

No. 197

**CITIES & TOWNS—ORDINANCES—CONSTITUTIONAL
LAW—DISCRIMINATION**

Held: A city may not by ordinance impose a license or occupation tax on persons residing outside of certain counties, while exempting from such license residents of such counties engaged in the same business as classified and defined by said ordinance.

August 4, 1941.

Mr. E. Gardner Brownlee
County Attorney
Ravalli County
Hamilton, Montana

Dear Mr. Brownlee:

You have requested my opinion whether a city may by ordinance require a license of a non-resident of certain counties of the state for the privilege of selling merchandise, fruit or produce from trucks or similar temporary stands within the limits of such city while exempting residents of such counties. You advise the city of Kalispell has enacted an ordinance requiring such license, but exempting therefrom residents of Lake, Lincoln and Flathead Counties. A copy of said Ordinance is submitted with your request and provides, in part, as follows:

"Section 2. Any person, firm, association, or corporation who shall hereafter sell or offer to sell at wholesale or retail any goods, wares, merchandise, fruit, or produce from a wagon, railroad car, motor vehicle, or temporary stand, or upon any street or public ground within the corporate limits of the City of Kalispell, shall be deemed a transient merchant within the meaning of this ordinance.

"Section 3. The term 'Wholesale,' as used in this ordinance, shall mean the sale or delivery to any hotel, restaurant, retail store, commission house, or to any person, partnership, firm, association, corporation, or other agency for re-sale, direct or indirect, but this ordinance shall not apply to any farmer or producer, including the regular employees of any such farmer or producer, when selling or delivering such fruits, vegetables, garden truck, or farm produce as shall have been actually grown or produced by such farmer or producer within the Counties of Flathead, Lincoln, and Lake, in Montana, or in either or any of such counties; nor shall this ordinance apply to any religious, fraternal, patriotic organization, association, corporation, or other group, located in and which has its principal headquarters or place of business in any of said three counties of Flathead, Lake and Lincoln, nor to any person, association, or other such group or organization, acting solely under the sponsorship of such non-profit organization or group exempted as aforesaid.

"Section 4. Each transient merchant, before conducting any business as herein defined, within the corporate limits of the City of Kalispell, shall make application to the City Clerk of said City for a license so to do. Such application shall specify the applicant's name and residence, the number of days or period of time during which

such applicant will engage in such business in said City, the number of motor trucks or other vehicles to be used in such business in Kalispell, the merchandise, produce, article or articles to be sold or offered for sale, and the manner of conducting business. All licenses hereunder shall expire on the 31st day of December of each year, and shall be non-transferable. The amount to be paid for such license to conduct the business of a transient merchant shall be the sum of Two Hundred Dollars per year, or any part of a year, for each and every vehicle, whether motor truck or otherwise, used by said transient merchant in the City of Kalispell in the conduct of his said business. At the time of filing the application for such license, such transient merchant shall accompany the application hereinabove provided for with the sum or sums herein specified as a license fee."

The ordinance attempts to regulate the business of "Transient merchants," as defined by Section 2. It applies to all persons other than residents of Flathead, Lake and Lincoln Counties. It exempts from its provisions citizens residing in these three counties. In other words, the ordinance discriminates in favor of certain residents of the state as against all others. In this respect, it is in violation of Section 11, Article XII of the Montana State Constitution, which provides:

"Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

Our Supreme Court, in the case of *Hale v. County Treasurer of Mineral County*, 82 Mont. 98, 108, 265 Pac. 6, in discussing this question said:

"It is an essential requirement that a tax be equal upon all persons belonging to the class upon which it is imposed."

And again at page 107 of the above cited case, the Court said:

"In imposing a license tax, the state may tax all or it may select for taxation certain classes and leave the others untaxed. **But it is generally held that occupation taxes must be uniform upon the same class of subjects, although proper sub-classification is allowable. The rules as to classification are the same without regard to whether the imposition is a tax or a mere exercise of the police power.** In order to render a classification illegal, the business discriminated against must be shown to be precisely the same as that included in the class which is shown to be favored." (Cooley on Taxation, 4th ed. Sec. 1685).

"It is within the legislative power to define the different classes and to fix the license tax required of each. **All the taxpayer can demand is that he shall not be taxed at a different rate from others in the same occupation as classified by legislative enactment.** This seems to be the universal rule."

And the Court in this case quoted with approval from Cooley on Taxation, 4th ed., Sec. 259, as follows:

"While perfect equality is impossible, yet there are cases where there is such glaring inequality, either intentional or otherwise, as to clearly violate the uniformity and equality rule. **Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality, or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible.**" (Underscoring mine.)

As supporting the above principles, see the following cases:

Quong Wing v. Kirkendall, 39 Mont. 64, 101 Pac. 250, affirmed
in 223 U. S. 59, 56 L. Ed. 350;
Northwestern Life Ins. Co. v. Wisconsin, 247 U. S. 132, 62
L. Ed. 1025;
Bickett v. Tax Commission, 177 N. C. 433, 99 S. E. 415;
City of Bozeman v. Nelson, 73 Mont. 147, 237 Pac. 528;
Ford Motor Co., et al., v. Linnane, et al., 102 Mont. 325, 57
Pac. (2nd) 803.

The ordinance here in question singles out certain persons, to-wit: residents outside Flathead, Lake and Lincoln Counties, of the same class or subject, to-wit: transient merchants as classified and defined by the ordinance, and places an exceptional burden upon them, while exempting from the burden of the tax the residents of those counties. The ordinance in this respect is clearly discriminatory and in violation of Section 11, Article XII of the State Constitution and therefore invalid.

It is therefore my opinion a city may not by ordinance impose a license or occupation tax on persons residing outside of certain counties, while exempting from such license residents of such counties engaged in the same business as classified and defined by said ordinance.

Sincerely yours,

JOHN W. BONNER
Attorney General