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MUNICIPAL CORPORATIONS - LICENSES - PROHIBITORY FEE ON "SELFSERVICE" GROCERIES

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MUNICIPAL CORPORATIONS — LICENSES — PROHIBITORY FEE ON "SELF-SERVICE" GROCERIES — A city ordinance imposed an annual license fee of $10,000 on "self-service" groceries. The city had power by statute to license stores for the sale of meat, groceries, etc., for revenue purposes. Plaintiff brought an action to enjoin the ordinance. *Held*, the ordinance was invalid and injunction should be granted. *Great Atlantic & Pacific Tea Co. v. Board of Commissioners of Camden*, (N. J. Eq. 1939) 4 A. (2d) 16.

In view of the fact that chain store taxes based upon the number of units operated have been generally upheld, the attempt to make further distinctions and subdivisions for tax purposes based on the method of doing business is noteworthy.[1] The usual justification for the chain store tax is that the chain stores, as compared with independent retailers, employ distinguishable methods of conducting business.[2] In the principal case, the self-service plan was distinguishable primarily because of the furnishing of baskets to customers so as to invite and permit personal selection,[3] thereby resulting in greater economy of operation. This feature can be readily imitated and the availability of this plan to a retailer is not determined by the number of units operated or the amount of capital invested.[4] It is difficult, therefore, to see any substantial basis for a discriminatory tax against retail businesses operated in this manner.[5] The

[1] State Board of Tax Commrs. v. Jackson, 283 U. S. 527, 51 S. Ct. 540 (1931); Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481 (1933); Great Atlantic & Pacific Tea Co. v. City of Spartanburg, 170 S. C. 262, 170 S. E. 273 (1933); Safeway Stores, Inc. v. City of Portland, 149 Ore. 581, 42 P. (2d) 162 (1935); Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772 (1937); 73 A. L. R. 1464 (1931); 85 A. L. R. 699 (1933); 112 A. L. R. 293 (1938); 44 YALE L. J. 619 (1935).

[2] State Board of Tax Commrs. v. Jackson, 283 U. S. 527, 51 S. Ct. 540 (1931), lists thirteen advantages of chain store operation, most of them due primarily to the specialization and power accruing to large scale operation. The wisdom of restraining more efficient units of our economic system remains an arguable question.

[3] Evidence introduced showed some degree of self-service to be customary in all groceries, and the use of baskets was also present in other stores though not generally furnished by the store.

[4] The retailing practice of self-service was at the time being successfully used by other than chain stores, though the ordinance was directed mainly against the latter.

[5] City of Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707 (1899) (ordinance discriminating against department stores held invalid); Seattle v. Dencker, 58 Wash.

tax in the principal case could not be sustained under the municipality's power to license for regulation, since in such case the fee charged must bear a reasonable relation to the expense of regulation if the business is a legitimate one.[6] As a revenue measure the ordinance was not only an unjustified discrimination, but was also confiscatory.[7] Though few cases have held ordinances invalid for the sole reason that they were confiscatory,[8] it is suggested that the principal reason is that unjust discrimination accompanies confiscation in most cases as in the principal case.

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501, 108 P. 1086 (1910) (ordinance imposing discriminatory tax on automatic selling device held invalid); Douglas v. South Georgia Grocery Co., 180 Ga. 519, 179 S. E. 768 (1935) (ordinance imposing a discriminatory license fee on stores using "cash and carry" method held invalid).

[6] 3 MCQUILLIN, MUNICIPAL CORPORATIONS, § 1102 (1928); 37 MICH. L. REV. 498 (1939).

[7] In each case the evidence showed that the profits of the self-service groceries would be insufficient to meet the tax imposed.

[8] Fiscal Court of Owen County v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296 (1908); City of Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315 (1910); Ziedman & Pollie v. City of Ashland, 244 Ky. 279, 50 S. W. (2d) 557 (1932).