

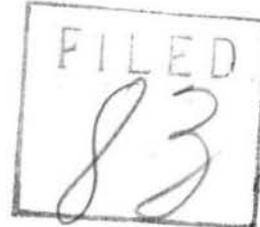
CITIES:
SALES TAX:

Zoratur

Cities of third class cannot pass sales tax act by ordinance. Cities of third class can enact ordinance placing license for occupation tax on businesses, according to the volume of business carried on.

July 18, 1936.

Honorable R. P. Smith
City Attorney
Cape Girardeau, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads as follows:

"I would appreciate receiving the opinion of your office as to the power of a City of the Third Class (Alternative Form) levying a sales tax. I have found no specific authority for such a tax, but neither have I found such specific authority for a gasoline tax which has been levied and collected by a number of cities, some of them of the class designated above.

"Also, if it be impossible to levy such a tax as a TAX, would it, in the opinion of your office, be legal to fix the amount of the license or occupation tax at a percent of the gross business done by the licensee?

"The administration which has just assumed office in this city is faced with a serious financial problem and is seeking new sources of revenue. We are informed by local business men who have travelled in other states, that municipalities, particularly in New York, levy and collect such a tax. This has led to the inquiry. Any information which your office can supply in this regard will be appreciated."

Enclosed is a copy of an official opinion rendered by Honorable Wm. Orr Sawyers, Assistant Attorney-General, on May 8, 1935, to Honorable Mark W. Wilson, Prosecuting Attorney, Clinton, Missouri, holding a village can impose occupational tax on dealers for privilege of selling gasoline.

It is the opinion of this department that the holding in the enclosed opinion is applicable to a city of the third class (alternative form of government) by virtue of Section 6840, as amended, Laws of 1931, page 276, which reads in part 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, ***."

which grants such city the same power as Section 7097, R. S. No. 1929, referred to in the enclosed opinion.

However, we wish to call your attention to the distinction to be made in this type of a tax and a sales tax. This tax is, according to the enclosed opinion an occupational tax and definitely assessed against the merchant and to be paid by the merchant. A sales tax would be more in the nature of an excise tax and furthermore is to be paid, if following the method of payment of sales tax as enacted by the Legislature, by the people and not by the merchant. In *State v. Smith*, 90 S. W. (2d) 405, Judge Leedy, in speaking for the Court held the sales tax to be an excise tax. From the foregoing, section 6840, supra, would not be applicable for a municipality to enact a sales tax, in that it would not be regulating, licensing or taxing a merchant, but in reality would be a tax on the purchaser, for which we are unable to find any such authority granted the law makers of a city of this kind. In *Siemens v. Shreeve*, 296 S. W. 413, l.c. 416, the Court said with regard to municipalities having the power to tax:

"It is conceded that the license tax here sought to be imposed is an attempted exercise of the taxing power, and not a police regulation. A city has no inherent power to tax. This power rests primarily in the state and may be delegated by constitutional provision or by statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred, and in case of doubt the power is denied. 7 McQuillin on Municipal Corporations (Suppl.) Section 987."

McQuillin on Municipal Corporations, Vol. 6, Sec. 2583, page 275 states:

"One of the most essential powers of government is the right to raise revenue; no government could maintain itself without such power. The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. This principle is universally recognized. Therefore as municipal corporations have no inherent power of taxation, consequently they possess only

such power in respect thereto which has been granted to them by the constitution or the statutes."

In *Federal State & P. V. Pass Ry. Co. v. City of Pittsburg*, 226 Pa. 419; 73 Atl. 668, 1. c. 663, the Court said:

"A statement of a few rules and principles of law about which there is or can be no dispute will be helpful to a proper understanding of the questions involved in this proceeding. While taxation is an incident of sovereignty absolutely necessary to maintain government, the authority to impose taxes depends upon express legislative grant, and not upon incidental governmental power. There is no such thing as taxation by implication. The burden is always upon the taxing authority to point to the act of assembly which authorizes the imposition of the tax claimed."

Cooley on Taxation, Vol. 4, Sec. 1764, p. 3511, makes the distinction between a demand of money under police power and one made under power to tax:

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax."

Section 4271, R. S. No. Vol. 44, Corpus Juris, page 1261, provides:

"The power to tax, inherent only in sovereignty, and belonging exclusively to the legislative department of the government, is, to the extent that it is exercised by a municipal corporation, merely a delegated power, subject to repeal and to such limitations and restrictions as may be placed upon it by constitution or statute. While the power to tax is very generally granted to municipal corporations, the power is not possessed by a municipal corporation unless it has been plainly and unmistakably granted to it either in express terms or by necessary implication. It cannot be vested

in the city by judicial construction, or acquired by prescription, nor can a restricted power be expanded by construction."

In your letter our attention is called to the fact that Municipalities in the State of New York, as well as other states, have active sales tax laws. We wish to explain that municipalities are allowed to enact such ordinances by reason of an act passed by the State Legislature of New York, expressly providing that municipalities may enact sales tax laws:

In the laws of New York, 1934, Chapter 873, an act was passed becoming effective as of August 18, 1934, expiring December 31, 1935, title of which reads as follows:

"AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws."

A similar act was passed upon the expiration of the 1934 Laws becoming effective April 29, 1935, and expiring July 1, 1936. However, the above Act in the State of New York, just quoted, providing that cities of a certain size may enact such an ordinance would indicate this was the only method that such an ordinance could be passed, which is no more than what we have stated. In the absence of any constitutional or statutory provision authorizing the law making body of a city to enact a sales tax law they are prohibited from so doing.

In view of the above opinion of this department holding that such a city can not legally enact a sales tax ordinance, we will now consider your second query, "would it be legal to fix the amount of the license or occupation tax at a percent of the gross business done by the licensee?" The enclosed opinion to Honorable Mark W. Wilson embodies this same principle with respect to the gasoline tax of one cent per gallon.

The Court in *Viquesney v. Kansas City*, 266 S. W. 700, held that a tax of one cent per gallon of gasoline sold in Kansas City, was legal, under Section 8702, which provides the city may license and regulate certain business. The Court further said:

"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 '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."

We are unable to find any law prohibiting the law makers of the city from fixing the amount of license at a per cent of the gross business of the licensee. Section 6840, p. 276, Laws, 1931, provides that a municipality may license and regulate certain businesses. However, this section fails to specify the particular procedure in licensing and regulating such businesses. This is left to the discretion of law makers of such municipality. As stated in ex parte Sanford, 139 S. W. 376; 236 Mo. 668, l. c. 692:

"It is also a well settled rule of construction, that where a statute contains grants of power, it is to be construed so as to include the authority to do all things necessary to accomplish the object of the grant." (Cases cited).

CONCLUSION.

It is the opinion of this department that a city of the third class (alternative form of government) in the State of Missouri is prohibited from passing an ordinance in the nature of a sales tax in the absence of any constitutional or statutory provision authorizing same. However, a city may legally fix the amount of a license or occupation tax at a per cent of the gross business done by the licensee.

Respectfully submitted,

OLLIVER HOLEN
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

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