2001

Bryce E. Roe, Ralph L. Jerman and B. L. Dart, Jr. v. Salt Lake City : Brief of Respondent

Utah Supreme Court

BRIEF

T

OF THE

STATE OF UTAH

BRYCE E. ROE, RALPH L. JERMAN and B. L. DART, JR., doing business as ROE, JERMAN & DART, a partnership, and ROE, JERMAN & DART, a business partnership,
Plaintiffs and Respondents,

vs.

SALT LAKE CITY, a municipal corporation,
Defendant and Appellant.

Case No. 10974

BRIEF OF RESPONDENTS

ROBERT S. CAMPBELL, JR.,
GORDON L. ROBERTS,
520 Kearns Building
Salt Lake City, Utah
Attorneys for Plaintiffs and Respondents.

HOMER HOLMGREN,
Salt Lake City Attorney,
JACK L. CRELLIN,
Assistant Salt Lake City Attorney,
414 City and County Building,
Salt Lake City, Utah,
Attorneys for Defendant and Appellant.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES CITED

TABLE OF CONTENTS—Continued

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BRYCE E. ROE, RALPH L. JERMAN and B. L. DART, JR., doing business as ROE, JERMAN & DART, a partnership, and ROE, JERMAN & DART, a business partnership,
Plaintiffs and Respondents,

vs.

SALT LAKE CITY, a municipal corporation,
Defendant and Appellant.

Case No. 10974

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action for declaratory relief brought by Plaintiffs asking the lower Court to find that Section 20-3-2(a) Revised Ordinances of Salt Lake City, Utah, as Amended, is unconstitutional, and, in addition, is in excess of the authority of Appellant Salt Lake City as granted in Section 10-8-80, *Utah Code Annotated,* 1962. For the Court's review the complete Ordinance is set out as Appendix 1 in this Brief.

DISPOSITION OF CASE BY LOWER COURT

Based upon the pleadings, answers to interrogatories and memoranda filed by Plaintiffs and Defendant, respectively, the lower Court granted Plaintiffs' motion for summary judgment and held that the Ordinance in question (Salt Lake City Ordinance, Section 20-3-2(b) (a)) was unconstitutional as applied to Plaintiffs and that Defendant was without statutory authorization to enact the same under 10-8-80 U. C. A., 1962.

RELIEF SOUGHT BY APPELLANT ON APPEAL

Appellant appeals from the order of summary judgment entered against it and asks that this Court reverse the same and hold that Appellant is entitled to summary judgment in its favor, sustaining the constitutional validity of the questioned Ordinance, 20-3-2(a).

STATEMENT OF FACTS

The case was submitted to the trial Court on stipulated facts as set out in the pleadings and published interrogatories. Appellant's Statement of Facts in its Brief, while essentially correct, falls short of a full presentation of the substantial facts particularly with respect to the unreasonable and arbitrary discrimination evoked by the Ordinance as disclosed by the City's answers to interrogatories.

Accepting, therefore, the Appellant's Statement as far as it extends, the following facts should be and are added as bearing upon the actual discrimination evoked by the questioned Ordinance against the Plaintiffs. The City in

its answers to interrogatories, admitted that the Ordinance resulted in the following comparisons (assuming gross business revenues to exceed $10,000.00 annually):

> A partnership of three lawyers with two secretary employees would be taxed $96.00 ($30 per partner), while a partnership of three stockbrokers with two secretary employees would be taxed $42.00 ($30 for the first partner and $3 each additional partner or employee). A chemical corporation with five employees (three of whom are stockholders) would also be taxed $42.00.
>
> A law partnership consisting of ten partners, ten associate lawyers and fifteen legal stenographers would be taxed $375.00, while a mining corporation with thirty-five full time employees consisting of a manager, thirteen mining engineers, one staff lawyer, two accountants, one surveyor, one appraiser and fifteen stenographers would be taxed only $132.00. (See Defendant's answers to interrogatories R. 17-22.)

Appellant in its Brief acknowledges "that the license tax imposed upon partners and associates engaged in the enumerated professions is greater than the license tax imposed upon partners and associates in other non-professional business" (App. Br. p. 4). And the lower Court determined that the Ordinance did in fact require Plaintiffs "to pay a license fee tax on a formula and basis which exceeds and is substantially dissimilar from the license fee tax paid by non-professional individuals, partnerships, corporations and associations" (R. 30-32).

