LICENSE TAX: A village cannot subdivide merchants as a class and levy an unequal tax on a subdivided class.

February 23, 1938.

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Mr. Arthur C. Mueller,
Prosecuting Attorney,
Hermann, Missouri.

Dear Sir:

We have your letter under date of February 9th requesting an opinion from this office, together with the copy of the ordinance submitted us, which letter is as follows:

> "Will you kindly give this office your opinion on the following question:
>
> "Can a village, existing as such under the laws of Missouri, acting through its board of trustees legally pass an ordinance to impose and collect a tax on gasoline sold at retail within the limits of the village?"

As a preliminary matter, we will first say that the tax mentioned is not levied on gasoline as such, but only indirectly so as an occupation tax, to be paid by the person, firm, or corporation, who sells the gasoline at retail, and such vendor is classed as a merchant.

In the above respect the case of Viquesney v. Kansas City, 266 S. W. 700, is in point, the court saying at page 702:

> "The first question for determination is whether the tax of 1 cent a gallon on the gasoline sold by the dealer is a property tax or an excise or 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 a taxpayer, irrespective of the value of his assets, it is an 'excise tax.' * * *
>
> "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."

Section 7097, R. S. Mo. 1929, relating to villages, provides, among other things, as follows:

> "Such board of trustees shall have power * * * to license, tax and regulate merchants."

No authority is given under said section to regulate gasoline vendors, gasoline filling stations, or the like.

Section 7287, R. S. Mo. 1929, which applies to all cities, towns and villages, provides 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."

Section 7097, referred to, constitutes the charter of a village so far as the authority to levy a license tax is concerned, and the occupation of a gasoline filling station, or gasoline vendor, or the like, is not specified therein.

The real question involved in your inquiry, as we see it, is whether or not the village of Morrison has a right to classify the different kinds of merchants so as to make gasoline merchants a special class, or subdivision of the

general class, in view of the fact that there is no statutory or charter power granted towns or villages so to do.

We are persuaded to the belief that the case of Kansas City v. Grush, 151 Mo. 128, is controlling in the matter before us. In this case Kansas City undertook by ordinance to classify into a distinct class the seller of or dealer in produce for the purpose of levying a different license tax. The substance of the court's opinion is that a produce dealer is a merchant and one of the general class and could not be specially dealt with. In this respect the court said, l. c. 135:

> "Nor is there any reason why a merchant who deals altogether in produce should be required to pay $50 for the privilege of carrying on his business in addition to his ad valorem tax, while his neighbor who deals in groceries, hardware or dry goods is wholly exempt from a license tax. Both are merchants, and neither is subject to more burdens than the other. No doubt exists as to the power of the legislature or of a special charter to divide the various occupations into different classes, and that a tax upon all persons belonging to one class would not be obnoxious to the Constitution merely because another class was not taxed, but when as in this case the ordinance singles out a part of a legal class, to wit, merchants, and imposes a burden upon it, and exempts all others of the same class, then those against whom this unjust discrimination is directed may justly complain of the violation of the constitutional guaranty of equality of taxation, and equal protection of the laws."

While this decision shows a distinction in tax as between the produce dealer and other merchants to the extent that the other merchants were exempted entirely from the tax, yet we believe the same principle would be involved if the grocery, hardware or dry goods merchants had been required to pay some tax but less in amount than the produce merchant.

Hence, under the above authority, we do not believe that the village of Morrison, having levied a flat tax of twelve dollars per annum on all merchants, or the counter part thereof, namely, dealers in goods, wares and merchandise of any kind, as appears by the ordinance submitted, has the authority to classify or subdivide merchants as a class so as to embrace a gasoline merchant or dealer in a subdivision thereof. However, there may be considerable doubt in this view, and for this reason we allude to the following cases, which are in time of decision subsequent to the Grush case, as follows:

City of St. Charles v. Schulte, 264 S. W. 650;
Viquesney v. Kansas City, supra;
Ex parte Asotsky, 5 S. W. (2d) 22;
Automobile Gasoline Co. v. City of St. Louis,
32 S. W. (2d) 281.

In City of St. Charles v. Schulte, supra, the court held that St. Charles had a right to collect a license tax on vendors of soft drinks, depending on the nature of the drink sold, and could classify the amount of tax accordingly. However, from a reading of the opinion in this case it does not appear that the issue was specifically raised and presented in the case as to whether or not St. Charles had sufficient charter right to reclassify or subdivide such vendors.

The next case above referred to, namely, the Viquesney case, shows that in the motion for rehearing the court had taken into consideration the charter power of Kansas City to divide the various occupations into different classes, hence, impliedly recognizing that such power to divide should exist in the charter.

The next case above referred to, namely, Ex parte Asotsky, a decision en banc, shows that the city had such charter power to divide into different classes, and which charter power was taken into consideration in the decision of the case; and this decision further recognizes the absence of such power at the time the Grush case was decided, and hence differentiates it from the principal opinion for such reason, as said by the court at page 25:

"Petitioner relies on Kansas City v. Grush, 151 Mo. 128, 52 S. W. 286. It was there held that the city had no power to license eo nomine a produce dealer

> engaged in the business of buying and selling potatoes, apples, etc. The city only had power to license, etc., merchants as a class. Respondents have pointed out that the charter in force when that ordinance was passed did not authorize the city to divide the occupations, businesses, etc., into different classes, and hence the Grush Case is not controlling."

In the last of the above cases referred to, namely, Automobile Gasoline Co. v. City of St. Louis, the opinion shows that the City of St. Louis had the necessary specific authority to divide, subdivide or classify the various occupations which it was authorized to tax, so whatever the St. Louis opinion might say relative to a city, town or village which is not given such charter power to divide would be obiter. In this last named case it will be noted that the Grush case is considered and the observation made that Kansas City at the time in question was not authorized to divide occupations into different classes. In discussing the St. Charles case, the opinion says this, l. c. 286:

> "In any event the reasoning and the conclusion reached in the St. Charles Case clearly sustains the view that authority given to a city by its charter to classify enumerated subjects of taxation does not violate either the constitutional or statutory provisions above referred to."

In reading the St. Charles case we do not find therein what the court in the City of St. Louis case says is there, as shown by the excerpt last above quoted. However that may be, the St. Louis case certainly appears to hold not only in the principal opinion, but also by the discussion it makes of the Grush case and the St. Charles case, that authority should be given in the charter of a city, town or village before it can undertake a subdivision of the merchant class.

CONCLUSION.

In view of the above statutory provisions, the ordinance which you have submitted, and the above cases referred to in connection therewith, we are inclined to believe that the village

of Morrison does not have sufficient authority, under the circumstances, to pass the proposed ordinance. However, we are frank to say that this conclusion is reached with some doubt, in view of the seeming conflict which appears to exist more or less in the court rulings hereinabove referred to, and as a consequence a future court decision may be the only way in which the question could be conclusively determined.

Respectfully submitted,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JWB:HR