeared that the borough now planned to adopt a new ordinance, the court did not consider the old ordinance as it existed before the adoption of the challenged amendment.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Ordinances requiring landlords to pay yearly fee and give unified city and county government some power over rental properties, including power to force tenants and occupants to move out, do not rise to level of confiscation of property and, thus, do not inflict legislative punishment within meaning of constitutional provision prohibiting bills of attainder. U.S.C.A. Const. Art. 1, § 10, cl. 1. Brooks v. Sauceda, 85 F. Supp. 2d 1115 (D. Kan. 2000), aff'd, 242 F.3d 387 (10th Cir. 2000).

[Top of Section]

[END OF SUPPLEMENT]

§ 7. As double taxation

[Cumulative Supplement]

Where a license or excise tax is levied on the business of renting property, and there is also placed a property tax on the property so used in the business, it has been uniformly held that there is no double taxation.

In the first appeal of the case of St. Louis v Bircher (1879) 7 Mo App 169, the court, in affirming the conviction of a hotelkeeper for keeping a hotel without a city license, for which a tax was payable of 50 cents for every room in the house which had been constructed or intended to be used as a bedroom or parlor, said that there was no double taxation in the offensive sense, in levying a license tax where a property tax had already been paid, since the former tax was not upon the rooms but upon the business of keeping a hotel, and an assessment upon the value of certain property for a revenue tax had no necessary connection with a license to carry on a particular business, in which the same property might be used. On further appeal, 76 Mo 431, the court rejected a contention that the city was not empowered by its charter to levy the license tax, affirming the previous decision.

Where the owner of a trailer park objected to a town ordinance imposing a monthly fee of $3.50 per trailer parked on her land, on the ground that it constituted double taxation since she was already paying real-estate taxes, the court in Barnes v Gorham (1957) 12 Misc 2d 285, 175 NYS2d 376, held that the ordinance did not provide for a tax upon the real property of the plaintiff, but rather was a regulatory and licensing provision under the town law, and enforceable as such, and that the amount of the fee was reasonable in view of evidence as to the cost incurred by the town in inspecting and regulating trailer parks.

A license or privilege tax, for the privilege of keeping a hotel, imposed by a city ordinance in the amount of a flat fee of $40, plus one percent on the actual rental or estimated value of the rental, and providing that hotels having less than 10 rooms should pay no privilege tax, was challenged in Fulgum v Nashville (1881) 76 Tenn (8 Lea) 635, where it was objected that the tax thus imposed on the rental value was double taxation and void, because property taxes had already been levied on the hotel, but the court said that it did not understand this to be contrary to the established rule in the

state on this subject, since property of merchants and traders was taxed at its value, while their licenses were regulated by the amount of sales.

See Cobb v Commissioners of Durham County (1898) 122 NC 307, 30 SE 338, supra § 5[c], where it was held not to be double taxation to levy a license tax for the privilege of conducting a hotel business, as well as a corporation franchise tax for the privilege of doing business as a corporation.

But it has been held that one who has taken out a license for and paid a tax on a certain business cannot be compelled to take out another license or pay another tax for anything which constitutes an essential part of such business.

In making its decision that a city council did not have power to impose a room tax upon a hotel which had already been licensed as an inn or tavern and to sell intoxicating liquors, the court in Atlantic City v Hemsley (1908) 76 NJL 354, 70 A 322, said that the power of a city to impose an annual tax of 50 cents for each sleeping room in boardinghouses, cottages, and hotels, might exist in view of a provision of the charter permitting the city to license and regulate a number of enumerated occupations, concluding with the words "and all other kinds of business" conducted in such city, if that section of the city charter stood alone, but that since the defendant here had been issued a license under another section of the charter granting the city the power to license the sale of intoxicating liquor, and expressly reserving the power to license inns and taverns conferred by an earlier charter, and in pursuance of this latter power the city had granted the defendant a license to keep an inn and tavern and to sell intoxicating liquors at the hotel here concerned, which was both licensed and conducted as an inn or hotel, and necessarily maintained spare bedrooms as an incident to its business, the rule must be invoked that a person who had taken out a license for or paid a tax on a certain business could not be compelled to take out another license or pay another tax for anything which constituted an essential part of such business.

Note also the case of Richards v Pontiac (1943) 305 Mich 666, 9 NW2d 885, infra § 9, where a city license fee was held invalid, because the state had entered the field of licensing tourist camps and prescribing their fees.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Monthly license fees based on graduated classification of mobile home spaces were valid and imposition thereof did not constitute double taxation of real property, despite defendants' contentions that fees constituted tax imposed on mobile home spaces without regard to whether they were occupied or not and therefore constituted invalid tax on real property contrary to constitutional requirement that property be assessed for taxation under general laws and uniform rules, since constitutional prescription did not apply to legislative power of indirect taxation upon privileges, franchises, trades, and occupations by exacting license fees for privilege of transacting business, though such power be exercised for revenue purposes. Monmouth Junction Mobile Home Park, Inc. v. South Brunswick Tp., 107 N.J. Super. 18, 256 A.2d 721 (App. Div. 1969).

[Top of Section]

[END OF SUPPLEMENT]

§ 8. As special legislation, or as taxation of a natural right

Where a tax on renting has not applied uniformly to persons in the same circumstances, the tax has been struck down as special legislation.

In a case dealing primarily with the validity of a county ordinance imposing a high tax per trailer on trailer parks, the court in County Board of Supervisors v American Trailer Co. (1951) 193 Va 72, 68 SE2d 115, also considered the validity of the enabling statute permitting the imposing of a county license and license tax based on the maximum number of trailers accommodated. The statute itself was held to be invalid as a special or local law prohibited by the state constitution, since by its language it limited its application to a county having a population density in excess of 1,000 per square mile, which in effect limited it to only one county in the state, although that in itself would not have rendered the statute invalid except for the fact that it also, in effect, authorized the imposition of a high county license fee on trailer camp operators in that one county alone, while exempting other counties adjoining areas having a far greater population density than 1,000 per square mile, and so having similar trailer camp problems, but receiving exemption on account of the fact that none of such areas happened to be located in a county having such a population density over the county taken as a whole.