The trial Court further found and as a part of its Findings stated that "when compared to non-professional business individuals, partnerships, corporations, and associations, the license tax under the Ordinance is dissimilar and excessive as to Plaintiffs, solely by virtue of the fact that the individual Plaintiffs are practicing lawyers and Plaintiff-partnership is a law partnership" (Findings of Fact R. 31). It concluded that there was "no reasonable basis for discriminating between Plaintiffs and non-professional business individuals, partnerships, corporations, and associations" under the Ordinance (R. 32), and that it, therefore, was unconstitutional and void, since it denied to Plaintiffs due process of law and the full and equal protection of the law (R. 32-33). In so doing, the trial Court decreed that Appellant was without the limits of statutory authority under §10-8-80 U. C. A., 1962, to enact the Ordinance.

One additional comment is required respecting the facts before the Court. Appellant has attached, as an Appendix to its Appeal Brief, a pamphlet entitled "Economic Facts About Law Practice", which purportedly was published by a committee of the American Bar Association in 1966. Considerable reliance is placed on this pamphlet by the City not as an authoritative treatise or precedent which bears upon the legal issues before the Court, *but as proof of the truth of independent, evidentiary facts regarding the income of lawyers doing business in a partnership or as sole practitioners in Utah.* (See App. Br. pp. 22-23.)

An inspection of the record in this case will reveal that

this pamphlet was not introduced in evidence in the trial Court and it is not before this Court on appeal. Indeed, the appendix was not even offered in the lower Court, Plaintiffs have had no opportunity to object to its admissibility on the grounds of relevancy, lack of foundation, and hearsay, and the trial Court has had no opportunity to consider any such proffer of evidence or to be apprised of its nature.

This Court has spoken sufficiently on the matter, as to make the citation of precedent needless, that factual matters may not be introduced for the first time on appeal and that this Court will not consider any proffer of new facts in the determination of the appeal. Accordingly, Plaintiffs move and petition the Court to strike the Appendix to Appellant's Brief, or to disregard the same in its consideration of the issues of law presented.

ARGUMENT

POINT I.

ORDINANCE 20-3-2 EVOKES AN UNCONSTITUTIONAL DISCRIMINATION AGAINST PLAINTIFFS.

Factually, there is no dispute whatsoever that attorneys are subjected to a substantially heavier tax burden than are all other non-professional businesses. It is Plaintiffs' contention that this discriminatory treatment cannot be justified and thus renders the tax, as applied to them, unconstitutionally void.

The guiding principle in analyzing such discrimination was stated in *Orem City* v. *Pyne,* 16 U. 2d 355, 401 P. 2d 181 (1965) wherein this Court adopted an opinion of District Judge Maurice Harding:

> "[C]ity licensing ordinances enacted for tax purposes must be strictly construed, and in cases of reasonable doubt, the construction should be against the government. Miller v. Standard Nut Margarine Co., 284 U. S. 498, 52 S. Ct. 260, 263, 76 L. Ed. 422. Appeals of School District of City of Allentown (1952) 370 Pa. 161, 87 A. 2d 480." *Judge Harding's opinion,* page 2.

The full text of Judge Harding's opinion in the *Orem City* case is set out herein as Appendix 2.

Plaintiffs do not contend herein that the City does not have the power to levy any tax at all against members of the legal profession. This question was well settled by 10-8-80 U. C. A. (Repl. Vol. 1962) as applied to lawyers by the Court in *Davis* v. *City of Ogden,* 117 Utah 315, 215 P. 2d 616 (1959). Under *Davis,* lawyers are subject to a municipal license fee tax, as are other members of the business community. *But neither Davis nor* §10-8-80, *gives the City the discretion or authority to enact a discriminatory and abusive tax against attorneys.* In point of fact, §10-8-80 expressly proscribes the same by conditioning the City's power as follows:

> "All such license fees and taxes shall be *uniform* in respect to the class upon which they are imposed."

And as noted in *Mathews* v. *Jensen,* 21 Utah 207, 61 Pac. 303 (1900), a similar prohibition against discrimination is

to be found in the Equal Protection Clause of the Federal Constitution. (Amendment XIV.)

