(court cases in blue can be clicked on to go to a detailed summary; also, please open up the BOOKMARKS to see an outline of all the court cases in this document)

Court Cases

Affiliate and Subsidiary Companies

The Los Angeles Municipal Code was amended to provide for the following on January 1, 2002.

The term "gross receipts" as used in this article shall not include any amount received from or charged to any person which is a related entity to the taxpayer. A person is a related entity to a taxpayer if 80% or more of the ownership interests in both value and voting power of said person and the taxpayer are held, directly or indirectly, by the same person or persons. Notwithstanding the foregoing, any amount received from or charged to any person which is a related entity to a taxpayer shall be included in "gross receipts" when said amount is compensation for activities, including, but not limited to, selling, renting and service, performed by the taxpayer for any person which is not a related entity to the taxpayer.

These court cases continue to be used as they define issues not only for related companies but also for other companies doing business in the City of Los Angeles.

CITY OF LOS ANGELES v. SECURITY SYSTEMS, INC.
(1975) 46 Cal. App. 3d 950

The taxpayer provides billing services and collections for its subsidiaries, and provides personnel to its subsidiaries. The subsidiaries reimburse the taxpayer for the salaries of the persons who serve the subsidiaries. The court ruled that " the entire payroll, regardless of what form of or for when work was performed," was the taxpayer's own obligation, and reimbursement of the salaries were taxable gross receipts.

CITY OF LOS ANGELES V. CLINTON MERCHANDISING CORPORATION
(1962) 58 Cal. 2d 675

The court affirmed City of Los Angeles' position that taxpayer providing merchandise to affiliates was subject to taxation pursuant to LAMC Sec. 21.166 (Wholesale) rather than LAMC Sec. 21.79 (Commission Brokers).

A secondary issue, in regards to LAMC Sec. 21.190 (Professions / Occupations) activity, decided by the court was that the taxpayer was subject to taxation pursuant to Sec. 21.190 (Professions/Occupations) only for revenue received for services it rendered to its affiliates. The court held that receipts received from its affiliates as an agent of the affiliates were not subject to taxation.

REXALL DRUG COMPANY v. PETERSON
(1952) 113 Cal. App. 2d 528

The taxpayer provided administrative services for its subsidiaries and charged each subsidiary its proportionate cost. The court rejected the taxpayer's claim that receipts received for the administrative services provided on a nonprofit basis were not subject to taxation by the City of Los Angeles.

The court was not persuaded by the taxpayer's following arguments that: (a) a business may not be taxed unless it is conducted for a profit or for livelihood; (b) Rexall was not an independent contractor.

Administrative Remedy

CITY OF LOS ANGELES v. CENTEX TELEMANAGEMENT, INC.
(1994) 29 Cal. App. 4th 1384

Neither the City nor the taxpayer can bring a lawsuit until all administrative remedies have been exhausted per the provisions of Sec. 21.16 LAMC (Assessment-Administrative Remedy). The Statute of Limitation is tolled and no litigation may be instituted until the administrative procedures are exhausted.

Claims Against The Application of the LAMC

HOSPITAL MEDICAL COLLECTIONS, INC. v. CITY OF LOS ANGELES
(1976) 65 Cal. App. 3d 46

The court found that the taxpayers, which were collection agencies, were taxable on the entire gross receipts earned, including amounts paid as commissions to independent collection contractors.

ALCO PLATING CORP. v. CITY OF LOS ANGELES
(1974) 39 Cal. App. 948

The City may tax at different rates businesses primarily engaged in manufacturing and selling, and businesses primarily engaged in providing a service.

THE CITY OF LOS ANGELES v. W.J. TANNAHILL, et al
(1951) 105 Cal. App. 2d 541

The City can adopt a rational classification, like Sec. 21.195 (Trucking / Hauling), which affects equally all persons of the same class; it is lawful to tax trucks operated for hire based upon their unladen weights and amount of use.

Constitutionality of the Tax

TIMES MIRROR COMPANY ET AL V. CITY OF LOS ANGELES
(1987) 192 Cal. App. 3d 170

The City of Los Angeles Business Tax levied against newspaper companies was Constitutional; the First Amendment does not exempt newspapers from generally applicable economic regulations and taxes.

Failure To Pay Business Tax

DAVID B. EDWARDS V. CITY OF LOS ANGELES
(1941) 48 Cal. App. 2d 62

The taxpayer was subject to taxation pursuant to LAMC Sec. 21.99 (Hotel, Apartment, etc.) for the rental of apartments. Additionally, the taxpayer was subject to prosecution for failure to pay the business tax.

Independent Contractor/Agent

PROGRAMMING-ENTERPRISES, INC, v. CITY OF LOS ANGELES
(1989) 215 Cal. App. 3d 281

The taxpayer employment agency argued that monies received to pay the salaries of independent contractors should not be taxable gross receipts. The court ruled in favor of the City of Los Angeles on three issues.

First, taxpayer's claim that it acted as the agent of an independent contractor and, therefore, the exemption found in LAMC Sec. 21.190(c)(6) (Professions / Occupations) should apply to a percentage of taxpayer's gross receipts was rejected. The gross receipts were not received by the taxpayer on behalf of another.

Second, the taxpayer's gross receipts for work performed by independent contractors were found not to be subject to apportionment given that the taxpayer had neither property nor employees located outside the city.

Third, the taxpayer's gross receipts derived from work performed by independent contractors was not subject to taxation pursuant to LAMC Sec. 21.189.1 (Miscellaneous Services-Temporary Help Agency) since the taxpayer was not supplying its own employees to others on a temporary basis.

CITY OF LOS ANGELES v. H.R. SHERWOOD et al
(1978) 85 Cal. App. 3d 347

The court rejected the taxpayer's contention that it operated as an agent, and determined it to be an independent contractor whose gross receipts were taxable. Furthermore, it was determined that certain receipts were not collected by the taxpayer on behalf of another as claimed and that said receipts were subject to taxation.

INDEPENDENT CASTING-TELEVISION, INC. v. CITY OF LOS ANGELES
(1975) 49 Cal. App. 3d 502

Plaintiff casting agency sued for a tax refund, claiming that gross receipts did not include monies it received to pay the extras' salaries. The court ruled that the taxpayer was not due a refund of taxes paid since it determined that the taxpayer was the employer of extras placed with producers. It was held that taxpayer was not acting in the capacity of agent and was subject to tax on its reimbursed wages.

AMERICAN PRESIDENT LINES, LTD. V. FRANCHISE TAX BOARD
(1970) 3 Cal. App. 3d 587

The court ruled that a taxpayer's actions as an independent contractor on behalf of another party cannot be considered acts of the other party, and the taxpayer's gross receipts include amounts earned as an independent contractor.

In "Lieu Tax" Or Gross Premium Tax

CALIFORNIA FEDERAL SAVINGS AND LOAN ASOCIATION et al., v. CITY OF LOS ANGELES
(1995) 50 Cal. 3d 402

All Savings and Loan Associations are exempt from the City's business tax since they pay an "in lieu" tax to the State of California and have a financial institution status.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. CITY OF LOS ANGELES
(1990) 50 Cal. 3d 402

Insurance companies that pay the "in lieu" tax or the gross premiums tax are exempt from paying the city's business tax.

Professional License vs Municipal Taxation

FRANKLIN v. PETERSON
(1948) 87 Cal. App. 2d 727

The issuance of a professional license by the State of California does not carry with it an exemption from municipal taxation. The City's business tax ordinance does not attempt to regulate the professions, business or occupations that are subject to tax. It provides only for a license for revenue purposes, and is not a regulatory measure affecting the business or profession so taxed, and thus is constitutional.

Proration of the Annual Minimum Business Tax

CITY OF SAN JOSE v. RUTHROFF & ENGLEKIRK CONSULTING STRUCTURAL ENGINEERS, INC.,
(1982) 131 Cal. App. 3d 462

The Court of Appeals held that a minimum annual city business tax must be prorated to reflect the amount of business actually conducted within the taxing city. Out-of-city taxpayers shall remit a business tax which reflects the amount of business actually conducted within the City of Los Angeles.

CITY OF LOS ANGELES, Plaintiff and Appellant, v. SECURITY SYSTEMS, INC., Defendant and Respondent

Civ. No. 44622

Court of Appeal of California, Second Appellate District, Division One

46 Cal. App. 3d 950; 1975 Cal. App. LEXIS 1821; 120 Cal. Rptr. 600

April 9, 1975

PRIOR HISTORY: [**1]
Superior Court of Los Angeles County, No. C-3548, James D. Tante, Judge.

DISPOSITION: We conclude that respondent's entire payroll, including all officers' salaries, for the calendar years 1968, 1969 and 1970, and its assumed reimbursement therefor constitute its gross receipts subject to business tax. Although in its complaint plaintiff prays for recovery of $ 2,240.46, we cannot determine either from the pleading or the record exactly what this sum covers -- whether it represents taxes only or includes penalties and/or interest -- or even whether such computation is correct, thus, we reverse the judgment and remand the cause to the superior court to make such determination in accord with the views expressed in this opinion.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff city sought review of a judgment of the Superior Court of Los Angeles County (California), which held that defendant corporation owed back taxes to the city. Plaintiff contended that the award, a fraction of the sum sought, was inadequate.

OVERVIEW: Plaintiff city brought an action under Los Angeles, Cal. Code §§ 21.03 and 21.190, against defendant corporation to recover business taxes based on gross receipts for three years. Defendant acted as a financial conduit for its two wholly owned subsidiary corporations that installed, maintained, and sold alarm systems. Each accounting year, defendant's bookkeeping allocated all income and expenses between the affiliates, and thus it had no income or loss. Plaintiff contended that defendant's entire payroll sum constituted its gross receipts subject to business taxes. The trial court held that defendant's payroll for its own office salaries and 25 percent of the officers' salaries should be considered defendant's expenditures. Plaintiff appealed the trial court's award of a fraction of the sum that plaintiff had sought. The court held that defendant's entire payroll, including all officers' salaries for the three years, and its assumed reimbursement constituted gross receipts subject to business tax. The court held that it could not determine what the sum plaintiff prayed for covered. The court reversed and remanded to the trial court to compute the taxes.

OUTCOME: The court reversed the trial court's judgment, which held that defendant corporation owed back taxes to plaintiff city, and remanded for the trial court to determine the proper amount of taxes owed. Defendant corporation's entire payroll, including all officers' salaries, were to be considered as defendant's expenditures.

CORE TERMS: affiliates, gross receipts, payroll, personnel, salary, reimbursement, business tax, accounting, occupation, customers, expenditures, wage, wholly owned subsidiary, fractional part, person engaged, central office, alarm, registration, installation, certificate, undisputed, subsidiary, calendar, furnish, conduit, paying

CORE CONCEPTS - Hide Concepts

Civil Procedure : Jurisdiction : Jurisdictional Sources
The municipal court has no jurisdiction over controversies relating to tax levies. Cal. Civ. Proc. Code § 89.

Tax Law : State & Local Tax : Franchise Tax
Tax Law : State & Local Tax : Income Tax
Los Angeles, Cal. Code § 21.03, provides that, subject to the provisions of the article, a business tax registration certificate must be obtained and a business tax must be paid by every person engaged in any of the businesses or occupations specified in Los Angeles, Cal. Code §§ 21.50-21.198. No person shall engage in any business or occupation subject to tax under the provisions of the article without obtaining a registration certificate and paying the tax required thereunder.

Tax Law : State & Local Tax : Income Tax
Los Angeles, Cal. Code § 21.190, provides that for every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions of this article, the tax shall be $ 24.00 per year or fractional part thereof for the first $ 12,000.00 or less of gross receipts, plus $ 2.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 12,000.00.

COUNSEL: Burt Pines, City Attorney, Thomas C. Bonaventura, Assistant City Attorney, and Ronald A. Tuller, Deputy City Attorney, for Plaintiff and Appellant.

Gold, Herscher & Taback and Daniel M. Herscher for Defendant and Respondent.

JUDGES: Opinion by Lillie, J., with Wood, P. J., and Thompson, J., concurring.

OPINION BY: LILLIE

OPINION: [*951] [***601] The City of Los Angeles sued defendant to recover $ 2,240.46 in business taxes n1 based on gross receipts for the [**2] calendar years [*952] 1968, 1969 and 1970, pursuant to sections 21.03 n2 and 21.190, n3 Los Angeles Municipal Code, penalties and interest. Plaintiff was awarded $ 230.52 and interest. It appeals from the judgment, and urges inadequacy of the recovery.

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n1 The municipal court has no jurisdiction over controversies relating to tax levies. (Code Civ. Proc., § 89; Cowles v. City of Oakland, 167 Cal.App.2d Supp. 835, 838-839 [334 P.2d 1069]; Unemp. etc. Com. v. St. Francis etc. Assn., 58 Cal.App.2d 271, 280 [137 P.2d 64].)

n2 Section 21.03: "(a) Subject to the provisions of this Article, a business tax registration certificate must be obtained and a business tax must be paid by every person engaged in any of the businesses or occupations specified in Sections 21.50 to 21.198, inclusive, of this Article, and a business tax is hereby imposed in the amount prescribed in the applicable section. No person shall engage in any business or occupation subject to tax under the provisions of this Article without obtaining a registration certificate and paying the tax required thereunder." [**3]

n3 Section 21.190: "(a) For every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions of this Article, the tax shall be $ 24.00 per year or fractional part thereof for the first $ 12,000.00 or less of gross receipts, plus $ 2.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 12,000.00."

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Most of the facts are stipulated and the rest undisputed. Defendant is a corporation, a wholly owned subsidiary of West Coast Burglar Alarm Systems; in turn defendant has two wholly owned subsidiary corporations, Aaron Alarm and Sylvester Alarm (hereafter referred to as affiliates). The affiliates install, maintain and sell alarm systems. Defendant's function is to act as a financial and employer "conduit" for the affiliates. In this respect and on behalf of its affiliates defendant sends out all billings to their customers and collects for them all sums owing, pays all of their obligations, hires, [**4] carries on its own payroll and supplies to them all of the waged and salaried persons used by them in their various functions -- installation, servicing, sales, central office activities and special contract labor n4 -- and makes deductions and disbursements on behalf of these employees for all withholding taxes, social security, state disability compensation, etc. Defendant's corporate officers also serve in the same capacity for its affiliates, and defendant pays all of these salaries. At the end of each accounting year defendant by bookkeeping transaction allocates all income and expenses between the affiliates, and thus has no income or loss, and pays no income taxes.

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n4 The trial court made the following pertinent finding: "Security Systems, Inc. carries on its payroll all of the employees who render the services of installing, maintaining and selling alarm systems to customers as well as all other employees rendering services to the related group of entities. None of the operating companies has a payroll. At the end of the year certain journal entries are made allocating to the operating companies on the basis of gross income, the payroll expenses incurred by Security Systems, Inc. The

function Security Systems, Inc. performs is that it acts as a conduit for all of the receipts and expenses of the operating companies."

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All of the foregoing facts having been agreed upon or undisputed, we [*953] are called upon to resolve a question of law only (Jones-Hamilton Co. v. Franchise Tax Bd., 268 Cal.App.2d 343, 347 [73 Cal.Rptr. 896]; Gibbons & Reed Co. v. Dept. of Motor Vehicles, 220 Cal.App.2d 277, 285 [33 Cal.Rptr. 688, 927].)

[***602] Plaintiff's position in the trial court was that defendant was the employer of all of the persons, including the corporate officers, who performed all of the functions of the affiliates, n5 and therefore defendant could be deemed to be in the business of providing all of the personnel, including the officers, to the affiliates similar to personnel agencies such as "Kelly Girl," "Manpower," etc. which furnish persons who are already their employees to pursue whatever endeavor the new "temporary employer" requires, except that defendant did not make a profit on its services. Accordingly, plaintiff contended, defendant's entire payroll sum, for which defendant realistically should be reimbursed by the affiliates whether or not it actually was, should constitute its "gross receipts," just as the total sums any personnel agency received from [**6] its customers (which in such instance would include a profit) would represent its gross receipts.

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n5 In opening brief appellant vigorously asserts that the evidence undisputedly establishes that it was such an employer. We find the evidence sufficient to constitute a prima facie demonstration of an employer-employee relationship between defendant and all of these persons. (Robinson v. George, 16 Cal.2d 238, 242 [105 P.2d 914]; Woodall v. Wayne Steffner Productions, 201 Cal.App.2d 800, 808 [20 Cal.Rptr. 572]; Alford v. Bello, 130 Cal.App.2d 291, 295 [278 P.2d 962].) Respondent in its brief makes no contention to the contrary.

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The trial court did not agree. It did, however, find and conclude that defendant's payroll in relation to its own office salaries and 25 percent of the officers' salaries should be considered as expenditures by defendant on its own behalf and, therefore, an assumed reimbursement for these items created gross receipts for defendant. n6 It further found that [**7] because all of the rest of the payroll classifications (for installation, service, central office sales, office and contract labor) represented payments to individuals who performed these duties exclusively for the affiliates, defendant had made the wage and salary payments to all these persons exclusively on behalf of the affiliates. Thus, the court concluded that reimbursement to defendant for these expenditures would create no gross receipts for it. In so ruling it relied on City of Los Angeles v. Clinton Merchandising Corp., 58 Cal.2d 675 [25 Cal.Rptr. 859, 375 P.2d 851], wherein the court held that reimbursement to a "central managing, accounting and disbursing" (p. 677) corporation for sums it had paid out [*954] on behalf of its affiliates, which sums represented

obligations of the affiliates, did not create gross receipts for the paying corporation. With the trial court's ruling we do not agree.

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n6 Accordingly, the court entered judgment for plaintiff based on the tax rate, penalties and interest applicable to these two items.

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The record establishes that all of the personnel were employees of defendant thus, of course, it was required to and did pay them their wages and salaries on its own behalf, and not exclusively on behalf of the affiliates. Therefore the entire payroll, regardless of what form of or for whom work was performed by everyone carried thereon, was defendant's own obligation, and its assumed reimbursement therefor would constitute its gross receipts. It is this circumstance which serves to distinguish this case from City of Los Angeles v. Clinton Merchandising Corp., 58 Cal.2d 675 [25 Cal.Rptr. 859, 375 P.2d 851], because therein the Supreme Court found that defendant corporation had met the "payroll" of one of its affiliates, rather than its own. Reasoning again by analogy to the personnel agencies ("Kelly Girl," etc.), they themselves are obligated to pay all of their employees whom they furnish to other business enterprises, regardless of the type of activity performed for those businesses.

Dispositive of the issue raised on the undisputed facts is Rexall Drug Co. v. Peterson, 113 Cal.App.2d 528 [248 P.2d 433]. Therein suit was brought under section 21.190. [**9] Rexall furnished "accounting, financial, personnel [italics ours] legal, executive [***603] managerial, and directive services" (p. 529) to 10 subsidiary corporations wholly owned by it; and Rexall apportioned its costs for these services (it did not include any profit) among its subsidiaries. The court held that the total sums so expended and then recovered by Rexall constituted its gross receipts subject to business tax.

We conclude that respondent's entire payroll, including all officers' salaries, for the calendar years 1968, 1969 and 1970, and its assumed reimbursement therefor constitute its gross receipts subject to business tax. Although in its complaint plaintiff prays for recovery of $ 2,240.46, we cannot determine either from the pleading or the record exactly what this sum covers -- whether it represents taxes only or includes penalties and/or interest -- or even whether such computation is correct, thus, we reverse the judgment and remand the cause to the superior court to make such determination in accord with the views expressed in this opinion.

CITY OF LOS ANGELES, Plaintiff and Respondent, v. CLINTON MERCHANDISING CORPORATION, Defendant and Appellant

L. A. No. 26255

Supreme Court of California

58 Cal. 2d 675; 375 P.2d 851; 1962 Cal. LEXIS 299; 25 Cal. Rptr. 859

November 9, 1962

PRIOR HISTORY: [***1]

APPEAL from a judgment of the Superior Court of Los Angeles County. Virgil M. Airola, Judge. *

* Assigned by Chairman of Judicial Council.

Action to recover license taxes under municipal ordinances.

DISPOSITION: Affirmed in part and reversed in part. Judgment for plaintiff affirmed as to assessment under one section of ordinance and reversed as to assessment under another section.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant wholesaler appealed from a judgment of the Superior Court of Los Angeles County (California) that affirmed plaintiff municipality's assessment of taxes owed by defendant under Los Angeles, Cal., Code §§ 21.166 and 21.190.

OVERVIEW: Defendant wholesaler performed warehousing services for affiliated men's clothing stores. Defendant took title to merchandise and distributed it at cost to affiliated stores, who then took title. Plaintiff municipality assessed wholesale sales tax on defendant's merchandise transactions with its affiliates, and assessed tax on defendant's total receipts exclusive of sales receipts, under Los Angeles, Cal., Code §§ 21.166 and 21.190. The trial court affirmed defendant's assessment. Defendant appealed. On appeal, the court affirmed in part and reversed in part. The court affirmed plaintiff's wholesale sales tax assessment under § 21.166 and held that defendant was a wholesaler rather than a broker exempt from the sales tax. The court reversed the assessment under § 21.190 and held that defendant was liable for tax under § 21.190 only for revenue it received for services it rendered, but not for all receipts from affiliated store that were used to pay for the affiliated stores' obligations.

OUTCOME: The court affirmed in part and reversed in part a judgment affirming plaintiff municipality's assessment of taxes owed by defendant wholesaler under a municipal wholesales sales tax ordinance.

CORE TERMS: gross receipts, merchandise, wholesale, broker, taxed, total amount, affiliate, subsidiary, classification, wholesaler, repayment, warehouse, fractional part, tax imposed, advertising, inventory, measured, selling, storage, resale, license tax, regular course of business, tangible personal property, short period of time, services rendered, transfer of title, monies received, calendar year, interest paid, entire amount

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Sales Tax
Los Angeles, Cal., Code § 21.166 reads in part as follows: (a) Every person selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, shall pay for each calendar year or portion thereof the sum of $ 8.00 for the first $ 20,000 or less of gross receipts, and, in addition thereto, the sum of 40 cents per year for each additional $ 1,000 of gross receipts or fractional part thereof in excess of $ 20,000.

Tax Law : State & Local Tax : Sales Tax
Los Angeles, Cal., Code § 21.166(b) reads: For the purpose of this section, a wholesale or sale at wholesale means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business.

Tax Law : State & Local Tax : Sales Tax
Los Angeles, Cal., Code § 21.00, subdivision (g) provides that a sale shall be deemed to include the making of any transfer of title, in any manner or by any means whatsoever, to tangible personal property for a price, and to the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor.

Tax Law : State & Local Tax : Sales Tax
While Los Angeles, Cal., Code § 21.79, pertaining to the licensing of commission merchants or brokers, provides that persons in that classification may take title to goods during transit and may store them for a short period of time without losing such business classification, the fact that the section states that a person who takes title does not lose the classification by short-lived storage does not mean he becomes a broker because of such temporary storage. Further, where a wholesaler on its own account sells merchandise; defendant and carries such merchandise on its books as its own inventory, none of these practices characterizes the operation of a broker.

Tax Law : Federal Taxpayer Groups : Exempt Organizations : Unrelated Business Income (IRC secs. 511-513)

The court rejects the conclusion that the entire amount of money collected by a wholesaler from its affiliate stores for stipulated services, other than sales activities in the supplying of merchandise, constitutes gross income under Los Angeles, Cal., Code § 21.190.

Tax Law : Federal Income Tax Computation : Deductions for Business Expenses : Other Business Expenses (IRC secs. 162, 274)
Los Angeles, Cal., Code § 21.190 reads in part as follows: (a) Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $ 12.00 per calendar year or fractional part thereof for the first $ 12,000 or less of gross receipts, and in addition thereto, the sum of $ 1.00 per year for each additional $ 1,000 or fractional part thereof, of gross receipts in excess of $ 12,000.

Tax Law : Federal Income Tax Computation : Deductions for Business Expenses : Other Business Expenses (IRC secs. 162, 274)
Los Angeles, Cal., Code § 21.190 bases the tax upon the gross receipts of defendant for the services it rendered as a management corporation. This section taxes any person engaged in any trade, calling, occupation, profession or other means of livelihood, measured by its gross receipts. As defined by the pertinent portion of Los Angeles, Cal., Code § 21.00, gross receipts are the total amount charged or received for the performance of any act, service or employment of whatever nature.

COUNSEL: Shearer & Fields, Bertram Fields and Bernard Shearer for Defendant and Appellant.

Roger Arnebergh, City Attorney, Bourke Jones and James A. Doherty, Assistant City Attorneys, and Robert C. Summers, Deputy City Attorney, for Plaintiff and Respondent.

JUDGES: In Bank. Tobriner, J. Gibson, C. J., Traynor, J., Schauer, J., McComb, J., Peters, J., and White, J., * concurred.

* Assigned by Chairman of Judicial Council.

OPINIONBY: TOBRINER

OPINION: [*677] [**852] This case involves the narrow question of whether the City of Los Angeles in assessing defendant's license taxes properly interpreted the term "gross receipts" to cover all of the amounts defendant handled rather than the gross amount it received for the services it rendered. The case presents the further question of whether [***2] the city properly assessed defendant as a "person . . . selling . . . goods . . . at wholesale." For the reasons hereinafter set out we believe the city properly assessed the tax in the second, but not in the first, instance.

Defendant appeals from a judgment sustaining the assessments in both respects for the years 1955 through 1958. The city measured the assessments by "gross receipts" under three separate sections of the Los Angeles Municipal Code: (1) $ 40.20 under section 21.167, based on gross receipts from defendant's retail sales of merchandise to its employees; (2) $ 8,840.18 under section 21.166, based on gross receipts from defendant's wholesale merchandising; and (3) $ 3,392.84 under section 21.190, based on gross receipts for services rendered by defendant exclusive of sales activities. Defendant does not contest the retail sales assessment (§ 21.167) but does challenge the propriety of the other two assessments.

As the stipulation of the parties discloses, defendant Clinton Merchandising Corporation is an affiliate of various sales corporations (hereinafter referred to as stores) engaged in the retail men's clothing business. It acts as the central managing, accounting [***3] and disbursing office for these stores. It collects all of their receipts and pays all of their obligations. It advances money when necessary to pay the obligations of any store which has receipts insufficient to cover its obligations. It renders various advisory services to the stores, including assistance in their advertising programs.

Defendant negotiates in the East for the purchase of all merchandise to be sold by the stores. It buys such merchandise with its own funds. In some cases the manufacturers ship the merchandise directly to the stores; in most cases they ship it to defendant's warehouse. Here it is stored and later distributed at cost to the stores. Defendant carries on its books as its own inventory all merchandise remaining in its warehouse at the end of an accounting period. Defendant makes occasional sales from such merchandise both at wholesale and retail to its own employees. As we have stated, the tax imposed [*678] on gross receipts from these sales, pursuant to section 21.167, is not disputed by defendant.

Defendant sets up a procedure for the financing of the stores and for the payment of its fees. Thus defendant allocates to a particular store, [***4] and enters on its books as "advances," all monies paid by it for the store's payroll, advertising and distributed merchandise. Defendant itself collects the store's receipts; it enters these as "repayment of advances." Other cost items, such as television advertising, defendant adjusts among the stores on a pro rata basis, measured by the ratio of the store's sales to the total sales of all stores in the area. As compensation for its services defendant deducts and retains a percentage fee, varying between 5 and 6 per cent, of the store's sales. From this amount defendant pays its own costs of operation.

Pursuant to section 21.166, the city assessed its tax upon the basis of receipts from wholesale sales; defendant, however, contends it has not operated as a wholesaler but as a broker and therefore should have been taxed only under the more lenient section 21.79. Under section 21.190, defendant paid a tax based upon the retained percentage of 5 or 6 per cent, which it treated as its gross receipts. The city, however, contends that the total amount of defendant's receipts, including the repayment of advances, are its gross receipts.

[**853] We therefore deal with [***5] two problems posed by the sections. The first turns essentially upon the status of the payee; the second, upon the amount of the tax. As to the first issue, we believe that the trial court properly held that defendant engaged in

the business of selling goods at wholesale and that the city, accordingly, correctly taxed it under section 21.166. As to the second problem, we have concluded that the defendant should not have been taxed upon the basis that its gross receipts embraced the entire amount which it collected from its affiliate stores rather than the amount which it received in payment for its services. To this extent the judgment under section 21.190 cannot stand.

Turning to the first issue, we find that the operation of defendant coincides with that of a wholesaler as contemplated by section 21.166. n1 Subdivision (a) of that section encompasses [*679] "[every] person . . . selling any goods" etc.; subdivision (b) n2 defines a wholesale sale as a "sale of goods . . . for the purpose of resale in the regular course of business"; section 21.00, subdivision (a) n3 specifies "gross receipts" as the total amount "received for the performance of any act, service or employment [***6] . . . in connection with the sale of goods . . ."; section 21.00, subdivision (g) n4 provides that "[sale] . . . shall be deemed to include . . . the making of any transfer of title. . . ." Here defendant uses its own funds to purchase the merchandise. It stores the shipped merchandise in its warehouses. It inventories the merchandise as its own. It takes title to the merchandise. Upon distribution of the merchandise to the particular store, defendant transfers title to that store. The recipient receives possession of the merchandise and title to it for the purpose of resale. The operation thus fulfills the statutory qualifications for that of a wholesaler.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Section 21.166 of the Los Angeles Municipal Code reads in part as follows: "(a) Every person . . . selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, shall pay for each calendar year or portion thereof the sum of $ 8.00 for the first $ 20,000 or less of gross receipts, and, in addition thereto, the sum of 40 cents per year for each additional $ 1,000 of gross receipts or fractional part thereof in excess of $ 20,000. . . ." (Italics added.) [***7]

n2 Section 21.166(b) reads: "For the purpose of this section, a wholesale or sale at wholesale means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business." (Italics added.)

n3 Section 21.00, subdivision (a) of the code defines gross receipts as "The total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, whether such service, act or employment is done as a part of or in connection with the sale of goods, wares, merchandise or not, for which a charge is made or credit allowed, including all receipts, cash, credits and property of any kind or nature, any amount for which credit is allowed by the seller to the purchaser without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, losses or any other expense whatsoever; . . ." (Italics added.)

n4 Section 21.00, subdivision (g) provides that a "[sale] . . . shall be deemed to include . . . the making of any transfer of title, in any manner or by any means whatsoever, to

tangible personal property for a price, and to the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor."

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [***8]

Defendant's various attempts to convert its defined status into other classifications by describing aspects of the operation in unusual descriptive terminology must fail. Thus it claims that it charges the store which receives the merchandise for "advances" and takes as "repayment of advances" that portion of the receipts which is attributable to such merchandise. The use of unique nomenclature to describe the transaction, [*680] the wrapping of it in the designation [**854] of "advance," does not alter the nature of it. Nor does the distribution of the merchandise "at cost," rather than upon a profit-making mark-up, change the situation. Defendant's different labels do not effectuate new or different transactions.

Defendant's attempt to designate its status as that of a broker under section 21.79 likewise fails. Defendant's transactions in arranging for the purchase and delivery of merchandise possess none of the incidents of brokerage. Thus defendant's acquisition of title and storage of the goods in its warehouse may be for a "short period of time" but its exact duration depends upon the time when the stores need the goods. While section 21.79, pertaining [***9] to the licensing of commission merchants or brokers, provides that persons in that classification may take title to goods during transit and may store them for a "short period of time" without losing such business classification, the fact that the section states that a person who takes title does not lose the classification by short-lived storage does not mean he becomes a broker because of such temporary storage. Further, defendant on its own account sells the stored merchandise; defendant carries such merchandise on its books as its own inventory. None of these practices characterizes the operation of a broker. Moreover, defendant did not seek or obtain a license as a broker. We conclude that defendant's status as a wholesaler renders it subject to the tax imposed by section 21.166.

Our analysis of the second issue of the case, as we have stated, compels us to reject the trial court's conclusion that the entire amount of money collected by defendant from its affiliate stores for stipulated services, other than sales activities in the supplying of merchandise, constituted gross income under section 21.190. n5 The ruling apparently rests on the premise that all of [***10] the receipts pertained directly to the business activities in which defendant engaged and thus constitute the measure of the imposed tax.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 Section 21.190 reads in part as fallows: "(a) Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $ 12.00 per calendar year or fractional part thereof for the first $ 12,000 or less of gross receipts, and in addition

thereto, the sum of $ 1.00 per year for each additional $ 1,000 or fractional part thereof, of gross receipts in excess of $ 12,000."

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Section 21.190 bases the tax upon the gross receipts of defendant for the services it rendered as a management corporation. [*681] The section taxed any person "engaged in any trade, calling, occupation, profession or other means of livelihood," measured by its "gross recipts." As defined by the pertinent [***11] portion of section 21.00, "gross receipts" are the "total amount charged or received for the performance of any act, service or employment of whatever nature." (Italics added.) The gross amount which defendant received in the form of its 5-6 per cent service deduction constitutes under the definition its gross receipts. While defendant's net receipts would equal the amount it received less its own operating costs of business, defendant properly paid taxes based upon the whole amount of its receipts for such services. The section, however, did not equate gross receipts with the totality of all monies handled by the taxpayers, an irrelevant figure which blanketed all of the taxpayer's activities.

