

MUNICIPALITIES: May not discriminate between residents and non-residents on license tax; may transmit water to persons outside corporate limits through pipes not owned by the city.

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February 28, 1940

Honorable Walter W. Whinrey,
State Representative,
Lawrence County,
Mount Vernon, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of February 19, 1940, requesting our opinion on the following questions:

1. May a fourth class city impose a license tax that discriminates between residents and non-residents on trucks of residents of the city and bakery trucks of non-residents.
2. May a fourth class city charge a minimum of sixty cents for furnishing water from its municipal plant to residents and charge a minimum of one dollar to those outside the corporate limits.
3. Is a fourth class city required to own the pipe line through which the water is transmitted to non-residents.

I.

In attempting to answer your first question we must assume that the tax imposed is upon the occupation engaged in and not upon the vehicle as a vehicle license, and that the bakery truck is delivering and selling bread at wholesale. With these assumptions the question resolves itself into one which has been answered numerous times by our courts.

In *Nafziger Baking Co. v. City of Salisbury*, 48 S. W. (2d) 563, (Mo. Supreme), the court had before it an ordinance that attempted to exact a higher license tax from the plaintiff, a non-resident, than was exacted from residents. It was contended that such an ordinance violated the Fourteenth Amendment to the Constitution of the United States as denying equal protection of the law and as taking property without due process of law. On this the court said, l.c. 564:

"Such ordinances, being discriminatory and unjust, have often been condemned as being violative of the provisions of the Constitution above referred to. (Citing cases.)"

Therefore, it is our opinion that a city of the fourth class cannot discriminate between residents and non-residents in fixing license taxes.

While you do not specifically request it, we make the further observation that said city cannot exact any license tax from a non-resident bakery truck that is making deliveries and sales at wholesale. (*Ward Baking Co. v. St. Genevieve*, 119 S. W. (2d) 292, (Mo. Supreme). Nor can said city exact a motor vehicle license tax except where it is done in conformity with the rules laid down in *Sikeston v. Marsh*, 110 S. W. (2d) 1135, (Mo. App.) and *West Plains v. Noland*, 112 S. W. (2d) 79 (Mo. App.).

II.

We cannot undertake to answer your second inquiry because the control of rates charged by municipal water plants to patrons outside the corporate limits is vested in the Public Service Commission. Sections 5136, 5189, R. S. Mo. 1929; *Public Service Commission v. City of Kirkwood*, 4 S. W. (2d) 773, (Mo. Supreme). We suggest that you consult that body relative to question two.

III.

Section 7645 R. S. Mo. 1929 authorizes cities of the fourth class to sell water from their municipal

plants to other cities, persons and private corporations outside the city limits. When this sale is made to another city the purchasing city must supply the pipes for transmitting the water from the selling city to the purchasing city. (Section 7647 R. S. Mo. 1929).

While the point has never been directly passed upon we think the case of Taylor v. Dimmitt, 78 S. W. (2d) 841, (Mo. Supreme) is completely analogous to the instant question. In that case a fourth class city made a contract to furnish electrical power from its municipal plant to another city. This was done in conformity with Section 7642 R. S. Mo. 1929, (which is identical with Section 7645, supra, with the exception that it pertains to electric current instead of water). The city supplying the power undertook to erect the transmission lines necessary to transmit the current to the purchasing city. The court held that this could not be, due to the terms of Section 7644 R. S. Mo. 1929, (which is identical with Section 7647, supra, except that it relates to electrical current) which makes it the duty of the purchasing city to erect the transmitting lines and enjoins the supplying city from erecting the lines.

Thus we see that a fourth class city is authorized to sell water to those outside the corporate limits but cannot construct the pipe lines and if they sell at all it must be through pipes owned by another person or corporation. The legislature cannot be presumed to have expressly given such a city the right to sell water outside the corporate limits and then nullify that right by failing to authorize them to transmit water through pipes owned by another person.

Therefore, we are of the opinion that a city of the fourth class may transmit the water sold from its municipal plant to persons outside the corporate limits through pipes not owned by the city.

Respectfully submitted,

APPROVED:

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