The basic question, therefore, is whether there is a reasonable basis for taxing the business of a lawyer differently than non-professional business organizations. This Court has previously spelled out the test to be applied:

> "Our function is to determine whether an enactment operates *equally on all persons similarly situated.* If it does, then the discrimination is within permissible legislative limits. If it does not, then the differentiation would be without reasonable basis and the act does not meet the test of constitutionality." *Slater* v. *Salt Lake City,* 115 Utah 476, 489, 206 P. 2d 153, 160 (1949). (Emphasis added.)

This question is answered without ambiguity by this Court in its opinion in *Davis* v. *Ogden City, supra.* The Ordinance in that case, enacted by Ogden City, provided that each person who engaged in business had to obtain a business license. The fee for the license was graduated according to the gross receipts of the business. In the definition of "business", the Ordinance provided that it should include "persons engaged in any profession, trade, craft, business, occupation, or other calling." Consequently, the Ogden Ordinance applied *equally and on the same basis* to all businesses, be they professional, non-professional or whatever. (The Salt Lake City Ordinance, as noted above, does not have this virtue of uniformity.) The first question before the Court in *Davis* was whether the City had the power to exact such a tax from members of the legal profession. In its opinion, this Court analyzed the statutory

basis for such a tax and concluded that Ogden City had the power to tax businesses, including the professions.

However, in reaching this decision, the Court made a number of observations which are of paramount importance to the proper determination of the instant case. In holding that the Ogden tax was not discriminatory, this Court stressed the fact that the Ordinance applied equally to "all businesses" within the corporate limits of the city and without any economic discrimination as between lawyers and other businesses.

In fact, the *Davis* decision goes to great lengths to point out that lawyers, so far as being liable for the tax, held no protective sanctuary or immunity from the Ordinance. Lawyers were to be treated as other businesses, there being no justification for classifying lawyers differently than others in the Community. In this regard, the Court stated:

> "As members of the Bar, their admission to practice and their professional conduct after admission are essentially matters to be regulated by the judicial department of the state. As members and citizens of the state, county, and city, their rights, privileges and immunities, as well as their duty to pay a fair share of the expenses of government, *like those of any other citizen*, are controlled by the laws, ordinances and regulations of the political body of which they are a part and from which they receive protection. No one could reasonably contend that lawyers as a class are not subject to laws enacted pursuant to the police powers of the state or municipality and the members of the profession would protest any attempt to deny to them the services af-

> forded by the various sovreignties. There is no rational basis for a contention that lawyers are privileged because of their calling and should not be subject to the provisions of an ordinance enacted for the purpose of raising revenue to defray city expenses *unless there is a showing that the ordinance is discriminatory.*" 215 P. 2d at 622-23 (Emphasis added.)

The rationale carved out by the Court in *Davis* is of major consequence here. For the Ogden license tax was sustained in the *Davis* decision for the single reason that the Ordinance treated attorneys in the same fashion and equally with other businesses. The Court continued in *Davis* v. *Ogden City*:

> "The municipality, in imposing an occupational tax upon attorneys, is not interfering with state regulations, for it is not attempting to prescribe qualifications for attorneys different from or additional to those prescribed by the state. It is merely providing for an increase in its revenue by imposing a tax upon those who, by pursuing their profession within its limits, are deriving benefits from the advantages especially afforded by the city. *The tax is levied upon the business of practicing law, rather than upon a person because he is an attorney at law.*" 215 P. 2d at 623. (Emphasis added.)

This Court, therefore, has already determined the point here in question. In *Davis,* it was held that there is no rational basis for a reasonable classification as between lawyers and other businesses. In *Davis,* the effect was that lawyers should be taxed the same *as other businesses* and that is all that Plaintiffs ask here — to be treated the

same, no better and no worse, than *all other businesses*. The classification with which we are here concerned is composed of "businesses". The Court in *Davis* emphasized this as follows:

> "Being an occupation tax, the classification is reasonable and not arbitrary because it includes all *businesses* operated within the city. There is no denial of equal protection, no invasion of the privileges and immunities of any class of citizens and the ordinance operates equally upon all persons similarly situated." 215 P. 2d at 623. (Emphasis added.)

Equality is the very element missing in Ordinance 20-3-2 (a) under attack herein. It specifically and intentionally discriminates against lawyers and other professional business organizations.