The amounts defendant received in reimbursement for expenses paid by it for the stores, such as a store's payroll, rent, utilities, advertising, are not taxable as defendant's gross receipts. If monies which defendant collects on behalf of the stores represent its gross receipts, without deduction for the sums which it has paid or advanced for expenses of the affiliate stores, all monies received by an agent for his principal would comprise gross receipts of the agent. Yet defendant [***12] acts merely as an [**855] agent for handling money for the stores, paying out and receiving back sums advanced to the stores for their own operating expenses. Defendant's situation compares to that of an attorney who, upon the authorization of the client that the attorney reimburse himself, advances monies for costs of his client and is repaid from funds received on behalf of the client. A store's reimbursement of defendant for the store's own expenses is no more chargeable as "gross receipts" than the client's repayment of his attorney's advances.

We do not believe plaintiff may successfully rely upon Rexall Drug Co. v. Peterson (1952) 113 Cal.App.2d 528 [248 P.2d 433], a case in which the court sustained a license tax imposed under this same section upon the parent company as a service corporation to its subsidiaries. That case only involved Rexall's claim that it was not subject to any tax under section 21.190 by reason of the services it performed for its subsidiary drugstores. The opinion described the operation (113 Cal.App.2d at p. 529): "Rexall administers the whole business enterprise, maintains a head office in Los Angeles, [*682] [***13] and furnishes accounting, financial, personnel, legal, executive managerial, and directive services to its subsidiaries. For these services Rexall charges each subsidiary its proportionate cost thereof. No profit is charged." The opinion does not disclose the manner in which Rexall performed its services, how it obtained its income, or the portion thereof on which it was taxed. The court thus does not pass upon the question before us: whether the tax should be payable on a basis over and above the amount received for the services rendered or should embrace all monies collected for and on behalf of, or from, the affiliate companies. The decision holds only that Rexall could not sustain its position that it owed no tax at all.

We believe that the ordinance includes as "gross receipts" those sums received for the use and benefit of the taxpayer and excludes those receipts which are held for the account of another. The definition of "gross receipts" (§ 21.00) as applied to income for rendered services prohibits the taxpayer's deduction for his own "labor or service costs, interest paid or payable, losses or any other expense whatsoever." If the draftsmen further intended that no [***14] deduction should be made for monies received for the account of another, they would have so stated. The section's denial of the right to exclude any "expense whatsoever" does not indicate an intent to deny exclusion of money recouped after payment of the expenses of another.

The judgment is affirmed insofar as it sustains the license tax imposed on defendant under section 21.166 but reversed as to the tax imposed under section 21.190.

REXALL DRUG COMPANY (a Corporation), Appellant, v. WALTER C. PETERSON, as City Clerk, etc., et al., Respondents

Civ. No. 18859

Court of Appeal of California, Second Appellate District, Division One

113 Cal. App. 2d 528; 248 P.2d 433; 1952 Cal. App. LEXIS 1401

October 6, 1952

SUBSEQUENT HISTORY: [***1]

A Petition for a Rehearing was Denied October 30, 1952.

PRIOR HISTORY:

APPEAL from a judgment of the Superior Court of Los Angeles County. F. Ray Bennett, Judge pro tem. *

* Assigned by Chairman of Judicial Council.

Action for declaratory relief.

DISPOSITION: Affirmed. Judgment for defendants affirmed.

CORE TERMS: subsidiary, gross receipts, independent contractor, business license tax, fractional part, accounting, livelihood

COUNSEL: Adams, Duque, Davis & Hazeltine, Bryant K. Burton and James E. Wallace for Appellant.

Ray L. Chesebro, City Attorney (Los Angeles), Bourke Jones, Assistant City Attorney, and Alan G. Campbell, Deputy City Attorney, for Respondents.

JUDGES: Drapeau, J. White, P. J., and Doran, J., concurred.

OPINIONBY: DRAPEAU

OPINION: [*529] [**433] Rexall Drug Company, a corporation, owns all of the stock of 10 subsidiary corporations. These subsidiary corporations engage principally in the manufacture and sale of articles commonly sold by drugstores.

Rexall administers the whole business enterprise, maintains a head office in Los Angeles, and furnishes accounting, financial, personnel, legal, executive managerial, and directive

services to its subsidiaries. For these services Rexall charges each subsidiary its proportionate cost thereof. No profit is charged.

The city of Los Angeles claimed [***2] that these charges were subject to business license tax, as imposed by section 21.190 of the Municipal Code. This section reads in part as follows:

"(a) Every person engaged in any trade, calling, occupation, vocation, [**434] profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $ 12.00 per calendar year or fractional part thereof for the first $ 12,000 or less of gross receipts, and in addition thereto, the sum of $ 1.00 per year for each additional $ 1,000 or fractional part thereof, of gross receipts in excess of $ 12,000."

Rexall denied the claim and brought this action in declaratory relief to settle the controversy.

The trial court found for the city, and adjudged that the transactions were subject to tax and that $ 10,011.24 unpaid taxes were due the city.

Rexall appeals from the judgment, and contends that in furnishing the administrative services on a nonprofit basis for its wholly owned subsidiaries it was not engaged in a business subject to license tax by the city.

In support of this contention Rexall argues, [***3] (a) that a business may not be taxed unless it is conducted for profit or for livelihood, (b) that Rexall was not an independent contractor, [*530] (c) that Rexall's administration of its subsidiaries was only incidental to its principal business, and (d) that in accounting between Rexall and its subsidiaries debits for intercompany bookkeeping were not gross receipts as contemplated by the ordinance.

While in exceptional cases, to prevent fraud or injustice, the law will look through what has been termed the corporate veil (Gordon v. Aztec Brewing Co., 33 Cal.2d 514 [203 P.2d 522]), in tax matters a corporation and its stockholders are deemed separate entities. (Northwestern Pac. R. Co. v. State Board of Equalization, 21 Cal.2d 524 [133 P.2d 400].) Ownership of capital stock in one corporation by another does not itself create identity of corporate interest as between the two. (Northwestern Pac. R. Co. v. State Board of Equalization, supra.) To do otherwise would lead to endless confusion and trouble in the imposition of taxes.

Bearing in mind that each of Rexall's subsidiary corporations is an independent legal entity, it becomes manifest that [***4] the transactions here in question were subject to business license tax by the city.

The judgment is affirmed.

CITY OF LOS ANGELES, Plaintiff and Appellant, v. CENTEX TELEMANAGEMENT, INC., Defendant and Respondent.

No. B073192.

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

29 Cal. App. 4th 1384; 1994 Cal. App. LEXIS 1113; 34 Cal. Rptr. 2d 782; 94 Cal. Daily Op. Service 8396; 94 Daily Journal DAR 15474

October 20, 1994, Decided

SUBSEQUENT HISTORY: [**1]

The Publication Status of the Document has been Changed by the Court from Unpublished to Published October 31, 1994. Review Denied February 15, 1995, Reported at: 1995 Cal. LEXIS 746.

PRIOR HISTORY: Superior Court of Los Angeles County, No. BC042828, Raymond D. Mireles, Judge.

DISPOSITION: The judgment is reversed and the matter remanded for a new trial on any remaining issues. The City to have its costs on appeal.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, the city of Los Angeles, sought review of the decision of the Superior Court of Los Angeles County (California) that dismissed plaintiff's action against defendant corporation for money allegedly due by defendant on an unpaid tax assessment. Plaintiff challenged the determination that the action was barred by the statute of limitations.

OVERVIEW: Plaintiff, city of Los Angeles, issued a notice of tax due to defendant corporation stating that a business tax would be considered delinquent as of October 17, 1988. Defendant sought an administrative hearing on the matter under Los Angeles, Cal. Mun. Code § 21.16, and the assessment was affirmed in April 1989. Plaintiff filed its action in the trial court to recover the tax on November 21, 1991. The trial court dismissed the action based upon the grounds that the three year statute of limitations had accrued as of the date of delinquency, October 17, 1988, and had thus expired before the action was filed on November 21, 1991. The court reversed the decision and remanded the matter for a new trial on the remaining issues. The court agreed with the trial court that the cause of action accrued as of the date of delinquency, October 17, 1988. The court held that the statute of limitations was tolled during the time that defendant was

pursuing its administrative remedy because plaintiff could not institute litigation until the administrative procedures were exhausted. The court held that because the statute was tolled until April 1989, plaintiff's action was not untimely.

OUTCOME: The court reversed the statute of limitations decision of the trial court and remanded the case for a new trial on the remaining issues. The court held that the limitations period for plaintiff, city of Los Angeles, to institute an action to recover taxes was tolled during the time that defendant corporation was pursuing an administrative remedy.

CORE TERMS: statute of limitations, exhausted, administrative process, business tax, administrative remedy, exhaustion, lawsuit, doctrine of exhaustion, failed to pay, legal action, delinquent, pursued, notice, exhaustion of administrative remedies, cause of action, notification, delinquency, owing, administrative remedies, collection action, tax liability, notifying, notified, annual, tolled, levy

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Franchise Tax
The cause of action to collect a business tax accrues on the delinquency date. Los Angeles, Cal. Mun. Code § 21.05 provides that where the tax in question is an annual business tax it is deemed delinquent within 30 days from the date of notification that it is owing.

Civil Procedure : Jurisdiction : Subject Matter Jurisdiction : Jurisdiction Over Action
Administrative Law : Judicial Review : Reviewability : Exhaustion
The rule of exhaustion of administrative remedies is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. Furthermore, when administrative machinery exists for the resolution of differences, the courts will not act until such administrative procedures are fully utilized and exhausted. To do so would be in excess of their jurisdiction. The administrative remedy must be pursued as a condition precedent to the lawsuit. That the doctrine is applicable to tax matters is well established.

Administrative Law : Judicial Review : Reviewability : Exhaustion
Los Angeles, Cal. Mun. Code § 21.16(c) provides: If the city clerk grants the request for waiver of hearing, the administrative proceedings prescribed by this section shall be deemed exhausted and the city of Los Angeles shall have the right to bring an action in any court of competent jurisdiction to collect the amount of the assessment, plus such penalties and interest as may have accrued thereon.

Administrative Law : Judicial Review : Reviewability : Exhaustion
By inference, where the taxpayer requests a hearing under Los Angeles, Cal. Mun. Code § 21.16(c), the city of Los Angeles cannot bring an action because the administrative process is not yet exhausted. Additionally, because under § 21.16(f), one of the board of

review's options is to decrease the assessment, it would be pointless for the city to bring a collection action without knowing what amount, if any, it is entitled to collect. Exhaustion of the administrative process does not occur until the taxpayer either files or fails to file its exceptions to the board's decision. Los Angeles, Cal. Mun. Code § 21.16(g).

Governments : Legislation : Construction & Interpretation
It is a basic rule of statutory construction that all the parts of a statute must be read together and harmonized.

COUNSEL:

James K. Hahn, City Attorney, Richard A. Dawson, Assistant City Attorney, and Michael L. Klekner, Deputy City Attorney, for Plaintiff and Appellant.

Wilson, Sonsini, Goodrich & Rosati, Donald E. Bradley, Ivan H. Humphreys and Dwayne M. Horii for Defendant and Respondent.

JUDGES: Opinion by Woods A. M., P. J., with Epstein and Vogel C. S., JJ., concurring.

OPINIONBY: WOODS (A. M.), P. J.

OPINION: [*1386] [***782]

WOODS (A. M.), P. J.

The City of Los Angeles (City) appeals the dismissal of its action against Centex Telemanagement, Inc. (Centex) for money due on an unpaid tax assessment on grounds the action was barred by the statute of limitations.

Centex provides telecommunications management services for a fee to small and medium-sized businesses located [**2] in the City. Centex paid the City an annual business tax based on the amount of these fees.

In June 1987, Centex filed a claim for a refund of its previous year's business tax. The City then informed Centex it was beginning an examination of Centex's business tax liability for 1986 and 1987.

On June 27, 1988, the City notified Centex that its examination had resulted in additional [***783] liability in the principal amount of $ 38,048.05. On September 16, the City issued to Centex a notice of tax due which stated in part that if payment was not made by October 17, 1988, there would be an additional penalty of $ 6,564.71. When Centex failed to pay the tax, the City, on November 3, 1988, sent Centex a second letter that referred to "delinquent" amounts and informed Centex if it failed to pay its tax liability before November 30, 1988, additional interest would be charged. No additional penalty

was sought, however. When Centex again failed to pay the tax, the City, on November 22, 1988, sent another letter notifying Centex that it was levying an assessment in the amount of $ 44,218.23, which amount included the original penalty and interest.

Centex then sought an administrative [**3] hearing under Los Angeles Municipal Code (L.A. Municipal Code) section 21.16. Pursuant to that statute, the matter was heard before the City's board of review. On April 14, 1989, the board affirmed the assessment. Centex filed written exceptions to the notice of decision.

On November 21, 1991, the City filed the instant complaint. Centex filed an answer asserting, inter alia, the statute of limitations. The trial of the action was based exclusively on written stipulated facts and documentary exhibits. The City argued that the statute of limitations was tolled while [*1387] Centex exhausted its administrative remedy for review of its tax liability. The court rejected the argument and granted judgment to Centex on ground that the action was barred by the statute of limitations. This appeal ensued. We reverse.

I

The parties agree that the statute of limitations for bringing this action is the three years provided in Code of Civil Procedure section 338, subdivision (a) for "[a]n action upon a liability created by statute, other than a penalty or forfeiture." (Code Civ. Proc., § 338, subd. (a); City of Los Angeles v. A.E.C. Los Angeles (1973) 33 Cal. App. 3d 933, 941 [109 [**4] Cal. Rptr. 519].) The "cause of action to collect [a] business tax accrues on the delinquency date . . . . [Citation.]" (Ibid.) L.A. Municipal Code section 21.05 provides that where the tax in question is an annual business tax it is deemed delinquent "within 30 days from the date of notification" that it is owing. (L.A. Mun. Code, § 21.05.)

The court below determined that the accrual date for the City's cause of action against Centex was October 17, 1988, 30 days after its initial letter notifying Centex of the additional taxes due. We agree. There is no merit in the City's contention, relying on the A.E.C. Los Angeles decision, that the statute of limitations began to run from November 22, 1988, the date upon which the City notified Centex of the levy. While it is true that the date of notification of the levy was used in A.E.C. Los Angeles, it is also true that there is no mention in that case of any earlier notice to the taxpayer of a deficiency and it is, therefore, distinguishable from the instant case.

Additionally, the City's correspondence with Centex on November 3, 1988, referred to the October 17 date as the date when the amount in question became [**5] delinquent. Thus, its current argument notwithstanding, even the City considered October 17 to be the delinquency date. Accordingly, using this date, its complaint would be untimely but for the tolling of the statute while Centex pursued its administrative remedies. The court below held that the statute was not so tolled. With this, we disagree.

II

"[T]he rule [of exhaustion of administrative remedies] is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and

this remedy exhausted before the courts will act." (Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292 [109 P.2d 942, 132 A.L.R. 715].) Furthermore, "[w]hen administrative machinery exists for the resolution of differences, the courts will not act until such [*1388] administrative procedures are fully utilized and exhausted. To do so would be in excess of their jurisdiction. [Citations.]" (Horack v. Franchise Tax Board (1971) 18 Cal. App. 3d 363, 368 [95 Cal. Rptr. 717].) "The administrative remedy must be pursued as a [***784] condition precedent to the lawsuit. [Citations.]" (Westinghouse Elec. Corp. v. County of Los [**6] Angeles (1974) 42 Cal. App. 3d 32, 39 [116 Cal. Rptr. 742].) "That the doctrine is applicable to tax matters is well established." (People v. Sonleitner (1960) 185 Cal. App. 2d 350, 361 [8 Cal. Rptr. 528].)

Notwithstanding these clearly enunciated principles, Centex asserts that the doctrine of exhaustion is not applicable when it is the taxing entity, rather than the taxpayer, that brings the legal action; in other words, the City was required to file its lawsuit even though Centex was availing itself of an administrative process the result of which could have been a determination that no additional taxes were due. (L.A. Mun. Code, § 21.16, subd. (f).) The corollary to this position is that, by failing to file its action while awaiting the outcome of the administrative process, the City has forfeited the taxes which the administrative process in fact confirmed were due. To state the argument is to expose its lack of logic and merit.

Relevant portions of the L.A. Municipal Code provision under which Centex pursued its administrative remedies demonstrate an intention by the drafters of that code that the doctrine of exhaustion apply to this situation.

Centex requested [**7] a hearing under L.A. Municipal Code section 21.16. Under that section the taxpayer may either request a hearing or file a written waiver of hearing. Subdivision (c) provides that "If the City Clerk grants the request for waiver of hearing, the administrative proceedings prescribed by this section shall be deemed exhausted and the City shall have the right to bring an action in any court of competent jurisdiction to collect the amount of the assessment, plus such penalties and interest as may have accrued thereon . . . ." (L.A. Mun. Code, § 21.16, subd. (c).) By inference, where the taxpayer requests a hearing under this section, the City cannot bring an action because the administrative process is not yet exhausted. Additionally, because under subdivision (f), one of the board of review's options is to decrease the assessment, it would be pointless for the City to bring a collection action without knowing what amount, if any, it is entitled to collect. Exhaustion of the administrative process does not occur until the taxpayer either files or fails to file its exceptions to the board's decision. (L.A. Mun. Code, § 21.16, subd. (g).) It is clear to us from these provisions that the [**8] doctrine of exhaustion applies in this case and pending such exhaustion the City was not authorized to begin a legal action. [*1389]

For support of its position, Centex refers us to L.A. Municipal Code section 21.19 which authorizes a lawsuit by the City against any taxpayer "owing any tax due under the provisions of this article or Article 1.5, . . ." (L.A. Mun. Code, § 21.19.) It is a basic rule of statutory construction that all the parts of a statute must be read together and harmonized. (People v. Pieters (1991) 52 Cal. 3d 894, 899 [276 Cal. Rptr. 918, 802 P.2d 420].) To read section 21.19 to require initiation of a legal action by the City prior to the

taxpayer's exhaustion of administrative remedies would bring it directly into conflict with section 21.16. Accordingly, we reject Centex's interpretation of the latter section. Equally unpersuasive is Centex's reliance on Cal. Cigarette Concessions v. City of L. A. (1960) 53 Cal. 2d 865 [3 Cal. Rptr. 675, 350 P.2d 71], a decision in which, contrary to Centex's intimations, the Supreme Court expressly refrained from determining the exhaustion of remedies issue presented to it. (Id. at p. 872.)

We hold, [**9] therefore, that the statute of limitations for the City's collection action did not commence until Centex had exhausted its administrative remedy with the board of review's issuance of a decision on April 14, 1989. The City's complaint, filed on November 21, 1991, was therefore timely.

The judgment is reversed and the matter remanded for a new trial on any remaining issues. The City to have its costs on appeal.

Epstein, J., and Vogel C. S., J., concurred.

A petition for a rehearing was denied November 10, 1994, and respondents petition for review by the Supreme Court was denied February 15, 1995.

HOSPITAL MEDICAL COLLECTIONS, INC. et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES et al., Defendants and Appellants

Civ. No. 48856

Court of Appeal of California, Second Appellate District, Division Four

65 Cal. App. 3d 46; 1976 Cal. App. LEXIS 2189; 135 Cal. Rptr. 147

December 20, 1976

PRIOR HISTORY: [**1]

Superior Court of Los Angeles County, No. C 75283, Jules D. Barnett, Temporary Judge. *

* Pursuant to Constitution, article VI, section 21.

DISPOSITION: The judgment appealed from is reversed. Each party shall bear its own costs on appeal.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant city and city clerk appealed an order of the Superior Court of Los Angeles County (California), which entered judgment in favor of plaintiff corporate collection agencies an action to recover taxes paid under protest.

OVERVIEW: Plaintiff corporate collection agencies filed suit against defendant city and city clerk, and sought, pursuant to Los Angeles Mun. Code, art. I, ch. 2, § 21.78(c), a refund of taxes paid on collections alleged to have been made outside the State of California. The trial court entered judgment in favor of plaintiffs and defendants appealed. The court held that the out of city commissions earned by plaintiffs for collections outside of Los Angeles were gross receipts within the meaning of the ordinance and that the ordinance specifically allowed local collection agencies to deduct from gross receipts the commissions they received from collections made outside California. The court reversed and remanded the case for a new trial, however, because the trial court's findings of fact and conclusions of law were not supported by the parties' written stipulation of facts and, as such, the court could not ascertain whether the gross receipts should be deducted from plaintiffs' gross receipts pursuant to § 21.78(c), because

it could not determine from the record whether plaintiffs' commissions were made outside of Los Angeles or outside California.

OUTCOME: The court reversed the trial court's judgment, holding that while the commissions plaintiff corporate collection agencies earned were taxable gross receipts, it could not determine whether they should be deducted from the tax calculation because the record from the court below was unclear about the commissions' origins.

CORE TERMS: collection, gross receipts, out-of-city, collection agencies, written stipulation, collected, extraterritorial, business activity, creditor-assignor, assignee, total amount, out-of-state, forwardee, conclusions of law, collection agency, located outside, supplemental, licensed, assigned, taxing jurisdiction, apportionment, intercity, taxation, city clerk, collectors, deducted, manufacturing, business tax, engaged in business, amount received

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
The gross receipts which constitute the measure of the tax on business activity are defined in Los Angeles, Cal. Mun. Code art. I, ch. 2, § 21.00(a), as the total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature it may be. The expense of doing business is not deductible in arriving at the amount of gross receipts.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles, Cal. Mun. Code art. I, ch. 2, § 21.78(c), which deals specifically with collection agencies, provides that in computing the tax imposed by this section, there shall be deducted from gross receipts the amount received as the result of collections made outside the State of California.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles, Cal. Mun. Code art. I, ch. 2, § 21.00(a) not only refers to gross receipts as those dollar amounts received by the taxpayer, but also includes in its definition the total amount charged for the performance of any act, service or employment.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
The form of the taxpayer's books and records showing the transaction does not determine the transaction's character. The essential inquiry must be directed toward the presence or absence of a taxable local event.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Business activity within a taxing jurisdiction may be subject to tax regardless of extraterritorial elements which occur at some point in the transactions involved.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles, Cal. Mun. Code art. I, ch. 2, § 21.78(c) specifically allows local collection agencies to deduct from gross receipts the amount received by them as the result of collections made outside the State of California.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles, Cal. Mun. Code art. I, ch. 2, § 21.78(c) does not, in allowing exclusions from gross receipts of collections made outside the State of California, identify the entity making the collection; it simply provides that the proceeds from all collections so made, without limitation, may be deducted.

COUNSEL: Burt Pines, City Attorney, Thomas C. Bonaventura, Senior Assistant City Attorney, and Thomas J. Theis, Deputy City Attorney, for Defendants and Appellants.

David P. Connelly for Plaintiffs and Respondents.

JUDGES: Opinion by Jefferson (Bernard), J., with Kingsley, Acting P. J., and Dunn, J., concurring.

OPINIONBY: JEFFERSON

OPINION: [*48] [***148] This appeal concerns an action to recover taxes paid under protest. Plaintiff taxpayers are three corporate collection [*49] agencies, Hospital Medical Collections, Inc., Petroleum Collections, Inc., and Mutual Collection Bureau. Named as defendants were the City of Los Angeles and Rex E. Layton, City Clerk. The case was tried below pursuant to a written stipulation of facts. Judgment was rendered in favor of plaintiffs and against defendants in the sum of $ 75.16 together with costs of $ 53.20. Defendants have appealed from the judgment.

At issue in this case is the proper interpretation [**2] of certain provisions contained in the Los Angeles Municipal Code, article I, [***149] chapter 2, the "Business Tax Ordinance." n1 Defendant City of Los Angeles imposes a tax on business activity conducted within the city (§ 21.03), and defendant city clerk is empowered to make the assessments (§ 21.16). The tax is measured by the amount of "gross receipts" of the taxpayer in the preceding year (§ 21.14, subd. (a)), and is payable by collection agencies engaged in business in the city (§ 21.78).

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n1 Unless otherwise specified, all references to code sections are to sections contained in the Los Angeles Municipal Code.

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The "gross receipts" which constitute the measure of the tax are defined in section 21.00, subdivision (a), as "[the] total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, . . ." The expense of doing business is not deductible in arriving at the amount of "gross receipts."

Section [**3] 21.78, which deals specifically with collection agencies, provides in subdivision (c) thereof that "[in] computing the tax imposed by this section, there shall be deducted from gross receipts the amount received as the result of collections made outside the State of California."

Plaintiffs' supplemental complaint, including the exhibits attached thereto, sought refund of taxes paid on collections alleged to have been made outside the State of California. However, the written stipulation of facts, entered into in the trial court by plaintiffs and defendants, and which constituted the factual basis for the trial, tells us the following: Plaintiffs are California corporations whose place of business is within the City of Los Angeles. They are licensed collection agencies, regularly engaged in that activity; they accept assignments of indebtedness from creditors, and proceed to attempt collection from the debtors in return for a portion of the proceeds as commissions for their services. The [*50] assignments concern debts owed by persons residing in the City of Los Angeles and elsewhere.

The written stipulation of facts recites, in paragraph 14: "When assigned a claim against [**4] an out of City debtor, plaintiffs expend normal telephone and mail collection activity. If collection is unsuccessful by this method, the claim is assigned to an out-of-city, independent, licensed collection agency in the area where the debtor is located." (Italics added.)

These independent, licensed collection agencies, located in the area where the debtor is located, the stipulation states, agree to collect the debt in return for a commission. The claim by plaintiffs is then assigned to such independent collection agency, and such agency proceeds with its own collection activity in the debtor's out-of-city area. If the independent agency succeeds in collecting the claim, it then forwards to plaintiffs the proceeds of its collection activity, less the amount retained by such agency as its commission.

Plaintiffs maintain books which show the assignment by the creditor to plaintiffs, and the full commission paid by the creditor -- whether retained out of the collected proceeds by plaintiffs or by the assignees of plaintiffs -- and the amount ultimately remitted by plaintiffs to the creditor. It is not clear from the written stipulation of facts whether, in the event the proceeds [**5] are received by plaintiffs after out-of-city collection, plaintiffs then make an additional charge against the proceeds before remitting the net amount to the creditor. Plaintiffs' Exhibit A to the supplemental complaint suggests that the plaintiffs' assignee agency retains a substantial part of the total commission charged the creditor, but not all of it, unless the debt involved is so small that the assignee agency retains the entire amount.

Plaintiffs' books and records are kept to show those amounts actually received by them as commissions, and also to show separately those amounts which have been retained outside the city as commissions of the assignee collection agencies. When [***150] computing the amount of "gross receipts" subject to the city business tax, plaintiffs have, in the past, deducted from the total amount of commissions charged their creditor-assignors, the commission amounts retained by the out-of-city assignee collection agencies. The defendant city clerk took issue with this practice, claiming that, in deducting the assignee agencies' commission [*51] amounts, plaintiffs were deducting a business expense, not allowed by section 21.00, subdivision [**6] (a). Accordingly, defendant city clerk assessed plaintiffs on July 10, 1973, for unpaid business taxes for the years 1970, 1971 and 1972. Plaintiffs paid the taxes under protest, and duly exhausted their administrative remedies before filing this suit for a refund.

The emphasis in the trial court appears to have been focused on the meaning to be attributed to the term "gross receipts," although it is unclear whether the issue was debated in terms of out-of-city collections or out-of-state collections. On appeal, plaintiffs repeatedly refer to the commissions at issue as those collected outside of the state of California, while defendants argue with reference to out-of-city collections -- those collected outside the City of Los Angeles.

Plaintiffs point out that they were assessed for amounts that they never in fact received; that they were merely a bookkeeping intermediary between the creditor-assignors and the forwardee collector-assignees. Since the stipulation is not entirely clear as to whether plaintiffs, as "bookkeepers," also charged the creditor-assignors (at least the cost of processing at their local offices), we assume, only for the purposes of argument, that plaintiffs [**7] received no direct benefit from the forwarded assignments.

We note, first of all, that section 21.00, subdivision (a), not only refers to "gross receipts" as those dollar amounts received by the taxpayer, but also includes in its definition "the total amount charged . . . for the performance of any act, service or employment . . . ." (Italics added.) The framers of the ordinance apparently intended to include as "gross receipts" the total amount charged for a particular business transaction, without limitation in the form of requiring actual collection by the taxpayer. Thus, the form of the taxpayer's books and records showing the transaction does not determine the transaction's character. The essential inquiry must be directed toward the presence -- or absence -- of a "taxable local event" (City of Los Angeles v. Shell Oil Co. (1971) 4 Cal.3d 108, 122 [93 Cal.Rptr. 1, 480 P.2d 953]), which, in this case, concerns the existence of business activity by the taxpayer within the city.

Plaintiffs contend that the "taxable event" was in fact the collection of debts outside the City of Los Angeles. Defendants point out that the parties' written stipulation of facts [**8] establishes that plaintiffs accepted [*52] assignments in Los Angeles from their creditor clients. In the case of a debtor located outside of Los Angeles, plaintiffs would make efforts to collect the debt through mail and telephone activities. If such activities proved unsuccessful, the plaintiffs would then select a licensed collection agency located in the area where the debtor was located and assign and forward the claim to the selected collection agency. Defendants further emphasize that plaintiffs retained the responsibility for receiving payment of the proceeds from the forwardee agencies making collection

from the debtors, and the responsibility for remitting net proceeds to the creditor-assignor customers, with whom plaintiffs still maintained privity. In addition, plaintiffs were obligated, after collection from the debtors, to provide a full accounting to the creditor-assignors. All of these activities were carried on within the City of Los Angeles.

As our discussion below will disclose, bookkeeping procedures do not determine the location of business activity -- and taxability.

Plaintiffs suggest that the forwardee collectors are independent contractors, maintaining [**9] a distinct and separate relationship with the creditor assignors who originally dealt with plaintiffs. There have been a [***151] number of decisions where the determination of what constitutes "gross receipts" turned, at least in part, on the taxpayer's relationships with other business entities. These decisions have usually involved a situation where the taxpayer's books did not disclose "gross receipts" attributable to the taxpayer.

In City of Los Angeles v. Clinton Merchandising Corp. (1962) 58 Cal.2d 675, 681-682 [25 Cal.Rptr. 859, 375 P.2d 851], the California Supreme Court observed that the term "gross receipts" could not be equated with "the totality of all monies handled by the taxpayers, . . ." but that it referred to those sums "received for the use and benefit of the taxpayer." The Clinton court held that the term "gross receipts" excluded those sums in the possession of the taxpayer which were "held for the account of another." (See also, City of Los Angeles v. Meyers Bros. Parking System, Inc. (1975) 54 Cal.App.3d 135 [126 Cal.Rptr. 545].)

Where the taxpayer has been involved in a close relationship with corporate affiliates, involving agency [**10] or independent contracting but routine transfer of funds from one entity to another, emphasis has been placed on the independent business activity of the taxpayer disclosed by the transactions, regardless of how the books and records have been kept. [*53] Thus, where the taxpayer has itself incurred obligations it must discharge, the amount so discharged has been held to constitute the "gross receipts" of the taxpayer. (City of Los Angeles v. Security Systems, Inc. (1975) 46 Cal.App.3d 950 [120 Cal.Rptr. 600]; Independent Casting-Television, Inc. v. City of Los Angeles (1975) 49 Cal.App.3d 502 [122 Cal.Rptr. 416].)

What these cases emphasized, although they came before the court with varying factual stipulations, was that the city business tax is one that imposes a tax upon activity -- business-generating activity. If such activity is being conducted by the taxpayer, it becomes subject to the tax.

We conclude that plaintiffs were engaged in business activity in Los Angeles when they were assigned debts for collection here and engaged thereafter in procedures to collect the debt, including the selection of out-of-city collectors to obtain proceeds [**11] from debtors located outside the City of Los Angeles. The fact that the forwarding collectors retained their commissions out of the proceeds collected instead of billing plaintiffs for their services is immaterial to the question of the taxability of such commissions to the plaintiffs as taxpayers. The charge to the creditor-assignors was, in our view, the "taxable

local event" that produced the "gross receipts" upon which defendants based their assessment.

Plaintiffs also argue that the "extraterritorial elements" involved in out-of-city collections compel the resultant determination that defendants were attempting to tax beyond the jurisdiction of the City of Los Angeles. Assuming for the moment, that the amounts in issue here were collected by the forwardee collection agencies outside the City of Los Angeles, but not outside the State of California, we reject plaintiffs' contention in this regard.

Business activity within a taxing jurisdiction may be subject to tax regardless of extraterritorial elements which occur at some point in the transactions involved. (Irvine Co. v. McColgan (1945) 26 Cal.2d 160 [157 P.2d 847, 167 A.L.R. 934].) There have been a series [**12] of cases dealing with the problem of intercity taxation in California. In City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal.2d 823 [271 P.2d 5] and City of Los Angeles v. Belridge Oil Co. (1957) 48 Cal.2d 320 [309 P.2d 417], the California Supreme Court held that gross receipts arising from transactions having certain extraterritorial elements may still be the measure of [*54] a tax imposed by a city so long as they are directly attributable to business activity within the city. Thus, it has been held that where manufacturing takes place within a city -- although sales are made without -- the manufacturing process provides sufficient basis for imposing a tax measured by "gross receipts" in terms of the amount realized [***152] from subsequent out-of-city sales. (Carnation Co. v. City of Los Angeles (1966) 65 Cal.2d 36 [52 Cal.Rptr. 225, 416 P.2d 129].)