But a challenge to a taxing ordinance on the ground that it was taxation of a natural right was rejected in one case.

Where a statute required that each mobile home park operator should collect from each occupied mobile home occupying space in his park a monthly parking permit fee, the court in Barnes v West Allis (1957) 275 Wis 31, 81 NW2d 75, rejected a challenge to the tax as a tax on the natural right to live in a home, saying that while such a right might be considered an actual right rather than a privilege, it was established that a tax which did not violate other constitutional principles of the state could properly be laid on inherent or natural rights.

§ 9. As exceeding delegated power

[Cumulative Supplement]

In a number of cases where an excise or license tax has been placed on the renting of real property, the power of the municipality levying the tax to do so has been challenged. In general it has appeared that a municipality is granted, either by statute or by its charter, sufficient police power to levy a regulatory tax not in excess of the reasonable cost of administration, and where it is further authorized to tax for revenue, a municipality may levy an excise or license tax the amount of which must be reasonable and not confiscatory.

Where a statute had granted to local governing bodies the power to license and regulate trailer camps and campsites, and to fix the fees for all such licenses, which, it was provided, might be imposed for revenue, the court in Bellington v East Windsor Twp. (1955) 17 NJ 558, 112 A2d 268, upheld an ordinance prescribing a license fee of $200 a year for a trailer camp or campsite, and $2 a week per trailer, rejecting the contention of the trailer camp operator that the license fee was invalid as enacted for purposes of taxation, not regulation, and was prohibitory and confiscatory. Regulatory and administrative provisions of the ordinance were not challenged. The court found that the enabling statute was not a general municipal tax measure, as an end in itself, but was in essence a regulative police mechanism directed to the service of the public need in the particular area of governmental action by control through a license and a license fee, which might also, within reasonable bounds, be imposed for revenue as an incident of the police regulation, and should be a fee reasonably related to the regulated subjects and the public ends to be served. It was noted that there was a basic distinction between a local legislative act primarily regulative of a business, trade, or professional calling in the exercise of the police power to serve the common need, and the use of the delegated power to tax the pursuit for revenue. In the first case, it was said, the license fee was ordinarily the means of defraying the expense fairly attributable to the regulative process, while the broader sovereign power to tax for revenue to serve a public purpose was confined by constitutional limitations, the terms of the grant itself, and the rule of reason and good discretion, but the two might be unitedly exercised, and the assessment might still constitute a license fee proper, rather than a tax for revenue, even though the fee charged was in excess of the regulatory expenses and burdens. It was said that where the primary object was police

regulation, it did not necessarily matter that the incidental result was revenue above the actual cost of supervision and control of the business, since that was not enough to cause a tax to be one for revenue rather than a license tax, but where revenue was a principal objective of the tax, it was not sustainable under the police power alone. In this case it was found that trailer camps were peopled in great part by transients who used and enjoyed the community's services and facilities without sharing the cost, and it was held that the inclusion in the license fee of a tax designed in some measure to equalize the common burden was within the statutory power to tax for revenue as an incident of the police regulatory power, but that the tax might not be prohibitory or confiscatory. Analyzing the amount of the tax here prescribed, and comparing it with other similar taxes in nearby areas, and noting the allegation that the annual license fee here to be paid amounted to about 50 percent of the gross income, the court pointed out that the rental charges made appeared to be in aid of sales promotion in the pursuit of the operator's allied business of trailer sales, and that the rental charges were therefore fixed without full regard to the value of the service, and so held that there was no showing that the burden of the tax was such that profitable operation could not be had under a fair and reasonable rate for the service thus provided, ruling that the operator of a business made subject to the excise could not subvert or defeat the state's delegated power to tax by undervaluing the service.

Stating the rule that when the legislature confers upon a municipality the general power of taxation, it grants all the power possessed by itself in respect to the imposition of taxes and the city can then impose taxes in its discretion, upon all subjects within its jurisdiction not withheld from taxation by the legislature, whether taxed by the state or not, the court in Fallon Florist, Inc. v Roanoke (1950) 190 Va 564, 58 SE2d 316, held that where the city had been granted by its charter the power to raise annually by taxes such sums of money as the council should deem necessary for the purposes of the city, and in such manner as the council should deem expedient, this language was designed to confer upon the city the general power of taxation except only as that power was limited by the constitution and laws of the state and of the United States, and so an ordinance imposing, inter alia, a tax of 5 percent of the total amount paid for room rental by or for any transient to any hotel within the city, and placing the duty upon the one receiving the payment for such rental of collecting, and reporting to the designated officials of the city, the taxes so levied, was valid. The court noted that the state constitution provided that the general assembly might define and classify taxable subjects and, except as to classes of property therein expressly segregated for either state or local taxation, might segregate the several classes of property so as to specify and determine upon what subject state taxes and upon what subject local taxes might be levied.

Also see Sights v Yarnalls (1855) 53 Va (12 Gratt) 292, where the court said that it was of the opinion that it could not undertake to say that a tax imposed on "ordinaries," according to the rental, and fixed at $380 on the first $1,000 of rental value and 25 percent on the excess, was unjust, unequal, or exorbitant, nor that the exercise of the discretion vested in the city council as to the amount of the tax to be levied on ordinaries was undue, improper, or oppressive. However, it was not clear in this case whether the rental value referred to was an appraised rental value of the building or in the value of the rents to be collected from persons lodging at the ordinary. The meaning of the term "ordinary" here is also open to doubt, although it is said to have been applied to hotels in the Southern States.

