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Legislation - Application of Merchantile License Tax to Lawyers

Edward H. Hoenicke
University of Michigan Law School

LEGISLATION—APPLICATION OF MERCANTILE LICENSE TAX TO LAWYERS—The Philadelphia City Council passed an ordinance entitled "AN ORDINANCE—To provide for revenue by imposing a mercantile license tax on persons en-

gaging in certain businesses including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia. . . ." Under this ordinance the city required lawyers to register, pay a registration fee, and pay a tax on a percentage of their gross volume of business; thereupon, "mercantile licenses" were issued to them. The city charter required each ordinance to deal with one subject only and to express that subject in the title. The application of the ordinance to lawyers was attacked under the sponsorship of the Philadelphia Bar Association, and the lower court enjoined enforcement against lawyers. On appeal, *held,* reversed. *Sterling v. Philadelphia,* 378 Pa. 538, 106 A. (2d) 793 (1954).

The taxation of lawyers for revenue purposes is not an unconstitutional invasion of the judicial sphere by the legislative branch of government.[1] It is reasoned that lawyers as citizens must bear their fair share of the tax burden along with all others.[2] In this context, the lawyer is not considered an "officer of the court" or a "public official."[3] The power in the judiciary to set the qualifications for the bar does not preclude the legislature from taxing members of the bar; in fact, historically, the very status of "attorney" was created by statute.[4] Today, the power to license attorneys is upheld if the licensing is interpreted as a revenue and not a regulatory measure.[5] The power of a municipality to levy taxes is derived from the power of the state by direct grant,[6] by the terms of a municipal charter,[7] or by implication from the absence of a statute prohibiting municipal taxation.[8]

The particular ordinance presents problems because of two provisions: the charter limitation that a bill must embody only one subject which, in turn, must be expressed "clearly and adequately" in its title,[9] and the provision of the Pennsylvania Statutory Construction Act directing that tax measures be

[1] Goldthwaite v. City Council of Montgomery, 50 Ala. 486 (1874); Lister v. City of Fort Smith, 199 Ark. 492, 134 S.W. (2d) 535 (1939); 16 A.L.R. (2d) 1228 (1951).

[2] 4 COOLEY, THE LAW OF TAXATION, 4th ed., §1704, p. 3415 (1924).

[3] In re Galusha, 184 Cal. 697, 195 P. 406 (1921); Newlin v. Stuart, 273 Ky. 626, 117 S.W. (2d) 608 (1938). It has been held that an attorney is not an officer of the state in the sense that his actions are not to be regarded as "state action" for purposes of the Fourteenth Amendment. Berg v. Cranor, (9th Cir. 1954) 209 F. (2d) 567.

[4] CRABB, A HISTORY OF ENGLISH LAW 351 (1831); Lee, "The Constitutional Power of the Courts Over Admission to the Bar," 13 HARV. L. REV. 233 at 238 (1899).

[5] In re Johnson, 47 Cal. App. 465, 190 P. 852 (1920); McCarthy v. Tucson, 26 Ariz. 311, 225 P. 329 (1924). A license tax on lawyers was held invalid in Hill v. City of Eureka, 35 Cal. App. (2d) 154, 94 P. (2d) 1025 (1939). See also 1912A Ann. Cas. 597. The many cases on this point turn not only on the unique wording of the particular statutes involved, but also upon the courts' willingness or reluctance to accept the purpose of the measures as stated by the legislatures. Of course, even a tax for revenue purposes may be so exorbitant as to be unreasonable and confiscatory. Newlin v. Stuart, note 3 supra. The cases are split on whether the payment of the tax can be made a condition precedent to practicing law. Wright v. Atlanta, 54 Ga. 645 (1875); Shepherd v. Little Rock, 183 Ark. 244, 35 S.W. (2d) 361 (1931).

[6] Davis v. Ogden City, 117 Utah 315, 215 P. (2d) 616 (1950).

[7] Abraham v. City of Rosenberg, 55 Ore. 359, 105 P. 401 (1909).

[8] Barrett v. State, 44 Ariz. 270, 36 P. (2d) 260 (1934).