"It is only when the final operation yielding the finished product is inappreciable in comparison with the extraterritorial activities producing the component parts that a 'manufacturing' tax based on unapportioned gross receipts may be said to reach significant extraterritorial values." [**13] (General Motors Corp. v. City of Los Angeles (1971) 5 Cal.3d 229, 240 [95 Cal.Rptr. 635, 486 P.2d 163].) (Italics added.)

Apportionment problems arise when the taxpayer conducts substantial business activity outside the city as well as activity within -- for example, in the area of selling. In General Motors, the court reiterated the "legal and constitutional framework within which our determinations [concerning intercity taxation] must be made. '[It] is clear that in spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution -- notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws . . . -- combine with the equal protection clause of the federal Constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not prohibit local license taxes upon businesses "doing business" both within and [**14] outside the taxing jurisdiction; . . .'" (General Motors, supra, 5 Cal.3d 229, at p. 238) if there is a proper apportionment. (See, also, Shell Oil Co., supra, 4 Cal.3d 108, 124.)

In the instant case, however, we are dealing neither with manufacture nor sale, but with the providing of a service. The contract of assignment -- which generates the subsequent

activity -- occurs in the City of Los Angeles, and the ultimate conclusion of the collection transaction also occurs in the city. The presence of intervening extraterritorial elements between the beginning and concluding activities, does not make for nontaxability under those circumstances, nor are the extraterritorial [*55] elements so substantial as to require apportionment. (See Carnation, supra, 65 Cal.2d 36.)

Thus, we determine that, within the meaning of section 21.00, subdivision (a), the out-of-city commissions involved in the instant case were properly includable in plaintiffs' "gross receipts." However, section 21.78, subdivision (c), specifically allows local collection agencies to deduct from "gross receipts" the amount received by them as the result of collections made outside the State of California. [**15] Defendants, who presented arguments on appeal premised on both out-of-city and out-of-state collections, seek to persuade us that this exclusion was not available to plaintiffs because plaintiffs themselves were not making out-of-state collections, but were forwarding the claims to other collection agencies located outside of California, and that these latter collection agencies made the out-of-state collections.

We regard the suggested interpretation as unsound. Section 21.78, subdivision (c), does not, in allowing exclusions from "gross receipts" of "collections made outside the State of California," identify the entity making the collection; it simply provides that the proceeds from all collections so made, without limitation, may be deducted.

Thus, it may be seen that it is of crucial importance in the case at bench whether the commissions in dispute here were collected outside of California -- in which case the judgment entered below reflected a correct decision, if taken alone -- or whether the commissions were collected outside the City of Los Angeles but within the State of California -- in which case reversal would be indicated.

The record on appeal presents an [**16] insurmountable problem in this regard. As indicated previously herein, the supplemental complaint and exhibits incorporated as part [***153] of such complaint referred to the amounts in dispute as out-of-state collections. The written stipulation of facts entered into by the parties, however, constitutes the factual basis upon which the judgment was rendered. This stipulation sets forth that the commissions involved were out-of-city collections, but with no indication that out-of-city collections meant collections made outside of the State of California.

The trial court signed and filed two sets of findings of fact and conclusions of law which are inconsistent. The first set of findings, [*56] reciting that the commissions had been collected outside of the State of California, were signed by the trial judge on March 11, 1975. The record does not tell us what transpired thereafter. But a second set of findings of fact and conclusions of law, reciting that the commissions were those collected from debtors located out of the City of Los Angeles, was also signed by the trial judge, on May 5, 1975. No mention is made in this set of findings with respect to whether the debtors [**17] were located outside of the State of California. Judgment for plaintiffs was entered July 22, 1975.

This sequence of events has reduced the record to a state of total confusion. We would have no difficulty holding that the first set of findings of fact and conclusions of law,

duly signed by the trial judge, constitutes the operable set, except that, as written, they are not supported by the parties' written stipulation of facts, which refers only to out-of-city commissions. Although the second set of findings signed by the trial judge accurately reflects the written stipulation of facts executed by the parties, these findings cannot, under the circumstances presented here, replace the first set of findings already signed. It may be that the commissions involved were all collected outside of California by forwardee collection agencies from debtors located out of the state as the supplemental complaint and plaintiffs' brief on appeal suggest, but we cannot so conclude because the parties' written stipulation of facts, upon which the judgment was based, states otherwise.

Of necessity, therefore, we must remand the matter for a new trial, hopefully one that will be based upon a written [**18] stipulation of facts that will accurately reflect the exact source of the commissions in dispute -- on collections made out of the State of California, or, within its boundaries, but outside of the City of Los Angeles -- and that only one set of findings of fact and conclusions of law -- internally consistent, will be signed in support of the judgment rendered.

The judgment appealed from is reversed. Each party shall bear its own costs on appeal.

ALCO PLATING CORPORATION et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent

Civ. No. 42505

Court of Appeal of California, Second Appellate District, Division Five

39 Cal. App. 3d 948; 1974 Cal. App. LEXIS 1023; 114 Cal. Rptr. 506

June 3, 1974

SUBSEQUENT HISTORY: [**1]

Appellants' petition for a hearing by the Supreme Court was denied July 31, 1974.

PRIOR HISTORY:

Superior Court of Los Angeles County, No. C 25711, Ben Koenig, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant metal platers challenged an order of the Superior Court of Los Angeles County (California), which rendered a declaratory judgment in favor of respondent city in appellants' action seeking a declaration that they were to be taxed under Los Angeles, Cal., Mun. Code § 21.166, not Los Angeles, Cal., Mun. Code § 21.190.

OVERVIEW: Appellant metal platers filed a declaratory judgment action against respondent city, seeking a declaration that appellants were entitled to be taxed under Los Angeles, Cal., Mun. Code § 21.166, applying to wholesalers, instead of under Los Angeles, Cal., Mun. Code § 21.190, applying to independent contractors in a trade. The lower court granted judgment for respondent, and, on appeal, the court affirmed. The court found that appellants were not wholesalers any more than painters would be because appellants' work was predominately a service function and the furnishing of materials was incidental to its application. The court found that the taxpayer classification was not unconstitutional because there was a reasonable basis for distinguishing between, and classifying in different classes, businesses which were primarily engaged in manufacturing and selling or selling tangible personal property at wholesale on the one hand, and businesses which were primarily engaged in supplying a service on the other hand.

OUTCOME: The court affirmed the lower court's judgment, finding that because appellant metal platers were in a service industry, the furnishing of the material to their customers was merely incidental to its application. Thus, the court found that respondent city had properly taxed appellants under the statute applying to those in any trade as an independent contractor, instead of under the statute applying to wholesalers.

CORE TERMS: gross receipts, inventory, fractional part, customer, selling, board of review, merchandise, wholesale, supplied, manufacturing process, reasonable basis, agreed statement, taxed, metal, classification, declaratory judgment, primarily engaged, return of capital, person engaged, house painter, business tax, manufacturing, incidental, repealed, plating, paint

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles, Cal., Mun. Code § 21.190 reads as follows: (a) for every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions of this article, the tax shall be $ 30.00 per year or fractional part thereof for the first $ 6,000.00 or less of gross receipts, plus $ 5.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 6,000.00.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles, Cal., Mun. Code § 21.166 reads as follows: (a) for every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $ 20.00 per year or fractional part thereof for the first $ 20,000.00 or less of gross receipts, plus $ 1.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 20,000.00.

Constitutional Law : Equal Protection : Scope of Protection
Legislative classification for purposes of taxation is not unlawful if there is a reasonable factual basis for the classification and the legislative conduct is not arbitrary.

COUNSEL: Peter A. Lewi for Plaintiffs and Appellants.

Burt Pines, City Attorney, Thomas C. Bonaventura, Assistant City Attorney, and Ronald A. Tuller, Deputy City Attorney, for Defendant and Respondent.

JUDGES: Opinion by Loring, J., * with Kaus, P. J., and Hastings, J., concurring.

* Assigned by the Chairman of the Judicial Council.

OPINIONBY: LORING

OPINION: [*949] [***506] Twelve corporate members of the metal plating industry (hereafter Taxpayers) filed an action for declaratory relief against the City of Los Angeles, a municipal corporation (City) seeking a declaratory judgment that section 21.190 of the Los Angeles Municipal Code did not apply to them at all, that they were taxable only under section 21.166 of the code; that if any of their business gross receipts were includable within [*950] section 21.190, the section as to them was unconstitutional. Both sections imposed a business tax. Section 21.166 imposed a lower rate. The City board of review had rendered a decision that [**2] a portion of Taxpayers' gross receipts representing cost of materials was taxable under section 21.166 and the balance of Taxpayers' gross receipts were taxable under section 21.190. The trial court rendered declaratory judgment in favor of City and against Taxpayers upholding the validity of the decision of the board of review and declaring that section 21.190 as applied to Taxpayers was constitutional. Taxpayers appeal from the judgment.

[***507] Facts

The parties entered into an agreed statement of facts reserving the right to produce additional evidence. n1 Each of the Taxpayers were engaged primarily in the business (within the City of Los Angeles) of applying ("depositing") various types of metal coatings to fabricated parts, which parts were supplied by customers, by means of an electroplating process. During and prior to 1971 City taxed Taxpayers under section 21.190 n2 which reads as follows: "'(a) for every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions of this Article, the tax shall be $ 30.00 per year [**3] or fractional part thereof for the first $ 6,000.00 or less of gross receipts, plus $ 5.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 6,000.00.'"

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n1 Hereafter all recitations of fact herein will be taken from the agreed statement unless otherwise indicated.

n2 All references are to City's business tax ordinance unless otherwise noted.

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In 1971 Taxpayers claimed they were taxable under section 21.166 which reads as follows: "'(a) for every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $ 20.00 per year or fractional part thereof for the first $ 20,000.00 or less of gross receipts, plus $ 1.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 20,000.00 --.'"

We marginally note section 21.189 n3 (repealed Aug. 17, 1953) which [**4] is not involved herein except only as it provides an aid in interpretation.

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n3 Prior to August 17, 1953, section 21.189 read as follows: "'(a) Every person engaged in the business of manufacturing, fabricating, processing, repairing or servicing goods, wares, merchandise or articles for others, for which business a license is not required by any provision of this Article, shall pay for each calendar year, or portion thereof, the sum of $ 12.00 for the first $ 12,000.00 or less of gross receipts, and, in addition thereto, the sum of $ 1.00 per year for each additional $ 1,000.00 of gross receipts, or fractional part thereof, in excess of $ 12,000.00.'"

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[*951] City's board of review concluded that Taxpayers' gross receipts representing cost of materials should be taxable under section 21.166 and the remaining balance of Taxpayers' gross receipts should be taxable under section 21.190. The agreed statement recited compliance with all technical requirements within the time prescribed by law which were prerequisite [**5] to a judicial determination of the issues.

Discussion

Taxpayers' claim that they are taxable under section 21.166 because they are engaged in a process of manufacturing and selling goods, wares or merchandise at wholesale because what their customers are primarily interested in is obtaining the materials (such as paint, nickel, zinc, chromium, cadmium, silver and other metals and materials) which Taxpayers have available for sale and that the application of such materials by Taxpayers to the customer's property is merely incidental.

We regard this as a gross distortion of the facts not having any basis in the court's findings or otherwise. Under Taxpayers' argument (and that is all that it is) a house painter should be classified as a manufacturer because he sells paint. The only difference between Taxpayers and a house painter is the material applied, the tools used, the process of application, and the location and nature of the property to which the application is made. Each process is predominantly a service function, the [***508] furnishing of the material to be applied is merely incidental to its application. In each case what the customer is primarily interested in [**6] is the application of the new material to his original property. There is no evidence that Taxpayers' customers ever applied or had the tools or equipment and know-how necessary to apply materials supplied by Taxpayers to their own property.

The records of City received in evidence clearly demonstrate that the City Council expected and intended when it repealed section 21.189 in 1953, that persons formerly covered by section 21.189 would thereafter be taxable under section 21.190. The trial court was entitled to consider such evidence. (Coca-Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918 [156 P.2d 1].)

Legislative classification for purposes of taxation is not unlawful if [*952] there is a reasonable factual basis for the classification and the legislative conduct is not arbitrary. (Gowens v. City of Bakersfield, 193 Cal.App.2d 79 [13 Cal.Rptr. 820]; Higbie v. County

of Los Angeles, 47 Cal.App.2d 281 [117 P.2d 933]; Roth Drug, Inc. v. Johnson, 13 Cal.App.2d 720 [57 P.2d 1022]; Web Service Co. v. Spencer, 252 Cal.App.2d 827 [61 Cal.Rptr. 493]; Associated Home Builders, etc., Inc. v. City of Newark, 18 Cal.App.3d [**7] 107 [95 Cal.Rptr. 648].)

In our view the trial court was justified in impliedly concluding that the City presumably found a reasonable basis for distinguishing between, and classifying in different classes, businesses which were primarily engaged in maufacturing and selling or selling tangible personal property at wholesale on the one hand, and businesses which were primarily engaged in supplying a service on the other hand. In the first class the business must invest capital in an inventory and bear the attendant risks and burdens of maintaining such inventory and must pay property taxes on such inventory. A business which primarily provides a service need not make such large investments in inventory and it thereby avoids the risks and burdens which are inherent in maintaining such inventory. It does not pay property tax on a nonexistent inventory. The question is not whether we, or the trial judge, would have reached the same conclusion as the City council. The question is whether or not there is a reasonable basis for the conclusion which the City council reached. The trial court was justified in concluding that there was such a reasonable basis in the case at bar. It [**8] must be borne in mind that the tax in question is measured by gross receipts, not net income. Clearly the City had a right to apply a higher rate of tax on gross receipts from a business which is primarily personal service than to a business which is primarily a manufacturing process since in the manufacturing process a higher percentage of gross receipts is attributable to the inventory used in the manufacturing process which therefore is a form of return of capital investment. To impose a gross receipts tax on both businesses at the same rate would be to impose a tax on capital investment to the extent that gross receipts represented a return of capital.

When the City board of review distinguished between that portion of Taxpayers' gross receipts attributable to the costs of materials supplied in the electric plating process and imposed a tax thereon under section 21.166 and that portion of Taxpayers' gross receipts in excess of cost of materials supplied in the process and imposed a tax thereon under section 21.190, [*953] the City did all for Taxpayers' benefit that Taxpayers had a right to legally expect.

The judgment is affirmed.

THE CITY OF LOS ANGELES, Respondent, v. W. J. TANNAHILL et al., Appellants

Civ. No. 18254

Court of Appeal of California, Second Appellate District, Division Two

105 Cal. App. 2d 541; 233 P.2d 671; 1951 Cal. App. LEXIS 1507

July 18, 1951

SUBSEQUENT HISTORY: [***1]

A Petition for a Rehearing was Denied July 31, 1951, and Appellants' Petition for a Hearing by the Supreme Court was Denied September 13, 1951.

PRIOR HISTORY:

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesse J. Frampton, Judge.

Action by city to recover license taxes on trucks operated for hire on streets of city, and penalties for nonpayment of taxes.

DISPOSITION: Affirmed. Judgment for plaintiff affirmed.

CORE TERMS: license tax, ordinance, unladen, streets, truck, charter, municipality, trailer, regulation, occupation, license, pound, licensing, classification, regulating, municipal, classify, graded, transportation, semi-trailer, occasional, graduate, carriers, highway, trips, hire, business purposes, municipal affair, motor vehicles, business done

COUNSEL: Laurence Phillips for Appellants.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney and Alan G. Campbell, Deputy City Attorney, for Respondent.

JUDGES: Moore, P. J. McComb, J., and Wilson, J., concurred.

OPINIONBY: MOORE

OPINION: [*542] [**671] The question for decision is whether a municipality can impose a valid license tax on trucks operated for hire and graduate such tax in proportion to their unladen weights where their domicile is in a suburban city and they visit the

taxing municipality "on an average of more than once a week during at least one quarter of the calendar year involved."

Appellants were conducting a for-hire trucking business with headquarters only in Vernon, a city buried in the heart of the manufacturing district [***2] of Los Angeles. [**672] They held permits as city carriers, contract carriers and radial highway common carriers and also a certificate from the Interstate Commerce Commission to operate as common carriers in interstate commerce points within 325 miles of the city of Los Angeles. From Vernon their trucks operate throughout Southern California, hauling merchandise into Los Angeles, but never [*543] moving a cargo from one point to another within that municipality. There was no evidence of the frequency of the trips into the city other than the stipulation that they averaged "more than once a week in any quarter of the year," which fact is an essential to make such carriers liable for the license tax under subsection G of section 21.159 of ordinance 77,000 of Los Angeles, to wit:

"Exemptions and Exceptions. No fee hereunder shall be required for the operation of any motor vehicle or equipment along the streets of this city if such operation is merely occasional and incidental to a business conducted elsewhere; provided, however, that no operation shall be deemed merely occasional if trips or hauls are made beginning or ending at points within this City upon an average more [***3] than once a week in any quarter, and a business shall be deemed to be conducted within this City if an office or agency is maintained here or if transportation business is solicited here."

To escape the force of the provision that a fee will not be required where the "operation is merely occasional and incidental" and to show that appellants come within the ordinance respondent caused the stipulation to include the recital that trips were on the average made into the city "more than once a week in any quarter of the year."

The ordinance forbids (section 21.10) every person who engages in any occupation for which a license is required, to do so "until such license is first obtained." Section 21.159, subsection 4 (b) provides:

"Every person whose business . . . is that of operator of any motor vehicle for the transportation of property for hire or reward, and who in the course of that business uses public streets and highways of this city for purpose of such operation, shall pay a license fee for each year, or fractional part thereof, of such operation, the amount of which shall be determined as provided in this section."

By subsection (c) the fees are computed as follows:

"1. For [***4] each vehicle, other than a tractor, or a trailer or semi-trailer, used to receive or discharge, pick-up or deliver property within this city, the annual fee shall be as follows, where the unladen weight thereof is:
4000 lbs. or less $ 4.00
Over 4000 lbs. and not more than 8000 lbs. 8.00
Over 8000 lbs. 10.00

[*544] 2. For each trailer or semi-trailer so used, where the unladen weight thereof is:
1000 lbs. or less $ 2.00
Over 1000 lbs. and not more than 3000 lbs. 4.00
Over 3000 lbs. 6.00

3. For each tractor which is used to haul one or more trailers or semi-trailers not permanently affixed thereto . . . . $ 10.00."

During the four years involved in this action appellants operated its several trucks and trailers on the streets and highways of Los Angeles. By virtue of such ordinance the city made demand for payment of the following sums for the four years indicated, to wit: $ 212 for 1945, $ 308 for 1946, $ 326 for 1947, $ 326 for 1948. In addition, penalties for nonpayment aggregating $ 586 for the four years were demanded, as provided by the ordinance for nonpayment of such license fees n1 which were based upon the unladen [***5] weight of the vehicles.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 That a portion of the license tax for each year was paid is not explained.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Appellants contend that (1) the license tax imposed violates article I, section 3(5) of the city's charter; (2) the license tax must be levied under general and uniform laws "(art. I, § 2(11) (e)); (3) no discrimination in the amount of license tax shall be made between persons engaged in the same business. (art. I, § 3(5).) Because [**673] of such provisions appellants argue that they are the victims of an unjust discrimination; that a truck weighing 4,000 pounds can, and often does, handle more business than an 8,000 pound truck. In making such contention appellants overlook constitutional provisions, the law as declared by the appellate courts and as created by statute and practice.

By section 6 of article XI of the Constitution a city is empowered to make and enforce all laws and regulations in respect to municipal affairs subject only to the restrictions and limitations provided in its charter. [***6] Licensing, taxing and regulating occupations operating within a city is a municipal affair. The power of a city to make and enforce laws and regulations with respect to municipal affairs is reinforced by section 8 of the same article. By section 23 of article XII, every transportation entity is a public utility and is subject to control and regulation by the city in which it operates. The city's charter is not a grant of powers to the municipality. The power for levying taxes is a constitutional [*545] grant which is not limited by the charter, but is accentuated by that instrument which details the city's powers of assessing, collecting and enforcing taxes and licensing and regulating any lawful business and imposing license fees. (City charter, § 2, subsec. 11 (d) (e); West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 521 [95 P.2d 138]; In re Montgomery, 163 Cal. 457, 459 [125 P. 1070, Ann.Cas. 1914A 130]; Glass v. City of Fresno, 17 Cal.App.2d 555, 560 [62 P.2d 765].)

The only limitation founded upon the city's power to levy license taxes for revenue is as follows:

"No discrimination in the amount of license tax shall be made between [***7] persons engaged in the same business, otherwise than by proportioning the tax to the amount of the business done." (Charter, § 3(5), Stats, 1925, p. 1031.) But in Barker Bros., Inc. v. City of Los Angeles, 10 Cal.2d 603 [76 P.2d 97], the Supreme Court said at page 607: "Wide discretion is given legislative bodies in the imposition of taxes and the right to classify for such purposes is of wide range and flexibility . . . The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.'"

The Constitution is not violated where the city adopts a rational classification which affects equally all of the same class. It may classify occupations and distinguish between those of the same or similar occupations. (Bramman v. City of Alameda, 162 Cal. 648, 653 [124 P. 243].) If the license tax on laundry proprietors may be graded according [***8] to the number of their employees (Ex parte Sisto Li Protti, 68 Cal. 635 [10 P. 113]) or if hotels may be graded on the basis of whether the meals are cooked and served by the proprietor or are furnished "for pay" (Ex parte Lemon, 143 Cal. 558 [77 P. 455, 65 L.R.A. 946]) how can it be said that there is a discrimination against an operator of for-hire trucks on the basis of their unladen weights? If "any graduation will be sustained which is reasonable and fair" (Bramman v. City of Alameda, supra, p. 653) there should be no problem about grading the license tax on the vehicles of a transportation company based upon their unladen weight. [*546] Such method is excellent for "gauging the amount of business done or the capital employed therein." (Ibid.) The manner of conducting a business, such as that done by the peddler and the storekeeper "is distinctive for the purpose of taxation." (Ex parte Haskell, 112 Cal. 412 [44 P. 725, 32 L.R.A. 527].) In City of San Mateo v. Mullin, 59 Cal.App.2d 652 [139 P.2d 351], the taxed attorney deemed himself aggrieved by the license tax of $ 15 required of him while some associates of law firms paid only $ 5.00. [***9] The court explained that it was each "business" operating a law office that was taxed. There was in fact no discrimination between an individual attorney and an individual plus an employee or associate.

[**674] It is an inherent quality of a state to possess the power to tax and to select its subjects of taxation. It is not bound to tax every member of a class or none. (Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 508 [57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327].) An ordinance must be clearly obnoxious as unreasonable and oppressive to justify nullifying it by judicial decree. Since it is the right of a city to regulate its municipal affairs the courts must uphold such regulations unless it is manifest that the ordinance transcends the power of the municipality and violates the rights secured to the citizen by the Constitution or the statutes. (Ex parte Lemon, supra, p. 563.)

It is the general rule that a license tax on vehicles may be fixed at a specified sum or graded according to type, size, or use. (53 C.J.S., p. 600.) From the early period of California's legislation for the purpose of regulating traffic and licensing the operation of

motor [***10] vehicles, the amount of fee charged has been based upon the unladen weight of the automobile. The most recent statute upon the subject fixed the annual registry fees upon cars not exceeding 4,000 pounds unladen at $ 10 and graduates the tax on vehicles weighing over 14,000 pounds to $ 120. Trailers are regulated similarly and the registration charges upon them are also graduated in proportion to their unladen weight. (Veh. Code, § 372.) A Georgia decision is directly apropos.

The city of Savannah enacted an ordinance for the purpose of raising revenue. For the use of the streets for business purposes persons and firms were classified as those (1) who operate business without vehicles of any kind and (2) those who use vehicles on the streets. The first class must pay the specific tax provided for each specified kind of business. Those [*547] of the second class, in addition to the specific tax required for their principal business, must pay a graduated tax, commencing with the one-horse cart at $ 8.00; every operator of an automobile of one ton or less capacity -- $ 10. The Supreme Court held the ordinance valid: the city has power either to impose the tax or to prohibit [***11] the use of its streets for business purposes; it does not tax motor vehicles or their operation; the city may classify businesses according to whether they are conducted on the streets or not; the ordinance is not void because it imposes the license tax as well as the "regular business license tax" for the right to carry on business generally within the city; also, the license tax is not void because the ordinance graduates the tax upon the number and sizes of the vehicles. "Two large and heavy moving motor vans of the modern type or two heavy two-horse drays will wear and damage the streets of the city more than a one-ton light type automobile truck or a one-horse dray; and the former will congest the traffic of such streets more than the latter." (Derst Baking Co. v. Mayor & Aldermen of Savannah, 180 Ga. 510 [179 S.E. 763, 768].)

The Derst decision is a forthright declaration of the law governing such matters. It is set in clear and emphatic language and expresses accurately the law of this state. Not only is there no constitutional prohibition against such ordinance, but on the contrary, under the cited constitutional provision, the city of Los Angeles, by virtue of [***12] its freeholders' charter is empowered to legislate upon any municipal affair. Also, it may levy a license tax upon those who have their offices elsewhere but conduct a business of transporting goods for hire in a neighboring city. (California Fireproof Storage Co. v. Santa Monica, 206 Cal. 714 [275 P. 948].) In that case the plaintiff maintained offices in Los Angeles and had no depot or warehouse in the bay city; no equipment there except its trucks used in transporting household goods to and from Santa Monica; had no solicitors or agents there, but merely sent its trucks into the city on call. After reviewing appellate decisions the court held (page 722) that if plaintiff "is to enter said city ad libitum upon 'call' . . . it will transact business therein precisely as it transacts its business in the city of Los Angeles. It does not matter at which end of the line the business [**675] is initiated, its situs is the municipality of Santa Monica."

By virtue of the holdings of the last two cited decisions the ordinance 77,000 of respondent is valid insofar as [*548] its provision for classifying vehicles by their unladen weights for the purpose of determining [***13] the amount of license taxes is concerned.

Affirmed.

TIMES MIRROR COMPANY et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent

No. B023000

Court of Appeal of California, Second Appellate District, Division Two

192 Cal. App. 3d 170; 1987 Cal. App. LEXIS 1761; 237 Cal. Rptr. 346; 14 Media L. Rep. 1289

May 28, 1987

SUBSEQUENT HISTORY: [**1]

Appellants' petition for review by the Supreme Court was denied September 2, 1987. Mosk, J., was of the opinion that the petition should be granted.

PRIOR HISTORY:

Superior Court of Los Angeles County, No. C511941, John L. Cole, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff newspapers appealed the summary judgment entered by the Superior Court of Los Angeles County (California) in favor of defendant city in plaintiffs' action that challenged the validity, on constitutional grounds, of a business tax imposed by defendant.

OVERVIEW: Plaintiff newspapers challenged, on constitutional grounds, the validity of a business tax collected by defendant city. Defendant was awarded summary judgment, and plaintiffs appealed. The court found that there was no constitutional problem with the tax and affirmed the judgment. The court noted that although the government could not unduly burden free speech through taxation or other regulatory measures, it was beyond dispute that the federal constitution did not exempt newspapers from generally applicable regulations and taxes. The court further stated that a compelling state interest was not needed to collect such a tax as long as newspapers were treated no differently than others who were similarly situated. The tax collected by defendant was applicable to those engaged in wholesale or retail business activities and, therefore, was a generally applicable tax that presented U.S. Const. amend. I problems. Furthermore, the various classifications and rates within the tax were neither arbitrary nor unreasonable. Finally, the court held that the tax provided clear guidelines for its administration, thus, it could not be considered an impermissible delegation of legislative duties.

OUTCOME: The court affirmed the summary judgment awarded to defendant city because the business tax, which was challenged by plaintiff newspapers on First Amendment grounds, had broad application, and the various rates and classifications contained within it were neither arbitrary nor unreasonable. The court also stated that the tax was not an impermissible delegation of legislative authority.

CORE TERMS: gross receipts, newspaper, First Amendment, business tax, merchandise, regulation, taxed, classification, ordinance, apportionment, broadcasting, television, taxation, retail, use tax, wholesale, sales tax, selling, fractional part, differential, advertising, clerk, radio, manufacturing, exemption, printing, protected speech, exempt, business activities, required to pay

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax
Governments : Local Governments : Ordinances & Regulations
The power of the City of Los Angeles to levy taxes derives from Cal. Const. art. XI, § 5, which authorizes charter cities to make and enforce all ordinances and regulations in respect to municipal affairs. Taxation for the purpose of generating revenue is a municipal affair within the meaning of art. XI. A municipal taxing scheme is, thus, valid unless preempted by state law or prohibited by constitutional principles.

Constitutional Law : Fundamental Freedoms : Freedom of Speech
U.S. Const. amend. I prohibits the enactment of any law abridging the freedom of speech, or of the press, and is applicable to state and municipal action pursuant to U.S. Const. amend. XIV.

Constitutional Law : Fundamental Freedoms : Freedom of Speech : Scope of Freedom
There are two basic ways in which U.S. Const. amend. I rights may be impinged: (1) a direct regulation of speech or press based on the content of the material; or (2) an indirect or incidental regulation of speech or press resulting from pursuit of governmental goals unrelated to freedom of expression.

Tax Law : State & Local Tax
Constitutional Law : Fundamental Freedoms : Freedom of Speech : Scope of Freedom
Although the government may not unduly burden freedom of speech or of the press through taxation or other regulatory measures, it is beyond dispute that the provisions of U.S. Const. amends. I and XIV do not exempt newspapers and the business of newspaper publication from generally applicable economic regulations and taxes.

Tax Law : State & Local Tax
The state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those laws operate evenhandedly upon all similarly situated.

Tax Law : State & Local Tax
Constitutional Law : Fundamental Freedoms : Freedom of Speech : Scope of Freedom
Differential taxation of the press places such a burden on the interests protected by U.S. Const. amend. I that a court cannot countenance such treatment unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

Constitutional Law : Fundamental Freedoms : Freedom of Speech : Scope of Freedom
The states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems.

Tax Law : State & Local Tax
Constitutional Law : Fundamental Freedoms : Freedom of Speech : Scope of Freedom
Although those engaged in protected speech may not be singled out for discriminatory tax treatment in the absence of counterbalancing governmental interest of compelling importance that cannot be achieved without differential taxation, no such counterbalancing interest need be present when the tax measure does not result in a discriminatory burdening of U.S. Const. amend. I rights.

Constitutional Law : Substantive Due Process : Equal Protection
Tax Law : State & Local Tax
The power of a municipality to classify for the purpose of taxation is very broad. Neither due process nor equal protection impose a rigid rule of equality in tax legislation. It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation, and it is within the discretion of the legislature to exact different license taxes from different classes or subclasses of businesses, subject only to the limitations of the state and federal constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary.

Tax Law : State & Local Tax
Governments : Local Governments : Licenses
The power to license for purposes of generating revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business. It is recognized that a legislative body may classify and subdivide classes within those engaged in one generic field of activity where there is a reasonable basis for such action.

Constitutional Law : Fundamental Freedoms : Freedom of Speech : Scope of Freedom
If the state subsidizes some U.S. Const. amend. I activity but not all, no suspect classification is created. Conversely, the failure to subsidize the exercise of a fundamental right does not infringe that right.

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review
Occupations and businesses, including the entertainment industry, may be properly subdivided and separately classified if the classification is founded on natural, intrinsic,

or fundamental distinctions which are reasonable in their relation to the object of the legislation. In other words, the classification within the ordinance does not violate equal protection if the distinction rests upon a rational basis, and it must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

Tax Law : State & Local Tax : Administration & Procedure
Administrative Law : Separation & Delegation of Power : Legislative Controls
A legislative body need not prescribe the exact means by which a tax is to be fixed but may delegate to its taxing officers the power to adopt a suitable method. The essential requirement is the legislature's specification of a standard, an intelligible principle to which the person or body authorized to administer the act is directed to conform, but it may leave to the administrative agency the precise determination necessary to bring the standard into operation.

Tax Law : State & Local Tax
There is no constitutional prohibition against local taxes upon businesses doing business both within and outside the taxing jurisdiction so long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction.

COUNSEL: Gibson, Dunn & Crutcher, Rex S. Heinke, William C. Foutz, Kelli L. Sager, William A. Niese, Jeffrey S. Klein, Hufstedler, Miller, Carlson & Beardsley, Fred L. Leydorf, Sheppard, Mullin, Richter & Hampton, Frank Simpson III and Kathyleen A. O'Brien for Plaintiffs and Appellants.

Harry P. Warner and Henry L. Baumann as Amici Curiae on behalf of Plaintiffs and Appellants.

James K. Hahn, City Attorney, Thomas C. Bonaventure, Senior Assistant City Attorney, Richard A. Dawson, Assistant City Attorney, and Michael L. Klekner, Deputy City Attorney, for Defendant and Respondent.

