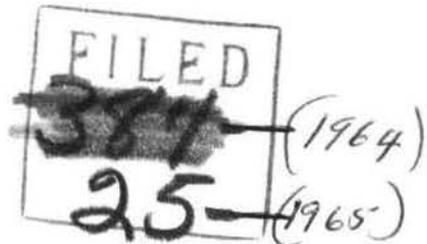


CHARTER CITIES: A constitutional charter city, if
LICENSE TAX: authorized by the charter, may im-
VENDING MACHINES: pose a license tax on vending machines
MUNICIPAL CORPORATIONS: owned or rented by a school district
SCHOOL DISTRICT: and located within such city, as the
tax imposed is not on property owned
by the school district, but on the pri-
vilege of using such vending machines.

OPINION NO. 387 (1964)
OPINION NO. 25 (1965)

December 23, 1965

Honorable Maurice Schecter
State Senator, 13th District
41 Country Fair Lane
Creve Coeur 4, Missouri



Dear Senator Schecter:

This is in answer to your request for an opinion of this office, which request reads as follows:

"May a chartered city impose a license tax on vending machines owned or leased by a school district, situated in its high school? The net proceeds or profit made from such vending machine go into the cafeteria fund of such school district.

"To be more explicit, this school district has a number of modess machines which they own and the city is attempting to impose a license fee on each such machine.

"The school district also leases soda vending machines on a flat monthly basis and receives all profits from the sale of soda and the city is also attempting to assess a license fee on the same. The lease provides that all licenses shall be paid by the lessee."

Honorable Maurice Schecter

This request asks two questions, the first is:

"Is a school district required to pay a license fee to the city on vending machines they own, where the profits from such machines go into the school fund?"

In answer to question one of your request, your attention is first directed to Section 71.610, RSMo 1959, reading as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

From the foregoing statutory requirement, it is apparent that an examination of the charter is necessary to determine what "business avocations, pursuits or callings" are especially named as taxable.

Article III, Section 3.10(30) of the City Charter of Florrisant states:

"The Council shall have all powers vested in it by the constitution and statutes of the State of Missouri and this Charter, including, but not limited to, the following powers which shall be exercised by ordinance:

* * * *

"(30) To license, tax and regulate all businesses, occupations, professions, vocations, activities or things whatsoever set forth and enumerated by the laws of Missouri now or hereafter applicable to constitutional charter cities or cities of the first, second, third or fourth class, or any population group, and which any such cities are not or may hereafter be permitted by law to license, tax and regulate."

Honorable Maurice Schechter

This charter provision, supra, does not expressly list those businesses, avocations, activities, etc., that may be licensed or taxed, but incorporates statutes which do enumerate their taxable and licensable activities. This form of incorporation was approved in General Installation Company v. University City, Mo., 379 S.W. 2d 601, 604:

"If the incorporation by reference technique is permissible, and it is in Missouri, the incorporated language becomes a part of the incorporating legislative act for all purposes . . . and that by such authorized technique the business of respondent was 'specially named in the charter as taxable' to the same extent and with the same effect as if the words and terms of the incorporated statutes had been copied and set forth in the charter haec verba . . ."

One licensing authority provided in the Charter, supra, is taking authority of First Class Cities. Section 73.110, regarding first class cities, states in part:

"The mayor and common council shall have power within the city, by ordinance, not inconsistent with the constitution or any laws of this state or of this chapter:

* * * * *

"(17) To license, tax and regulate * * * automatic selling machines or devices * * *".

Your question as stated indicates that the item being licensed is a vending machine (or automatic selling machine or device) and the license imposed is not a property tax, but a privilege or excise tax.

"We therefore conclude the tax imposed on the operation of slot machines . . . is not a merchants occupation tax . . . but is a privilege tax . . ."

Edmonds v. City of St. Louis, 348 Mo. 1063, 156 S.W. 2d 619, 624.

Honorable Maurice Schechter

In State v. Smith, 90 S.W. 2d 405, the court, speaking on the authority of the Legislature to impose a tax on sales or transactions with a subordinate branch of the government, stated:

" . . . The weight of authority seems to be that, as applied to counties, municipalities and other subdivisions, exemption from property taxes does not ordinarily extend to excise taxes . . . "

It is therefore the opinion of this office that a charter city may impose a license tax on the vending machines owned by the school district, for the reasons stated above.

Your second question deals with basically the same problem and reads:

"Is a school district required to pay a license fee to the city on vending machines which it leases, where the terms of the lease provide all licenses shall be paid by the school district, these vending machines being leased to the school district on a flat monthly basis."

The difference between the first and second question turns on the ownership of the machines. It is the opinion of this office that the license imposed is on the use or privilege, not on the ownership. It would appear that ownership is not a factor when dealing with excise taxes.

In Edmond v. City of St. Louis, supra, at page 622, the court, dealing with cigarette vending machines, states:

" . . . the Tax must be paid and the license obtained by the operator of the machine, permissive or actual. The operator is the person, firm or corporation who exercises the privilege of managing or conducting the machine. Webster's New International Dictionary; 29 Words and Phrases, Perm Ed., pp. 537, 584. Appellants plead in their petition that they have obtained the machines by lease or bailment and conduct their cigarette businesses exclusively there-through. That makes them the actual operators and answerable for a violation of the ordinance."

Honorable Maurice Schecter

In Food Center of St. Louis, Inc., v. Village of Warson Woods and City of Rock Hill, 277 S.W. 2d 573, 578, the court said:

" . . . 'The subject matter of a business or occupation tax, however, is not the sale, even though sales of the character specified are utilized as a measure of the tax to be assessed, and are essential to a determination that a person is engaged in a taxable occupation. It is not a privilege tax on purchasers, or a tax on the property or the income. It is on the privilege or occupation, that is, on the person for the privilege of engaging in the business or occupation designated, . . . '".

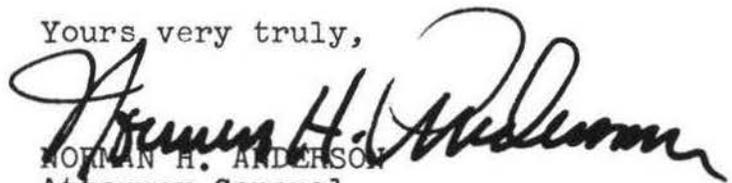
It is our opinion that a license fee can be imposed upon the school district for vending machines which they rent, as the school district is being licensed for the privilege of having and using the vending machines; actual ownership of these vending machines is not the determining factor. This opinion is based upon the assumption that the City in question (Florissant) has ordinances applicable to the facts as stated.

CONCLUSION

It is therefore the opinion of this office that a constitutional charter city, if authorized by the charter, may impose a license tax on vending machines owned or rented by a school district and located within such city, as the tax imposed is not on property owned by the school district, but on the privilege of using such vending machines.

The foregoing opinion which I hereby approve was prepared by my assistant, Gerald L. Birnbaum.

Yours, very truly,


NORMAN H. ANDERSON
Attorney General