First deciding that it was reasonable to classify both trailer coaches and mobile homes as "trailers," although the former were used for temporary occupancy, the court in Karen v East Haddam (1959) 146 Conn 720, 155 A2d 921, held that an ordinance requiring a trailer park operator to pay an annual license fee of $100, and a weekly license fee of $1 for each occupied trailer in the park, enacted by a municipality which under the applicable statute did not have the power to levy a tax, was nevertheless valid and reasonable as a police and not a tax measure.

Where a statute provided for the regulation of trailer camps by local ordinances in the counties of the state, permitting a license and license tax based on the maximum number of trailers accommodated at such camps, under which the amount of the tax must be related to the cost of enforcement, it was held in County Board of Supervisors v American Trailer Co. (1951) 193 Va 72, 68 SE2d 115, that after an ordinance passed under the authority of this statute had provided for an increased license tax of $50 per year per trailer lot used or intended to be used as such, the amended ordinance was invalid, because no effort had been made to relate the amount of the tax to the cost of enforcing the regulatory measures

provided for by the ordinance. It was found that the enabling statute was only a regulatory one, and authorized only a regulatory ordinance, and that the tax permitted was a tax upon the license so authorized, but that there was nothing in the title nor in the body of the act to suggest that a revenue measure was intended.

A city ordinance providing for the licensing of tourist camps and for the payment of an annual fee of $10 for each unit of capacity of the trailer camp here concerned was held to be void in Richards v Pontiac (1943) 305 Mich 666, 9 NW2d 885, because, the state having entered the field of licensing tourist camps, any provision for additional fees by the city was invalid.

Holding that a city council did not have power to impose a room tax upon a hotel which had already been licensed as an inn or tavern and to sell intoxicating liquors, the court in Atlantic City v Hemsley (1908) 76 NJL 354, 70 A 322, said also that the section of the city charter under which the ordinance in question was passed did not specifically empower the city council to pass ordinances imposing a sleeping room tax upon inns or hotels, or to otherwise license or regulate them, and it appeared that the power to enact the ordinance in question, so far as it applied to hotels, was at least doubtful, since statutes delegating such power were to be construed strictly.

See also St. Louis v Bircher (1882) 76 Mo 431, supra § 7, where a tax on hotels and boardinghouses of 50 cents for each room constructed or intended to be used as a bedroom or parlor was held by the appellate court below to have been valid as regards the city's general power to levy it, since the city was said to have required no legislative authority for passing the licensing ordinance, because it had been given general authority to frame a charter for itself for its government, under which charter it was invested with the power to levy taxes for the support of the city government.

A city ordinance providing that no person should conduct or operate any roominghouse, multiple-family dwelling, or any combination thereof, without obtaining a license, defining a "multiple-family dwelling," in effect, as a structure used for more than two dwelling units or for two dwelling units and any other occupancy, and including apartment houses and apartment hotels, and providing for annual license fees of $3 per rooming unit, $5 per dwelling unit, and $3 and $5 respectively for combinations of rooming and dwelling units, with maximums of $200 in each case, was held not to be unconstitutional in McBriety v Baltimore (1959) 219 Md 223, 148 A2d 408. The court found the ordinance to be a reasonable regulation of an occupation, and held that the city had full power under its charter, not only to license for regulatory purposes, but also to tax for revenue purposes the dwellings defined in the ordinance. It was also found that the ordinance properly embraced only one subject matter, the licensing and regulating of renting or leasing housing accommodations in the city, whatever the accommodation might be.

In Michaels v Township Committee of Pemberton Twp. (1949) 3 NJ Super 523, 67 A2d 324, the court, holding an ordinance for an annual license fee of $15 for each trailer space in a trailer park, which license fee was for the purpose of revenue, to be reasonable in view of the added municipal burden imposed by a trailer camp, said that the mere fact that a municipality might collect revenue under an ordinance did not preclude it from exercising its police power under such ordinance to reasonably regulate any business, the unrestrained pursuance of which might affect the public health and safety, and as long as the revenue collected under the ordinance was such an amount as might be reasonably expended in enforcing the regulatory ordinance and for the added burden to the township, the ordinance could not be said to be one for the raising of revenue only.

See Los Angeles v Lankershim (1911) 160 Cal 800, 118 P 215, supra § 5[b], where a city ordinance imposing a license fee on the business of letting office and storage rooms and prescribing fees of one dollar per year for each office room and $3 for each storeroom, but exacting the fees only for buildings containing more than 30 rooms, was held to be discriminatory, and it was noted that it was strictly forbidden by the city charter, as well as by the general law of the state, to discriminate in the matter of licenses between persons engaged in the same business, unless the discrimination took the form of regulating the amount of the license in proportion to the amount of the business done.

In St. Louis v Bircher (1882) 76 Mo 431, the court held that a license tax upon the business of keeping a hotel was authorized by the city charter, contrary to the contentions of the appellant hotelkeeper.

See also where an ordinance imposing a license tax upon the operation of apartments and apartment houses, providing for a license fee of $2 for one apartment and, in effect, for $5 each annually for two or more apartments, was held invalid in Martin v Greenville (1950) 312 Ky 292, 227 SW2d 435, since it did not appear that the city, without further delegation of power from the legislature, had the power either to regulate or inspect apartment houses under the authority which it had been granted to regulate certain specifically named occupations, and "any other trade, occupation, or profession." It was further noted that where a license fee was imposed under the police power, the exacted fee must not be so large as to create the imputation of a revenue measure, and the fee must be sufficient only to meet the expense of issuing the license and exercising supervisory regulations over the subject of the tax, and here, since there was an absence of regulation or inspection authority, the fees could be used under the proper exercise of police power only for the issuance of a license and for paying an officer for securing a warrant for failure to procure one, but it appeared that all the funds to be collected under the ordinance in question would fall into the class of revenue. It did not appear to the court that the classification, based only on the number of rooms in a unit, was a reasonable one, and it cited authorities to the effect that a tax based upon a difference in number only would constitute a tax for revenue.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

City license tax on persons engaged in business of renting houses, apartments or other types of dwelling units and defining "engaged in business" as renting four or more houses, apartments or other types of dwelling units, was invalid where neither city's charter nor state statute delegated to city power to extend "engaged in business" beyond its common law definition. Krauss v. City of Norfolk, 214 Va. 93, 197 S.E.2d 205 (1973), on reh'g, 199 S.E.2d 529 (Va. 1973).