JUDGES: Opinion by Compton, Acting P. J., with Gates and Fukuto, JJ., concurring.

OPINIONBY: COMPTON

OPINION: [*174] [***348] In an action for declaratory relief, injunction, and recovery of taxes paid under protest by plaintiffs Times Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises, each engaged in the printing and publication of [**2] a daily newspaper or newspapers, n1 the trial court determined that a business tax levied against them by defendant City of Los Angeles (City) was constitutionally valid. Summary judgment was thereafter entered in favor of the City and this appeal followed. We affirm.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 During and prior to 1984, the Times Mirror Company published the Los Angeles Times and Lozano Enterprises published La Opinion. Although at the outset of this litigation Tribune Newspapers West, Inc. published both the Daily News and the Greensheet Shopper, the Daily News is currently owned and published by the Cooke Media Group, Inc.

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The facts are undisputed. Los Angeles Municipal Code (L.A.M.C.) section 21.03 requires that a business tax registration certificate must be obtained and a business tax paid by every person who engages in any of the businesses or occupations enumerated in subsequent sections. The section further provides that the tax is imposed pursuant to the City's taxing power solely [*175] for the purpose of generating [**3] revenue. n2 Different businesses pay taxes calculated by a variety of methods, including flat fees, "per unit" fees, daily charges, percentages of payroll, and percentages of gross receipts. n3

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n2 L.A.M.C. section 21.03 provides in pertinent part: "(a) Subject to the provisions of this Article, a business tax registration certificate must be obtained and a business tax must be paid by every person engaged in any of the businesses or occupations specified in Sections 21.50 to 21.198, inclusive, of this Article; and a business tax is hereby imposed in the amount prescribed in the applicable section. No person shall engage in any business or occupation subject to tax under the provisions of this Article without obtaining a registration certificate and paying the tax required thereunder.

"(b) The business tax registration certificate required to be obtained and the tax required to be paid are hereby declared to be required pursuant to the taxing power of the City of Los Angeles solely for the purpose of obtaining revenue. Compliance with such requirements shall not be construed to be a condition precedent to engaging in any business or occupation within the City of Los Angeles where the imposition of such a condition precedent would be contrary to law." [**4]

n3 For the 1984 tax year, 273,125 businesses were subject to the municipal ordinance which raised over $ 131 million in revenues for the City. In 1985, 250,653 "accounts" generated approximately $ 142 million in revenues.

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Prior to January 1984, the code expressly exempted from the business tax gross receipts derived from "the publication and sale of newspapers, magazines and other periodicals regularly issued at intervals not exceeding three months" as well as the gross receipts of businesses engaged in radio and television broadcasting. (Former L.A.M.C., § 21.190(c)(7) and (8).) In 1983, however, the city council amended the code to eliminate these exemptions and inserted provisions taxing receipts derived from newspaper sales and advertising (L.A.M.C., §§ 21.166(f), 21.167(e)) and from radio and television broadcasting (L.A.M.C., § 21.189.2). As part of this change, the business of "publishing

or publishing and printing" was included within the term "manufacturing" and "newspapers, magazines, periodicals, books and other printed matter" were classified as "goods, wares or merchandise." [**5] Pursuant to L.A.M.C. section 21.166, wholesale newspaper sales became subject to an annual business tax of $ 20.00 per year for the first $ 20,000 of gross receipts, and $ 1. for each additional $ 1,000 of gross receipts or fractional part thereof. (L.A.M.C., § 21.166(a).) Under L.A.M.C. section 21.167, retail newspaper sales became taxed at the rate of $ 18.75 for the first $ 15,000 of gross receipts [***349] plus $ 1.25 for each additional $ 1,000 of gross receipts or fractional part thereof. (L.A.M.C., § 21.167(a).) n4

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n4 Both L.A.M.C. sections 21.166 and 21.167 establish generic classifications and tax rates for all wholesale and retail business activities within the City.

Section 21.166 provides in relevant part: "(a) For every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $ 20.00 per year or fractional part thereof for the first $ 20,000.00 or less of gross receipts, plus $ 1.00 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 20,000.00; provided that blind persons need not include the first $ 20,000.00 of gross receipts in the computation of the amount of tax due hereunder, nor be required to pay the minimum tax of $ 20.00. This exemption shall not subject such blind person to the provisions of Section 21.190 of this Code. (Amended by Ord. No. 140,833, Operative 1/1/71.)

"(b) For the purpose of this section, a wholesale sale or sale at wholesale means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business.

". . . .

"(f) For the purpose of this section, newspapers, magazines, periodicals, books and other printed matter shall be deemed to be included in the term "goods, wares or merchandise"; publishing or publishing and printing shall be deemed to be included in the term "manufacturing"; and the term "gross receipts" shall mean California receipts from the selling or furnishing of advertising or advertising space in printed matter in addition to California receipts from the sale of goods, wares and merchandise. The provisions of this subsection shall apply only to business tax periods commencing on or after January 1, 1984. (Added by Ord. No. 158,484, Eff. 12/29/83.)"

Section 21.167 states in part: "(a) For every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $ 18.75 per year or fractional part thereof for the first $ 15,000.00 or less of gross receipts, plus $ 1.25 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 15,000.00; provided that blind persons need not include the first $ 15,000.00 of gross receipts in the computation of the amount of tax due hereunder nor be required to pay the minimum tax of $ 18.75. This exemption shall not subject such blind

person to the provisions of Section 21.190 of this Code. (Amended by Ord. No. 140,833, Operative 1/1/71.)

"(b) For the purpose of this section, a retail sale or sale at retail means a sale of goods, wares or merchandise for any purpose other than resale in the regular course of business.

"(c) Whenever a person engages at the same location in two or more businesses of the kind taxed in this section, a joint Registration Certificate shall be issued for all such businesses and the tax shall be measured by the sum of the gross receipts of all such businesses so conducted.

". . . .

"(e) For the purpose of this section, newspapers, magazines, periodicals, books and other printed matter shall be deemed to be included in the term "goods, wares or merchandise"; publishing or publishing and printing shall be deemed to be included in the term "manufacturing"; and the term "gross receipts" shall mean California receipts from the selling or furnishing of advertising or advertising space in printed matter in additional to California receipts from the sale of goods, wares or merchandise. The provisions of this subsection shall apply only to business tax periods commencing on or after January 1, 1984. (Added by Ord. No. 158,484, Eff. 12/29/83.)"

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[*176] For purposes of determining the amount of tax due under the foregoing sections, revenue generated from the sale or furnishing of advertising by those engaged in publishing or publishing and printing was included within "gross receipts." As a further result of the amendments to the code, radio and television broadcasters became subject to the same tax rates imposed on retail newspaper sales. (L.A.M.C., § 21.189.2.) n5

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n5 L.A.M.C. section 21.189.2 provides in pertinent part: "(a) For every person engaged in business as a radio broadcaster or television broadcaster the tax shall be $ 18.75 per year or fractional part therof for the first $ 15,000.00 or less of gross receipts, plus $ 1.25 per year for each additional $ 1,000.00 of gross receipts or fractional part thereof in excess of $ 15,000.00.

"(b) For the purpose of this section, the following terms shall be defined as follows: 1. 'Radio Broadcaster' shall mean any person engaging in the business of producing and broadcasting or broadcasting local or network radio programs or advertising material, including but not limited to the furnishing of services, program elements or facilities in connection with such production and broadcasting or broadcasting. 2. 'Television Broadcaster' shall mean any person engaging in the business of producing and broadcasting or broadcasting local or network television programs or advertising material, including but not limited to the furnishing of services, program elements or facilities in connection with such production and broadcasting or broadcasting. A

'television broadcaster' shall include any person operating a television system where the viewing audience pays a fee to view the broadcast.

". . . .

"(e) The provisions of this section shall apply only to business tax periods commencing on or after January 1, 1984."

Prior to the 1984 amendments, the broadcast media were only subject to the business tax to the extent that they engaged in motion picture production and related activities.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**7]

[*177] [***350] The ordinance further imposes a tax on all theaters in the City, including movie theaters, which is calculated in the same manner and at the same rate as the tax for retail sales under section 21.167. (L.A.M.C., § 21.147.) Section 21.192 requires those engaged in renting or leasing tangible personal property, including motion picture rentals, to pay a tax of $ 30 on the first $ 12,000 of gross receipts, and $ 2.50 for each additional $ 1,000 or fraction thereof. Motion picture and cartoon production is classified and taxed under section 21.109. The measure of the tax is based upon the total of the gross costs of production and gross receipts from the lending of employees and the furnishing of studio facilities to other film producers. The tax itself is graduated and ranges from $ 125 for the first $ 50,000 of gross receipts and production costs, up to a maximum of $ 10,750 when the measure of the tax is $ 4.2 million and above.

In computing the tax owed under the ordinance, income received from the sale of goods shipped out of state is excluded from the gross receipts of both wholesale and retail businesses, including those engaged in the publication [**8] of printed material. (L.A.M.C., § 21.168.1.) L.A.M.C. section 21.15(h) further authorizes the city clerk to promulgate rules and regulations for the apportionment of gross receipts "according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, . . ." Pursuant thereto, clerk's rulings No. 13 and No. 14, relating to persons with and without a fixed place of business within the City, describe the manner in which gross receipts should and should not be considered "directly attributable" to local activities and provide procedures and practices to be followed in making that determination.

Based upon the foregoing provisions of the municipal ordinance, the Times Mirror Company paid under protest approximately $ 1.4 million in business taxes for the years 1984 and 1985. For the same period, Tribune Newspapers West, Inc. paid $ 202,000 and Lozano Enterprises paid $ 22,000. After exhausting their various administrative remedies to secure a refund from the City, plaintiffs initiated this litigation. Following argument on the [*178] newspapers' motion for summary judgment and the City's motion for summary adjudication of issues, [**9] the trial court found that the applicable provisions of the ordinance did not impose a special or discriminatory tax on the newspapers or the media in general. It further held that L.A.M.C. section 21.15(h), authorizing the city clerk to apportion gross receipt taxes, and the rulings promulgated thereunder (i.e., Tax Rulings Nos. 13 and 14), passed constitutional muster.

In urging us to reverse, plaintiffs first contend that the business tax is unconstitutional because it unjustifiably imposes a differential tax burden on a variety of First Amendment activities and discriminates between First Amendment and non-First Amendment enterprises. In support of this argument plaintiffs allege that "the tax on fifty million dollars in production costs for the motion picture industry would be $ 10,750; the same gross receipts received in a year through lectures, shows, or entertainment, would be taxed at only $ 155; a telephone company receiving the same amount of gross receipts for the Yellow Pages would owe the City $ 50,000; a billboard company . . . would owe the City $ 250,000; . . . a newspaper would owe a tax of $ 62,500 on its retail receipts or $ 50,000 on its wholesale receipts; [**10] and a radio or television broadcaster would owe $ 62,500. . . ." The newspapers further point out that the City taxes various non-First Amendment businesses at lower rates than [***351] those imposed on the broadcast and print media. n6

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n6 As evidence of these lower rates, plaintiffs cite to provisions of the ordinance which tax amusement rides at an annual rate of $ 125 (L.A.M.C., § 21.94), junk dealers at $ 500 per year (L.A.M.C., § 21.100), shoe repair outlets at $ 0.75 per $ 1,000 (L.A.M.C., § 21.186), and trucking-hauling companies at a maximum rate of $ 0.22 per day (L.A.M.C., § 21.195).

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The power of the City to levy taxes derives from article XI, section 5 of the California Constitution which authorizes charter cities to "make and enforce all ordinances and regulations in respect to municipal affairs. . . ." Taxation for the purpose of generating revenue is a municipal affair within the meaning of article XI. (City of Los Angeles v. A.E.C. Los Angeles (1973) 33 Cal.App.3d 933, 939 [109 [**11] Cal.Rptr. 519].) A municipal taxing scheme is thus valid unless preempted by state law or prohibited by constitutional principles. (United Business Com. v. City of San Diego (1979) 91 Cal.App.3d 156, 164 [154 Cal.Rptr. 263]; Century Plaza Hotel Co. v. City of Los Angeles (1970) 7 Cal.App.3d 616, 622 [87 Cal.Rptr. 166].) Here, of course, plaintiffs maintain that the City's business tax violates the constitutional guaranties of free speech and press.

The First Amendment prohibits the enactment of any law "abridging the freedom of speech, or of the press . . . ," and is applicable to state and municipal action pursuant to the Fourteenth Amendment. (Douglas v. Jeannette (1943) 319 U.S. 157, 162 [87 L.Ed.2d 1324, 1328, 63 S.Ct. 877]; [*179] City of Alameda v. Premier Communications Network, Inc. (1984) 156 Cal.App.3d 148, 152 [202 Cal.Rptr. 684].)

There are two basic ways in which First Amendment rights may be impinged: (1) a direct regulation of speech or press based on the content of the material (see, e.g., Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817]); Keyishian v. Board [**12] of Regents (1967) 385 U.S. 589 [17 L.Ed.2d 629, 87 S.Ct. 675]; Mills v. Alabama (1966) 384 U.S. 214 [16 L.Ed.2d 484, 86 S.Ct. 1434]); or (2) an

indirect or incidental regulation of speech or press resulting from pursuit of governmental goals unrelated to freedom of expression (see, e.g., Buckley v. Valeo (1976) 424 U.S. 1 [46 L.Ed.2d 659, 96 S.Ct. 612]; Branzburg v. Hayes (1972) 408 U.S. 665 [33 L.Ed. 2d 626, 92 S.Ct. 2646]; Kovacs v. Cooper (1949) 336 U.S. 77 [93 L.Ed. 513, 69 S.Ct. 448, 10 A.L.R.2d 608]).

The instant case presents a question falling into the second category: the incidental or indirect impact of taxation on First Amendment activities. (See Murdock v. Pennsylvania (1943) 319 U.S. 105, 112 [87 L.Ed. 1292, 1298, 63 S.Ct. 870].) The structure of the tax is not content oriented.

Although the government may not unduly burden freedom of speech or of the press through taxation or other regulatory measures, it is beyond dispute that the provisions of the First and Fourteenth Amendments do not exempt newspapers and the business of newspaper publication from generally applicable economic regulations and taxes. (Grosjean [**13] v. American Press Co. (1936) 297 U.S. 233, 249 [80 L.Ed. 660, 668, 56 S.Ct. 444]; Festival Enterprises, Inc. v. City of Pleasant Hill (1986) 182 Cal.App.3d 960, 963 [227 Cal.Rptr. 601]; City of Corona v. Corona Daily Independent (1953) 115 Cal.App.2d 382, 387 [252 P.2d 56].)

The state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those laws operate evenhandedly upon all similarly situated. (Fox etc. Corp. v. City of Bakersfield (1950) 36 Cal.2d 136, 142 [222 P.2d 879].) "The power to create classifications for taxation purposes is a broad one, within the discretion of the Legislature, and is subject only to limitations of the state and federal Constitutions." (Festival Enterprises, Inc. v. City of Pleasant Hill, supra, 182 Cal.App.3d at p. 963.)

Although plaintiffs recognize these general precepts of constitutional law, they contend that here the City has exceeded the limitations of its taxing power. Relying on [***352] Minneapolis Star v. Minnesota Comm'r of Rev. (1983) 460 U.S. 575 [75 L.Ed.2d 295, 103 S.Ct. 1365] and City of Alameda [**14] v. Premier Communications Network, supra, 156 Cal.App.3d 148, plaintiffs [*180] claim that the structure of the City's business tax treats them differently than other similarly situated taxpayers and thus impermissibly impinges on their exercise of First Amendment rights.

In Minneapolis Star, the United States Supreme Court held a Minnesota use tax which applied to "publications" to be an unconstitutional burden on the press. While acknowledging decisions upholding economic regulations generally applicable to all businesses, the court concluded that "[differential] taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." (Minneapolis Star v. Minnesota Comm'r of Rev., supra, 460 U.S. 575, 585 [75 L.Ed.2d 295, 305].)

The statute at issue in Minneapolis Star imposed a general sales tax on the sale of goods above a certain minimum price and a use tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" [**15] which was not specifically

exempt by statute and on which no sales tax was paid. As the court noted, this was a classic use tax designed to complement and protect the sales tax by eliminating a resident's incentive to travel to states with lower sales tax and purchase goods there rather than in Minnesota. Such taxes, in essence, require a resident who shops out of state to pay a "use tax" equal to the sales tax savings. The Minnesota statute provided an exemption from the sales tax for periodic publications, which the plaintiff, the Minneapolis Star and Tribune Company, had enjoyed from 1967 to 1971.

In 1971, the Minnesota Legislature amended the statute to impose a special use tax on the costs of ink and paper used in producing periodic publications, while leaving intact the publications' exemption from the sales tax. The amendment had the effect of creating the only situation in the entire tax scheme where components of goods that were later to be sold at retail were taxed. In all other situations, tax was assessed only when the finished product was purchased by the ultimate user. The only components taxed were ink and paper used in periodic publications. As a result, the [**16] tax fell exclusively upon the press. The statute was subsequently amended to exempt from the use tax the first $ 100,000 worth of ink and paper used in any calendar year by a publication so that, in practice, only a few publishers in the state were subject to use taxation.

These unique features of the Minnesota use tax, not the mere fact that the press was being taxed, led the court to declare the amended statute unconstitutional. In doing so, however, the court stressed that "the states and the [*181] federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems. (Minneapolis Star v. Minnesota Comm'r of Rev., supra, 460 U.S. 575, 581 [75 L.Ed.2d 295, 302].) The majority noted that "[any] tax that the press must pay, of course, imposes some 'burden.' But, as we have observed, [citation] this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses . . . ." (Id., at p. 583 [75 L.Ed.2d at p. 303].)

The Minnesota statute failed because it singled out the [**17] press for differential tax treatment. The only supporting rationale was the need for revenue -- a need which the court noted was better served by taxing all businesses equally. The law did not serve to complement the state's sales tax, as do most use tax statutes, since it imposed a use tax on publications which were specifically exempt by statute from the state's sales tax. The court emphasized, however, that had the tax been a generally applicable sales tax it would probably have been constitutionally permissible. Responding to the argument that the use tax [***353] was merely a less onerous, substitute tax which could be generally and permissibly applied to the press, the court held that the state had offered no adequate justification for the differential tax, which was impermissible even if it did not currently impose a greater effective burden since "the very selection of the press for special treatment threatens the press not only with the current differential treatment, but also with the possibility of subsequent differentially more burdensome treatment" (Id., at p. 588 [75 L.Ed.2d at p. 307], italics in original.) n7

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n7 The court also found that the statute was unconstitutional because the use tax, which exempted the first $ 100,000 of paper and ink used in any calendar year, unfairly targeted a limited number of publishers whose use of such products exceeded the exempt amount. Noting that no similar exemption existed for other small enterprises, the court held that "to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." (Minneapolis Star v. Minnesota Comm'r of Rev., supra, 460 U.S. 575, 592 [75 L.Ed.2d 295, 309].)

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In City of Alameda v. Premier Communications Network, Inc., supra, 156 Cal.App.3d 148, the Court of Appeal for the First District applied the rationale of Minneapolis Star in striking down a local business license tax on television subscription service companies. Although the municipal ordinance at issue applied to 87 types of businesses, only 4 were required to pay a gross receipts tax. Of these four, only two, television subscription and emergency communications services, were required to pay 3 percent of their gross receipts. Moreover, most businesses were permitted to pay an "in-lieu" gross receipts tax rather than the otherwise applicable tax set forth in the ordinance. Television subscription services, however, were not eligible to claim the in-lieu taxes. As a result, Premier's tax burden on its annual gross receipts [*182] of $ 210,000 was $ 6,300. If the company had been permitted to pay the in-lieu tax, its burden would have been only $ 472.

Concluding that only two types of businesses were required to pay 3 percent of gross receipts without any alternative, the court found the tax invalid, holding that Premier was taxed differently than the great [**19] majority of businesses and in a more burdensome manner. "Under the principles set forth in Minneapolis Star, the tax burden imposed upon Premier, a disseminator of protected speech, cannot stand unless that burden is necessary to achieve an overriding governmental interest. The only interest asserted to justify the differential tax burden is the generation of revenue. [Citation.] While that purpose is an interest critical to any government, it cannot, standing alone, justify special treatment of a segment of the media which disseminates protected speech when alternative means of achieving the same interest without implicating First Amendment concerns are available. [Citation.]" (City of Alameda v. Premier Communications Network, Inc., supra, 156 Cal.App.3d 148, 156.)

The municipal ordinance here does not possess the constitutional infirmities that were present in either Minneapolis Star or Premier Communications. Although the City's tax is levied upon the privilege of engaging in or transacting business, it is, on its face, and in fact, a tax for revenue purposes only, and does not grant or take away any right to do business. The tax is neither special [**20] nor unique and is generally applicable to all those engaged in wholesale or retail business activities. In no way does the tax resemble a penalty directed at only a few publications. (Cf. Arkansas Writers' Project, Inc. v. Ragland (1987) 481 U.S. 221 [95 L.Ed.2d 209, 107 S.Ct. 1722].) The press is not singled out for differential treatment since the tax rates established by the ordinance apply to all manufacturers and sellers alike, including publishers.

Plaintiffs nevertheless argue that both Minneapolis Star and Premier Communications stand for the proposition that all First Amendment activities must be taxed at the same rate and that there must be parity between First Amendment and non-First Amendment businesses. Neither the [***354] cases cited nor the Constitution mandate such requirements.

Plaintiffs' challenge, which is couched in terms of equal protection, must stand or fall with the novel proposition that a municipality is powerless to employ more than one method of computing taxes for various businesses unless it can demonstrate some compelling justification for doing so. Although those engaged in protected speech may not be singled out for discriminatory [**21] tax treatment in the absence of counterbalancing governmental interest of compelling importance that cannot be achieved without [*183] differential taxation (Festival Enterprises, Inc. v. City of Pleasant Hill, supra, 182 Cal.App.3d 960, 964; City of Alameda v. Premier Communications Network, Inc., supra, 156 Cal.App.3d 148, 153), no such counterbalancing interest need be present when the tax measure does not result in a discriminatory burdening of First Amendment rights. (Vance v. Bradley (1979) 440 U.S. 93 [59 L.Ed.2d 171, 99 S.Ct. 939]; Fox etc. Corp. v. City of Bakersfield, supra, 36 Cal.2d 136, 141-142.)

Having determined that the City's ordinance does not impose a peculiar or differential burden on plaintiffs' businesses in violation of the First Amendment, we must only determine whether the varying rates established by the taxing scheme are "founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation. . . ." (Fox etc. Corp. v. City of Bakersfield, supra, 36 Cal.2d at p. 142.)

The power of a municipality to classify for the purpose of taxation is very broad. [**22] Neither due process nor equal protection impose a rigid rule of equality in tax legislation. (Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization (1973) 30 Cal.App.3d 1009, 1016 [106 Cal.Rptr. 867], and cases cited therein.) "It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation, and it is within the discretion of the Legislature to exact different license taxes from different classes or subclasses of businesses, subject only to the limitations of the state and federal Constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary." (Fox etc. Corp. v. City of Bakersfield, supra, 36 Cal.2d at p. 142; Gutknecht v. City of Sausalito (1974) 43 Cal.App.3d 269, 276 [117 Cal.Rptr. 782]; Associated Home Builders etc., Inc. v. City of Newark (1971) 18 Cal.App.3d 107, 109-110 [95 [**23] Cal.Rptr. 648]; Clark v. City of San Pablo (1969) 270 Cal.App.2d 121, 126-127 [75 Cal.Rptr. 726].)

The power to license for purposes of generating revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business. (See City of Los Angeles v. Crawshaw Mortgage & Inv. Co. (1975) 51 Cal.App.3d 696, 703 [124 Cal.Rptr. 363].) n8

[***355] "It is recognized that a legislative body may [*184] classify and subdivide classes within those engaged in one generic field of activity where there is a reasonable basis for such action. [Citations.]" (Clark v. City of San Pablo, supra, 270 Cal.App.2d at p. 131.)

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n8 The U.S. Supreme Court's observations in Regan v. Taxation With Representation of Wash. (1983) 461 U.S. 540, 547-548 [76 L.Ed.2d 129, 138, 103 S.Ct. 1997] are particularly applicable here: "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. More than 40 years ago we addressed these comments to an equal protection challenge to tax legislation: 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [The] passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' [Citation.]"

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The classifications created by the City's taxing scheme are anything but arbitrary or unreasonable. On its face the ordinance purports to impose a tax on "every person manufacturing and selling goods, wares, or merchandise" at both the wholesale and retail levels. (L.A.M.C., §§ 21.166, 21.167.) Independent contractors and those engaged in the rental of tangible personal property also are taxed at specified rates. (L.A.M.C., §§ 21.190, 21.192.) By amendment, newspapers and other periodicals are classified as "goods, wares, or merchandise" while publishing and printing are categorized as "manufacturing."

These various distinctions flow naturally from differences in the methods and procedures used in conducting the business activities subject to the ordinance and thus afford an acceptable basis for imposing disparate rates of taxation. (See Alco Plating Corp. v. City of Los Angeles (1974) 39 Cal.App.3d 948, 951-952 [114 Cal.Rptr. 506].) Within each broad classification, however, all businesses are taxed similarly.

Even a cursory review of the law reveals that all members of the press are treated alike; that the press and all other publishing enterprises are treated similarly; [**25] and that all publishing enterprises are treated identically with other wholesalers and retailers. The City has not created an artificial class of businesses in order to tax some who are engaged in the same business and not others. The amount of plaintiffs' tax is determined by no

means other than by the amount of their business activities. (See City of Los Angeles v. Lankershim (1911) 160 Cal. 800, 804 [118 P. 215].)

Plaintiffs' argument that the municipal tax scheme is unconstitutional because the City has chosen to use a different method of computing [*185] the tax levied against motion picture production than it has for newspaper publication or radio and television broadcasting is unpersuasive. The inherent difference between these various forms of mass media is patent. These differences are reflected in the ways in which the ultimate product is conceived, produced, disseminated, and exhibited.

Plaintiffs nonetheless maintain that they should be required to pay no more in taxes than a film producer with the same gross receipts. They have not shown, nor can they show, that a producer, in making a film, operates in a manner similar to a business which manufactures [**26] and sells daily newspapers or to any other retailer or wholesaler. Plaintiffs' analysis also ignores the fact that the motion picture industry is highly fragmented (see, e.g., United States v. Paramount Pictures (1948) 334 U.S. 131 [92 L.Ed. 1260, 68 S.Ct. 915]) and that the City separately classifies and taxes each of these various fragments as different business activities. n9

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n9 Motion picture production is taxed by L.A.M.C. section 21.109; distribution (vis-a-vis sales) by sections 21.166 and 21.167; exhibition by section 21.147; and rentals by section 21.192.

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Even if the cap on the amount of tax imposed on motion picture production is viewed as a subsidy of that business, it would not afford plaintiffs a basis for attacking the tax scheme. If the state subsidizes some First Amendment activity but not all, no suspect classification is created. Conversely, the failure "to subsidize the exercise of a fundamental right does not infringe [that] right." (Regan v. Taxation with Representation [**27] of Wash., supra, 461 U.S. 540, 549 [76 L.Ed.2d 129, 139].)

Furthermore, occupations and businesses, including the entertainment industry, may be properly subdivided and separately classified if the classification is [***356] founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation. (See City of Berkeley v. Oakland Raiders (1983) 143 Cal.App.3d 636, 639 [192 Cal.Rptr. 66]; United Business Com. v. City of San Diego (1979) 91 Cal.App.3d 156, 178 [154 Cal.Rptr. 263].) In other words, the classification within the ordinance does not violate equal protection "if the distinction rests upon a rational basis, and it must be presumed to rest on that basis if there is any conceivable state of facts which would support it." (City of San Jose v. Donohue (1975) 51 Cal.App.3d 40, 45 [123 Cal.Rptr. 804].)

We conclude that the tax rate distinctions which may exist between different members of the media and between the media and other taxpayers are constitutionally permissible and in no way impinge on the exercise of plaintiffs' rights under the First Amendment.

[*186] Next we reject [**28] plaintiffs' contention that the ordinance is unconstitutional on its face because it grants the city clerk absolute discretion in apportioning the amount of gross receipt taxes to be collected from businesses engaged in protected First Amendment activities. Apportionment is required to prevent the tax from having an extraterritorial impact.

L.A.M.C. section 21.15(h) provides in relevant part: "When, by reason of the provisions of the Constitution of the United States or the Constitution of California, the business tax imposed by this Article cannot be enforced without there being an apportionment according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, the City Clerk may make such rules and regulations for the apportionment of the tax as are necessary or desirable to overcome the constitutional objections." Pursuant to the authority granted him by this section, the city clerk adopted Tax Rulings Nos. 13 and 14 for the apportionment of gross receipts of taxpayers subject to sections 21.166 and 21.167. Each is applicable to all businesses classified as either a wholesaler or retailer, including those engaged in the business [**29] of publishing or publishing and printing. The rulings essentially provide for an apportionment formula based upon various specified physical elements n10 and further provide that any taxpayer [***357] who [*187] believes that the percentages do not apply to his or her particular business may petition the city clerk for a modification of the formula. The taxpayer has the burden of establishing the modification.

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n10 Pursuant to Rule No. 13, the measure of tax for "a person who does not own, lease, occupy or otherwise maintain within the City of Los Angeles a place or premises upon which or from which he engages in business" is as follows: "(a) 35% of those gross receipts from all sales to customers located within the City of Los Angeles, where delivery or shipment is made to points within the City by vehicles operated by the taxpayer. (b) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points within the City by means other than vehicles operated by the taxpayer regardless of the f.o.b. point or other conditions of sale. (c) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points outside the City."

Under Rule No. 14, the measure of tax for "[a] person who manufactures any goods, wares, or merchandise within the City of Los Angeles" is "the total gross receipts from the sale of goods manufactured in the City." The regulation further provides that "[a] person who owns, leases, occupies or otherwise maintains within the City a place or premises upon which, or from which he engages in the business of selling goods, wares, and merchandise, not manufactured by the taxpayer in the city and whose gross receipts from such sales are attributable to business activities carried on within the City and activities carried on outside the City, may apportion such gross receipts directly attributable to activities carried on within the City. [para.] In making a calculation of gross receipts to be reported as the measure of tax, the person may deduct from 100% of gross receipts the percentage of gross receipts deemed to be directly attributable to selling

activities carried on by such person outside the City of Los Angeles. For the purpose of this calculation, the person may deduct . . . the following percentages of those sales, or particular categories of sales, on which the corresponding elements of the selling process are performed at a place or location outside the City:

"1. Up to 30% for the location where the sale is negotiated or solicited by the taxpayer, through the physical presence of himself, his employees or his agents.

"2. Up to 20% for the sales office which serves as the base of operations for sales activities, or if there is no sales office which serves as a base of operations, the office from which the sale activities are directed or controlled.

"3. Up to 10% for the location where orders or contracts are accepted or approved. Such acceptance or approval shall be deemed to take place at the location of the office specified in item 2 above, unless there is clear and conclusive evidence that a binding acceptance or approval occurs elsewhere.

"4. Up to 20% for any facility, operated by the taxpayer, where the goods, wares or merchandise are stored immediately prior to shipment or delivery.

"5. Up to 5% for the location which gives the order for, or arranges for, the shipment or delivery of articles sold.

"6. Up to 5% for the place where billing procedures are performed.

"7. Up to 5% for the place where the collecting of receipts is performed.

"8. Up to 5% for the place to which merchandise is delivered, by vehicles operated by the taxpayer." (Italics added.)

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Relying on a series of United States Supreme Court decisions which hold that a public official may not be granted unfettered discretion to deny or regulate the issuance of licenses or permits, thus limiting or restricting access to protected speech (see, e.g., Shuttlesworth v. Birmingham (1969) 394 U.S. 147 [22 L.Ed.2d 162, 89 S.Ct. 935]; Kunz v. New York (1951) 340 U.S. 290 [95 L.Ed.2d 280, 71 S.Ct. 312]; Schneider v. State (1939) 308 U.S. 147 [84 L.Ed. 155, 60 S.Ct. 146]), plaintiffs argue that the City's ordinance infringes upon their First Amendment rights by giving the city clerk blanket authority to prescribe formulas for the apportionment of taxes. Plaintiffs' reliance on these cases is totally misplaced.

The business tax with which we are here concerned is strictly a revenue measure. While a registration certificate is required by L.A.M.C. section 21.03, no conditions are placed upon the right to such a document. The certificate is required not to regulate but to expedite the collection of revenue. (See City of Los Angeles v. A.E.C. Los Angeles, supra, 33 Cal.App.3d 933, 940.) Plaintiffs nonetheless contend that "it is difficult to [**31] see any distinction between a 'licensing' ordinance and the City Tax Ordinance as

written" apparently because of the various provisions of the law relating to enforcement procedures. These procedures, however, do nothing more than insure the collection and remittance of the tax and assure that accounting and record keeping standards are properly maintained. Such regulations are necessary adjuncts to the municipal taxing power and in no manner restrict access to protected speech. n11

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n11 Much of plaintiffs' argument relates to L.A.M.C. section 21.189.2. That section, however, pertains only to radio and television broadcasters and, by its very terms, has no application to the publication of newspapers or other printed matter. Subdivisions (c) and (d) provide as follows: "When gross receipts are constitutionally required to be apportioned and are derived from or attributable to activities engaged in within and without the City, gross receipts shall be apportioned in a manner that is fairly calculated to determine the amount of gross receipts derived from or attributable to engaging in business in the City. Such apportionment shall be made on the basis of payroll, value and situs of tangible property, general expense, or by reference to any of these or other factors, or by any other method of apportionment as will fairly determine the amount of gross receipts derived from or attributable to engaging in business in the City. Gross receipts derived from or attributable to sources within the City shall include gross receipts from any activities carried on in this City. (d) Notwithstanding the foregoing, the gross receipts used in the measurement of the tax under this section shall be limited to receipts which are generated, produced, or attributable to local activities, in the State of California."

