

Licenses—Oleomargarine—Tax—Fee—Senate Bill 27.

Since it is admitted that the license fee is levied not for regulatory purposes but for the purpose of curtailing the sale of oleomargarine, in the absence of proof that oleomargarine is injurious to public health senate bill 27, as it appears at the date of opinion, would probably be held invalid as exacting an unreasonable and confiscatory tax.

Mr. B. F. Thraikill,
Dairy Commissioner,
Helena, Montana.

February 18, 1931.

My dear Mr. Thraikill:

You have requested my opinion whether senate bill 27 amending section 40 of chapter 93, laws of 1929, by increasing the license fees required from dealers in oleomargarine might be held void as being unreasonable and confiscatory.

The general rule applicable to the fixing of a license or tax is as follows:

“Subject to constitutional limitations, and within the limitations of reasonableness as heretofore considered, the determination of the amount or reasonableness of a license tax, whether imposed for purposes of regulation or for revenue, ordinarily rests within the discretion of the legislative power, state or municipal imposing the license or tax, and the exercise of such discretion will not be interfered with by the courts unless it is clearly apparent that there has been an abuse of discretion, and that the fee or tax is arbitrary, unreasonable, oppressive, or prohibitive. If the fee or tax is imposed under the police power as a means of regulation, the courts will interfere to declare the act or ordinance void only where it is obvious there has been an abuse of discretion and that the fee or tax is beyond the limits of a police regulation and is unreasonable or oppressive. If the fee or tax is imposed for revenue purposes, the amount thereof is particularly within the discretion and judgment of the legislative authority, state or municipal, and ordinarily will not be interfered with by the courts, unless the tax imposed amounts to a prohibition of a useful or legitimate occupation, or unless in case of an ordinance the tax imposed is manifestly in excess of the needs of the municipality and out of proportion to other taxes.

“In some jurisdictions the court may reduce the amount of the fees or taxes, if it finds them unreasonable.” (37 C. J. 193.)

The question of the reasonableness of a license or tax has been before the courts innumerable times but as each case is dependent upon the particular facts involved the decisions are of little help in deciding the question before us, but as stated by the United States Supreme Court in the case of Holden vs. Hardy, 169 U. S. 366,

“The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.”

Since it is not contended that the bill in question is for regulatory purposes only but the purpose, as freely admitted by its sponsors, is to curtail the sale of oleomargarine in the state as much as possible, it is at once apparent that the application of the test above mentioned to the bill would present a situation pregnant with possibilities unfavorable to the sponsors thereof. If, however, it has been established and definitely

recognized that oleomargarine is injurious to the public health then the license might be sustained under the following exception, to-wit:

“The rule that the license fee can cover only the expense of issuing the license and regulating the business does not apply to those occupations or privileges which, although tolerated, are hurtful to public morals, productive of disorder, or injurious to the public. In such cases fees or taxes may be imposed in such sums as to have a restraining or repressive effect, or even to prohibit the occupation or privilege.”

But as to this fact I have not sufficient information upon which to base an opinion.

Very truly yours,

L. A. FOOT,
Attorney General.