[Top of Section]

[END OF SUPPLEMENT]

§ 10. As requiring payment of debt of another

Where it is provided that a tax levied upon a landlord be passed on by him to, or collected from, the tenant paying the rent, it is generally held that this may be properly required, and that it does not constitute the payment of a debt by another, since the obligation of the tenant for the tax is not a debt.

In Gaulden v Kirk (1950, Fla) 147 So 2d 567, where a privilege tax of 3 percent of the rental charge was levied on persons engaged in the business of renting, leasing, or letting any living quarters, or sleeping or housekeeping accommodations, a provision requiring the landlord to pass the tax on to, and collect it from the tenant, was held to have been properly inserted for the purpose of protecting landlords, and, in particular, small landlords who might not be able to afford to pay the tax and remain in business. The parallel situation in the case of sales taxes was noted, where it was said that in a number of states a provision that the seller collect the tax from the buyer had been held valid where the tax was upon the privilege of transacting business. The contention that the statute was unconstitutional because it required one person to pay the debt of another was rejected, inasmuch as the lessee did not pay a debt of the landlord, for the latter's tax obligation was not a debt, and the only debt which might be said to be created by the law was the one arising from

the contractual relationship between the landlord and the tenant, and the act of paying a constitutionally levied tax was nothing more than a bearing of the taxpayer's share of the necessary expenses of government.

Upholding an ordinance imposing, inter alia, a tax of 5 percent of the total amount paid for room rental by or for any transient to any hotel in the city, and placing the duty upon the one receiving the payment for such rental of collecting, and reporting to the designated officials of the city, the taxes so levied, the court in Fallon Florist, Inc. v Roanoke (1950) 190 Va 564, 58 SE2d 316, held that there was no merit in the contention that the hotel room rental tax ordinance was invalid in that it required taxes to be collected by the person who received the amount paid for hotel room rental, and to be transmitted by him to the proper city official, since, it was said, the power to impose a tax carried with it the power to provide practical means for its collection such as were found in the ordinances, because it was of course impossible that the city treasurer, or one of his deputies, be present at each of the transactions contemplated in the ordinances to collect the taxes thereon imposed, and consequently a layman in each instance was made the agent by which the particular tax was collected from the renter of a hotel room, and, therefore, the ordinances relieved the city treasurer of no duties or obligations imposed upon him by the city charter or the general law.

See also Hoffman v Neptune City (1948) 137 NJL 485, 60 A2d 798, supra § 6, where the court, discussing a tax levied upon a trailer camp operator of $10 monthly for each trailer parked in the camp, said that a license fee or tax which was confiscatory could not be justified upon the possibility—which presumably would be present in every instance—that the taxpayer could thereafter attempt to pass it on to patrons, noting that the park operator had testified that if he did so his patrons would go elsewhere.

III. Construction and application of statute or ordinance

§ 11. Rules of construction; generally

[Cumulative Supplement]

In construing the applicability of excise and license taxes on renting, the courts have followed the usual principles that the legislative intent must, if possible, be ascertained and followed, and that where there are ambiguities, these must be interpreted most strongly against the taxing power. In the cases infra, therefore, the courts have applied these principles to questions of what businesses were intended to be taxed, what constituted a renting business subject to tax, what premises were intended to be covered, whether services to the government were taxable to the renter, and finally, what was the proper method of computing taxes found applicable to the renting operation concerned.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

See Tower Plaza Investments Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973), § 3.

[Top of Section]

[END OF SUPPLEMENT]

§ 12. Specific renting operations as within statute or ordinance

[Cumulative Supplement]

Where a taxing statute or ordinance is stated to apply to some specified businesses, but others are not specifically mentioned, the courts have been required to decide just how widely the legislative body, in making its enactment, intended to spread the application of the tax. In case of ambiguity the principle that uncertainties must be construed most strongly against the taxing power has been invoked, as it has in other similar cases.

Where the defendant tax commissioners had requested payment of a 2 percent sales tax on the rentals from a mercantile and office building, under the provisions of a statute imposing a tax on the gross income or sales of a number of occupations and businesses which had been divided by the statute into seven classes, each with the rate of tax classified for it, it was decided in White v Moore (1935) 46 Ariz 48, 46 P2d 1077, that a tax on the income of those who rented offices and storerooms must be assessed within a classification described as "hotels, guesthouses, dude ranches and resorts, roominghouses, apartment houses, automobile rental services, automobile storage garages, parking lots, tourist camps or any other business or occupation charging storage fees or rents and adjustment and credit bureaus and collection agencies," but held that the reading of the types of businesses mentioned in the classifications suggested that, in selecting the business composing each, the legislature had in mind occupations through which ran a common thread or purpose, which in the class above enumerated was an intention to include those supplying accommodations, either wholly or in part, for tourists or transients, and that it was not reasonable to presume that it was intended that the business of renting offices and storerooms to permanent residents for business purposes should come within the term "any other business charging rents," and that therefore the tax was not intended to be levied on the plaintiffs here. The decision below, applying the tax to the renting for mercantile and office purposes engaged in by the plaintiffs, was therefore ordered reversed.