So far as we can discern, the city clerk has not promulgated any formulae for the apportionment of taxes levied under section 21.189.2. Were it necessary to so decide, we would have no difficulty in concluding that the city council's delegation of authority comports with the principles discussed infra. Since plaintiffs are in the publishing, not broadcasting business and are in no way subject to the provisions of section 21.189.2, we need not address this issue in the context of this case.

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[*188] The argument that section 21.15(h) is unconstitutional because it does not provide any formula, rule or specific standard for the apportionment of gross receipts is equally unavailing. It has long been established that a legislative body need not prescribe the exact means by which a tax is to be fixed but may delegate to its taxing officers the power to adopt a suitable method. (El Dorado Oil Works v. [***358] McColgan (1950) 34 Cal.2d 731, 737-738 [215 P.2d 4]; Pacific Fruit Express Co. v. McColgan (1944) 67 Cal.App.2d 93, 101-102 [153 P.2d 607].) "The essential requirement is the Legislature's specification of a standard -- 'an intelligible principle to which the person or body authorized to [administer the act] is directed to conform' [citation] -- but it may leave to the administrative agency the precise determination necessary to bring the standard into operation." (El Dorado Oil Works v. McColgan, supra, 34 Cal.2d 731, 738.) Section 25.12(h) surely complies with this principle by directing the city clerk to make "such rules and regulations for the apportionment of the tax as are necessary or desirable" to

satisfy the demands of [**33] both the federal and state Constitutions. (Cf. El Dorado Oil Works v. McColgan, supra, 34 Cal.2d 731.)

Citing to Big Mama Rag, Inc. v. United States (D.C. Cir. 1980) 631 F.2d 1030, plaintiffs appear to argue that the apportionment formulae set forth in Tax Rulings Nos. 13 and 14 must fall before the First Amendment unless the classifications established by the clerk can be justified by a compelling state interest. We disagree.

In Big Mama Rag, Inc., a newspaper's application for tax exempt status was denied because it could not qualify as an "educational institution" as that term had been defined by an Internal Revenue Service regulation. Finding that the definition was overly vague and that the subjective criteria used to evaluate the application was based upon the content of protected speech, the court struck down the regulation as unconstitutional. In so [*189] holding the court observed: "[Regulations] authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials. . . ." (Id., at p. 1034.) "Applications for tax exemption must be evaluated . . . on the basis of criteria capable of neutral [**34] application. The standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities." (Id., at p. 1040.)

The distinction between apportionment and the granting or withholding of a tax exemption is obvious. The city council here has not delegated to the clerk the authority to decide who pays the business tax or when. That official merely determines the manner in which the tax is to be computed based upon objective criteria that is content neutral and relates only to the amount of revenue generated within the City.

Although the formulation of the criteria requires the exercise of judgment, abuses of such judgment are checked both by extensive administrative review and by prompt postdetermination access to the courts. Contrary to the arguments advanced by plaintiffs, neither L.A.M.C. section 21.15(h) nor the clerk's tax rulings impose any burden on the exercise of their First Amendment rights. We find no indication that the regulations were intended to suppress any ideas or any demonstration [**35] that they have had that effect. Under the circumstances, the various classifications established by the rulings need not be justified by the showing of a compelling state interest.

There is no constitutional prohibition against local taxes upon businesses "doing business" both within and outside the taxing jurisdiction so long "as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction. . . ." (City of Los Angeles v. Shell Oil Co. (1971) 4 Cal.3d 108, 124 [93 Cal.Rptr. 1, 480 P.2d 953]; City of Los Angeles v. London Towne Livery Service, Ltd. (1979) 97 Cal.App.3d 814, 816-817 [159 Cal.Rptr. 94].) Here, the promulgation of the tax rulings constitute a permissible exercise of administrative discretion that fully carries out the intent of the city council. They describe, in a detailed fashion, the manner in which taxes are to be apportioned according to the amount of business activity done within and without the city. [***359] The various formulae set forth in the regulations cannot be characterized

as arbitrary, capricious or patently [**36] unreasonable. As such, we need not inquire further into the clerk's exercise of authority properly delegated to him by the city council.

DAVID B. EDWARDS, Appellant, v. THE CITY OF LOS ANGELES (a Municipal Corporation) et al., Respondents

Edwards v. Los Angeles

Civ. No. 11710

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

48 Cal. App. 2d 62; 119 P.2d 370; 1941 Cal. App. LEXIS 762

November 27, 1941, Decided

SUBSEQUENT HISTORY: A Petition for a Rehearing was Denied December 27, 1941, and Appellant's Petition for a Hearing by the Supreme Court was Denied January 21, 1942.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County. Hartley Shaw, Edward T. Bishop and B. Rey Schauer, Judges. Action to enjoin a prosecution for nonpayment of a license tax.

COUNSEL: Scott & Eberhard and Ray C. Eberhard for Appellant.

Ray L. Chesebro, City Attorney, and Frederick von Schrader and Herbert L. Iasigi, Deputies City Attorney, for Respondents. Carter, J., Voted for a Hearing. Edmonds, J., did not Participate therein. Spence, J., Acting pro tem.

JUDGES: WARD, J. Peters, P. J., and Knight, J., concurred.

OPINIONBY: WARD

OPINION: WARD, J. -- Plaintiff appeals from a judgment against him entered upon the sustaining of defendants' demurrer to his complaint, without leave to amend. The action was brought to enjoin the prosecution of plaintiff for failure to pay a license tax to the city of Los Angeles in accordance with the provisions of a general ordinance, No. 77,000 (art. 1, chap. 2 of the Los Angeles Municipal Code), imposing a variety of license taxes.

The complaint alleges: "That plaintiff is . . . the owner of . . . real property being improved with a two-story frame apartment house building containing four apartments on the first floor and four apartments on the second floor . . . that each of said apartments is

equipped with a kitchen, bathroom, toilet in addition to rooms intended for sleeping quarters and has living rooms and is intended for and is suitable for a dwelling for persons or families occupying the same; that each of said apartments is completely furnished with all furniture necessary to a place of residence for a family; that plaintiff, as the owner of said premises, does now, and at all times herein mentioned has rented apartments in said building for housekeeping purposes to the public generally." The complaint further alleges a demand by defendants on plaintiff for the payment of a license fee in connection with the above business; the service of a citation requiring the payment of such fee within seven days, and notification that failure to comply would result in a criminal complaint being issued against him.

Section 21.99 of the general ordinance above referred to and applicable herein is as follows: "For every person engaged in the business of renting or letting any rooms in any hotel, rooming house, boarding house, apartment house or lodging house, the same fees as those prescribed for the business referred to in section 21.167 hereof shall be paid." The fees prescribed by section 21.167 are proportionate to gross receipts. Section 21.202 imposes the ordinary misdemeanor penalty for a violation of the provisions of the ordinance.

The ordinance carries a penalty clause for its violation, but it is not a regulatory penal statute. Upon its face it is an occupational license tax for revenue. (*In re Tepper*, 60 Cal. App. 98 [212 P. 220]; *Barker Bros., Inc.,* v. *Los Angeles*, 10 Cal. 2d 603 [76 P.2d 97]; *City of Los Angeles* v. *Lankershim*, 160 Cal. 800 [118 P. 215].)

(1a) Appellant contends that the ordinance denies him equal protection of the laws, and contravenes the Constitution of the United States, the State of California and the Charter of the city of Los Angeles; that the practice of a landowner to rent his property does not constitute an occupation or engaging in business, and that the ordinance is so indefinite and uncertain as to be invalid as a penal ordinance. He further urges that there is an illegal and arbitrary classification of those on one hand who rent or let rooms in any hotel, rooming house, boarding house, apartment house or lodging house, who must pay the tax, and on the other hand, those renting similar accommodations in flats, bungalow courts, duplexes or single family residences, who, appellant contends, are not required to pay a tax. Respondents take the position that the ordinance does not make such classification. It is their view that a flat, bungalow court, duplex or single family residence may, in the circumstances of a particular case, constitute an apartment house, hotel, rooming house, boarding house or lodging house.

In an opinion of the Superior Court of the State of California, in and for the County of Los Angeles (*People* v. *Beach*, unreported, Superior Court No. Cr. A-1491, trial court No. 79782), upon an appeal from a judgment of the municipal court, to which opinion a dissent was filed, the constitutionality of the section of the ordinance in question was upheld, the court there saying: "There are, however, differences in the nature of these various things thus referred to, which separate them to some extent from those enumerated in the ordinance, and may, in the mind of the city council, have required a different rate of taxation, or justified their nontaxation." We believe the constitutionality of the section may be upheld upon a broader basis.

(2) The general rule is that a legislative body has a wide discretion in enacting license taxes, and that unless unreasonableness plainly appears the determination of such body should be final. (*In re Schmolke*, 199 Cal. 42 [248 P. 244]; *Rainey* v. *Michel*, 6 Cal. 2d 259 [57 P.2d 932, 105 A. L. R. 148].) (3) If the ordinance applies to all those conducting like businesses in a similar manner, the ordinance should be upheld, but if it is not uniform in its application and exempts from its operation businesses of identical character, though bearing another name, there is an unreasonable classification, and the ordinance must be held invalid as discriminatory.

(1b) The question arises: Is there an intrinsic or natural distinction between the business of conducting a furnished apartment house, by letting and renting rooms, and conducting the same business in a flat, bungalow court, duplex or single family residence? The evident purpose of the ordinance is to require a license tax upon those engaged in the business of renting rooms for lodging accommodations. (4) A lodger is one who has no interest in the realty, but who occupies part of a tenement which is under the control of another. (*McDowell* v. *Hyman*, 117 Cal. 67 [48 P. 984]; *United States* v. *Ackerman*, 211 Cal. 408 [295 P. 811].) Whether one is a tenant or a lodger is a mixed question of law and fact, the niceties of which need not be discussed herein, but it may be conceded that flats, duplexes and single dwelling houses in some instances offer accommodations to mere lodgers, sometimes referred to as guests or roomers. (5) "Guests in a hotel, boarders in a boarding house, and roomers or lodgers, so called, are generally mere licensees and not tenants. They have only a personal contract, and acquire no interest in the realty." (1 McAdam on Landlord and Tenant, 5th ed., p. 239.) To the extent that an identical business is operated; that is, the renting of accommodations to lodgers, whether in a structure called a hotel, apartment, rooming house, boarding house, or lodging house, flat, bungalow court, duplex or single dwelling, is immaterial under the terms of the ordinance, the purpose of which is to collect license taxes in proportion to gross receipts.

(6) An "apartment house" has been referred to as a dwelling house or a tenement house, and sometimes the term is used interchangeably with "flats." (3 C. J. S. 1422, 1423; *Lignot* v. *Jaekle*, 72 N. J. Eq. 233 [65 A. 221].) "Duplex houses" may in fact be apartments or flats. A "flat" may be used as a lodging house; if so, it is, under the terms of the present ordinance, not distinguishable from a rooming house. Structures placed side by side, or one in the rear of another, or in a circle or semi-circle, and frequently called inns or courts, do not lose their identity as hotels, rooming houses or apartments merely by bestowing upon them a different appellation, if in fact they are used to lodge the public. It is immaterial whether the place used for lodging purposes is built of stone or steel, brick or wood, or of a framework of cloth, or whether mother earth constitutes the floor and the high heavens the ceiling, if in fact it is a place sufficiently defined in area, the letting or renting of which to guests, roomers or lodgers is engaged in as a business.

(7) The words used in the ordinance definitely indicate that a license shall be required of one engaged in the business of renting lodging space to a guest or roomer. The construction placed upon the terms of the ordinance should be in conformity with the intent of the framers thereof (*Coulter* v. *Pool*, 187 Cal. 181 [201 P. 120]; *Estate of Roher*, 14 Cal. App. 2d 669 [58 P.2d 948]), and when such ordinance has been construed to include any person engaging in renting lodgings as against conferring a tenancy, there

should be no departure therefrom. (*Blalock* v. *Ridgway*, 92 Cal. App. 132 [267 P. 713].)

(1c) That the ordinance was intended to be all-inclusive and does in fact reasonably cover all lodgings is shown by its terms. If a flat is used as a lodging house, the party engaged in renting rooms therein is not deceived by the language of the ordinance and should know with certainty that if without a license, he is violating its terms. It is the business of renting rooms without a license which is prohibited; the type or form of structure in which the business is conducted is merely an incident thereto. The types enumerated are sufficient, including "boarding house," inserted no doubt so that a boarding house keeper who also rented rooms, might not, under the guise of a boarding house proprietor defeat the purpose of the ordinance. Of course it is the renting of rooms, and not the business of boarding, which is the subject of the tax.

(8) It is not required in a general occupational tax ordinance, nor in the section thereof here in question, that the legislative body should enumerate specifically by title or name every possible phase of the business of renting rooms as lodgings. To do so would be an endless task not necessary to the attainment of the result intended by the ordinance. It would be an easy matter to designate the premises in which such a business is conducted by a name not mentioned in the ordinance. In this period of giving to lodging places names indicative of their construction or suggestive of their location, some of which do not intimate the business of renting rooms to lodgers, much confusion would result in the interpretation of the ordinance if any consideration were given such name. It was certainly not intended that one engaged in the business of lodging the public should by the device of operating a place under such name escape payment of the tax.

(9) The article in the Civil Code relative to innkeepers (div. 3, pt. 4, tit. 3, ch. 2, art. 4), notwithstanding that "tenant" is therein sometimes used synonymously with "guest" or "lodger", indicates a general classification of "hotel-keeper, furnished apartment house keeper, furnished bungalow court keeper, boarding-house or lodging-house keeper" (sec. 1859), and keepers of "furnished cottages" (sec. 1861a) as "innkeepers", and provides therein certain rights, privileges and duties as between the innkeeper and guests, boarders and lodgers. The character of an inn is not lost because of difference in structure or surrounding buildings or lands. An inn is a place where the public will be received and accommodations provided to guests for compensation. (14 Cal. Jur. 316, sec. 2.)

Appellant attempts to fortify his contention by citations, using language that seems to undermine respondents' position and the trial court's interpretation. An examination of such decisions shows different factual backgrounds. In *Barker Bros., Inc.,* v. *Los Angeles, supra*, an ordinance placed a license tax on any store commonly known as a department store or any store where a variety of goods, wares and merchandise is displayed in or offered for sale in several departments or sections. Appellant in that case contended that he did not conduct a department store of the kind described. The court held that the ordinance did not sufficiently define "department store," saying (p. 608): "If the owner of the furniture store keeps his stock in helter-skelter disorder he requires no license; if he arranges it by 'departments or sections' he must pay a tax. If he sells a 'variety' of household goods or china ware from a general stock he escapes taxation; if, however, he offers it for sale grouped according to kind, he is then carrying on a business subject to the ordinance. Certainly such classification, so far as the evidence presented in this case

shows, is based upon no reasonable distinction." "The term 'commonly known as a department store' cannot be applied with any certainty to a particular business and is too indefinite to be used as a classification for the purpose of taxation." In the present case "apartment house" is not defined; neither is there a definition of hotel, rooming house, boarding house or lodging house; but the ordinance is sufficiently clear to indicate that in any business of letting or renting rooms, a license is required.

Bueneman v. *City of Santa Barbara*, 8 Cal. 2d 405 [65 P.2d 884, 109 A. L. R. 895], and *Town of St. Helena* v. *Butterworth*, 198 Cal. 230 [244 P. 357], cases cited by appellant on the question of requiring a tax on a particular kind of business, with preference given those within the confines of a municipality to the detriment of those without, are not in point with the question here involved, namely, whether there is discrimination against appellant in holding his apartment house to be within the purview of the present ordinance. In *City of Los Angeles* v. *Lankershim, supra*, an ordinance claimed to be regulatory, but in fact, as in the present case, simply an ordinance for revenue, imposed an occupational tax on the owners of buildings containing more than thirty rooms. The court pointed out that an owner renting twenty-nine rooms was in the same category, and therefore the classification was unjust and discriminatory. In the present case there is no classification and no discrimination; the amount of the license tax is in proportion to the business transacted, which is permissible under the ordinance. In *Justesen's F. S., Inc.,* v. *City of Tulare*, 12 Cal. 2d 324 [84 P.2d 140], a "health measure" expressly exempting one class was held to be unreasonable and arbitrary. In the present case there is no express, and, as appears from an analysis of the ordinance, no implied exception.

(10) Appellant is the owner of the building referred to in the complaint. It is urged that the act of an owner in renting his property does not constitute an occupation or engagement in business in the sense which may constitutionally subject him to a license tax. Section 21.08, defining "Engaged In Business" specifically refers to "owner" in conjunction with "officer, agent, manager, employee, servant or lessee." When the owner of the realty engages in the business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants.

(11) Appellant suggests that a property owner is left entirely in the dark as to what is intended by the term "rooms." He states that he is renting apartments; that is, dwelling accommodations. Needless to say, when an apartment is rented it is in fact a rental of the room or rooms contained therein. A room is an area set apart or appropriated for any purpose, marked off by a partition or lines indicating its extent. (54 C. J. 1102, 1103.) The only rooms that come within the purview of this ordinance are rooms rented to guests or roomers for lodging purposes; not rooms used as stores or the like, nor rooms leased or let to tenants conferring on them an interest in the realty.

(12) Payment of an occupational license tax is generally enforceable by fine and imprisonment. A complaint in a criminal proceeding in the language of the ordinance, alleging necessary essential elements, with sufficient descriptive location of the structure, would be sufficient. The present ordinance, for revenue only, in no manner attempts to regulate the conduct of business. In its penal aspect, only one question need be considered: Is the language used so indefinite and uncertain that the ordinary lay mind would in good faith be deceived, and, whether engaged in the business of renting rooms

for lodging accommodations in a dilapidated barn, under the trade name of "barn," or in a sumptuous hotel apartment or apartment hotel, under the trade name of "inn," believe that he was not violating the ordinance? It is not reasonable to assume that one would be misled because lodging accommodations, under any name, are divided or separated horizontally instead of vertically. Even the "common mind" (*In re Peppers*, 189 Cal. 682 [209 P. 896]) would understand that a license tax could not be evaded because a "flat," in which a business of renting lodgings is conducted, is not specifically so defined in a building or health ordinance which enumerates structures conducting identical businesses. Any reasonable person engaged in such business would understand from the terms of the ordinance, having in mind its object, that it covered not only the structures enumerated, but any that might be included in such classifications.

(13) Where the terms in a statute or ordinance are capable of different constructions, that upholding the constitutionality thereof is preferable. (*In re Flesher*, 81 Cal. App. 128 [252 P. 1057].)

(1d) The ordinance does not attempt to interfere in the conduct of the business; it does not discriminate in the amount of taxes to be paid, nor does it expressly or impliedly exempt or discriminate between persons exercising the same privilege. It is sufficiently definite and certain in its terms to be enforceable.

The judgment is affirmed.

Peters, P. J., and Knight, J., concurred.

PROGRAMMING-ENTERPRISES, INC., Plaintiff and Respondent, v.
CITY OF LOS ANGELES, Defendant and Appellant

SUBSEQUENT HISTORY:

Respondent's petition for review by the Supreme Court was denied January 31, 1990. Broussard, J., and Kaufman, J., were of the opinion that the petition should be granted.

PRIOR HISTORY:

Superior Court of Los Angeles County, No. C 614589, Robert B. Lopez, Judge.

COUNSEL: James K. Hahn, City Attorney, Richard A. Dawson, Assistant City Attorney, and Michael L. Klekner, Deputy City Attorney, for Defendant and Appellant.

William M. Poindexter, Lee C. Heiman and Poindexter & Doutre for Plaintiff and Respondent.

JUDGES: Opinion by Roth, P. J., with Gates and Fukuto, JJ., concurring.

OPINIONBY: ROTH

OPINION: The City of Los Angeles appeals from a judgment in favor of respondent Programming-Enterprises, Inc., awarding a refund of business taxes for the years 1982 through 1986, in the sum of $ 128,404.90 plus prejudgment interest.

The facts are not in dispute. The city's business license ordinance imposes a tax on persons engaged in business in the city; the amount of tax is based on the taxpayer's gross receipts. Respondent is an employment agency doing business under the fictitious name Mini-Systems Associates. It specializes in placing engineers and computer programmers. Its gross receipts, insofar as this case is concerned, derive from its activities in placing workers in temporary employment. The ordinance imposes a business tax of 0.35 percent on the gross receipts of several types of businesses, including "temporary help agencies." (L. A. Mun. Code, § 21.189.1(a).) n1 A temporary help agency is defined as "any person engaged in the business of supplying *his employees* to others on a temporary basis." (§ 21.189.1(b), italics added).) Various tax rates are applied to other described types of businesses. The tax rate on gross receipts of businesses not specifically described is 0.50 percent. (§ 21.190(a); see generally *Times Mirror Co.* v. *City of Los Angeles* (1987) 192 Cal.App.3d 170, 174-175 [237 Cal.Rptr. 346]; *Marsh & McLennan of Cal., Inc.* v. *City of Los Angeles* (1976) 62 Cal.App.3d 108, 111-112 [132 Cal.Rptr. 796].)

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n1 All further section references are to the Los Angeles Municipal Code.

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Mini-Systems offers each of its temporary workers a choice of working either as Mini-Systems' employee or as an independent contractor. The parties are in agreement on the business tax consequences of the former arrangement. The tax consequences of the latter arrangement are the sole issue in this case.

For clarity, throughout this opinion we shall employ a hypothetical illustration which accurately reflects the undisputed facts.

Mini-Systems' office is situated within the City of Los Angeles. Mini-Systems keeps on file the curricula vitae of numerous computer programmers, engineers, and technical workers. Suppose Aeroshear, an aerospace firm located in Torrance -- outside the City of Los Angeles, tells Mini-Systems it needs two engineers on a temporary basis. Mini-Systems sends Aeroshear several resumes, including those of engineers Smythe and Jones. After interviewing several candidates, Aeroshear notifies Mini-Systems it wants Smythe and Jones. Mini-Systems and Aeroshear enter written agreements, in the form of Aeroshear purchase orders, covering Smythe's and Jones's work at Aeroshear. These agreements provide that Aeroshear will pay Mini-Systems $ 50 per hour for each hour worked. Smythe and Jones are not parties to these agreements.

Mini-Systems is satisfied that both Smythe and Jones are sufficiently reliable to be retained as independent contractors rather than employees, if they wish. Mini-Systems thus asks each whether he prefers to work as Mini-Systems' employee or as an independent contractor. Mini-Systems does not consult Aeroshear on this question; according to Mini-Systems' evidence, "it makes no difference to [Aeroshear] whether it is an independent contractor or employee." Insofar as this case is concerned, working as *Aeroshear's* employee is not an option made available to Smythe or Jones by either Aeroshear or Mini-Systems.

Smythe tells Mini-Systems he prefers to work as its employee. Mini-Systems then hires Smythe as its employee, entering into a written employment agreement with him whereby it agrees to pay him a wage of $ 42 per hour worked. n2 Aeroshear is not a party to this agreement. Mini-Systems obtains worker's compensation insurance covering Smythe and, as his employer, withholds employment taxes from his paycheck.

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n2 This figure is based upon evidence that Mini-Systems typically pays the worker an amount equal to 85 percent of what Mini-Systems receives.

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Jones, however, tells Mini-Systems he prefers to work as its independent contractor. Jones and Mini-Systems then enter into a written agreement whereby Mini-Systems engages Jones, as a self-employed independent contractor, to provide consulting services to Aeroshear, for which Mini-Systems agrees to pay Jones $ 42 per hour worked, without withholding taxes, and Jones agrees to pay his own taxes. Aeroshear is not a party to this agreement either.

Mini-Systems pays both Smythe and Jones weekly or biweekly, often before Mini-Systems has been paid by Aeroshear.

There is no dispute over the business tax due on account of Mini-Systems' arrangement with Smythe. With respect to that arrangement, Mini-Systems is, under the taxing ordinance, a temporary help agency: it supplies Smythe, its employee, to Aeroshear on a temporary basis. For each hour Smythe works, Mini-Systems is subject to a 0.35 percent tax on the $ 50 it receives from Aeroshear -- with one crucial refinement.

The refinement is this: for reasons discussed fully *infra*, the City of Los Angeles is not permitted to tax Mini-Systems' extraterritorial business activities, and Smythe labors at Aeroshear in Torrance, outside the Los Angeles city limits. Consequently the $ 50 Mini-Systems receives for each hour Smythe works must be allocated between that portion fairly attributable to activities performed by Mini-Systems inside the city (principally its recruitment effort and its bookkeeping and payroll activities) and that portion attributable to activities performed by its employees outside the city (Smythe's labors). Only the former may be taxed. To make the required allocation, the city promulgated a rule, known as City Clerk's Ruling No. 15, fixing this allocation at 20 percent inside the city and 80 percent outside the city, for every business located within the city which derives gross receipts due to work performed outside the city, "in the absence of substantial information to the contrary." n3

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n3 Mini-Systems maintained satellite offices outside the city, and some of the temporary employees were recruited by these offices. All accounting work was done at the main office inside the city. In 1985 Mini-Systems demonstrated to the city's satisfaction that the presumed 20/80 allocation fixed by ruling No. 15 should be altered to 15/85 with respect to gross receipts of Mini-Systems based on the labors of those temporary employees it had recruited through its satellite offices outside the city. The parties have agreed that this revised allocation governs all tax years in this litigation. Having noted this fact, to avoid unnecessary confusion we will in this opinion refer to the apportionment as 20/80.

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Hence for each hour Smythe works, the city imposes on Mini-Systems a 0.35 percent tax on 20 percent of the $ 50 it receives from Aeroshear. The tax on each $ 50 is thus 3.5

cents. Mini-Systems agrees this is the correct tax.

The city proposes a different tax treatment, however, of Mini-Systems' gross receipts in connection with Jones's work. Mini-Systems does not agree with the city. The dispute has three aspects.

First. The city refuses to classify Mini-Systems' gross receipts with respect to Jones as receipts of a temporary help agency. The ordinance defines a temporary help agency as "any person engaged in the business of supplying *his employees* to others on a temporary basis," and its gross receipts are taxed at the rate of 0.35 percent. (§ 21.189.1(a), (b), italics added.) Because Jones is not Mini-Systems' employee, the city instead classifies Mini-Systems' gross receipts on account of Jones's labors under the ordinance's "catchall" classification, section 21.190(a), which imposes a higher tax rate of 0.50 percent on the gross receipts of businesses not specifically described elsewhere. Mini-Systems contends this classification is erroneous under the ordinance, and if not erroneous, it is irrational and therefore deprives Mini-Systems of equal protection of the law.

Second. The city refuses to apply the 20/80 apportionment rule to the $ 50 Mini-Systems receives on account of each hour of Jones's work, and insists on taxing the entire $ 50 rather than only 20 percent of it, even though Jones, like Smythe, labors outside the city, because Jones is not Mini-Systems' employee. Mini-Systems contends apportionment is required.

Thus the city claims, with respect to Mini-Systems' arrangement with Jones, 0.50 percent of each $ 50: a tax of 25 cents. (The tax with respect to the Smythe arrangement, as stated earlier, is only 3.5 cents.)

Third. Though it taxes Mini-Systems at the 0.50 percent "catchall" rate, the city refuses to give Mini-Systems the benefit of a provision in the "catchall" portion of the ordinance -- section 21.190(c)(6) -- which requires, in counting Mini-Systems' gross receipts, *exclusion* of "Receipts of persons acting as agents or brokers for other persons to be paid over to such other persons . . . ." Mini-Systems contends that when Aeroshear pays it $ 50, it receives $ 42 of that sum *as Jones's agent* and in that capacity pays the $ 42 over to him; it receives for its own account only the remaining $ 8. Thus, Mini-Systems contends, the $ 42 cannot be included in its gross receipts, and its gross receipts subject to tax are only $ 8. If the city is permitted to deny it the lower 0.35 percent rate under the temporary help agency classification, and also to deny it the benefit of the 20/80 apportionment, Mini-Systems contends, its tax should be 0.50 percent of $ 8, or 4 cents.

The parties stipulated Mini-Systems paid the taxes demanded by the city, claimed refunds, and exhausted its administrative remedies; they further agreed the question of refund was properly before the court for decision. The trial court sustained Mini-Systems' position on the third issue and ordered a refund calculated on that basis. It also sustained Mini-Systems' position on the second issue, but did not calculate the refund on that basis. n4 The court rejected Mini-Systems' position on the first issue. The city appeals.

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n4 The amount of the refund sought was approximately the same under both theories, because under the apportionment theory Mini-Systems sought to exclude 85 percent of its gross receipts as allocable to out-of-city work, and under the agency theory it sought to exclude 85 percent of its gross receipts as sums it received as agent for the independent contractors. (See fns. 2 and 3, *ante*.)

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We sustain the city's position on all three issues. It is expedient to discuss them in the following order. (1) Mini-Systems does not act as Jones's agent, and the business tax is correctly imposed on the full $ 50, not just the $ 8 remaining in Mini-Systems' hands after it pays Jones. (2) Mini-Systems is not entitled to 20/80 apportionment of the $ 50 received for Jones's work. (3) The 0.50 percent tax rate is the correct rate under the ordinance and its imposition does not deprive Mini-Systems of equal protection of the law.

1. Mini-Systems is not Jones's agent within the meaning of section 21.190(c)(6), so it cannot exclude from its gross receipts an amount equal to the amount it pays Jones.

Section 21.190(c)(6) requires, in counting a taxpayer's gross receipts, exclusion of "Receipts of persons acting as agents or brokers for other persons to be paid over to such other persons . . . ." **(1)** Mini-Systems contends that when Aeroshear pays it $ 50, it receives $ 42 of that sum as Jones's agent and in that capacity pays the $ 42 over to him; it receives for its own account only the remaining $ 8 and can be taxed only on that amount.

This contention does not conform to the contractual arrangements Mini-Systems set up with Aeroshear and Jones. Aeroshear has no contract with Jones; it owes the $ 50 only to Mini-Systems and owes Jones nothing. Therefore Aeroshear's remittances to Mini-Systems cannot be considered payments Aeroshear makes to Jones through his agent; Mini-Systems receives the $ 50 for its own account. The lengthy and comprehensive written agreement between Mini-Systems and Jones nowhere states or suggests that Jones appoints Mini-Systems as his agent or that Mini-Systems agrees to act for him as his agent. Under this agreement, Mini-Systems' promise to pay Jones is its own obligation, not that of Aeroshear. (See *City of Los Angeles* v. *Sherwood* (1978) 85 Cal.App.3d 347, 351 [149 Cal.Rptr. 298].) When it makes this payment to Jones, Mini-Systems is not remitting to a principal funds it holds as his agent.

Section 21.190(c)(6) appears to apply, rather, when a taxpayer receives monies not for its own use and benefit but rather as an intermediary between two parties dealing with each other. (See *City of Los Angeles* v. *Clinton Merchandising Corp*. (1962) 58 Cal.2d 675, 681-682 [25 Cal.Rptr. 859, 375 P.2d 851]; *City of Los Angeles* v. *Meyers Bros. Parking System, Inc*. (1975) 54 Cal.App.3d 135 [126 Cal.Rptr. 545].) For example, a travel agent or a stockbroker could apparently exclude from their gross receipts sums received from clients to purchase airline tickets or investment securities, respectively. (See *City of Los Angeles* v. *Sherwood, supra*, 85 Cal.App.3d at pp. 350-351; § 21.189.1(c).) Sums the

taxpayer pays out pursuant to its own obligations cannot be subtracted from its gross receipts subject to tax. (*City of Los Angeles* v. *Security Systems, Inc*. (1975) 46 Cal.App.3d 950, 954 [120 Cal.Rptr. 600]; *Independent Casting-Television, Inc.* v. *City of Los Angeles* (1975) 49 Cal.App.3d 502, 507-509 [122 Cal.Rptr. 416].) This distinction is consistent with the ordinance's general definition of "gross receipts" as including "the total amount charged or received for the performance of any act, service or employment, of whatever nature it may be . . . *without any deduction therefrom on account of* the cost of the property sold, the cost of materials used, *labor or service costs* , interest paid or payable, losses *or any other expense whatsoever* . . . ." (§ 21.00(a), italics added.) n5

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n5 It is thus unnecessary to pass on the city's contention that section 21.190(c)(6)(ii), which commands the inclusion in gross receipts of sums a taxpayer receives in "compensation or reimbursement for salaries" of its "employees" (as "employees" is defined in Labor Code section 3350 et seq.), is applicable notwithstanding Jones's status as an independent contractor.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - *2. Mini-Systems' gross receipts in connection with Jones's work are not subject to apportionment*.