The principles thus enunciated in *Davis* have been more recently reaffirmed in *Orem City* v. *Pyne, supra.* This case also dealt with an occupation tax enacted under the color of §10-8-80 U. C. A. (Repl. Vol. 1962). Judge Harding analyzed the problem as follows:

> "[T]he classification by the legislative body must be reasonable and the tax must be applied with uniformity upon *similar kinds* of businesses and with substantial equality of the tax burden to all members of the same class. The imposition of taxes which are to a substantial degree unequal in their operation upon similar kinds of businesses is prohibited." Page 3 of *Judge Harding's opinion.* (Emphasis added.)

Based upon this reasoning Judge Harding and subsequently this Court held that the Orem City tax was unconstitutional

as applied because it accorded a different treatment to various businesses engaged in the sale of tangible personal property. As put in the Harding opinion and ratified by this Court:

> "Why should one business selling tangible personal property at retail be subjected to a tax of up to $300.00 per year, while other businesses (also selling tangible personal property at retail) such as an implement dealer, an appliance shop, cement plant, creamery, butcher shop, photography shop, or a dealer specializing in the sale of goods made in Japan, Hong Kong, Formosa, China, or India, doing the same volume of business, be taxed $25.00?" Page 3 of *Judge Harding's opinion.*

The same reasoning applies with equal finesse to the Ordinance now before the Court. To paraphrase the rationale of the *Orem City* decision:

> "Why should a firm of three lawyers with two secretaries be taxed $96.00 per year while other businesses also rendering personal and individual services, such as a stock brokerage, a firm of chemists, a public relations firm, an advertising firm, a beauty shop, a firm of automotive technicians, an assay office, a private detective agency doing business in the same volume, the same income, and with the same structure be taxed only $42.00?"

The answer to this rhetorical question must be the same as that found by this Court in *Orem City* v. *Pyne* — the tax is "unreasonable, arbitrary, and discriminatory." Interestingly, Appellant fails to refer to, cite, or discuss the holding in the *Orem City* opinion, although the case was the subject

of much attention in the arguments before the trial Court herein.

In light of the patent discrimination of the subject Ordinance, the following statement in *Mathews* v. *Jensen,* 21 Utah 207, 227, 61 Pac. 303, 308 (1900) is apropos:

> "Private rights cannot thus be arbitrarily invaded or annihilated, under the mere guise of a license. *One class of citizens can not thus be compelled to bear the burdens of government, to the advantage of all other classes.* The law, as we have seen, will not permit it. Neither the Constitution nor the statute authorizes boards of county commissioners to enact ordinances, as in this instance, to tax citizens arbitrarily and unjustly, by license which confers no privilege that was not previously enjoyed, and which has no view to regulation."

It requires no extension of this philosophy to hold that one professional business, i.e., lawyers, cannot be taxed more oppressively than another business of a non-professional nature. In this instance the professional business organizations, being taxed at a greater rate, are bearing an unjust portion of the burdens of government, to the general benefit of non-professional organizations. As noted in *Mathews* v. *Jensen, supra,* such discrimination constitutes a denial of equal protection under both the state and federal constitutions as well as the deprivation of property without due process of law.

The City concedes at page 15 of its Brief, that a license tax must "operate on all alike under the same circum-

stances", but argues that the Ordinance under attack herein does not discriminate and "applies equally to all persons similarly situated". (App. Br. p. 29.) It is this very point which brings into focus the gravamen of the offense which the Ordinance 20-3-2(a) commits. What is there about the partnership business of a lawyer which distinguishes it from a partnership or corporate business of a grocery merchant, a stockbroker, industrial development firm, advertising firm, public relation experts, barbers or any other members of the community who offer personal services? The Ordinance certainly does not provide us with any reason why such businesses, including lawyers, are not "similarly situated". The trial Court found that there was no rational basis to single out lawyers from other personal service non-professional businesses for excessive license tax. That Finding is fully warranted for there is no reasonable criterion or basis to discriminate against Plaintiffs and other lawyers under this type of a license revenue tax.

Appellant apparently claims, as a basis for discriminatory treatment, that the combination of lawyers doing business as a partnership increases the respective income of each partner. Assuming for argument the truth of that statement, is it any less true that combinations of stockbrokers, chemists, public relation agents and merchants doing business as partners, corporations or other associations also return higher incomes than sole proprietorships? We submit not. All such business associations are on equal plane so far as the capability to produce income is concerned.