In Alvord v State Tax Com. (1950) 69 Ariz 287, 213 P2d 363, the court considered the effect of the subsequent legislative addition to the statute construed in White v Moore, which to the list of rental properties added the words "office buildings," so that the previous judicial construction of that portion of the statute, as referring only to the renting of accommodations for tourists or transients, appeared to be invalidated. The contention of the state here was that when the legislature inserted the words "office buildings" in its enumeration of businesses, preceding the words "other business or occupation… charging rents," it severed the "thread of common purpose" which was the effecting of transient accommodations only, and thereby made the rule of ejusdem generis inapplicable in arriving at the legislative intent, and that therefore the necessary conclusion was that the legislature intended by the destruction of this "thread of common purpose" to seize for taxation everything, including rents from farms, dwelling houses, storerooms, and so forth. The court, however, said that this revenue act, the construction of which was, to say the least, doubtful, should be given a strict construction against the taxing power, giving due regard to the expression of the legislative intent, and should not be extended to embrace objects bearing the burden of taxation by strained construction or implication. Since the preceding judicial construction had in effect notified the legislature that when it used the expression "any other business or occupation…charging rents," it had used it in a restricted sense, it appeared to the court that if the legislature had intended to embrace all businesses charging storage fees and rents, there would have been no object in particular enumeration, unless the general terms used were intended to be restrictive, and so it would seem much more reasonable to assume that the legislature had expected only to add one more enumerated business for the purpose of taxation, than to speculate that, by merely inserting another classification, it had intended to reach out and levy a tax on any and all businesses collecting rents. The specific holding in this case, therefore, was that the state tax commission could not subject owners of agricultural lands, dwelling houses, and certain other properties from which rentals were being received, to the provisions of the statute as thus amended.

See also Edwards v Los Angeles (1941) 48 Cal App 2d 62, 119 P2d 370, infra § 13, where it was held that the type of renting, which was to lodgers rather than to tenants, and not the type of premises concerned, determined the applicability of the tax.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Wholly owned subsidiary of national bank was engaged in business within meaning of transaction privilege taxing statutes where buildings owned by subsidiary were rented to be used as offices by tenants, including bank, for respective businesses, and where subsidiary operated parking lot, receiving rent from bank's tenants and employees; but tax was not applicable to buildings leased to bank and others where lessees operated buildings, entered into leases with tenants, and collected rent, nor to parking garages operated by lessees, nor to residences in remote areas occupied by bank managers and other personnel. Arizona State Tax Commission v. First Bank Bldg. Corp., 5 Ariz. App. 594, 429 P.2d 481 (1967).

Commission properly imposed transaction privilege taxes based on income of subsidiary corporation of state bank from leases or subleases of all banking space to parent organization, including single-purpose buildings occupied by branch banks, subsidiary in these circumstances being engaged "in the business of office buildings" within meaning of statute. Bodco Bldg. Corp. v. Arizona State Tax Commission, 5 Ariz. App. 589, 429 P.2d 476 (1967).

[Top of Section]

[END OF SUPPLEMENT]

§ 13. Specific premises as within statute or ordinance

[Cumulative Supplement]

In determining just what specific premises are subject to an excise or license tax levy on their renting, the courts in this case also apply the rules of strict construction against the taxing power and of carrying out, as far as possible, the expressed legislative intent.

In Edwards v Los Angeles (1941) 48 Cal App 2d 62, 119 P2d 370, the court, in finding to be valid an ordinance providing that every person engaged in the business of renting or letting any rooms in any hotel, roominghouse, boardinghouse, apartment house, or lodginghouse, should pay license fees proportioned to gross receipts, held that the ordinance did not by these terms make an illegal and arbitrary classification of those who on one hand rented or let rooms in any hotel, roominghouse, apartment house, or lodginghouse, who must pay the tax, while exempting those who rented similar accommodations in flats, bungalow courts, duplexes, or single-family residences, since these latter types of dwellings might under the circumstances of a particular case constitute an apartment house, hotel, etc., as described in the ordinance. The ordinance was said evidently to be intended to place a license tax upon those engaged in the business of renting out lodging accommodations, defining a lodger as one who had no interest in the realty but who occupied part of a tenement which was under the control of another. It was held to be immaterial in what forms the places used for lodging purposes were built, since the ordinance was all-inclusive and did in fact reasonably cover all lodgings, as shown by its terms. It was also said that the mention of boardinghouses was no doubt inserted merely to prevent the exemption of any boardinghouse keeper who also rented rooms. Distinguishing the act of an owner in renting his property to tenants from that of the business, here held to be taxable, of supplying accommodations to lodgers, the court found that the renting of apartments by the property owner here constituted the renting of the rooms in his apartments as lodgings, and not the renting of rooms used as stores and the like, nor did it constitute such a leasing of the rooms to tenants which would confer on them an interest in the realty.

A tax upon the operators of an office building deriving revenue therefrom was held to have been properly levied in State v Heymann (1933) 178 La 479, 151 So 901, so far as the tax computed from revenues obtained from office rentals was concerned, but was held not to be computable upon the revenues received from other parts of the building rented out as retail stores and not as offices.

Where a corporation owning a building occupied a large part of it for its own business but rented out the surplus space for offices to others, it was held in State v United Fruit Co. (1934, La App) 152 So 915, that the income it received from rentals from the offices in the building which were not occupied in its own business were subject to a license tax levied on anyone operating an office building and deriving revenue therefrom, of one-tenth of one percent of the gross rent or compensation therefrom, although the corporation had contended that it had built the building for its own use, with the renting of the surplus space merely a temporary arrangement until it should find need to occupy all of the space in the building for its own use, and that it was not regularly in the business of building operation.

In Edwards v Moonachie (1949) 3 NJ 17, 68 A2d 744, where a municipality had been authorized by the legislature to license "hotels, boardinghouses, lodging and roominghouses," in particular, with a general clause embracing "all other places," as well as "buildings used for sleeping and lodging purposes, restaurants and all other eating places, and the keepers thereof," the court first decided that the validity of the borough ordinance licensing trailer camps and campsites must be determined by the powers originally given by the statute, which had subsequently been amended to include trailer camps, etc., saying that a subsequent grant of such authority, without more, did not serve to validate the ordinance. Then, considering the wording of the original authorization, it held that the doctrine of ejusdem generis should not be applied so as to limit the class particularly enumerated, because the general terms in a statute must be given a meaning beyond the particular words, where it was plain from the whole that they were used in a broader sense, and said that, in this case, to hold that the general words were not inclusive of "trailer camps" and "campsites," as defined by the ordinance, would be to deprive them of all meaning. Specifically, it was held, trailer camps and campsites, in the view of the ordinance, comprised "places" used for "sleeping and lodging purposes."