For constitutional reasons, when taxing a business located within the city, the city may not tax that portion of the business's gross receipts which is derived from or fairly attributable to its business activities carried on outside the city limits. (*City of Los Angeles* v. *Shell Oil Co*. (1971) 4 Cal.3d 108, 119 [93 Cal.Rptr. 1, 480 P.2d 953].) (2a) Inthe city's view, Mini-Systems' entire gross receipts based on Jones's work are fairly allocable to business activities conducted by Mini-Systems within the city limits because in connection with those receipts Mini-Systems has neither property nor employees located outside the city. Jones works outside the city, of course, but he is a self-employed consulting engineer, not Mini-Systems' employee.

The city is correct. (3) Apportionment is constitutionally required whenever failure to apportion would "operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction." (*City of Los Angeles* v. *Shell Oil Co., supra*, 4 Cal.3d 108, 124.) The city's tax ordinance also calls for such apportionment. (§ 21.190.1(d); see §§ 21.189.2(c), 21.15(h).) In *Shell* the Supreme Court identified two constitutional infirmities of an unapportioned tax. First, the potential burden of multiple taxation by different cities can put intercity businesses at a competitive disadvantage. (See 4 Cal.3d at pp. 118, 119, 123.) Secondly, the taxation of "an event" occurring outside the city constitutes the impermissible extraterritorial application of local laws. (See *id*. at p. 120.)

At bench, the taxation by the City of Los Angeles of the entirety of Mini-Systems' $ 50

gross receipts from its arrangement with respect to Jones does not implicate either constitutional restriction. Mini-Systems is not subjected to the possibility of double taxation on the same gross receipts, for it has not been suggested that the City of Torrance, under a business tax ordinance of its own, could tax the $ 50 Mini-Systems receives from Aeroshear in connection with the Jones arrangement; Mini-Systems has no presence in Torrance. Nor is Los Angeles attempting to tax business activities carried on outside its borders, for it is not taxing Jones's activities, only those of Mini-Systems.

The cases on apportionment are numerous, but none is on point. Most of the cases requiring apportionment for taxpayers providing services involve the business of transporting passengers or cargo both inside and outside the taxing jurisdiction. (*Willingham Bus Lines, Inc.* v. *Municipal Court* (1967) 66 Cal.2d 893 [59 Cal.Rptr. 618, 428 P.2d 602] (passenger transportation); *City of Los Angeles* v. *London Towne Livery Service, Ltd*. (1979) 97 Cal.App.3d 814 [159 Cal.Rptr. 94] (same); *City of Los Angeles* v. *Drake* (1961) 195 Cal.App.2d 744 [16 Cal.Rptr. 103] (same); *City of Los Angeles* v. *Carson* (1960) 181 Cal.App.2d 540 [5 Cal.Rptr. 356] (same); *Security Truck Line* v. *City of Monterey* (1953) 117 Cal.App.2d 441 [256 P.2d 366] (fish hauling); see *Ferran* v. *City of Palo Alto* (1942) 50 Cal.App.2d 374 [122 P.2d 965] (laundry).) So far as these opinions reveal, the work performed outside the taxing jurisdiction was always rendered by the taxpayer's own employees as opposed to independent contractors.

Other cases, involving goods -- in some of which apportionment was required and in others not -- also do not suggest that the extraterritorial activities of the taxpayer were carried on by anyone other than the taxpayer's own employees. (*General Motors Corp.* v. *City of Los Angeles* (1971) 5 Cal.3d 229 [95 Cal.Rptr. 635, 486 P.2d 163](manufacture and sale of motor vehicles); *City of Los Angeles* v. *Shell Oil Co., supra*, 4 Cal.3d 108 (sale of gasoline); *Carnation Co.* v. *City of Los Angeles* (1966) 65 Cal.2d 36 [52 Cal.Rptr. 225, 416 P.2d 129] (manufacture and sale of foodstuffs); *City of Los Angeles* v. *Belridge Oil Co*. (1957) 48 Cal.2d 320 [309 P.2d 417] (sale of petroleum products); *City of Los Angeles* v. *Belridge Oil Co*. (1954) 42 Cal.2d 823 [271 P.2d 5] (same); *Times Mirror Co.* v. *City of Los Angeles* (1987) 192 Cal.App.3d 170, 186-189 [237 Cal.Rptr. 346] (publication and sale of newspapers); *Universal Consolidated Oil Co.* v. *City of Los Angeles* (1962) 202 Cal.App.2d 771 [21 Cal.Rptr. 61] (production and sale of crude oil).)

Irvine Co. v. *McColgan* (1945) 26 Cal.2d 160, 167 [157 P.2d 847, 167 A.L.R. 934] contains language to the effect that a corporation is not entitled to apportionment of state franchise tax for business conducted outside the state unless that business is done "*by* the corporation acting through its officers or agents." (26 Cal.2d at p. 167, original italics.) This decision supports the city's position, but it is not controlling because the constitutional dimensions of apportionment differ when interstate commerce is implicated. (See *City of Los Angeles* v. *Shell Oil Co., supra*, 4 Cal.3d 108, 119; *General Motors Corp.* v. *City of Los Angeles, supra*, 5 Cal.3d 229, 241, fn. 13.)

The parties have debated at length the case of *Hospital Medical Collections, Inc.* v. *City of Los Angeles* (1976) 65 Cal.App.3d 46 [135 Cal.Rptr. 147]. This decision is of little value on the apportionment issue because it focused on what is includible in the taxpayer's gross receipts rather than what is allocable to nonlocal activity. To the limited extent the opinion does discuss apportionment (see 65 Cal.App.3d at pp. 53-55), it

supports the city, for it found the city was not attempting to tax outside its jurisdiction when it included in the gross receipts of a Los Angeles collections bureau the entire commission earned from its clients, even though it had contracted with, and shared its commissions with, out-of-town collection firms which performed some of the collection activities as independent contractors.

Thus none of these cases addressed the question at bench: whether activities which the taxpayer arranges for, and from which it benefits, but which are carried on not by the taxpayer's employees but rather by independent persons with whom the taxpayer contracts, must be apportioned to the extent those independent persons conduct their activities outside the taxing jurisdiction.

Though unguided by precedent, we have no difficulty answering this question. The extraterritorial business activities of which apportionment is required are activities carried on by the taxpayer, i.e, the corporation and its employees and agents, and not activities carried on by others, even though the taxpayer may have advantageous contracts with those others. Mini-Systems has no employees carrying out its affairs in Torrance; only Jones labors in Torrance, and he is an independent, self-employed consulting engineer. Jones's activities are not those of Mini-Systems, and so no apportionment is required.

It avails Mini-Systems nothing to point out that in substance Jones and Smythe are indistinguishable. The contractual formalities set up by Mini-Systems have substantial legal consequences -- this was undoubtedly Mini-Systems' reason for creating these arrangements in the first place -- and are not to be disregarded. By making Jones an independent contractor, Mini-Systems undoubtedly procured for itself significant costs savings, not the least of which were tax savings; it also by this arrangement made it possible for Jones to reap like advantages. Mini-Systems also used the distinction as a marketing strategy: its promotional brochure describes persons like Smythe as "members of our engineering and computer staff who work for limited durations at the client's site under client direction" and those like Jones as "Consulting Technical Personnel . . . the elite members of the technical community whose high level of expertise is available from our extensive pool of consulting associates."

Mini-Systems is in no position, therefore, to demand that the contractual arrangement it created be disregarded, as lacking in substance, by the one public entity under whose taxing system that arrangement had consequences Mini-Systems finds disadvantageous. As was aptly observed in *Independent Casting-Television, Inc.* v. *City of Los Angeles* (1975) 49 Cal.App.3d 502, 508-509 [122 Cal.Rptr. 416], "Nor can Taxpayer escape the tax consequences of the plan of operation adopted by it because the plan is sound in a business sense. Tax consequences follow what is done irrespective of motivation. If good business management dictates that a particular mode of operation be employed, Taxpayer is in no position to complain that the economies of operation attained by that mode are offset to a degree by the tax which the law imposes upon it." (See also *City of Los Angeles* v. *Olson Farms, Inc*. (1983) 142 Cal.App.3d 527, 531 [191 Cal.Rptr. 485].)

3. Application of the higher 0.50 percent tax rate is correct under the ordinance and does not deprive Mini-Systems of equal protection of the laws.

(4) Mini-Systems is not entitled under the taxing ordinance to have its gross receipts taxed at the lower 0.35 percent rate applicable to temporary help agencies because its operations, with respect to Jones -- who is not its employee -- do not bring it within the ordinance's definition of temporary help agency: "any person engaged in the business of supplying *his employees* to others on a temporary basis." (§ 21.189.1(b), italics added).)

This distinction between the tax rates applied to Mini-Systems' gross receipts with respect to Smythe and Jones does not constitute an unconstitutional arbitrary classification. We repeat our remarks in *City of Los Angeles* v. *London Towne Livery Service, Ltd., supra*, 97 Cal.App.3d at page 819: "[A]n attack upon a tax classification based upon a claim that equal protection has been violated is a most difficult enterprise.' [Citation.] The ordinance carries a presumption of constitutionality which can be overcome only by strong evidence that the classification oppressively discriminates against a particular person or group." Mini-Systems has demonstrated no oppressive discrimination. As we have already observed, the manner in which a business chooses to structure its operations often has significant tax consequences.

The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion. Costs to appellant.

CITY OF LOS ANGELES, Plaintiff and Appellant, v. H. R. SHERWOOD et al., Defendants and Respondents

Civ. No. 52292

Court of Appeal of California, Second Appellate District, Division Five

85 Cal. App. 3d 347; 1978 Cal. App. LEXIS 1975; 149 Cal. Rptr. 298

September 11, 1978

SUBSEQUENT HISTORY: [**1]

A petition for a rehearing was denied October 5, 1978, and respondents' petition for a hearing by the Supreme Court was denied November 9, 1978.

PRIOR HISTORY:

Superior Court of Los Angeles County, No. C 42129, Benjamin Landis, Judge.

DISPOSITION: The judgment is reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff city sought review of a decision of the Superior Court of Los Angeles County (California), which found that defendant doctors were not liable for certain business taxes.

OVERVIEW: Defendant doctors created a system whereby a number of doctors set up individual practices within the same building, but shared operating costs. All patient receipts were collected into a clearance account and doctors and rents were paid from this account. Plaintiff city argued that defendants were liable for business taxes under Los Angeles Municipal Code § 21.190. The reviewing court agreed. Under Los Angeles Municipal Code § 21.190 independent contractors were taxed upon their gross receipts. While certain monies were excluded from taxation under Los Angeles Municipal Code § 21.190(c)(6), this did not apply to independent contractors. The reviewing court found that defendants were independent contractors, not agents, because defendants did not represent the doctors in any capacity beyond purely administrative tasks.

OUTCOME: A decision that found that defendant doctors were not liable for certain business taxes in a suit by plaintiff city was reversed because defendants were independent contractors and were not excluded from the relevant tax.

CORE TERMS: doctor, producer, gross receipts, payroll, monies received, deposited, incidental expenses, subsidiary, broker, fringe benefits, supplied, workers' compensation, medical building, contractor, collected, patients, taxed, nurses

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Los Angeles Municipal Code § 21.03 imposes a business tax upon certain businesses. Under Los Angeles Municipal Code § 21.190 independent contractors are taxed upon their gross receipts. Such receipts are defined in Los Angeles Municipal Code § 21.00(a) as including: the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, without any deduction therefrom on account of labor or service costs losses or any other expenses whatsoever.

Business & Corporate Entities : Agency : Agency Established : Elements of Agency
The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties.

COUNSEL: Burt Pines, City Attorney, Thomas C. Bonaventura, Assistant City Attorney, and Pedro B. Echeverria, Deputy City Attorney, for Plaintiff and Appellant.

A. Perry Insel, Nossaman, Krueger & Marsh and James A. Hamilton for Defendants and Respondents.

JUDGES: Opinion by Hastings, J., with Kaus, P. J., and Stephens, J., concurring.

OPINIONBY: HASTINGS

OPINION: [*349] [***298] This is an action to collect business taxes which the plaintiff, the City of Los Angeles (City), contends are owed it by the defendants. After a nonjury trial, judgment was entered for the defendants, and the City appeals.

Defendants are three medical doctors who formed a corporation called Vendunn Company (Vendunn). In 1951, Vendunn purchased land and constructed a medical building. The defendants set up their individual practices in this building and leased office space to other doctors. n1 It was defendants' intention that the building would house [**2] most every medical specialty so that the nearby community would have

available [***299] comprehensive medical care under one roof. All the doctors practice individually but share operating costs. All receipts from the doctors' patients are collected by the defendants and deposited in a clearance account. The doctors recieve a certain percentage of their receipts out of this account, another percentage is allotted for rent paid to Vendunn and the remainder of the receipts are deposited into the Sherwood-Trimble Special Business Account (Special Business Account). (See fn. 3, infra.)

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n1 To avoid confusion, any reference to "doctors" means all of the individual doctors, including defendants, who are tenants in the medical building.

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The City claims that defendants are engaged in a business as defined by section 21.190 of the Los Angeles Municipal Code (LAMC). n2 This section taxes every person engaged in any business trade as an independent contractor who is not specifically taxed by other provisions of [**3] the LAMC. The tax is measured by the gross receipts of the trade, which in this case would be the monies deposited in the Special Business Account.

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n2 Unless otherwise stated, all references to code sections pertain to the Los Angeles Municipal Code.

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The defendants relied on a specific exemption afforded by section 21.190, subdivision (c)(6), which excludes from gross receipts of persons acting as agents or brokers, receipts "other than [1] receipts received as commissions or fees earned, or [2] charges of any character made or compensation of any character received for the performance of any service as agent or broker . . . ." (Italics added.)

The trial court found defendants were engaged in business within the purview of the LAMC, and that they were agents of the doctors, but that [*350] monies received by them through the Special Business Account, n3 were not received as commissions or as compensation for the performance of any service as agent or broker, thus untaxable under section 21.190, [**4] subdivision (c)(6). The basis for this ruling was the court's determination that defendants "paid out (the monies) on behalf of the Doctors . . . ."

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n3 Approximately 20 percent of the doctors' gross fees was deposited with this account each month. The city bases its tax on these gross receipts. The tax for the years in question, 1969, 1970 and 1971, totaled $ 4,120.24.

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The trial court's finding (memorandum of intended decision) that defendants were engaged in a business within the meaning of LAMC is extremely important. The facts support this conclusion. n4 Therefore, the only issue on appeal is whether the facts support the trial court's finding that the monies received by the defendants were exempt from the tax for the reasons stated. Defendants claim there is substantial evidence to support the judgment and therefore we must affirm. For the reasons, hereinafter stated, we disagree and reverse the judgment.

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n4 The principal supporting facts are: Defendants share equally in any profits or losses. They were responsible for paying payroll obligations and expenses if the 20 percent charged the doctors was insufficient to meet them. In one of the three years in question, there was a $ 3,000 profit and each defendant received $ 1,000. Rent paid on some of the equipment used by the doctors was owned by the defendants. The services rendered by defendants could be very attractive to a doctor renting space in the defendants' building, thus assuring higher than average occupancy.

At oral argument before this court some doubt was expressed about this finding and defendants argued that they were not conducting a business. We continued the matter for further briefing on this issue. Defendants' supplemental brief does not persuade us that the trial court's finding was in error.

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Section 21.03 imposes a business tax upon certain businesses. Under section 21.190 independent contractors are taxed upon their gross receipts. Such receipts are defined in subdivision (a) of section 21.00 as including: ". . . the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, . . . without any deduction therefrom on account of . . . labor or service costs . . . losses or any other expenses whatsoever . . . ."

If we stop here, it is clear that all receipts in the Special Business Account (the 20 percent of the doctors' gross fees) would be subject to the tax. Defendants argue, [***300] however, that because all, or most all the monies received were spent by them for services furnished the doctors by nurses, technicians, receptionists, bookkeeping and clerical staff, etc., and for rental equipment, that these receipts are excluded from tax by section 21.190, subdivision (c)(6). This is incorrect. The principal type of receipts [*351] excluded are monies received by agents who, in turn, must purchase specific items ordered by the client. Examples are travel agents who purchase airline tickets, lodging, [**6] etc., for the customer, and stockbrokers who purchase investments. (See Ordinance No. 149,503.) The 20 percent charged the doctors by defendants is for services and equipment provided by them through their business. In other words, they are meeting their own obligations for payroll and expenses. The record shows that all the employees paid through this fund are employees of defendants. They hire them and fire them. They pay their salaries, withhold their income tax and provide workers' compensation insurance and unemployment insurance. n5

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n5 It is true that the doctors had full range of choice in their selection of secretaries and nurses and defendants would usually discharge or transfer an employee if requested to do so by a dissatisfied doctor; however, the final decision rested with the defendants.

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The facts demonstrate that defendants were independent contractors and not agents for the doctors. The chief characteristic of the agency is that of representation, the authority to act for and in the place [**7] of the principal for the purpose of bringing him or her into legal relations with third parties. (1 Witkin, Summary of Cal. Law (8th ed., 1973) Agency and Employment, § 4, p. 646; Marsh & McLennan of Cal., Inc. v. City of Los Angeles, 62 Cal.App.3d 108, 117 [132 Cal.Rptr. 796].) The only instance in which defendants arguably represent the doctors is in billing and collecting amounts due from patients. However, this is purely an administrative or mechanical act involving no representation of the doctors by respondents.

The direction and control of defendants' employees by the doctors does not aid defendants' arguments. At most, it supports a "general-special" employment situation. In Independent Casting-Television, Inc. v. City of Los Angeles, 49 Cal.App.3d 502 [122 Cal.Rptr. 416], the taxpayer was an agency that supplied "extra" actors to motion picture producers. The agency billed the producers and received payment from them for the wages paid to the extras plus an amount intended to cover payroll taxes, fringe benefits, workers' compensation insurance premiums, and a service charge. Taxpayer treated the extras as its employees for state and federal tax [**8] purposes, workers compensation and fringe benefits. In essence, the taxpayer acted in a fashion consistent with its employment of the extras and its supplying their services to the producers. Taxpayer contended that the amounts received for the extras' wages, payroll taxes and other costs incidental thereto were not gross receipts. The taxpayer argued that the extras were not its employees because the producer exercised control over [*352] them on the job and because the arrangement was required by administrative convenience. Answering these contentions, the court, at pages 508-509, stated: "It is not significant that the extras are special employees of the producer during their work (see 2 Witkin, Summary of Cal. Law (8th ed.) Workmen's Compensation, § 91) so long as they are also employees of Taxpayer which supplied their services to the producers. It is the latter fact to which the incidents of the Los Angeles city license tax attaches by reason of section 21.00 and 21.190. It is the fact that Taxpayer meets its own payroll and incidental expenses and not the technicalities of the joint employment relationship that results in the payments from the producers being includable [**9] in taxpayer's gross receipts. [para.] Nor can Taxpayer escape the tax consequences of the plan of operation adopted by it because the plan is sound in a business sense. Tax consequences follow what is done irrespective of motivation. If good business management dictates that a particular mode of operation be employed, Taxpayer is in no position to [***301] complain that the economies of operation attained by that mode are offset to a degree by the tax which the law imposes upon it. Taxpayer, after all, determined to treat the extras as its employees and to bill the producers for a variety of items including not only direct wage expense but also a negotiated figure for various incidental expenses and a fee for its services. Having done

so, it cannot escape the tax consequences which do not permit it to deduct its own payroll and incidental expenses."

Also in point is Rexall Drug Co. v. Peterson, 113 Cal.App.2d 528 [248 P.2d 433], where Rexall, a parent corporation, furnished accounting, financial, personnel, legal, executive managerial and directive services to its wholly owned subsidiaries and charged each subsidiary its proportionate share of the cost of these [**10] services but no profit, the tax was sustained. The City claimed that such charges were taxable gross receipts under the same section 21.190 involved herein. Rexall contended on several grounds that the charges did not constitute gross receipts. The court rejected Rexall's contentions on the basis that Rexall was providing services to separate legal entities and the charges collected from the subsidiaries went to meet Rexall's own expenses in rendering such services.

City of Los Angeles v. Meyers Bros. Parking System, Inc., 54 Cal.App.3d 135 [126 Cal.Rptr. 545], relied upon by defendants is clearly [*353] distinguishable, and does not mandate an affirmance. The facts of our present case show the court erred as a matter of law.

The judgment is reversed.

INDEPENDENT CASTING-TELEVISION, INC., Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Appellant

Civ. No. 45316

Court of Appeal of California, Second Appellate District, Division One

49 Cal. App. 3d 502; 1975 Cal. App. LEXIS 1225; 122 Cal. Rptr. 416

June 27, 1975

SUBSEQUENT HISTORY: [**1]

The Petition of the Plaintiff and Appellant for a Hearing by the Supreme Court was Denied August 28, 1975.

PRIOR HISTORY:

Superior Court of Los Angeles County, No. C58031, Arnold Levin, Temporary Judge. *

* Pursuant to Constitution, article VI, section 21.

DISPOSITION: The judgment is reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant city challenged the order of the Superior Court of Los Angeles County (California), which held plaintiff casting agency was owed a refund on license taxes paid pursuant to Los Angeles Municipal Code § 21.03. Defendant argued that gross receipts, defined by Los Angeles Municipal Code § 21.00(a), included reimbursements for wages paid to extras. Plaintiff appealed the denial of interest on the refund.

OVERVIEW: The court reversed the trial court and held plaintiff casting agency was not due a refund for city license taxes paid pursuant to Los Angeles Municipal Code § 21.03 because plaintiff was the employer, for tax purposes, of extras plaintiff placed with

producers. The court rejected plaintiff's argument that it was acting as an agent of producers when it paid wages to extras it placed with the producers and held the sums were paid by plaintiff to satisfy its own obligations to its employees. Because producers reimbursed plaintiff the cost of its wages, but Los Angeles Municipal Code § 21.14 did not permit deduction of labor costs in determining the amount of gross receipts, the reimbursements were part of plaintiff's gross receipts and were not simply paid to plaintiff as an agent of producers. The court held that it was irrelevant whether the extras could be considered joint employees of producers because the relevant question was whether plaintiff was responsible for their payroll or whether the producers were.

OUTCOME: The court reversed the trial court's judgment, which held plaintiff casting agency was owed a refund on city license taxes. The court held that extras placed with producers were employees of plaintiff because plaintiff paid their wages and that sums paid to plaintiff by producers, for plaintiff's provision of extras, were part of plaintiff's taxable gross receipts rather than sums paid to plaintiff as an agent of producers.

CORE TERMS: producer, gross receipts, collective bargaining agreement, designated, includable, payroll, hiring, registered, compensation insurance, negotiated, casting, refund, players, incidental expenses, fringe benefits, taxes imposed, license tax, person engaged, total amount, characterization, excludable, readily available, employment agency, amounts withheld, service charge, work performed, motion picture, entire amount, trust funds, own account

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Franchise Tax
The term gross receipts encompasses the total of amounts received as consideration for the services of personnel employed by the taxpayer supplied as special employees to others where the taxpayer acts for his own account in employing the employees and not as an agent arranging the employment.

Tax Law : State & Local Tax : Franchise Tax
An "employment agency" includes a person who acts as a labor contractor -- i.e., who employs another to render services to or under the direction of a third party. Cal. Bus. & Prof. Code § 9902(c).

Tax Law : State & Local Tax : Franchise Tax
The Los Angeles Municipal Code imposes a license tax for the privilege of doing business within the city, Los Angeles Municipal Code § 21.03, measured by gross receipts of the previous year, Los Angeles Municipal Code § 21.14(a). Gross receipts are defined in Los Angeles Municipal Code § 21.00(a) as the total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature for which a charge is made or credit allowed, including

all receipts, cash, credits, and property without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, losses or any other expense whatsoever.

Tax Law : State & Local Tax : Franchise Tax
The license tax is imposed upon every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions.

Tax Law : State & Local Tax : Franchise Tax
Los Angeles Municipal Code § 21.189.1(b) (1974) imposes the license tax upon "Temporary-Help Agency" defined as any person engaged in the business of supplying his employees to others on a temporary basis; provided however that such term shall not include an agency for the brokerage of labor for a fee to be paid either by the applicant for employment or the prospective employer. The rate of tax pursuant to § 21.189.1 is $ 21 per year for the first $ 6,000 of gross receipts and $ 3.50 per year for each additional $ 1,000 of gross receipts in excess of $ 6,000.

COUNSEL: Cochran & Shepphird, John D. Cochran and John R. Shepphird for Plaintiff and Appellant.

Burt Pines, City Attorney, Thomas C. Bonaventura, Assistant City Attorney, and Richard A. Dawson, Deputy City Attorney, for Defendant and Appellant.

JUDGES: Opinion by Thompson, J., with Wood, P.J., and Lillie, J., concurring.

OPINIONBY: THOMPSON

OPINION: [*504] [***417] The case at bench involves the definition of gross receipts for the purpose of the Los Angeles city license tax. We conclude that the term encompasses the total of amounts received as consideration for the services of personnel employed by the taxpayer supplied as special employees to others where the taxpayer acts for his own account in employing the employees and not as an agent arranging the employment. We reverse a trial court judgment holding to the contrary.

The facts are stipulated. A majority of motion picture producers doing business [**2] within the City of Los Angeles (City) entered into a collective bargaining agreement with the Screen Extras Guild. The remaining motion picture producers within the City deal with extra players in a manner in accord with the agreement. The collective bargaining agreement recognizes the Screen Extras Guild as the exclusive bargaining agent for extra players (extras). The producer is required to hire extras at not less than a minimum wage established in the agreement. There is a provision for agreement between the extras and producers for specified adjustments in pay. The producer is required to give specified

preferences to extras in hiring. A grievance procedure is established. Producers are required to make payments to specified trust funds for employee benefits.

The agreement provides for a preference in employment to extras registered on the rolls of a producer's designated casting agency. A producer is precluded from hiring extras from any other source unless the registered extras are unqualified, insufficient in number, or not readily available "according to the present general hiring practice of the above designated casting agencies." Additional persons may be registered [**3] on the rolls of the designated casting agencies only when the same standard of not readily available extras is met. The agreement states: "Only the Producer or its hiring agency shall perform any services in connection with the hiring or employment of extra players."

Independent Casting-Television, Inc. (Taxpayer) is not a party to the collective bargaining agreement but is named as a "designated hiring agency." Extras register with Taxpayer, filling out a personnel form and an Internal Revenue Service Form W-2 Employee's Withholding Exemption Certificate. In the years 1968 through 1973, an average of about 3,500 extras were registered with Taxpayer. Taxpayer maintains a file of [*505] cards identifying the principal characteristics of extras registered with it. Producers call Taxpayer and request that Taxpayer have specified extras or extra players meeting a given description report to work on a specified production at a designated time and place. Taxpayer enters the order on a form order sheet. It reviews its file and selects extras meeting the producer's requirements, advising them to report to work in specified attire at the designated time and place. Taxpayer prepares [**4] and forwards an "Independent Casting Extra Talent Voucher" to the producer for each extra reporting for work. The form contains the name of the extra and the base rate of pay for work to be performed as specified in the collective bargaining agreement.

The extra reports for work at the designated time and place and performs his services under the direction and control of the producer. The voucher is signed by the extra. The producer inserts an indication of the time and type of work performed and in some cases the amount to be paid to the extra. The producer initials the voucher and forwards it to Taxpayer at the time the extra is dismissed. If the producer has not inserted the amount to [***418] be paid, Taxpayer computes the amount due the extra for the type of work performed by reference to the collective bargaining agreement. Taxpayer deducts from the sum due the extra the sums required by California and federal law and the collective bargaining agreement. It pays the extra the net amount after deductions by a check to which is appended an "Employee's Earning Statement" identifying the production company and specifying the deductions taken in computing the amount of [**5] the check. The statement also includes a tally of the gross amount paid to the extra for the year to date for work for all producers, and the deductions taken from that gross figure for the year to date. Each extra is paid by Taxpayer only after oral or written approval by the producer.

Taxpayer invoices the producer for the wages paid to extras, plus a negotiated amount intended to cover estimated payroll taxes imposed by law on the employer, fringe benefits due per the collective bargaining agreement, workmen's compensation insurance payments, and a "service charge." The producer pays the amount billed. Taxpayer pays the amount of tax withheld from the extra's pay, together with other taxes imposed upon

employer and employee. It prepares and files the required employer's quarterly federal tax return, and a quarterly contribution return and report of wages under the Unemployment Insurance Code, and report of personal income taxes withheld. Taxpayer reports to the [*506] appropriate governmental agencies "as if it were the employer" of the extras. At the end of each year, Taxpayer furnishes each extra with a federal W-2 form reporting his earnings, deductions, and withholding [**6] earned while performing services for producers "who authorized [Taxpayer] to pay [the] extras." Taxpayer reports and pays to the Screen Extras Guild-Producers Welfare Plan, the Motion Picture Industry Pension Plan, and the Motion Picture Health and Welfare Fund the amounts withheld from the extra's pay and the producer's contribution "in accordance with" the collective bargaining agreement. Taxpayer maintains workmen's compensation insurance for the extras and the producers are "added to the policy as additional insured employers, but solely as respects employees of [Taxpayer] while performing work for the [producers named]." Taxpayer is licensed by the state as an employment agency. n1 During the years 1968 through 1972, Taxpayer rendered its services to approximately 214 separate producers, and each producer used the services approximately five times each year.

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n1 An "employment agency" includes a person who acts as a labor contractor -- i.e., who employs another to render services to or under the direction of a third party. (Bus. & Prof. Code, § 9902, subd. (c).)

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**7]

The Los Angeles Municipal Code imposes a license tax for the privilege of doing business within the city (§ 21.03; Carnation Co. v. City of Los Angeles, 65 Cal.2d 36, 37-38 [52 Cal.Rptr. 225, 416 P.2d 129]) measured by gross receipts of the previous year (§ 21.14, subd. (a)). Gross receipts are defined in section 21.00, subdivision (a), of the Los Angeles Municipal Code as "'The total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature . . . for which a charge is made or credit allowed, including all receipts, cash, credits and property . . . without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, losses or any other expense whatsoever; . . ." During the tax years 1969 through 1972, the tax was imposed upon "every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions . . ." at the rate of $ 30 per year for the first $ 6,000 [**8] of gross receipts, plus [***419] $ 5 per year for each $ 1,000 of gross receipts in excess of $ 6,000. (§ 21.190, subd. (a).) n2

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n2 Operative January 7, 1974, section 21.189.1, subdivision (b), was added to the Los Angeles Municipal Code. That section imposes the tax upon "Temporary-Help Agency" defined as "any person engaged in the business of supplying his employees to others on a temporary basis; provided however that such term shall not include an agency for the brokerage of labor for a fee to be paid either by the applicant for employment or the

prospective employer." The rate of tax pursuant to section 21.189.1 is $ 21 per year for the first $ 6,000 of gross receipts and $ 3.50 per year for each additional $ 1,000 of gross receipts in excess of $ 6,000.

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[*507] Taxpayer paid the Los Angeles business license tax pursuant to section 21.190 for the years 1969 through 1972 on the theory that the entire amount it received from producers was includable in its gross receipts and hence in the measure [**9] of tax. It filed timely claims for refund, contending that only the amount of its service charge plus the excess of the negotiated amounts intended to cover estimated payroll taxes, fringe benefits, and workmen's compensation insurance premiums over the actual amount of such items paid by Taxpayer was includable in its gross receipts. The claim was denied and a timely action was commenced by Taxpayer. The trial court accepted Taxpayer's theory as set out in its claim and granted it a judgment accordingly. The court denied interest on the judgment. The City appealed from the judgment granting the refund, and Taxpayer appealed from the portion of the judgment denying it interest.

Resolution of City's appeal depends upon characterization of the relationship of the extras, Taxpayer, and the producers. If the amounts which Taxpayer contends are excludable in computing its gross receipts were advanced by it as agent for the producers to satisfy payroll obligations of the producers to their employees, the reimbursement of the sums by the producers to Taxpayer is not includable within its gross receipts. (City of Los Angeles v. Clinton Merchandising Corp., 58 Cal.2d 675, 681 [**10] [25 Cal.Rptr. 859, 375 P.2d 851].) If, however, those sums were paid by Taxpayer to satisfy its own obligation to its own employees and were includable within a charge for their services made by Taxpayer to the producers, then the entire amount paid by the producers is includable within Taxpayer's gross receipts since section 21.14 of the Los Angeles Municipal Code does not permit the deduction of labor or service costs in determining the amount of those receipts. (City of Los Angeles v. Security Systems, Inc., 46 Cal.App.3d 950, 954 [120 Cal.Rptr. 600]; Rexall Drug Co. v. Peterson, 113 Cal.App.2d 528, 529-530 [248 P.2d 433].)