The nub of Appellant's argument seems to be that the *businesses* of lawyers may be subjected to a higher license fee tax than the businesses of all non-professionals because of the amount of income produced in the lawyer's business. Were the subject Ordinance a graduated income tax and were all businesses, partnerships, corporations, sole proprietorships, and other associations subject to the same tax, Appellant's argument would have some merit. (See *Davis* v. *Ogden City, supra.*) But the Ordinance in question is not that type of tax. Its enabling clause refers to it as a *license tax* levied upon the *business* of every person in Salt Lake City. It is only after reciting the general enacting clause as to all businesses that an excess formula is set out for a computation of the license fee as to lawyers and other professions. See Appendix 1. It is that formula, biased and discriminatory as it is, which renders the Ordinance unconstitutionally void and unenforceable.

POINT II.

AUTHORITIES CITED BY APPELLANT ARE NOT SUPPORTIVE OF ITS POSITION IN THIS CASE.

Appellant has cited in its brief several decisions in aid of its contention that the trial Court erred in declaring the Ordinance unconstitutional. For the most part, these cases are distinguishable on their facts from the case at bar, and in several instances, such authorities actually support the judgment of the trial Court and the position of Plaintiffs herein.

We welcome Appellant's citation of authorities which essentially hold that a license fee tax "must operate equally on all persons similarly situated". *Clark* v. *Titusville,* 184 U. S. 329 (1902). (Appellant's Brief p. 15.) Nor do we find any fault with Appellant's quotations from the Corpus Juris Secundum to the effect that "different licenses or taxes [may] be imposed on the various classes, provided that the classification is reasonable and *is defined with fair certainty.*" 53 C. J. S. Licenses Sec. 22(a) and (b) at 535-37. (Appellant's Br. p. 10.) These principles are fully embodied in the decisions of this Court in *Davis* v. *City of Ogden, supra,* and *Orem City* v. *Pyne, supra,* and as discussed in Point I of this Brief, are the touchstone of the finding of unconstitutionality herein.

In a number of cases cited by Appellant, the taxing Ordinance under construction established classifications of taxpayers on the basis of gross revenue, capital worth, or some other objective economic standard. *Salt Lake City* v. *Christenson Co.,* 34 Utah 38, 95 Pac. 523 (1908); *Clark* v. *Titusville, supra; Garbade* v. *City of Portland,* 188 Ore. 158, 214 P. 2d 1000 (1950). In those cases, no type of business was singled out by name for excessive or disparate tax treatment. In those cases no business or partnership of lawyers was required to pay a $96.00 license fee tax while other businesses in the community, using the same community services, employing the same number of personnel and producing the same or a greater amount of income, were taxed $42.00. Those are the facts with which we are here dealing, and it is that simple but substantial difference which makes such cases cited by Appellant unauthoritative.

Menlove v. *Salt Lake County,* 18 U. 2d 203, 418 P. 2d 227 (1966) and *Garret Freightlines, Inc.* v. *State Tax Commission,* 103 Utah 390, 135 P. 2d 523 (1943), referred to in Appellant's Brief are distinguishable and irrelevant since they were not enacted under the authority or sanction of a statute such as *Utah Code Ann.* §10-8-80 (the enabling legislation for the instant ordinance) which, itself, requires that the license taxes imposed must be uniform with respect to the class upon which they are imposed.

Appellant places considerable weight on the case of *City of San Mateo* v. *Mullin,* 59 Cal. App. 2d 653, 139 P. 2d 351 (1943). The Ordinance there in question, unlike that now being reviewed, applied *equally* to *all businesses* alike. Lawyers and other professions were not singled out for special treatment. The following quotation from that case clearly illustrates this fact:

> "The ordinance was amended in April, 1936, to provide that where two or more persons of like businesses, trade calling or profession are associated as partners, or as employer and employee, then an additional license tax in a less amount shall be paid for each additional person after the first." 139 P. 2d at 352.

Under the San Mateo Ordinance, therefore, any partnership or association had to bear the additional tax whether it consisted of lawyers or meat cutters. This is exactly the type of treatment which Plaintiffs here seek — to be taxed the same, no greater and no lesser, than all other associations and organizations in the business community.