See Supply Laundry Co. v Jenner (1934) 178 Wash 72, 34 P2d 363, supra § 5[a], where the court found a clear distinction between the taxability of income derived from the lease or rental of real estate, and that derived from engaging in a hotel, warehouse, or storage business wherein a mere license to use or enjoy real property was granted, and held that in this situation there was no discrimination in separately classifying those renting office buildings and those operating hotels, warehouses, and storage houses.

See also Barnes v West Allis (1957) 275 Wis 31, 81 NW2d 75, where the court held that occupied house trailers were properly classified differently from permanent homes for tax purposes, so that an excise tax was properly levied on use of a trailer which would not be levied on occupancy of a permanent home.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

See Arizona State Tax Commission v. First Bank Bldg. Corp., 5 Ariz. App. 594, 429 P.2d 481 (1967), § 12.

See Bodco Bldg. Corp. v. Arizona State Tax Commission, 5 Ariz. App. 589, 429 P.2d 476 (1967), § 12.

There was no statutory authority for ordinance imposing $50 per unit license tax on apartment houses for purpose of replacing revenue lost because of reduced apartment house assessments, and even if authority could be found, fee was excessive in relation to need for regulation or protection of community. Boulevard Apartments, Inc. v. Borough of

Hasbrouck Heights, 86 N.J. Super. 189, 206 A.2d 372 (Law Div. 1965), judgment aff'd, 90 N.J. Super. 242, 217 A.2d 139 (App. Div. 1966).

[Top of Section]

[END OF SUPPLEMENT]

§ 14[a] Meaning of term "business"—Renting and leasing as a business or occupation; generally

[Cumulative Supplement]

The renting and leasing out of real estate has been generally held to be a "business" and subject to excise and license taxes on businesses and occupations.

In Englewood v Wright (1961) 147 Colo 537, 364 P2d 569, 93 ALR2d 1129, a city ordinance established and imposed a business and occupational license tax for the purpose of raising municipal revenue and licensing and regulating the carrying on of all businesses, trades, occupations, and professions within the city, specifically prescribing a tax of $3 per unit per year on any person who rented, leased, or otherwise provided one or more residential units for hire, and a tax of the same nature of $4 where the units provided were commercial, and further prescribed that the tax should not be construed to be a tax on persons who paid rent or occupied rental units owned or leased for rental purposes by other parties. The ordinance was challenged, inter alia, on the ground that the tax sought to be collected was not truly a business or occupational tax, but was actually either an income tax in only slight disguise or else a tax on real property. The court here, however, disagreed with these interpretations, saying that it had been admitted that the city did have the authority and power to impose a business or occupational tax, then held that the renting of residential or commercial property was a "business" and, as such, was subject to the power to impose a business or occupational tax.

In determining the constitutionality of a state statute providing for a privilege tax of 3 percent on rental charges made by those engaged in the business of renting, leasing, or letting any living quarters, or sleeping or housekeeping accommodations, the court in Gaulden v Kirk (1950, Fla) 47 So 2d 567, supra § 3, saying that the word "business" was generally accepted as synonymous with "occupation," declared it to be the express legislative intent that the tax in question should be a privilege or occupation tax and the subject of the taxation the privilege of engaging in business within the state, and stated that the right of the legislature to impose such a tax for revenue purposes had been established.

Where a statute provided that any operators of an office building deriving revenue therefrom, with certain exceptions for building owners doing business in their own building, should pay a license tax equal to one-tenth of one percent on the gross rent or compensation thereof, the court in State v Heymann (1933) 178 La 479, 151 So 901, held the tax applicable to the defendant here, owner and operator of an office building. The court said that the operating or managing of an office building was now well recognized as the carrying on of an occupation or business regarding which the state constitution provided that license taxes might be levied on the persons pursuing such occupations, and that the statute was not void for vagueness in not further defining the business of operating an office building. The court, however, while holding the tax applicable to office rentals, did find that the tax might not be levied on the revenue from that part of the building occupied by retail stores and not used in the business of operating an office building, and ordered the tax judgment reduced by the amount computed as due by reason of rentals from the retail store premises.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

See Arizona State Tax Commission v. First Bank Bldg. Corp., 5 Ariz. App. 594, 429 P.2d 481 (1967), § 12.

See Bodco Bldg. Corp. v. Arizona State Tax Commission, 5 Ariz. App. 589, 429 P.2d 476 (1967), § 12.

See Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1973), § 4.

See Krauss v. City of Norfolk, 214 Va. 93, 197 S.E.2d 205 (1973), on reh'g, 199 S.E.2d 529 (Va. 1973), § 9.

[Top of Section]

[END OF SUPPLEMENT]

§ 14[b] Meaning of term "business"—Incidental renting as not constituting renting business

However, where a tax has been placed on the business of renting, it has been held that occupations mainly concerned with the provision of other services and not principally with renting may be distinguished as not taxable as renting businesses.

A statute levying a tax or excise for the privilege of engaging in the business of rendering or performing services, professional or otherwise, exempting, inter alia, gross income derived from the lease or rental of real estate, but not excepting gross income derived from engaging in a hotel, warehouse, or storage business wherein a mere license to use or enjoy real property was granted, was held not to be discriminatory in Supply Laundry Co. v Jenner (1934) 178 Wash 72, 34 P2d 363, supra § 5[a], since the court found a clear distinction between the business of renting offices and the businesses of operating hotels, warehouses, and storage places, saying that the latter businesses were purely commercial ones apart from the real estate itself and contemplated a variety of services other than those connected with the rental of office space.

