

Cities of 3rd Class may pass ordinances imposing license tax on wholesale merchants doing business within city limits under Section 6840.

11-25

November 25, 1935



Honorable Elmer A. Strom
Prosecuting Attorney
Cape Girardeau, Missouri

Dear Sir:

This Department is in receipt of your recent letter requesting an opinion regarding the following matter:

"The matter of the right of a city of the 4th class and a city of the 3rd class to pass ordinances for the collection of an occupation tax on a concern selling or consigning its merchandise to retailers in such cities has been presented to me and request made for an opinion from your office.

The exact question involved is whether a corporation organized in Missouri located in this city which sends out its driver and truck loaded with merchandise to cities in this county and surrounding counties to deliver its merchandise to merchants who have either previously ordered the goods or second who desire the goods by purchasing it directly from the truck or allow it to be consigned to them from the truck with a provision that if the consigned stock is not sold it will be picked up by the truck driver replaced with other merchandise or returned.

It would seem that such a procedure would be a benefit to the local merchants and since no property is sold to the consumer would be the same as if the merchandise

was shipped to the retailer by express, parcel post or common carrier unless it would be the mere fact that the driver has the power to make a sale or consignment at the time he arrives at the merchants door and is not dependent on an order previously given.

For your information Section 7046 R. S. Mo. 1929, Section 6840 as amended, Laws 1931 page 276, Section 7287 R. S. Mo. 1929, together with the cases of City of Ozarks vs. Hammond 49 S. W. 2nd 129; City of Lebanon vs. Joslyn 58 S. W. 2nd 289 and City of Aurora vs. Stafford 51 S. W. 2nd 547 throw light on this subject.

Local cities and other cities have ordinances covering wholesale merchandizing agencies, peddlers, drummers and "other business trades and avocations" under which they seek a tax of \$7.50 to \$30.00 per year and the matter is becoming quite a problem as it is difficult and expensive to handle appeals in such cases because of the great number and because it is a continuing violation and the fines for violation run from \$1.00 to \$100.00 for each violation.

I would appreciate an opinion from your office on this subject as soon as possible."

You do not state in your letter the kind or substance of the proposed ordinance which would affect the firms or concerns doing business in the manner you have described in your letter. We conclude it is some form of occupation or license tax as contemplated by Section 6840 Laws of Missouri, 1931, page 277, wherein it is provided as follows:

"The council shall have power and authority to levy and collect license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds, * * * * *"

We have consulted the cases and decisions mentioned in your letter and do not believe that they bear on the kind of ordinance the City of Cape Girardeau proposes to pass, if we can

glean your contention from your letter. We think it more than possible that you have in mind an ordinance somewhat similar as in the case of *City of Sedalia v. Standard Oil Company of Indiana*, 66 Fed. 2nd. 1. c. 760. All of the cases bearing on this question are contained in the decision which we herewith quote the pertinent part:

"The trial court was also of the opinion that the ordinance was invalid for lack of uniformity in its operation because it omitted to impose a similar tax upon those who sold gasoline, but did not transport it, and upon those who transported it in containers of less capacity than five gallons, whereas section 3 of article 10 of the Constitution of Missouri requires that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Assuming that there may have been others who sold or transported this commodity under these circumstances, the requirement of uniformity is met if the tax falls alike on all persons who are in substantially the same situation. In illustrating this principle the court said in *City of St. Charles v. Schulte*, 305 Mo. 124, 264 S. W. 654, 655:

'The Legislature delegated to cities of the third class, as it was competent for it to do, authority to levy and collect a license tax on the vendors of soft drinks. Under the general power so delegated to it the City of St. Charles was not bound to levy the same amount upon all vendors of soft drinks. It could, in its discretion, divide them upon any reasonable basis into classes, as, for example, the volume of business done (*City of Aurora v. McGannon* (138 Mo. 38, 39 S. W. 469), *supra*), or the specific character of the drinks sold (*In re Watson* (17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321), *supra*), and fix a different tax for each class. (1 *Cooley, Tax'n* (4th Ed.) 353). Upon the same principle peddlers have long been classified in

this state for the purpose of taxation. Section 9259, R. S. 1919 (Mo. St. Ann. Sec. 13318).

There can be no doubt but that, under well-settled principles, respondent was not bound to levy and collect a license tax upon vendors of all kinds of soft drinks, if it imposed a tax upon the vendors of any. It could in its discretion have imposed a tax upon those who engaged in selling near beers without imposing any at all upon the vendors of other soft drinks. *Carroll v. Wright*, 131 Ga. 728, 63 S. E. 260; *Coca-Cola Co. v. Skillman*, 91 Miss. 677, 44 So. 985.*

See also, *Ex parte Asotsky*, 319 Mo. 810, 5 S. W. (2d) 22; *Automobile Gasoline Co. v. City of St. Louis*, 326 Mo. 435, 32 S. W. (2d) 281.

On this record it is not made to appear that there was not a reasonable basis for the classification adopted. The suggestion that the classification adopted offends also against the Fourteenth Amendment to the Constitution of the United States is sufficiently met by what was said on that subject in *Campbell Baking Co. v. City of Harrisonville, Mo.* (C. C. A.) 50 F. (2d) 670.

There is a further suggestion that the ordinance is invalid because it undertook to impose a tax upon a business conducted outside of the territorial limits of the city. The bill alleges that defendant was engaged in the city of Sedalia in conducting the business of selling and transporting gasoline, but it also alleges that it was the defendant's duty to account for all gasoline sold by it, under the terms of the ordinance, within the state of Missouri. Considering the title of the ordinance, the general purpose expressed in it, and the limitation stated in section 6, exempting from its operation gasoline shipped from Sedalia to other cities, towns,

and villages, it is a reasonable interpretation of the ordinance in question that it included a tax upon dealers who, in the city of Sedalia, conducted the business of both selling gasoline and transporting it within the city, in the manner mentioned, and also upon dealers who in the city of Sedalia conducted the business of both selling gasoline and transporting it from within the city to points within the state of Missouri. No challenge has been made of the territorial authority of the city to impose the tax upon the first class, but it is asserted that the city may not impose the tax upon the second class, because of the delivery of the gasoline outside of the city. The ordinance does not undertake to measure the tax by the transportation outside of the city of Sedalia. The right of a municipal corporation to impose a tax of this kind upon an occupation or business which is conducted within the city limits, although a portion of the business was carried on outside of the city, is generally recognized. Postal Telegraph Cable Co. v. City Council of Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. Ed. 871; Western Union Tel. Co. v. City of Fremont, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; 37 Corp. Jur. 181; American Union Express Co. v. City of St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; City of Carterville v. Blystone, 160 Mo. App. 191, 141 S. W. 701; American Mfg. Co. v. City of St. Louis, 270 Mo. 40, 192 S. W. 402. The delivery outside of the city of gasoline sold within the city did not invalidate that ordinance."

CONCLUSION

We are of the opinion that an ordinance could be passed by your city council which would impose a license tax on wholesale merchants or firms dealing in the manner in which you have described in your letter.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN Jr. (Acting) Attorney General