Indeed, the *Mullin* case goes even further to point up the distinction which seems to have evaded Appellant here:

> "While the state certificate is a prerequisite to practice, the actual practice is a business . . . . *The tax is levied upon the business and not the person.* Whether that business is conducted by one, or more than one, associated as partners or as employer and employee it is still in the class of business as that word is used in the ordinance." 139 P. 2d at 354. (Emphasis added.)

A full reading of the *Mullin* decision will disclose that it buttresses the position of Plaintiffs, here, and substantially rejects the arguments of Appellant.

Appellant refers to the early case of *Blanchard* v. *State of Florida,* 30 Fla. 223, 11 So. 785 (1892), which involved almost exclusively the interpretation of a local statute. It is apparent from the decision in *Blanchard* that no question of constitutionality of the statute was raised therein, either as to the due process or equal protection which it afforded. Accordingly, it has no place in the determination of the issues raised in this appeal. It is unnecessary to discuss, piece by piece and case by case, the remaining decisions from other jurisdictions cited by Appellant in its Brief, for they can be placed in the same catalogs, distinguishable on their facts from the facts before this Court, or as having been determined without consideration of the constitutional issues raised by Plaintiffs herein.

In the ultimate analysis herein, decisions from without Utah are of no more than academic interest, for this case may be resolved upon the firm precedent of the decisions of

this Court in *Davis* v. *Ogden City,* 117 Utah 315, 215 P. 2d 616 (1959) and *Orem City* v. *Pyne,* 16 U. 2d 355, 401 P. 2d 181 (1965), viewed in light of the statutory authorization of 10-8-80 U. C. A. The discrimination, without reason or justification, against Plaintiffs in this case, is obvious. It may not be condoned or sanctioned under the guise of legislative discretion of Salt Lake City or under an attempt to label as a graduated income tax what is in fact and law, a license fee tax.

CONCLUSION

The Ordinance 20-3-2 of Salt Lake City, unfairly, unreasonably and arbitrarily discriminates against the Plaintiffs and denies to them due process of law and the full and equal protection of the law as guaranteed by Art. I, Sec. 7 of the Utah State Constitution and Amendment XIV of the United States Constitution.

The determination of the trial Court herein that said Ordinance is unconstitutional that it unreasonably discriminates against the Plaintiffs and that it denies to them their constitutional guarantees, should be affirmed by this Court.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.,
GORDON L. ROBERTS,
520 Kearns Building
Salt Lake City, Utah
Attorneys for Plaintiffs and Respondents.

APPENDIX NUMBER 2

IN THE FOURTH JUDICIAL DISTRICT
COURT OF UTAH
IN AND FOR UTAH COUNTY

OREM CITY, a Corporation,	*Plaintiff,*	CRIMINAL CASE NO. 4039 MEMORANDUM DECISION
vs.		and
DEE PYNE,	*Defendant.*	ORDER OF DISMISSAL

Dee Pyne was charged with the crime of a misdemeanor in failing to pay a license tax to Orem City for an automobile business operated by him in Orem. He was convicted in the Orem City Court and has appealed his conviction to the District Court, claiming that the license ordinance is void as to him.

The defendant's appeal entitles him to a trial de novo. He has entered anew a plea of not guilty, but has stipulated that during the time charged in the complaint he conducted a used car business and made sales subject to the sales tax imposed by the State of Utah; and that he has not paid any Orem City license tax. He now moves the court for a dismissal of the complaint, solely on the ground that the ordinance is invalid in imposing any tax on his used car sales business.

Ordinance No. 26 of Orem City is the ordinance in question. It was enacted under the authority given to cities by Section 10-8-80 U. C. A. 1953, to tax businesses for revenue purposes; provided, however, "that all such license

fees and taxes shall be uniform in respect to the class upon which they are imposed." The ordinance declares that its purpose is to raise revenue.

Section 3 of the ordinance levies a tax of 1/10 of 1% on the gross sales of businesses in Orem City engaged in selling tangible personal property, where such sales are subject to the Utah State sales tax, with a minimum of $6.25 per quarter-year and a maximum of $75.00 for the same period.

If the defendant's business is covered at all it is covered by this general Section, and not by any specific provision of the ordinance.