§ 14[c] Meaning of term "business"—Renting as sideline business held to be rental business

Where the defendant has contended that it was not in the business of renting, merely because it was not its main business, but where what renting it has been performing has not been merely incidental to the provision of other services, it has been found liable for a tax on its rental activities.

Where a state license tax had been placed on any persons operating an office building and deriving revenue therefrom, applicability of the tax to it was challenged by the defendant corporation in State v United Fruit Co. (1934, La App) 152 So 915, which contended that it was not in the business of operating an office building because it was merely renting the surplus space in its 10-story building, which it intended to occupy in its entirety in the future when its business required it, pointing out that to have erected a smaller building on such expensive ground would have been uneconomic. The court, however, held that since a very considerable portion of the space in the building was rented out by the defendant and a quite sizeable revenue derived from it, it was obvious that the defendant was "operating an office building" within the meaning of the act, noting that the act contemplated the instant situation, since it exempted from the tax the part of the building occupied by the owner for the carrying out of its own business.

§ 14[d] Meaning of term "business"—Single continuing rental contract as not rental business

Making a single contract of renting to extend over a considerable period, during which rental collections are made periodically, has been held to constitute but one act of renting and not to be the conducting of a rental business within the meaning of a tax ordinance.

In Young v Vienna (1962) 203 Va 265, 123 SE2d 388, 93 ALR2d 86, a landowner filed petition for declaratory judgment praying that the business privilege license tax ordinance of a municipality under which she was required to pay a tax for engaging in the business of renting commercial property be declared inapplicable to her, since the only transaction in which she had engaged was the leasing of a parcel of land zoned for commercial use for a term of 25 years at a monthly rental. The ordinance in question provided that every person who engaged in the business of renting houses, apartments, or commercial property should pay, for the privilege of doing business, an annual license tax of 15 cents on each $100 of gross receipts from the rental of all commercial establishments, apartment units, or dwelling units during the preceding year, with the minimum annual tax prescribed as $10. The ordinance exempted persons engaged in the business of renting houses or apartments unless such person was engaged in the business of renting more than two separate dwelling units, and the business of renting houses and apartments was defined as the rental of a building or portion thereof designed exclusively for residential occupancy, but not including hotels, boardinghouses, and roominghouses. The court rejected the argument of the municipality that the appellant must be held to be engaged in the business of renting commercial property because she would engage in 300 separate acts of business, over the period of the lease, in collecting the monthly rental, and held that she had performed only one act of renting one parcel of land, and that the monthly rental collections flowed from a single act of renting or leasing. The words of the ordinance "engage in the business of renting" were interpreted by the court to imply a continuous and regular course of dealing, rather than an irregular or isolated transaction, in the absence of a statute specifically providing otherwise, and to mean a course of dealing which required the time, attention, and labor of the person so engaged, for the purpose of earning a livelihood or profit, and so it held that her one isolated act of renting a parcel of land zoned for commercial use did not indicate that she was engaged in a continuous and regular course of renting commercial property for a livelihood or profit.

§ 14[e] Meaning of term "business"—Miscellaneous renting activities as not rental business

In miscellaneous decisions, one not performing the services prescribed as constituting a hotel business has been held not to be entitled to tax exemptions permitted such businesses, and one exercising the functions of apartment-house ownership has been held not to be engaging in the business of operation of apartment houses.

Where one section of a statute provided that every person engaged in the business of operating a boardinghouse, lodginghouse, or hotel having beds for 10 or more persons should pay a license tax, for each place of business, of 50 cents for each room therein, and another section provided that every person who operated for a profit any place where dancing or entertainment was provided should pay a license tax of $100, but that this latter section should not apply to any hotel paying an occupational tax as provided for in the former section, it was held by the court in Pellicer v Sweat (1938) 131 Fla 60, 179 So 423, that the classifications made by the statute in imposing license taxes by these two sections were clearly distinct and predicated upon reasonable differences in the classes, and that the petitioner here, who was operating a place as described in the latter section, must pay the license tax provided by that section, since it was not shown that she was operating a business as described in the former section so as to be exempted from the tax prescribed in the latter.

For a decision which, although it did not concern the business of renting so much as the operation of apartment buildings generally, discussed the liability of owners and managers for the payment of license taxes, see Miami v Schonfeld (1961, Fla App) 132 So 2d 767, where the city code provided that every person engaged in or managing any business, profession, or occupation referred to in a certain section of the code was required to secure a city license and one of the occupations designated was "apartment houses." The appellee here, although he owned the apartment houses concerned, did not take an active part in the management but permitted a management corporation to have control of the premises and do those things necessary for their continued operation, exercising such control in the name of the appellee. The city, while not claiming that the appellee was a person managing apartment houses, claimed that he was a person engaged in the business of operating apartment houses. The court said that since the ordinance did not tax the ownership of apartment houses, those things which the owner did as owner could not be said to be indicia of a business of operating apartment houses, and the fact that the owner received the net rents, paid the cost of maintenance and repairs, and had liability insurance, could not be said to indicate that he was in the business of operating apartment houses because those

things, when done by the owner, are activities attributable to his ownership, and it rejected the contention of the city that although the management corporation collected the gross rents, signed the leases, set rents with the agreement of the owner, contracted for maintenance and repairs and generally acted as overseer of the property, the corporation was merely the agent of the actual operator who was the owner, and held that the appellee owner here was not liable for payment of a license tax.

§ 15. Services rendered to government

Where a statute has exempted from sales tax sales of tangible property and charges for labor made to the government, it has been held, nevertheless, that since hotel room rentals are in neither class, a hotelkeeper is liable for sales taxes on room rentals paid by the government and, by his contract with it, not chargeable to the government.