Since the facts have been stipulated, we treat the issue of characterization as one of law. (City of Los Angeles v. Security Systems, Inc., supra, 46 Cal.App.3d at pp. 953-954; Jones-Hamilton Co. v. Franchise Tax Bd., 268 Cal.App.2d 343, 347 [73 Cal.Rptr. 896].) We conclude from [*508] the stipulated facts that the extras were employees of Taxpayer and that it paid the amounts claimed by it to be excludable from its gross receipts for its own account and not as the agent of the producers. The collective bargaining [**11] agreement contemplates use of designated casting agencies of which Taxpayer is one in the hiring of extras. Taxpayer treats the extras as its employees for state and federal tax purposes, workmen's compensation, and the collective bargaining agreement. It withholds income tax from sums due the extras and remits the amounts withheld. It pays the employer's taxes imposed upon the payroll incurred for extras. It pays premiums upon workmen's compensation insurance and the amounts required by the collective bargaining agreement to be disbursed to various trust funds to cover fringe benefits. Taxpayer bills the producers not only for wages computed per a schedule but also for a negotiated sum representing items incidental to employment with no provision

that an excess [***420] of billing over actual expense be refunded to the producer or that the producer make up any deficiency. In essence, Taxpayer acts in a fashion consistent with its employment of the extras and its supplying their services to the producers.

Taxpayer seeks to avoid the compelled result by arguing that: (1) the producer and not Taxpayer exercises control over the extras when they are on the job; and (2) the arrangement [**12] by which it treats extras as employees for some purposes is required by administrative convenience and economic necessity in order to avoid the difficulty and expense of extra record keeping that would be involved if each extra were treated administratively as an employee of a particular producer during the period the extra was working for the production company.

It is not significant that the extras are special employees of the producer during their work (see 2 Witkin, Summary of Cal. Law (8th ed.) Workmen's Compensation, § 91) so long as they are also employees of Taxpayer which supplied their services to the producers. It is the latter fact to which the incidents of the Los Angeles city license tax attaches by reason of section 21.00 and 21.190. It is the fact that Taxpayer meets its own payroll and incidental expenses and not the technicalities of the joint employment relationship that results in the payments from the producers being includable in taxpayer's gross receipts.

Nor can Taxpayer escape the tax consequences of the plan of operation adopted by it because the plan is sound in a business sense. Tax consequences follow what is done irrespective of motivation. If good [**13] [*509] business management dictates that a particular mode of operation be employed, Taxpayer is in no position to complain that the economies of operation attained by that mode are offset to a degree by the tax which the law imposes upon it. Taxpayer, after all, determined to treat the extras as its employees and to bill the producers for a variety of items including not only direct wage expense but also a negotiated figure for various incidental expenses and a fee for its services. Having done so, it cannot escape the tax consequences which do not permit it to deduct its own payroll and incidental expenses.

We thus conclude that the trial court erred in determining that Taxpayer is entitled to a refund of the taxes paid by it. Having done so, we do not reach Taxpayer's contention that it is entitled to interest on the refund erroneously ordered by the trial court.

The judgment is reversed.

AMERICAN PRESIDENT LINES, LTD., Plaintiff and Appellant, v. FRANCHISE TAX BOARD, Defendant and Respondent

Civ. No. 26262

Court of Appeal of California, First Appellate District, Division Two

3 Cal. App. 3d 587; 1970 Cal. App. LEXIS 1154; 83 Cal. Rptr. 702

January 19, 1970

PRIOR HISTORY: [**1]

Superior Court of the City and County of San Francisco, Raymond J. Arata, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant taxpayer sought review of an order of the Superior Court of the City and County of San Francisco (California), which entered a judgment in favor of respondent Franchise Tax Board (board) in appellant's action for a refund of franchise taxes it paid to the board under protest pursuant to Cal. Rev. & Tax. Code § 23151.

OVERVIEW: Appellant taxpayer challenged the trial court's judgment in favor of respondent Franchise Tax Board (board). Appellant, in seeking a refund of franchise taxes, contended that it engaged only in interstate commerce and was not subject to the state franchise tax, and that even if it were, the board erred in allocating to California all of appellant's federal reserve fund interest. The board and trial court agreed that appellant's services as a steamship corporation engaged as both a husbanding and general agent for the transportation of passengers and property between American and foreign ports, were intrastate activities subject to corporation franchise tax under Cal. Rev. & Tax. Code § 23151; that the reserve fund interest was includable in appellant's taxable income, and; that the interest was wholly allocable to California as appellant's commercial domicile. The court affirmed, holding that appellant's local business activities were separate from its own interstate and foreign commerce activities, and that

all of appellant's reserve fund interest income was allocable to California because it was not part of the unitary business's operating income and not subject to apportionment.

OUTCOME: The court affirmed the trial court's judgment in favor of respondent Franchise Tax Board (board) in appellant taxpayer's action for a refund of franchise taxes, because appellant's transportation services and general agent activities were intrastate activities separate from appellant's own interstate activities and thus were subject to franchise tax, and the board properly allocated appellant's reserve fund interest income to California.

CORE TERMS: ship, interstate commerce, interstate, shipowner, vessel, arranging, franchise tax, interstate and foreign commerce, soliciting, steamship, reserve funds, fuel, commerce, repair, commerce clause, domicile, freight, foreign commerce, interest income, local business, disbursements, regulation, husbanding, passenger, loading, cargo, unloading, delivery, selling, formula

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Franchise Tax
The interest from securities is properly included in computing the taxable income for purposes of the franchise tax. Such income from securities, however, is not included in the computation of income for the corporate income tax.

Tax Law : State & Local Tax : Franchise Tax
Cal. Rev. & Tax. Code § 23151 provides that every corporation doing business within the limits of the state and not expressly exempt from taxation by the provisions of the state constitution or by the Revenue and Taxation Code shall annually pay to the state, for the privilege of exercising its corporate franchise, a tax according to or measured by its net income.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
The commerce clause is a limitation upon the power of the states.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Before a state tax or regulation can be declared unconstitutional under the commerce clause, it must be shown to "burden" the commerce involved, be it interstate or foreign and it is not every burden that falls under the restraint implied from the grant of power to the federal government. The usual test is discrimination -- i.e., whether the tax directly singles out a subject which is solely related to the protected activity.

Tax Law : State & Local Tax : Franchise Tax

Those engaged in the business of supplying bunkering fuel and ships stores are considered to be in a business separate and apart from the commerce they serve and can be taxed accordingly.

Tax Law : State & Local Tax : Franchise Tax
A company engaged solely in soliciting commerce for interstate and foreign commerce cannot be subject to a local business license tax.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the nominal subject of the tax is such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it.

COUNSEL: McCutchen, Doyle, Brown & Enersen, Gordon M. Weber and Robert A. Blum for Plaintiff and Appellant.

Thomas C. Lynch, Attorney General, Ernest P. Goodman, Assistant Attorney General, and John J. Klee, Jr., Deputy Attorney General, for Defendant and Respondent.

JUDGES: Opinion by Taylor, J., with Shoemaker, P. J., and Agee, J., concurring.

OPINIONBY: TAYLOR

OPINION: [*588] [***703] American President Lines (hereafter taxpayer) appeals from an adverse judgment in its action for a refund of franchise taxes paid under [*589] protest to respondent, Franchise Tax Board (hereafter board). The taxpayer contends that it is engaged only in interstate commerce and, therefore, is not subject to the state franchise tax; and, in the alternative, if subject to the tax, the board erred in allocating to California all of the taxpayer's interest from two statutory reserve funds required by federal maritime law.

[***704] The appeal is on the following stipulation of facts: The taxpayer is a Delaware corporation with its principal office in Wilmington, Delaware, and its commercial [**2] domicile (e.g., executive and general offices) in San Francisco. The taxpayer also maintains offices or commercial agencies in several other states and foreign countries. The taxpayer is a steamship corporation engaged in the transportation of passengers, property and mail by American flag vessels between U.S. ports and ports in foreign countries. From 1946 to 1956, the years here in question, the taxpayer carried no passengers, property or mail between California ports. It neither embarked nor disembarked any passengers nor loaded or discharged any freight in California except in interstate or foreign transports.

In addition to operating vessels for its own accounts, the taxpayer, during the years in question, for a fee, acted as the so-called "husbanding agent" for other organizations engaged exclusively in carrying passengers and freight in interstate and foreign commerce. The taxpayer also received fees for acting as general agent, time charter agent and berth agent for the government of the United States exclusively in connection with vessels operating in interstate and foreign commerce. As husbanding agent for other organizations and the United States government, the taxpayer's [**3] activities in California were limited to making arrangements in connection with interstate and foreign operations of vessels belonging to such other company or the government of the United States. These activities included soliciting and engaging cargo, issuing bills of lading, arranging to obtain stevedores, arranging necessary vessel repairs, obtaining bunker fuel and ships stores from suppliers, obtaining crews for the vessels when needed, making disbursements with funds provided by the principal and attending to other details involved in the operation of ships between California and other states and countries throughout the world.

The taxpayer, an American flag steamship operator, receives operating differential subsidies from the United States government under the Merchant Marine Act of 1936, and is subject to regulation under that statute, as well as its subsidy contract with the United States. Pursuant to the applicable United States maritime regulations, the taxpayer may place in its general funds and distribute to its shareholders no more than those earnings that are 10 percent of the capital necessarily employed in its business. All profits in excess of that 10 percent [**4] must be deposited in a "Special Reserve Fund." The Merchant Marine Act also requires the taxpayer to maintain a "Capital [*590] Reserve Fund." This fund consists of the annual depreciation charges on the subsidized vessels, the proceeds from the sale of vessels, and other amounts the Maritime Administration deems necessary to assure the replacement of the taxpayer's fleet as it becomes obsolete. Withdrawals from both reserve funds can be made only with the permission of the Maritime Administration.

The Merchant Marine Act also permits the investment of some or all of the capital and special reserve funds in approved interest-bearing securities, on condition that the interest be deposited in the capital reserve funds. During the 10-year period here involved, the taxpayer received certain amounts of income from United States government securities held in the reserve funds, as well as interest from other investments held in the reserve funds.

In each of the 10 years here in question, the taxpayer filed timely California Corporation Income Tax returns based on its income. Thereafter, the board determined that: 1) the taxpayer's husbanding services and its activities as general [**5] agent, berth agent and time charter agent, were intrastate activities in California, subject to the payment of corporation franchise tax (Rev. & Tax. Code, § 23151) rather than the corporate income tax; 2) the interest received from United States government securities was, therefore, to be included [***705] in the measure of the taxpayer's taxable income; n1 and 3) the interest received on the reserve funds was wholly allocable to California as the commercial domicile of the taxpayer, rather than subject to any formula allocation between California and other states. The taxpayer paid the additional amounts due under protest and then commenced this action for a refund and determination of the issues

presented. The trial court found for the board on all of the questions presented and entered judgment accordingly. This appeal ensued.

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n1 The interest from securities is properly included in computing the taxable income for purposes of the franchise tax. Such income from securities, however, is not included in the computation of income for the corporate income tax.

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The first question presented is whether the trial court properly concluded that the taxpayer's husbanding activities in California and its activities as general agent, time charter agent, and berth agent were local intrastate activities and, therefore, subject to the franchise tax.

Section 23151 of the Revenue and Taxation Code provides that every corporation doing business within the limits of this state and not expressly exempt from taxation by the provisions of the Constitution of this state or by this part shall annually pay to the state, for the privilege of exercising its corporate franchise, a tax according to or measured by its net income. The taxpayer's activities here in question were clearly done within the [*591] limits of the state and not expressly exempt from taxation by the provisions of the state Constitution or the Revenue and Taxation Code. Accordingly, the taxpayer falls squarely within the language of the statute imposing the franchise tax. The taxpayer, however, argues that the activities here in question were merely an integral part of its interstate commerce activities and, therefore, it cannot be subject to the franchise tax because of the commerce [**7] clause n2 of the Constitution of the United States. We cannot agree.

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n2 The commerce clause of the United States Constitution is cast not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the commerce clause is a limitation upon the power of the states (Morgan v. Virginia, 328 U.S. 373 [90 L.Ed. 1317, 66 S.Ct. 1050, 165 A.L.R. 574]; Southern Pac. Co. v. Arizona, 325 U.S. 761 [89 L.Ed. 1915, 65 S.Ct. 1515]).

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Before a state tax or regulation can be declared unconstitutional under the commerce clause, it must be shown to "burden" the commerce involved, be it interstate or foreign (Haliburton Oil Well etc. Co. v. Reily, 373 U.S. 64, 69 [10 L.Ed.2d 202, 206, 83 S.Ct. 1201]; Nippert v. Richmond, 327 U.S. 416, 425 [90 L.Ed. 760, 765, 66 S.Ct. 586, 162 A.L.R. 844]) and it is not every burden that falls under the restraint implied from the grant of power to the federal government. The usual [**8] test is discrimination -- i.e., whether the tax directly singles out a subject which is solely related to the protected

activity (American Smelting & Refining Co. v. County of Contra Costa, 271 Cal.App.2d 437, 456 [77 Cal.Rptr. 570]).

As indicated in the factual summary above, the "husbanding services" that the taxpayer here performed for other shipowners for a fee included soliciting and engaging cargo, issuing bills of lading, arranging to obtain stevedores, arranging necessary vessel repairs, obtaining bunker fuel and ships stores from the suppliers, obtaining crews for the vessels when needed, making disbursements with funds provided by the shipowner principals, and attending to other details involved in the operation of the ships. These are local business activities, separate and apart from the interstate commerce engaged in by the shipowners to whom the service is sold by the taxpayer. Thus, there is no logical reason why these activities of the taxpayer should not be subject to the same franchise tax as all other corporations doing business within the state.

[***706] The fact that the taxpayer's local business activity is related to or even essential to interstate [**9] or foreign commerce is not relevant. A ship cannot run without fuel and could not operate without normal ships stores. Yet, it is well settled that those engaged in the business of supplying bunkering fuel and ships stores are considered to be in a business separate and apart from the commerce they serve and can be taxed accordingly (Puget Sound [*592] Stevedoring Co. v. Tax Com., 302 U.S. 90, 94 [82 L.Ed. 68, 72, 58 S.Ct. 72]; Martin Ship Service Co. v. City of Los Angeles, 34 Cal.2d 793 [215 P.2d 24]; Shell Oil Co. v. State Board of Equalization, 64 Cal.2d 713 [51 Cal.Rptr. 524, 414 P.2d 820], appeal dismissed 386 U.S. 211 [17 L.Ed.2d 870, 87 S.Ct. 973]). If the activities of corporations that sell fuel, supplies and repair services to vessels engaged in interstate and foreign commerce are considered to be engaged in intrastate commerce, it follows that those activities of the taxpayer that consist of arranging for such fuel, supplies and repair services for other shipowners are likewise intrastate commerce. The taxpayer here is in the same legal relationship to the shipowners for whom it performs these services as are the retailers of tangible [**10] personal property involved in the cases cited above. The only difference between the taxpayer here and retailers is that the former is selling a service rather than a specific item of personal property. This is a distinction without a difference. The taxpayer in receiving fees for the obtaining of bunker fuel and ships stores is doing nothing more than making a local sale of services. In fact, the taxpayer is selling its expertise and knowledge of local labor conditions, material, suppliers, ship providers, ship repair services, etc. These activities are carried on locally and constitute an income-producing activity, separate and apart from the taxpayer's operation of its own vessels in interstate and foreign commerce.

Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 [95 L.Ed. 573, 71 S.Ct. 508], cited by the taxpayer, does not support its position. In Spector, a Missouri corporation engaged in interstate trucking, operated two terminals in Connecticut as a gathering place for less than full truck load shipments. Spector is not at all analogous to the instant case and would not be so unless the trucking company there, in addition to its interstate trucking [**11] operations, had also earned income by performing services for other truckers, such as obtaining fuel for their trucks and arranging for drivers and necessary truck repairs. n3

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n3 Furthermore, recent cases, such as Roadway Express, Inc. v. Director, Division of Taxation (1967) 50 N.J. 471 [236 A.2d 577], appear to limit Spector to a franchise tax on the privilege of carrying on or doing business in a state rather than the exercise of a corporate franchise. Mid-Valley Pipeline Co. v. King (1968) 221 Tenn. 724 [431 S.W.2d 277], reflects the current trend that a corporation may be subject to a tax for the privilege of exercising its corporate franchise even though all of its business is in interstate or foreign commerce. (See General Motors Corp. v. Washington, 377 U.S. 436 [12 L.Ed.2d 430, 84 S.Ct. 1564], and other cases discussed in 36 U. Chi.L.Rev. 186.) However, the instant case was tried on the theory of the distinction between intrastate and interstate activities and we do not need to reach the questions raised by the recent cases.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**12]

The taxpayer argues that the question was settled in its favor by Texas Transport & Terminal Co. v. New Orleans (1924) 264 U.S. 150 [68 L.Ed. 611, 44 S.Ct. 242, 34 A.L.R. 907], wherein the taxpayer was engaged in [*593] activities directly comparable to those here in question. In Texas Transport, the taxpayer, a steamship agency, was regularly employed as agent for four interstate steamship lines under a contract fixing its compensation on the basis of commissions, and occasionally represented other shipowners that were engaged solely in interstate and foreign commerce. The taxpayer rendered services such as issuing bills of lading under the name of the shipowner, arranging for stevedores, making disbursements, bunkering, nominating ships for carrying cargo, arranging for cargo delivery [***707] on the wharf, collecting freight charges, attending to immigration service and assisting generally with local customs and regulations.

The United States Supreme Court's view of the facts, in the actual rendition of its opinion in Texas, however, appeared limited to the freight soliciting activity of the taxpayer. The court said at pages 152 and 153 [68 L.Ed. [**13] at pp. 612, 613]: "This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the State prior to their introduction therein, Stockard v. Morgan, 185 U.S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. McCall v. California, 136 U.S. 104. The latter decision controls the present case. There the agent of a railroad company was engaged in San Francisco in the business of soliciting and inducing persons to travel from the State of California into and through other states to New York City, over the line of railroad which he represented. It was held that the business of the agent constituted a method of securing passenger traffic for the company, and therefore (p. 109) the tax was one 'upon a means or an occupation of carrying on interstate [**14] commerce, pure and simple.' The only difference between that case and this is that there the agent was engaged in seeking interstate passenger business, while here the agent was engaged in seeking interstate and foreign freight business. Plainly, as pointed out in the McCall case (p. 109), the principle is the same."

Thus, Texas Transport, regardless of its additional facts, seems to hold no more than that a company engaged solely in soliciting commerce for interstate and foreign commerce cannot be subject to a local business license tax. The taxpayer's activities in the instant case are not limited to soliciting interstate and foreign business but include on a regular, rather than an occasional basis, a wide variety of local activities on behalf of other shipowners. Significantly, the strong dissenting opinion in the Texas Transport case (written by Brandeis and also signed by Holmes), and set forth in [*594] full in the footnote below) n4 [***708] focuses on the importance of these additional activities.

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n4 "From the multitude of cases, this general rule may be educed. The validity of a state tax under the commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce. In this case there is no claim that interstate commerce is discriminated against or obstructed. The contention is that the tax imposes a direct burden. Whether the burden should be deemed direct depends upon the character of plaintiff's occupation and its relation to interstate transactions.

"The occupation tax laid by New Orleans is fixed in amount; -- businesses being classified into several grades according to the amount of business done. The Texas Transport & Terminal Company falls within the highest grade -- those whose receipts exceed $ 100,000 a year -- and, thus, it is taxed $ 400 a year. The business is what is called a steamship agency. The main office is in New York City. It has branches in New Orleans and in five other ports of the United States. It is a wholly independent concern. No shipowner has an interest in it; and it has no interest in any ship which it serves. Some of these are regular ocean liners; others are casual tramp ships. The services rendered include, among other things, arranging with independent stevedore concerns for discharging and loading cargoes; arranging with independent dealers for bunkering, that is, buying fuel and oil; making provision for fitting ships for any special or peculiar cargo; making provision for compliance with the immigration and customs laws; and paying the ship's disbursements. For these, and the other services of soliciting cargoes, arranging for their delivery, and collecting payment for freight, the company is compensated. Usually the compensation is measured by a percentage on the gross freight charges collected. Sometimes it is a lump sum for each ship served. These comprehensive services require, for their efficient performance, the employment of a steamship agency, or its equivalent, whatever the home port of the ship, or the principal place of its owner's business.

"It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce, Wheeling, P. & C. Transportation Co. v. Wheeling, 99 U.S. 273, 284; Old Dominion S. S. Co. v. Virginia, 198 U.S. 299, 306; or by a tax upon net income derived exclusively from interstate commerce. United States Glue Co. v. Oak Creek, 247 U.S. 321; Shaffer v. Carter, 252 U.S. 37, 57; compare William E. Peck & Co. v. Lowe, 247 U.S. 165; or by an occupation tax, fixed in amount, although the business consists exclusively of selling goods brought from another State. Wagner v. City of Covington, 251 U.S. 95. On the other hand, the burden is deemed

direct, where the tax is upon property moving in interstate commerce, Champlain Realty Co. v. Brattleboro, 260 U.S. 366; or where it lays, like a gross-receipts tax, a burden upon every transaction in such commerce 'by withholding, for the use of the State, a part of every dollar received in such transactions.' Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 297; or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce. Robbins v. Shelby County Taxing District, 120 U.S. 489; Davis v. Virginia, 236 U.S. 697.

"The New Orleans tax is obviously not laid upon property moving in interstate commerce. Nor does it, like a gross-receipts tax, lay a burden upon every transaction. It is simply a tax upon one of the instrumentalities of interstate commerce. It is no more a direct burden, than is the tax on the other indispensable instrumentalities; upon the ship; upon the pilot boat, which she must employ; upon the wharf at which she must load and unload; upon the office which the owner would have to hire for his employees, if, instead of engaging the services of an independent contractor, he had preferred to perform those duties himself. The fact that, in this case, the services are performed by an independent contractor having his own established business, and the fact that the services rendered are not limited to soliciting, differentiate this case from McCall v. California, 136 U.S. 104. If these differences are deemed insufficient to distinguish that case from the one at bar, it should be frankly overruled as inconsistent with the general trend of later decisions."

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That these broader aspects of the taxpayer's activities cannot now be ignored is demonstrated by the later case of Puget Sound Stevedoring Co. v. Tax Com., 302 U.S. 90 [82 L.Ed. 68, 58 S.Ct. 72]. There, the majority of the taxpayer's stevedoring activities were carried on by its own employees loading or unloading vessels engaged in interstate and foreign commerce. However, the taxpayer also collected and supplied longshoremen to other shipowners or masters without its directing or controlling the loading or [*595] unloading operations. As to the taxpayer's stevedoring activities through its own employees, the court held that the business of loading and unloading vessels in interstate and foreign commerce was itself interstate and foreign commerce and, therefore, not subject to the Washington franchise tax. However, the taxpayer's activities on behalf of other shipowners were held to be subject to the tax.

The court said at pages 94 and 95 [82 L.Ed. at p. 72]: "The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, [**16] but rather a local business, and subject, like such business generally, to taxation by the state.

[***709] "What is done by appellant in connection with activities of this order is similar in many aspects to the work of a ship's chandler, and even more closely similar to that of a labor or employment bureau. Such a bureau was considered in Williams v. Fears, 179 U.S. 270, 278, and its business found to be no part of interstate or foreign commerce, though the transactions of such commerce were increased thereby. Cf. Federal Compress Co. v. McLean, 291 U.S. 17, 21, 22; Chassaniol v. Greenwood, 291 U.S. 584. Little

analogy exists between the activities now in question and those reviewed in McCall v. California, 136 U.S. 104; Texas Transport & Terminal Co. v. New Orleans, 264 U.S. 150; and Di Santo v. Pennsylvania, 273 U.S. 34. The contractors there considered were found to be acting as agents of foreign steamship companies with authority to make contracts binding on the principals and even running in their names. If appellant stands in that relation to the vessels that it serves in this branch of its activities, it has failed to make [**17] the fact apparent by the allegations of its bill. The effect of such a showing is not before us now." Similarly here, the taxpayer has not made such a showing.

In the recent case of Dunbar-Stanley Studios, Inc. v. State of Alabama (1969) 393 U.S. 537 [21 L.Ed.2d 759, 89 S.Ct. 757], the [*596] United States Supreme Court said at page 540: "In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the nominal subject of the tax is 'such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it.' Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954). If, for example, a license tax were imposed on the acts of engaging in soliciting orders or making deliveries, conflict with the Commerce Clause would be evident because these are minimal activities within a State without which there can be no interstate commerce."

In Dunbar, a North Carolina corporation, with its principal office and processing plant in Charlotte, North Carolina, contracted with J. C. Penney Company, who operated department stores in [**18] eight Alabama cities, for photographic services to be rendered by the North Carolina corporation's photographers, who were not residents of Alabama. The photographers were at the disposal of the local Penney stores, who advertised the services, invited parents to bring their children in to be photographed, etc. Each store took orders, arranged for a time for the sitting, provided a place, collected the money and then delivered the picture to the customer. The North Carolina corporation was paid a percentage of the receipts for the Penney stores in Alabama. The activities of the North Carolina corporation were limited to taking pictures, transmitting the exposed film to its offices in North Carolina where it was developed, printed and finished and then mailing the finished prints to the Penney stores in Alabama. The United States Supreme Court noted that the tax levied by the State of Alabama was on the distributable business of the photographer, not upon the soliciting of orders or the processing of the film, and held that the North Carolina corporation was engaged in a local activity subject to the Alabama tax.

The taxpayer cannot rely on the fact that it was an agent for the [**19] other shipowners and the federal government. The taxpayer, in making this argument, has blurred the distinction between agents who are employees or their principals and agents who are independent contractors. Although the taxpayer here acts for other shipowners and the United States government, its acts cannot be considered theirs (Irvine Co. v. McColgan, 26 Cal.2d 160, 163-166 [157 P.2d 847, 167 A.L.R. 934]; Automatic Canteen Co. v. State Board of Equalization, 238 Cal.App.2d 372, 385-386 [47 Cal. Rptr. 848]).

[***710] The activities engaged in by the taxpayer in the instant case included obtaining crews for the vessels owned by other shipowners, arranging for [*597] repair of vessels when needed, and making disbursements as required. The trial court properly concluded

that these were local business activities, separate and apart from the commerce engaged in by the shipowner and the taxpayer's own interstate and foreign commerce activities and, therefore, subject to the franchise tax.

As we have concluded that the taxpayer is subject to the franchise tax, we reach the second question on appeal, namely, whether the board correctly allocated all of the [**20] taxpayer's income from the special statutory reserve funds required by federal maritime regulations entirely to California. The activities of the taxpayer as a steamship operator that take place both within and without the State of California are unitary in nature. Thus, the amount of net income generated by the operation of that business which is attributable to California sources is determined by formula allocation. The only issue here concerns the proper allocation of the interest income received by the taxpayer from the securities held in the reserve funds. The board determined that the source of the interest income received by the taxpayer from the securities was the securities themselves and not the operation of the unitary steamship business. Accordingly, in computing the taxpayer's tax liability, the board allocated all of the interest income to the taxpayer's commercial domicile, California. The taxpayer contends that this interest income should be treated like its income from the steamship business and allocated by the same formula.

The California tax is measured by that portion of a corporation's net income that is "attributable to sources within the state" (Rev. [**21] & Tax. Code, § 25101). The approach generally followed by the board is that in most situations, the source of interest income is the intangible for which the income was paid unless the intangible has acquired a business situs elsewhere. The board further follows the rule that the situs of the intangible property is at the domicile of the owner (Southern Pac. Co. v. McColgan, 68 Cal.App.2d 48, 58, 68-69 [156 P.2d 81]). Intangibles owned by a foreign corporation doing business in California have a "taxable situs" here if the corporation, like the taxpayer in the instant case, maintains a "commercial domicile" in this state (Id. at pp. 62, 81).

The pertinent regulations of the board so provide and their application to a substantially identical fact situation was recently upheld by this court (Division Four) in Fibreboard Paper Products Corp. v. Franchise Tax Board, 268 Cal.App.2d 363 [74 Cal.Rptr. 747]. Fibreboard, like the taxpayer in the instant case, was a Delaware corporation engaged in a unitary business in California and other states, with its commercial domicile in California. Fibreboard received interest income from securities held in reserve accounts [**22] for losses against which the unitary business did not carry commercial insurance. This court held that the interest income was not [*598] part of the operating income of the unitary business and accordingly was not part of the unitary income subject to formula apportionment. We see no valid legal or factual distinction in this respect between Fibreboard and the instant case. Fibreboard is in complete accord with prior California appellate decisions and also discusses and disposes of many of the cases cited by the taxpayer here. Accordingly, we conclude that the board properly allocated all of the taxpayer's interest income from the reserve funds to California.

The judgment is affirmed.

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION et al., Plaintiffs and Appellants, v.
CITY OF LOS ANGELES, Defendant and Respondent.

No. S043694.

SUPREME COURT OF CALIFORNIA

11 Cal. 4th 342; 902 P.2d 297; 1995 Cal. LEXIS 5832; 45 Cal. Rptr. 2d 279; 95 Cal. Daily Op. Service 7886; 95 Daily Journal DAR 13496

October 5, 1995, Decided

PRIOR HISTORY: Superior Court of Los Angeles County, No. J CCP 1770, Dzintra I. Janavs, Judge.

COUNSEL:

Rogers & Wells, Dickson, Carlson & Campillo, Aaron M. Peck, Donald R. Brown and Jennifer L. Sokol for Plaintiffs and Appellants.

James K. Hahn, City Attorney, Thomas C. Bonaventura, Chief Assistant City Attorney, Richard A. Dawson, Assistant City Attorney, and Dion O'Connell, Deputy City Attorney, for Defendant and Respondent.

Rutan & Tucker, Elizabeth Hanna and Hans Van Ligten as Amici Curiae on behalf of Defendant and Respondent.

JUDGES: Opinion by Mosk, J., expressing the unanimous view of the court.

OPINIONBY: MOSK, J.

OPINION:

MOSK, J.

In this case, we address a conflict in the Courts of Appeal on a recurring issue of substantial fiscal significance to California public entities: does interest on a judgment against a local public entity accrue at the postjudgment interest rate of 10 percent per

annum prescribed by section 685.010, subdivision (a), of title 9 of part 2 of the Code of Civil Procedure, or at the rate of 7 percent per annum, pursuant to article XV, section 1, of the California Constitution?

We conclude that section 970.1, subdivision (b), of division 3.6 of title 1 of the Government Code, which provides that "[a] judgment ... is not enforceable under Title 9," exempts local public entities from title 9 of the Code of Civil Procedure. Division 3.6 does not, however, itself set a rate of postjudgment interest for claims against the state or local public entities. Accordingly, pursuant to article XV, section 1, of the California Constitution, "[i]n the absence of the setting of such rate by the Legislature," the applicable rate of postjudgment interest to be paid by local public entities is 7 percent per annum. The judgment of the Court of Appeal holding otherwise is reversed.

I.

In August 1983 California Federal Savings and Loan Association (California Federal) sought a refund from the City of Los Angeles (the City) of business license taxes and interest, alleging that Revenue and Taxation Code section 23182, as amended, nullified the City's power to levy the business license tax against it.

The trial court ruled that California Federal should recover business taxes paid for the years 1982, 1983, and 1984. It also ordered the City to pay postjudgment interest "as allowed by law until paid," but did not specify the rate of that interest. The City appealed and we ultimately affirmed the judgment. (California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal. 3d 1 [283 Cal. Rptr. 569, 812 P.2d 916].)

Thereafter, the trial court heard a motion regarding the applicable rate of interest. Following San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146 [272 Cal. Rptr. 38], it ruled that the judgment against the City would accrue interest at a rate of 7 percent per annum.

The Court of Appeal disagreed, reasoning that although "[u]pon reading Government Code section 970.1, subdivision (b), it might appear that its meaning is clear," the provision is nonetheless "not reasonably free from ambiguity and uncertainty." It concluded that the Government Code refers to and makes inapplicable only the portion of title 9 of the Code of Civil Procedure that contains the "mechanics of enforcing ... judgment[s]"--i.e., division 2, of which section 695.050, providing for enforcement of money judgments is a part--and not the other divisions of the Code of Civil Procedure, including division 1, of which section 685.010 is a part. Accordingly, the Court of Appeal modified the order awarding postjudgment interest to provide that the judgment shall bear interest at a rate of 10 percent per annum. We granted review.

II.

This case requires us to determine the interaction among Government Code section 970.1, subdivision (b), Code of Civil Procedure section 685.010, subdivision (a), and article XV, section 1 of the California Constitution. A brief chronology of these provisions is as follows.

In 1963, the Legislature added division 3.6 (commencing with section 810) to title 1 of the Government Code. (Stats. 1963, chs. 1681, p. 3266 & 1715, p. 3372.) Known as the Tort Claims Act, it enacted a comprehensive scheme for claims and actions against public entities and public employees.

In 1976, former article XX of the California Constitution, which provided for a 7 percent per annum interest rate on a judgment rendered in any court of the state, was reenacted as part of article XV, section 1, of the Constitution. In 1978, the latter provision was amended to provide: "The rate of interest upon a judgment rendered in any court of this State shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both. [P] In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum." (Cal. Const., art. XV, § 1.)

In 1980, section 970.1, subdivision (b) was added to division 3.6 of the Government Code. It provided: "A judgment is not enforceable under Title 9 (commencing with Section 681) of Part 2 of the Code of Civil Procedure but is enforceable under this article." (Stats. 1980, ch. 215, § 19, p. 453.)

