

VILLAGES: Can impose occupation tax on dealers for  
privilege of selling gasoline

5-22  
May 8, 1935



Honorable Mark W. Wilson  
Prosecuting Attorney  
Clinton, Missouri

Dear Sir:

We wish to acknowledge receipt of your letter  
in which you inquire as follows:

"I would like to have an opinion  
from you on the following ques-  
tions;

'Can a village, incorporated as  
such, levy a gasoline tax, for  
instance one cent per gallon on  
gas sold at stations in said  
village.' And how high can such  
a tax be made. "

Section 7097 Revised Statutes Missouri 1929,  
relating to villages, provides, in part, as follows:

"Such board of trustees shall  
have power to pass by-laws and  
ordinances \* \* \* \* \* to license,  
tax and regulate merchants \* \* \* \*."

In *Viquesney v. Kansas City, et al.* 266 S. W.  
700, the issue before the court was the power of the city  
of Kansas City to exact a tax of one cent on merchants and  
dealers in gasoline. Although it was a special city

charter there under consideration, still it authorized the licensing of "merchants" just as the statute in the instant case does. The court stated, l. c. 703:

"\* \* \* Evidently it was the understanding of the framers of the charter that 'merchant' should cover all dealers that might be included in the term, because the specific dealers mentioned in that section do not include retail merchants of many kinds. Appellant is hardly in position in the case to say the term 'merchant' does not cover the case, because he points out that the appellant was otherwise taxed, without objection from him, as a merchant. He paid an ad valorem merchant's general tax on his property, as shown by evidence introduced by the plaintiff. See, also, St. Louis v. Baskowitz, 273 Mo. loc. cit. 565, 201 S. W. 870.

Thus it appears that the city authorities, as well as the plaintiff, interpreted the charter to include callings like that pursued by the appellant, as that of a merchant. \* \* \* \* \*

From the foregoing, we are of the opinion that it would be within the delegated powers of a village incorporated as such to levy an occupation tax upon gasoline sold at stations in said village.

In the Viquesney case, supra, the City of Kansas City was requiring every person engaged in the business of selling, and offering for sale, gasoline, to take out a license and requiring that for the privilege of doing such business the licensee should pay the license collector the sum of one cent on each gallon of gasoline sold, transferred or stored by such person. In discussing the nature of the tax, the court says, on page 702, as follows:

"The first question for determination is whether the tax of 1¢ a gallon on gasoline sold by the dealer is a property tax, or an excise tax or an occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by the taxpayer irrespective of the value of his assets, it is an excise tax. (Citations omitted.)

Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is an occupation tax - - one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. In re Opinion of the Justices, (Me.) 121 A. 902; State v. Hart, 125 Wash. 520, 217 P. 45; Altitude Oil Co. v. People, 70 Colo. 452, 202 P. 180. In case of Bowman et al. v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, it was held by the Federal Supreme Court that such a tax was consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution."

Under the foregoing decision, it is settled in this state that the tax similar to the one in Kansas City is an occupation tax levied upon the dealer for the privilege of doing business. It is not a property tax in any sense of the word, and is not a direct tax against the purchaser. The purchaser under no circumstances can be made to pay the tax.

The question now raised is "how high can such a tax be made?" While it is true that our statutes do not

place any limitation upon the tax that may be exacted, yet it is a well settled rule that municipal authorities can not fix a tax so high as to be virtually confiscatory or prohibitive of a legitimate occupation.

The court in the recent case of *City of Washington v. Reed*, (No.) 70 S. W. (2d) 121, 1.c. 123, recognized the above rule and said:

"While it is the recognized rule that the discretion of the municipal lawmaking body will not be interfered with by the courts unless it is clearly apparent that there has been an abuse of discretion and that the tax fixed by the municipal lawmaking body is arbitrary, unreasonable, oppressive, or prohibitive, it is also the general rule that, if the license tax is fixed so high as to be virtually confiscatory or prohibitive of legitimate occupation or privilege, an ordinance imposing it may be held invalid.

Particularly is this rule recognized as to all businesses and occupations and privileges which are not in their general effect injurious or offensive to the public welfare and are not hurtful to public morals. As to such businesses or occupations, the general trend of authorities is that municipal authorities have not the power or right to fix the license tax at such high figure as to prohibit the pursuit of such businesses or occupations, and, when it appears to the reasonable mind that the license tax has been fixed at such a figure as to result in practical prohibition of such business, the power and authority of the courts to hold such license fee invalid is unquestioned."

The business of dealing in gasoline is a lawful pursuit or occupation and an attempt by a village to fix the tax at such a figure as to result in practical prohibition of such business would be declared invalid by the courts.

Honorable Mark W. Wilson

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May 8, 1935

From the foregoing, we are of the opinion that it is within the delegated power of the village incorporated to levy an occupation tax of one cent per gallon upon gasoline sold at stations in said village.

Respectfully submitted,

Wm. ORR SAWYERS  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:  
MW:LC