[9] Philadelphia Home Rule Charter, §2-201, approved April 17, 1951.

strictly construed.[10] One of the primary purposes of the title limitation is to insure that notice of the legislation is given the public. Although such limitations often are liberally construed,[11] no state constitution has a provision which goes so far as to demand that the subject be "clearly and adequately" expressed.[12] Adding to the strictness of the language in the charter the fact that a city council is a lesser political organ, it can be argued that this title provision was meant to be more strictly construed. Unless the word "mercantile" be regarded as surplusage, the title does not give notice to lawyers that the ordinance applies to them. If the word "mercantile" is ignored, what remains is an ordinance which authorizes the city to tax everything.[13] Such an ordinance would be beyond the power of the city of Philadelphia,[14] although the severability clause could be used by the courts to cut down the scope of the ordinance to conform to the limits of municipal power. It seems more consistent with the aims of good government, however, to presume that the council intended the word mercantile to have its traditional meaning, thereby limiting the tax, than to presume that it intended to pass an omnibus bill and depend upon the courts to delineate it. The majority of the court, however, felt that the intent of the council was clear, notwithstanding its designation of the measure as a mercantile license tax.[15] The point which is of concern to lawyers, and which provoked Justice Musmanno's sharp dissent, is the clear implication of the court's holding: if the license tax is applicable to lawyers, and if the ordinance conforms to the mechanical requirements of title, then the practice of law is a business of a mercantile character. This is a dramatic departure from the attitude of several centuries of lawyers—and non-lawyers.[16] The result may reflect a general

[10] Pa. Stat. Ann. (Purdon, 1952) tit. 46, §558, held applicable to municipal corporations in Breitinger v. Philadelphia, 363 Pa. 512, 70 A. (2d) 640 (1950).

[11] SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 3d ed., §1704 (1943).

[12] Twenty-three states say merely that the subject or object of the law shall be "expressed" in the title: ARIZ. CONST., art. 4, §13; CAL. CONST., art. IV, §24; DEL. CONST., art. 2, §16; GA. CONST., art. III, §VII, c. 2-19, §2-1908; IDAHO CONST., art. 3, §16; ILL. CONST., art. IV, §13; IND. CONST., art. 4, §19; IOWA CONST., art. 3, §29; KY. CONST., §51; MICH. CONST., art. V, §21; MINN. CONST., art. 4, §27; N.J. CONST., art. 4, §7, ¶4; N.Y. CONST., art. 3, §15; N.D. CONST., art. II, §61; ORE. CONST., art. IV, §20; S.C. CONST., art. 3, §17; S.D. CONST., art. III, §21; TENN. CONST., art. 2, §17; TEX. CONST., art. 3, §35; VA. CONST., art. IV, §52; WASH. CONST., art. 2, §19; W.VA. CONST., art. VI, §30; WIS. CONST., art IV, §18. Twelve states require that the subject be "clearly expressed": ALA. CONST., art 4, §45; COLO. CONST., art. V, §21; KAN. CONST., art. 2, §16; MO. CONST., art. 3, §23; MONT. CONST., art. V, §23; NEB. CONST., art. III, §14; N.M. CONST., art. IV, §16; OHIO CONST., art. II, §16; OKLA. CONST., art. 5, §57; PA. CONST., art. 3, §3; UTAH CONST., art. VI, §23; WYO. CONST., art. 3, §24. Two states require that the subject be "briefly expressed": FLA. CONST., art. III, §16; NEV. CONST., art. IV, §68; and one state each requires that the subject be "indicated": LA. CONST., art. 3, §16; "described": MD. CONST., art. 3, §29; and "indicate clearly": MISS. CONST., art. 4, §71.

[13] In fact, in Philadelphia it has been called the "Tax Everything Act."

[14] Pa. Stat. Ann. (Purdon, 1954) tit. 53, §§2015.1 to 2015.8.

[15] Principal case at 794.

[16] Pound, "What Is a Profession? The Rise of the Legal Profession in Antiquity," 19 NOTRE DAME LAWYER 203 (1944).

opinion of society which, in mid-twentieth century, allegedly[17] finds little distinction between the practice of law and the operation of a mercantile business. It is to be hoped that, tax or no tax, Philadelphia lawyers continue to adhere to standards well above those of the market place.

Edward H. Hoenicke

[17] Gossett, "Human Rights and the American Bar," 22 AMERICAN SCHOLAR 411 (1953).