In Edwards House Co. v Stone (1952) 216 Miss 96, 61 So 2d 663, a hotelkeeper sought to recover the amount of sales tax paid under protest under a statute levying a tax equal to 2 percent of the gross income from the business of operating a hotel. The hotel had furnished lodging to persons being recruited into the Armed Forces, under an agreement whereby the government contracted to pay for the services upon invoices bearing a certificate to the effect that state or local sales taxes were not included in the amounts billed. The appellant hotel company had not collected any state sales tax on the lodgings furnished, and contended that the tax was illegally imposed upon it by the tax commission, for the reason that the government was not liable therefor, and that it did not collect the same from the government, and that it was not liable for the tax on such services rendered to the government, since another section of the statute exempted from the general sales tax so much of gross income as was derived from sales of tangible property to the United States Government and so much as was derived from charges for labor to the government. The court held that the furnishing of lodging in a hotel was neither a sale of tangible property nor a charge for labor. The appellant was found to be liable for the tax, since it had specifically agreed with the government that it would not expect the government to pay the tax, the tax here laid no burden upon the government but placed it squarely upon the appellant, and the price to the government for the services rendered was not increased by imposition of the tax upon the appellant.

§ 16. Method of computation of tax

[Cumulative Supplement]

In several cases, where the exact method of computation of excise and license taxes has appeared to be unclear, or in controversy, court interpretation has been obtained regarding the method to be employed.

Where an ordinance for the licensing of trailer parks placed a license fee of $5 a year on each parking unit, and defined a parking unit as a plot of ground consisting of 600 square feet of unoccupied space designed for the accommodation of one trailer coach, the court in White v Richmond (1943) 293 Ky 477, 169 SW2d 315, rejected the contention of the park operator here that such a tax would amount to $1,815 a year on his 5-acre tract and would be confiscatory, saying that the operator had misinterpreted the ordinance which required a license fee for each unit used for parking purposes and no more, and pointing out that the tax on the 14 trailers then on the land would amount to only $70.

An amount payable on account of a tax placed on the operators of an office building deriving revenue therefrom was held to have been improperly computed in State v Heymann (1933) 178 La 479, 151 So 901, since it had been computed upon all rentals received from the building, including those for store premises, instead of only upon rentals from parts of the building rented out as offices.

In Barnes v West Allis (1957) 275 Wis 31, 81 NW2d 75, the court, upholding the collection from each mobile home park operator of a parking permit fee sufficient to cover municipal services and school district services used by the occupants of the mobile homes, in accordance with a statute requiring the fee to equal the cost of such services, approved generally

the method of computation of the tax, resulting in a flat amount monthly per trailer, which method was that of dividing the net cost of municipal services by the number of trailer occupants in the city, and for the school services, by dividing the net cost by the number of child occupants, but held that the estimated number of occupants and children was so far from the figure obtained from a spot count on one day as to be arbitrary. It suggested that the cost of school services might also be calculated on the basis of dividing net cost by the estimated population, rather than by the number of children, but said that it was not to be considered as contemplated by the legislature that such refinement as calculation of the cost of services for each separate mobile home park, and for each individual mobile home, was to be required.

Although holding that a license fee levied on hotels based on the number of rooms in the hotel was presumptively reasonable and valid, the court in Mobile v La Clede Hotel Co. (1930) 221 Ala 531, 129 So 477, supra § 5[b], found that since the taxing ordinance had, apparently inadvertently, omitted schedules of fees for hotels having 15 rooms, and also for those having from 30 to 35 rooms, which therefore could not be taxed, the ordinance must be condemned as arbitrary and capricious and therefore invalid.

In St. Louis v Bircher (1879) 7 Mo App 169, affd 76 Mo 431, it was said that there was nothing unreasonable in graduating the amount to be paid for a hotel license by the number of rooms which might be devoted to the accommodation of the public, nor was there any intelligible reason why the number of rooms actually occupied should be proved in order to justify the tax.

The following additional authority is relevant to the issues discussed in this section:

CUMULATIVE SUPPLEMENT

Cases:

Ordinance levying license tax upon every person engaged in business of renting residential property, including houses, apartments, and dwelling units, was not invalid on ground that it was being administered by commissioner of revenue by application of numerical test where, though commissioner used numerical guideline of ten apartment units, he made his actual determination based upon detailed information, obtained through interrogatories, as to number of employees engaged in operation of property, responsibility of landlord for payment of bills for utilities, taxes, maintenance and repairs, nature and extent of services furnished for tenants, and other pertinent facts. City of Portsmouth v. Citizens Trust Co., 219 Va. 903, 252 S.E.2d 339 (1979).

[Top of Section]

[END OF SUPPLEMENT]

RESEARCH REFERENCES

A.L.R. Library

- Obligation of Online Travel Companies to Collect and Remit Hotel Occupancy Taxes, 61 A.L.R.6th 387
- Tax on hotel-motel room occupancy, 58 A.L.R.4th 274
- Validity of municipal admission tax for college football games or other college sponsored public events, 60 A.L.R.3d 1027
- Picketing court or judge as contempt, 58 A.L.R.3d 1297
- Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 A.L.R.2d 90

Footnotes

1 One example of a tax situation not included here may be seen in the case of People ex rel. Paschen v Morrison Hotel Corp. (1956) 9 Ill 2d 187, 137 NE2d 344, where, in computing the real-estate tax on a hotel, the assessor "tempered" his assessment by considering net income, in the determination of which he used an assumed room occupancy rate and in subsequent years, after his method had been challenged, he had used an "adjusted room occupancy rate" closely approximating the local hotel association's figures for downtown hotels.

2 See Am Jur, Licenses (1st ed §§ 7 et seq., §§ 17 et seq.).

3 See Am Jur, Taxation (1st ed §§ 11–13, 24, 30, 33–37).

4 See Division II infra.

5 See Division III, infra.

6 § 4, infra.

7 § 5, infra.

8 § 6, infra.

9 § 7, infra.

10 § 8, infra.

11 § 9, infra.

12 § 10, infra.

13 § 12, infra.

14 § 13, infra.

15 § 14, infra.

16 § 15, infra.

17 § 16, infra.

18 Quoting Am Jur, Taxation (1st ed § 61).