The law presumes that the ordinance is valid until the contrary is shown. However, city licensing ordinances enacted for tax purposes must be strictly construed, and in cases of reasonable doubt, the construction should be against the government. Miller v. Standard Nut Margarine Co., 284 U. S. 498, 52 S. Ct. 260, 263, 76 L. Ed. 422. Appeal of School District of City of Allentown, (1952), 370 Pa. 161, 87 A. 2d 480.

The principal claim for invalidity is that the ordinance is discriminatory and arbitrary in its application to defendant's business.

In Matthews v. Jensen, 21 Utah 207, 61 P. 303, at page 277 of the Utah Reports, our Supreme Court said: "Neither the constitution nor the statute authorizes . . . ordinances, . . . to tax citizens arbitrarily and unjustly, by license which confers no privilege that was not previously enjoyed, and which has no view to regulation. *Unjust and illegal discrimination between persons in taxation, and the denial of equal justice, are within the prohibitions of the constitution of this state, and of the United States.*"

As to what constitutes illegal and unjust discrimination in taxation, our Court has held: "*Discrimination* is the essence of classification and *does violence to the constitution only when the basis upon which it is founded is unrea-*

sonable. In fixing the limits of the class, the legislative body has a wide discretion and this court may not concern itself with the wisdom or policy of the law. *Our function is to determine whether an enactment operates equally upon all persons similarly situated.* If it does then the discrimination is within permissible legislative limits. If it does not, then the discrimination would be without reasonable basis and the act does not meet the test of constitutionality." Slater v. Salt Lake City, 115 Utah 476, 206 P. 2d 153.

This indicates that the classification by the legislative body must be reasonable and the tax must be applied with uniformity upon similar kinds of businesses and with substantial equality of the tax burden to all members of the same class. The imposition of taxes which are to a substantial degree unequal in their operation upon similar kinds of businesses is prohibited.

What is the situation with respect to discrimination and reasonableness as this ordinance is written and may be applied and enforced?

Section 1 of the ordinance lists 201 purported businesses for taxation and fixes a tax rate for each. A few of these names do not indicate businesses at all and are beyond the power of the City to tax for revenue purposes. Excluding these few, the remainder represent legitimate businesses, subject to taxation for revenue purposes. Even here, however, the lack of definitions renders the application of the ordinance and the tax uncertain, confusing, and perhaps inequitable. And since this section and the ordinance as a whole does not attempt to tax all businesses within the city, it may well be questioned as to any equality in spreading the tax burden.

Section 3, standing alone, appears to be fair, reasonable, and definite in its application to all businesses generally in Orem City selling tangible personal property. This is a reasonable and proper classification fixed by the City. The difficulty arises when Section 1 is conisdered along with Section 3; because Section 1 places several businesses,

that would otherwise be covered by Section 3, on a flat annual fee basis that may be only one-twelfth as much as if they were on the gross sales basis, and taxable under Section 3. Why should one business selling tangible personal property at retail be subjected to a tax of up to $300.00 per year, while other businesses (also selling tangible personal property at retail) such as an implement dealer, an appliance shop, cement plant, creamery, butcher shop, photography shop, or a dealer specializing in the sale of goods made in Japan, Hong Kong, Formosa, China, or India, doing the same volume of business, be taxed $25.00?

To establish by Section 3 of the ordinance a reasonable classification of businesses generally for taxation and fix a tax rate therefor based on gross sales with certain minimum and maximum amounts, and by another section of the same ordinance exclude from the operation of Section 3, certain businesses naturally falling within its classification, and apply to such excluded businesses a tax rate on a flat annual basis that cannot possibly be more than the minimum for the unexcluded businesses is unreasonable, arbitrary, and discriminatory. Such exclusion assures to the excluded businesses a concession not accorded to other businesses similarly situated.

It is clear that the ordinance is void as it applies to the defendant's business in this case, and the motion for dismissal is granted.

This ruling is limited to the question presented by the defendant's motion. It is not within the province of the Court at this time to pass on the validity of the entire ordinance. It may be valid as to some businesses and invalid as to others. As hereinabove stated, in a few instances there seems to be an entire absence of authority for the city to impose any tax at all for revenue purposes.

Dated this 3rd day of August, 1964.

MAURICE HARDING, Judge.