In 1982, section 685.010 was added to division 1 of title 9 (commencing with section 681) of the Code of Civil Procedure. It provided in relevant part that "(a) Interest accrues at the rate of 10 percent per annum on the amount of a judgment remaining unsatisfied." (Stats. 1982, ch. 150, § 3, p. 495.) In the same year, the Legislature repealed title 9 (commencing with section 681) and added title 9 (commencing with section 680.010) of part 2 of the Code of Civil Procedure. n1 The relevant portion of Code of Civil Procedure section 685.010 now provides: "(a) Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." (Stats. 1982, ch. 1364, § 2, p. 5080.) At the same time, Government Code section 970.1, subdivision (b), was amended to provide: "A judgment, whether or not final, is not enforceable under Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure but is enforceable under this article after it becomes final." (Stats. 1982, ch. 497, § 95, p. 2192.) n2

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n1 Code of Civil Procedure section 680.010, the initial section of title 9, provides: "This title shall be known and may be cited as the Enforcement of Judgments Law." Title 9 of part 2 of the Code of Civil Procedure contains five divisions: (1) Definitions and General Provisions; (2) Enforcement of Money Judgments; (3) Enforcement of Nonmoney Judgments; (4) Third-Party Claims and Related Procedures; and (5) Satisfaction of Judgment.

n2 The phrase "this article," refers to article 1 (commencing with section 970) of chapter 2 of part 5 of division 3.6 of title 1 of the Government Code.

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III.

(1a) The City contends that, as a local public entity, it is exempted under the Government Code from the application of Code of Civil Procedure section 685.010, subdivision (a); it is therefore required to pay postjudgment interest not at the 10 percent per annum prescribed therein, but at the lower constitutional interest rate of 7 percent. (Cal. Const., art. XV, § 1.)

We agree. Government Code section 970.1, subdivision (b), provides that a judgment against a local public entity is "not enforceable under Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure." Given their ordinary meaning, the words of the enactment are neither ambiguous nor uncertain.

The provision plainly and expressly exempts local public entities from the application of title 9 of the Code of Civil Procedure as a whole, including therefore section 685.010. Whenever the Legislature refers in a statute to a title (or article, chapter, part, or division), without further specifying a particular section therein, it plainly intends to refer to it in its entirety. In addition, the word "enforce" is defined as to "give effect to"; "enforceable" is defined as "capable of being enforced," i.e., capable of being given effect to. (Webster's New Internat. Dict. (3d ed. 1961) p. 751.) We accordingly understand the phrase "not enforceable under Title 9" to mean that a judgment against a local public entity cannot be given effect under the provisions of title 9.

In rejecting the Court of Appeal's conclusion that the language of the statute is ambiguous, we approve a number of recent decisions by other Courts of Appeal that have construed the Government Code as exempting public entities from the 10 percent postjudgment interest rate set by the Code of Civil Procedure. (San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn., supra, 222 Cal. App. 3d 146, 151, 272 Cal. Rptr. 38 ["plain language" of Government Code section 970.1, subdivision (b), exempts local public entities from 10 percent interest rate of the Code of Civil Procedure]; Union Pacific Railroad Co. v. State Bd. of Equalization (1991) 231 Cal. App. 3d 983, 1007 [282 Cal. Rptr. 745] [" Government Code section 970.1 ... provides that Code of Civil Procedure section 685.010 is inapplicable to money judgments ...; instead the constitutional rate of 7 percent applies."]; Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 155 [32 Cal. Rptr. 2d 643] ["... Government Code section 970.1, subdivision (b), limits the rate of interest on the County's share of the judgment to 7 percent."]; cf. Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750 [23 Cal. Rptr. 2d 315] ["Title 9 ... governs the enforcement of judgments against private parties."].)

Although the Government Code exempts local public entities from the requirements of the Code of Civil Procedure, it does not itself set a postjudgment interest rate for money judgments against local public entities. "The most logical inference from the fact that the Tort Claims Act as adopted in 1963 made no reference to the liability of either state or local governments for interest on judgments is that the Legislature assumed such liability

to be constitutionally imposed." (Harland v. State of California (1979) 99 Cal. App. 3d 839, 847 [160 Cal. Rptr. 613].) Accordingly, article XV, section 1, of the California Constitution mandates that such interest be calculated at the rate of 7 percent per annum. (Ibid.; San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn., supra, 222 Cal. App. 3d 146, 151.)

IV.

Plaintiffs raise a series of constitutional and textual arguments to the effect that the interest provisions of the Code of Civil Procedure must govern judgments against local public entities. None is persuasive.

(2) At the outset, plaintiffs assert that the Legislature lacks authority to prescribe a different rate of postjudgment interest for local public entities; all judgments should be subject to the same rate of 10 percent, as fixed by the Code of Civil Procedure. The point is without merit. Article XV, section 1, of the California Constitution states that "[t]he rate of interest upon a judgment rendered in any court of this State shall be set by the Legislature at not more than 10 percent per annum." (Italics added.) Nothing in the section precludes the Legislature from setting different rates of interest for local public entities, so long as the rates do not exceed 10 percent per annum.

(1b) Next, plaintiffs argue that a close reading of the Government Code provision supports the Court of Appeal's conclusion that local public entities are not exempt from the interest rate set by the Code of Civil Procedure. Thus, they contend that in drafting the Government Code to provide that judgments are "not enforceable under Title 9" of part 2 of the Code of Civil Procedure, the Legislature intended to refer not to all the divisions of title 9, but only to the division that contains enforcement provisions for money judgments, i.e., division 2, and not to division 1, which includes Code of Civil Procedure section 685.010, subdivision (a), setting the interest rate at 10 percent per annum. We reject the argument. The statute is not so narrowly drawn.

In effect, plaintiffs would have us rewrite Government Code section 970.1, subdivision (b), to provide that judgments are "not enforceable under Division 2 of Title 9 of Part 2 (commencing with Section 695.010) of the Code of Civil Procedure." We decline to do so. (3) When, as here, " ' "statutory language is ... clear and unambiguous there is no need for construction, and courts should not indulge in it." ' " (DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601 [7 Cal. Rptr. 2d 238, 828 P.2d 140].)

Had the Legislature intended to exempt local public entities only from the provisions under Code of Civil Procedure, part 2, title 9, division 2, it could readily have done so. (4) It is our task to construe, not to amend, the statute. "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted ...." (Manufacturers Life Ins. Company v. Superior Court (1995) 10 Cal. 4th 257, 274 [41 Cal. Rptr. 2d 220, 895 P.2d 56].) We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.

"We must assume that the Legislature knew how to create an exception if it wished to do so ...." (City of Ontario v. Superior Court (1993) 12 Cal. App. 4th 894, 902 [16 Cal. Rptr. 2d 32].) Indeed, as the City points out, in amending and adding various provisions of the Code of Civil Procedure in 1982, the Legislature included specific references to particular divisions, chapters, and articles of title 9. For example, Code of Civil Procedure section 514.050 referred to "Division 4 (commencing with Section 720.010) of Title 9," and Code of Civil Procedure section 1166a, subdivision (e), was amended to refer to "Division 3 (commencing with Section 712.010) of Title 9 of Part 2." Although it amended Government Code section 970.1 in other respects, the Legislature did not amend that section to refer to specific divisions or chapters of title 9.

Moreover, title 9 as a whole is entitled "Enforcement of Judgments." (Code Civ. Proc., § 680.010; see fn. 1, ante.) That broad rubric belies plaintiffs' contention that by using the phrase "not enforceable under Title 9" the Legislature was referring only to that portion of title 9 that deals with the procedural mechanisms for enforcing money judgments, i.e., division 2, and not to title 9 in its entirety.

(1c) Plaintiffs' further argument that postjudgment interest is logically unrelated to "enforcement of judgments" is also unpersuasive. n3 It is evident that the Legislature, in including the interest provision of Code of Civil Procedure section 685.010 within title 9, conceived "enforcement of judgments" as embracing more than the mechanical procedural means--such as liens or writs of attachment--for implementing the collection of money judgments. Under the legislative scheme, postjudgment interest is appropriately included as an element of the enforcement of judgments. As we have elsewhere acknowledged, the judgment rate of interest is a "judicial tool" for enforcing judgments because it reduces the incentive to delay payment. (Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 797 [226 Cal. Rptr. 90, 718 P.2d 77].) It also serves to adequately compensate plaintiffs. (Harland v. State of California, supra, 99 Cal. App. 3d 839, 847.) It was thus logical for the Legislature to place the provision for postjudgment interest in title 9, which deals generally with enforcement of judgments.

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n3 Specifically, plaintiffs urge that the "mere accrual of interest" is "nothing more than a component of damages" and has nothing to do with enforcing a judgment.

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(5) Plaintiffs also contend that under the maxim expressio unius est exclusio alterius specific references in title 9 of the Code of Civil Procedure to an exemption for local public entities by implication rule out any such exemption under the remaining provisions of title 9. Any other reading, they insist, would also render "mere surplusage" these specific cross-references in title 9 to an exemption for local public entities. It is true, as the Court of Appeal noted, that division 2 of title 9 includes certain cross-references to the exemption for local public entities from the enforcement provisions of the Code of Civil Procedure. n4 These cross-references do not, however, compel the inference, under

the doctrine of expressio unius est exclusio alterius or any other rule of construction, that section 970.1, subdivision (b), of the Government Code was intended to apply only to the "mechanics" of enforcing a judgment, to which division 2 pertains. As we have noted elsewhere, the maxim, while helpful in appropriate cases, "is no magical incantation, nor does it refer to an immutable rule. Like all such guidelines, it has many exceptions ... More in point here, however, is the principle that such rules shall always ' "be subordinated to the primary rule that the intent shall prevail over the letter." ' " (Estate of Banerjee (1978) 21 Cal. 3d 527, 539 [147 Cal. Rptr. 157, 580 P.2d 657]; accord, In re Joseph B. (1983) 34 Cal. 3d 952, 957 [196 Cal. Rptr. 348, 671 P.2d 852]; Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 195 [132 Cal. Rptr. 377, 553 P.2d 537].) " 'This rule, of course, is inapplicable where its operation would contradict a discernible and contrary legislative intent.' " (In re Michael G. (1988) 44 Cal. 3d 283, 291 [243 Cal. Rptr. 224, 747 P.2d 1152].) Here the Government Code provision plainly refers to title 9 of the Code of Civil Procedure as a whole, not to any particular division thereof. Its express terms are dispositive. Where the legislative intent appears on the face of the provision, as here, we need not and should not indulge the parties' speculation about what might be inferred from the absence or presence of language in other provisions of the Government Code or the Code of Civil Procedure. n5

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n4 Thus, Code of Civil Procedure section 695.050, which is part of division 2, provides: "A money judgment against a public entity is not enforceable under this division if the money judgment is subject to Chapter 1 (commencing with Section 965) of, or Article 1 (commencing with Section 970) of Chapter 2 of, Part 5 of Division 3.6 of Title 1 of the Government Code." (Italics added.) Similarly, Code of Civil Procedure section 683.320 provides: "This chapter does not apply to a money judgment against a public entity that is subject to Section 965.5 or 970.1 of the Government Code." (Italics added.) By contrast, plaintiffs assert, Code of Civil Procedure section 685.010, subdivision (a), which prescribes the interest rate, does not expressly refer to an exemption for public entities.

n5 For its part, the City points to other provisions in division 1 of title 9 of the Code of Civil Procedure, in addition to section 685.010, that contain language implying the Legislature's intent to exclude the entirety of division 1 from the enforcement of judgments against public entities. Thus, Code of Civil Procedure section 685.050, subdivision (b), provides that a levying officer shall "Collect the amount of costs and interests entered on the writ" including "the amount of additional interest required to be collected ...." (Code Civ. Proc., § 685.050, subd. (b)(1), (2).) The provision is inapplicable to judgments against public entities, because a "writ," as defined under Code of Civil Procedure section 680.380, does not include a writ of mandate, the appropriate method to enforce a money judgment against a public entity. (See Gov. Code, § 970.2.) Not surprisingly, the City, too, invokes the maxim expressio unius est exclusio alterius.

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(1d) Finally, plaintiffs point to virtually identical language in Government Code section 965.5, subdivision (b), which refers to enforcement of money judgments against the state and state agencies. n6 They contend that because Government Code sections 970.1 and 965.5 are in pari materia, i.e., relate to the same subject matter, if Government Code section 965.5 does not make Code of Civil Procedure section 685.010 inapplicable to judgments against the state and state agencies, "it logically and necessarily follows" that Government Code section 970.1 also does not make the postjudgment interest provision inapplicable to judgments against local public agencies.

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n6 Section 965.5, subdivision (b), provides: "A judgment for the payment of money against the state or a state agency is not enforceable under Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure but is enforceable under this chapter." The only differences between Government Code sections 965.5, subdivision (b), and 970.1, subdivision (b), are that the former refers to a judgment "against the state or a state agency" and the latter refers to a judgment against local public entities and provides that such judgment is enforceable "after it becomes final."

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The argument begs the question. Plaintiffs' sole authority for the proposition that judgments against the state and its agencies accumulate postjudgment interest at a rate of 10 percent per annum is an opinion by the Attorney General and it is unpersuasive. (66 Ops.Cal.Atty.Gen. 217 (1983).) In concluding that the 10 percent postjudgment interest rate under Code of Civil Procedure section 685.010 applies to judgments against the state, the Attorney General did not even purport to address the effect of the language of Government Code section 965.5 now relied on by plaintiffs. Moreover, the opinion was rendered long before, and therefore without the benefit of, the above cited decisions of the Court of Appeal directly in point. (San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn., supra, 222 Cal. App. 3d 146, 151; Union Pacific Railroad Co. v. State Bd. of Equalization, supra, 231 Cal. App. 3d 983, 1007; Scott v. County of Los Angeles, supra, 27 Cal. App. 4th 125, 155; cf. Barkley v. City of Blue Lake, supra, 18 Cal. App. 4th 1745, 1750.)

In short, plaintiffs have it exactly backwards. If the argument that Government Code sections 965.5 and 970.1 are in pari materia is to be considered at all, it would lead to the conclusion that the plain language of these provisions exempts the state as well as local public entities from the enforcement of title 9, including the interest provision of Code of Civil Procedure section 685.010. n7

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n7 An amicus curiae, the legal division of the State Department of Transportation, represents that since the decision in San Francisco Unified School Dist. v. San Francisco

Classroom Teachers Assn., supra, 222 Cal. App. 3d 146, the state has in fact been paying interest on tort judgments at the rate of 7 percent, pursuant to article XV, section 1 of the California Constitution, and not at the rate of 10 percent prescribed by section 685.010 of the Code of Civil Procedure.

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V.

In conclusion, we find the intention of the Legislature to exclude public entities from the application of title 9 of the Code of Civil Procedure--including the 10 percent per annum postjudgment interest rate of Code of Civil Procedure section 685.010, subdivision (a)--sufficiently clear from the plain language of Government Code section 970.1, subdivision (b). In the absence of a legislative provision setting the rate of interest for claims against public entities, the constitutional rate of 7 percent per annum applies.

For the reasons stated, the judgment of the Court of Appeal is reversed insofar as it prescribes postjudgment interest at the rate of 10 percent per annum, and that court is directed to affirm the order of the trial court prescribing such interest at the rate of 7 percent per annum.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., George, J., and Werdegar, J., concurred.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff and Respondent,
v.
CITY OF LOS ANGELES, Defendant and Appellant.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff and Appellant, v.
STATE BOARD OF EQUALIZATION, Defendant and Respondent

No. S008824

Supreme Court of California

50 Cal. 3d 402; 787 P.2d 996; 1990 Cal. LEXIS 1034; 267 Cal. Rptr. 589

March 26, 1990

PRIOR HISTORY: [***1]

Superior Court of Los Angeles County, Nos. C587986 and C605065, Norman R. Dowds, Judge.

DISPOSITION: The judgment of the Court of Appeal is affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant county sought review of the Superior Court of Los Angeles County (California) decision which was affirmed by the court of appeals and which rendered judgment in favor of respondent insurer in an action to recover parking lot fee taxes, taxes paid on rental revenues, and utility user taxes paid to appellant pursuant to various provisions of the Los Angeles Municipal Code.

OVERVIEW: Appellant county challenged the trial court's interpretation of Cal. Const. art. XIII, § 28 and judgment, which were affirmed by the court of appeals, and claimed that judgment for respondent insurer to recover for extraneous taxes excluded by the statute was error. Appellant contended that there was ambiguity in § 28 and that the taxes were not exempted. The court affirmed the judgment because the statute was clear and unambiguous. The state tax on gross premiums was in lieu of all other taxes and licenses. The court held that if the legislature meant for the tax to be in lieu of only some of the

taxes, then it would have said so accordingly. The court held that respondent was exempt from all taxes except those specified in § 28. The very existence of express exceptions served to buttress the view that the in lieu provision meant what it said and was not ambiguous. Legislatures placed extensive limitations on respondent's investment practices, and if the limitations were insufficient, then it was for the legislature to address, not the court.

OUTCOME: The court affirmed the judgment of the trial court and the court of appeal because the language of the statute was clear and unambiguous, and the legislative intent was clear that the tax on gross premiums was in lieu of all taxes except those enumerated in the statute.

CORE TERMS: insurer, premium, exemption, real estate, electorate, taxation, voters, insurance business, exempt, noninsurance, gross premiums tax, constitutional provision, real property, passive, italics, title insurance, investment income, policyholder, invest, ambiguity, business done, municipal, license, local taxation, plain meaning, taxed, doing business, home office, quid pro quo, ambiguous

CORE CONCEPTS - Hide Concepts

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Cal. Const. art. XIII, § 28 provides that insurance companies doing business in California (other than companies issuing title and ocean marine insurance) must pay to the state a tax based on gross premiums.

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
Cal. Const. art. XIII, § 28(f) provides that with the exception of taxes on real estate and motor vehicles, the gross premiums tax is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property .

Tax Law : State & Local Tax : Income Tax : Corporations & Unincorporated Associations
See Cal. Const. art. XIII, § 28.

Governments : Legislation : Construction & Interpretation
In arriving at the meaning of a constitutional provision, consideration must be given to the words employed, giving to every word, clause and sentence their ordinary meaning. If doubts and ambiguities remain then, and only then, are we warranted in seeking elsewhere for aid. Among these aids is a consideration of the object to be accomplished. When, however, the language is clear and unambiguous there is no need for construction,

nor is it necessary to resort to indicia of the intent of the Legislature, in the case of a statute, or of the voters, in the case of a provision adopted by the voters.

COUNSEL: Meserve, Mumper & Hughes and Douglas R. Smith for Plaintiff and Appellant and Plaintiff and Respondent.

James K. Hahn, City Attorney, Pedro B. Echeverria, Richard A. Dawson and Ronald A. Tuller, Assistant City Attorneys, for Defendant and Appellant.

Louise H. Renne, City Attorney (San Francisco), John J. Doherty, Robin M. Reitzes, Deputy City Attorneys, John W. Witt, City Attorney (San Diego), Michael F. Dean, City Attorney (Roseville), Edwin J. Moore, City Attorney (Santa Clara), James G. Rourke, City Attorney (Tustin), and Steven Amerikaner, City Attorney (Santa Barbara), as Amici Curiae on behalf of Defendant and Appellant.

John K. Van de Kamp, Attorney General, Edmond B. Mamer and Herbert A. Levin, Deputy Attorneys General, for Defendant and Respondent.

JUDGES: Opinion by Panelli, J., with Lucas, C.J., Eagleson, J., and Kaufman (Marcus M.), J., * concurring, Separate dissenting opinion by Mosk, J., with Broussard and Kennard, JJ., concurring. * Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairperson of [***2] the Judicial Council.

OPINIONBY: PANELLI

OPINION: [*406] [**997] Section 28 of article XIII of the California Constitution (section 28) provides generally that insurance companies doing business in California (other than companies issuing title and ocean marine insurance) must pay to the state a tax based on gross premiums. Subdivision (f) of section 28 provides that with the exception of taxes on real estate and motor vehicles, the gross premiums tax is "in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property . . ." n1 [**998] This case presents the issue whether under section 28 an insurance company is exempt from taxes imposed by a city on revenues derived from the rental of an office building and operation of a parking lot owned by the company, and from a tax on use of electric power in the building. A unanimous Court of Appeal held an insurance company is exempt from all taxes except those specified in section 28. For the reasons that follow, we believe this determination was correct and therefore affirm the judgment of the Court of Appeal.

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n1 Section 28 provides in pertinent part as follows: "(b) An annual tax is hereby imposed on each insurer doing business in this state on the base, at the rates, and subject to the deductions from the tax hereinafter specified. [para.] (c) In the case of an insurer not transacting title insurance in this state, the basis of the annual tax' is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such

insurer upon its business done in this state, other than premiums received for reinsurance and for ocean marine insurance. . . . [para.] (f) The tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property, except: [para.] (1) Taxes upon their real estate. [para.] . . . [para.] (5) Motor vehicle and other vehicle registration license fees. . . ."

Section 28 also excepts retaliatory taxes from the "in lieu" provision. (§ 28, subd. (f) (3).)

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Background

Mutual Life Insurance Company of New York (MONY), a mutual life insurance company licensed to transact business in California, brought suit for a refund of parking lot fee taxes, taxes on rental revenues, and utility users taxes paid to the City of Los Angeles (city) and imposed pursuant to various provisions of the Los Angeles Municipal Code. MONY alleged these taxes were in contravention of section 28 and were therefore void.

The trial was conducted largely on a stipulation of facts entered into by the parties. Their stipulation was that "MONY was subject to taxation by the State of California pursuant to Article XIII, Section 28(f) of the California Constitution. . . . [Prior] to 1980 through 1984 MONY owned two office buildings located . . . in the City of Los Angeles, at each of which it operated an automobile parking facility . . . and engaged in commercial rentals . . . . [para.] From July, 1980 through April, 1984 MONY paid the [*407] charges made for the electricity used by its tenants in the two office buildings owned by it." During this period "MONY did not occupy or use any of the office space in either of the two office buildings owned by it."

At trial, [***4] Walter K. Korinker, vice-president of real estate investment for MONY, testified that MONY's purchase of the two office buildings was pursuant to an "overall investment plan . . . in the normal course of MONY's investment activities." Mr. Korinker explained that in his experience "investment in real property [is] an activity traditionally associated with the business of life and health insurance."

Following trial, the court rendered judgment against the city and in favor of MONY. The Court of Appeal affirmed. In so doing, the Court of Appeal refused to follow Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco (1982) 129 Cal.App.3d 876 [181 Cal.Rptr. 370]. We granted review to secure uniformity of decision.

Discussion n2

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n2 We granted leave to participate as amici curiae in support of petitioner to the City and County of San Francisco and the Cities of San Diego, Roseville, Santa Clara, Tustin, and Santa Barbara. The arguments of amici curiae will be referred to as petitioner's arguments.

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Our sole task in deciding the issue before us is to determine the meaning of the governing constitutional provision. In approaching this task, we start with established principles of construction, applicable to statutes and constitutional provisions alike. (County of Fresno v. Malmstrom (1979) 94 Cal.App.3d 974, 979 [156 Cal.Rptr. 777]; see Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) "[In] arriving at the meaning of a [constitutional provision], consideration must be given to the words employed, giving to every word, clause and [**999] sentence their ordinary meaning. If doubts and ambiguities remain then, and only then, are we warranted in seeking elsewhere for aid. . . . Among these aids is a consideration of the object to be accomplished." (State Board of Education v. Levit (1959) 52 Cal.2d 441, 462 [343 P.2d 8].) When, however, "the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters). [Citations.]" (Lungren v. Deukmejian, supra [***6] , 45 Cal.3d at p. 735.)

In the instant case, we perceive no ambiguity either patent or latent in section 28 that would authorize us to look beyond the plain meaning of the words. Nor, to our knowledge, has any court faced with the issue ever found the provision to be ambiguous. (See, e.g., Hughes v. Los Angeles (1914) 168 Cal. 764 [145 P. 94]; Pacific Gas & Electric Co. v. Roberts (1914) [*408] 168 Cal. 420 [143 P. 700]; Hartford Fire Ins. Co. v. Jordan (1914) 168 Cal. 270 [142 P. 839]; First American Title Ins. & Trust Co. v. Franchise Tax Bd. (1971) 15 Cal.App.3d 343, 346 [93 Cal.Rptr. 177]; Groves v. City of Los Angeles (1949) 93 Cal.App.2d 17 [208 P.2d 254].) Even in Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco, supra, 129 Cal.App.3d 876, discussed hereafter, the court implicitly acknowledged that its interpretation, allowing a tax other than those specified in section 28, was contrary to the "plain meaning" of the provision. (129 Cal.App.3d at pp. 881, 883.)

As this court stated when first called upon to apply the almost identical "in lieu" provision then applicable to utilities, as well as insurance [***7] companies, n3 "Where is there room for the play of construction upon language so plain as this . . . ? With the argument of respondents, that the framers of this article were intelligent men and must be presumed to know what they meant to say, we are in perfect accord. What they said is so plain, so clear, so free from ambiguity and the possibility of construction as to forbid debate. They declared that the state tax should be in lieu of all other taxes and licenses. If they meant that it should be in lieu of but some of those taxes they would have said so. . . . What they did say was that this state tax, with the state's ability to increase it at will, should be in lieu of all other taxes and licenses. If argument is required upon the meaning of plain words so clearly expressing an obvious idea, it can only be because of an utter breakdown in our written language in its ability to convey thought." (Pacific Gas & Electric Co. v. Roberts, supra, 168 Cal. at p. 432, italics in original.)

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n3 The gross premiums tax and the "in lieu" provision first appeared in former section 14 of article XIII of the California Constitution, which section also established, inter alia, a gross receipts tax and in lieu provision applicable to utilities and railroad companies. As to each, former section 14 declared that the taxes imposed were "in lieu of all other taxes and licenses, state, county, and municipal, upon the property of the corporation in question, subject to certain exceptions, . . ." (San Francisco v. Pacific Tel. & Tel. Co. (1913) 166 Cal. 244, 248 [135 P. 971]; see also Historical Note, 3 West's Ann. Cal. Const. (1954 ed.) art. XIII, former § 14, pp. 174-175. Former section 14 was amended numerous times and finally repealed in 1974.)

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Petitioner, however, suggests there is an ambiguity in section 28's references to an insurer's "business." Subdivision (b) imposes a tax on each insurer "doing business" in California, and subdivision (c) states that the basis of the tax is the gross premiums received by such insurer "upon its business" done in the state. Subdivision (b), it is argued, could refer to any kind of business done by an insurer, rather than just the insurance business, whereas subdivision (c) with its reference to gross premiums can mean only insurance business.

We are unpersuaded. The tax is on "gross premiums . . . received . . . by such insurer upon its business done in this state." (§ 28, subd. (c).) If the [*409] insurer does no insurance business here, there are no gross premiums received and section 28 does not apply. If the insurer does insurance business, section 28 does apply and the insurer pays the gross premiums tax on [**1000] its insurance business. In that case, pursuant to subdivision (f), the gross premiums tax is in lieu of all other state and local taxes and fees, not merely on the business of the insurers, but "upon such insurers and their property." In other words, doing [***9] insurance business that is subject to the gross premiums tax confers upon the insurer a status that entitles it to the broad exemption from paying state and local taxes of any kind except real property and motor vehicle taxes and fees. That such was the intent of the electorate is supported by the language and history of the "in lieu" provision.

As originally adopted, section 28 provided that the gross premiums tax was in lieu of all other taxes on the insurer's "property" (except county and municipal taxes on real estate). (See Historical Note, 3 West's Ann. Cal. Const., supra, art. XIII, former § 14, p. 175, col. 2.) In 1933 the electorate amended the provision to provide that the gross premiums tax was in lieu of all other taxes on "such companies or their property." (Italics added.) (Historical Note, 3 West's Ann. Cal. Const., supra, art. XIII, former § 14, p. 178, col. 2, par. 2.) In 1942 the electorate again amended the provision to its present form, which provides that the tax imposed is in lieu of all other taxes" upon such insurers and their property." (Italics added.) (See Historical Note, 3 West's Ann. Cal. Const., supra, art. XIII, former § 14 [***10] 4/5, pp. 205-206; see now § 28, subd. (f).) As this court recognized in Pacific Gas & Electric Co. v. Roberts, supra, 168 Cal. 420, "as in the case of every tax and upon whatsoever form or kind of property it may be laid, in its essence, it is a tax upon the owner of the property." (Id. at p. 430.) By these amendments, therefore, the electorate assured the broadest possible exemption for insurance companies subject to the gross premiums tax.

Even assuming, however, that section 28 requires "interpretation" beyond its plain meaning, the result would be the same. This follows from an examination of the evident purpose of the provision as well as a comparison of the language applicable to insurance companies generally with the language used in relation to title insurance companies.

The tax on gross premiums and the "in lieu" provision first appeared in the Constitution in 1910 as part of an overall revision of the state tax system with respect to corporations involved in certain kinds of businesses. The constitutional amendment "worked a radical change" in the system of taxation. Its purpose "was to divide the subjects of state and local taxation by imposing upon persons [***11] and corporations engaged in certain callings -- those of public service corporations, insurance companies, banks and trust companies -- the obligation to pay certain taxes to be applied exclusively to state [*410] purposes. At the same time, the persons engaged and the property employed in these callings were, to a greater or less degree, to be free from the burden of local taxation. . . . [para.] Under the old system, the property and franchises of the corporations . . . were taxed for both state and local purposes. The amendment [created] a new mode of taxing such property and franchises, and [appropriated] the revenue so raised to state purposes solely. . . . The percentages enumerated in the amendment are declared to be "in lieu of all other taxes,' etc., and such percentages were, doubtless, fixed at higher rates than would have been adopted in the absence of a restriction on other taxation." (San Francisco v. Pacific Tel. & Tel. Co., supra, 166 Cal. at pp. 247-248; see also Pacific Gas & Electric Co. v. Roberts, supra, 168 Cal. at pp. 423-425.)

In short, the "in lieu" provision was intended to preclude the state or any of its subdivisions from exacting any [***12] other revenue from the specified corporations (except local taxes on real estate) and was granted in exchange for the payment of a tax on gross, rather than net, premiums, and at an adjustable rate higher than would otherwise be applied. By excepting real property taxes from the "in lieu" provision, however, the constitutional provision kept in place the traditional funding source for local governments, thereby accommodating the revenue needs of counties and municipalities.

[**1001] The very existence of express exceptions -- originally, real property, and later, motor vehicle taxes (§ 28, subds. (f)(1), (5)) -- serves to buttress the view that the "in lieu" provision means what it says. "Under the familiar rule of construction, expressio unius est exclusio alterius, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 195 [132 Cal.Rptr. 377, 553 P.2d 537]; see San Francisco v. Pacific Tel. & Tel. Co., supra, 166 Cal. at p. 251.) As this court stated over 75 years ago, "the purpose of the constitution to exclude all other taxes and licenses is emphasized and [***13] accentuated by the one exception which that instrument itself declares . . . ." (Pacific Gas & Electric Co. v. Roberts, supra, 168 Cal. at p. 432 [construing the "in lieu" provision applicable to utilities].) The electorate, in excepting from the "in lieu" provision taxes on real property and motor vehicles, could have made a further exception for taxes incidental to the operation of a commercial real estate business, but they did not.

A comparison of the section 28 tax and "in lieu" provisions applicable to insurance companies in general, with those applicable to companies transacting title insurance, is

instructive. As originally adopted, former section 14 of article XIII of the California Constitution applied to all insurance companies, including title insurers. (See Consolidated Title Sec. Co. v. Hopkins [*411] (1934) 1 Cal.2d 414, 416 [35 P.2d 320]; Title Ins. & Trust Co. v. Los Angeles (1923) 61 Cal.App. 232 [214 P. 667].) In 1942, the electorate adopted former section 14 4/5 of article XIII of the Constitution, which distinguished between insurers not transacting title insurance in this state and those transacting title insurance. For the former, the [***14] basis of the annual tax remained the amount of gross premiums; for title insurance companies, the basis became "all income upon business done in the state," except as provided. The exceptions are interest and dividends, rents from real property, profits from the sale of investments, and income from investments. If the title insurance company has a trust department and does trust business, income from such trust business is also excepted. (Art. XIII, former § 14 4/5, subd. (c); see now § 28, subd. (c).) In that case, however, the trust business is taxable to the same extent as trust companies and the trust departments of banks. (Art. XIII, former § 14 4/5, subd. (f)(2); see now § 28, subd. (f)(2).) n4

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n4 Section 28, subdivision (f)(2) provides in pertinent part that a title insurer "which has a trust department or does a trust business under the banking laws of this state is subject to taxation with respect to such trust department or trust business to the same extent and in the same manner as trust companies and the trust departments of banks doing business in this state."

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The new section recognized that title insurers are engaged in a different type of insurance than other insurers and should be taxed on a different basis. (Title Ins. etc. Co. v. Franchise Tax Board (1956) 145 Cal.App.2d 60, 64 [302 P.2d 79].) But while the electorate established income rather than gross premiums as the basis for the title insurers' tax, they expressly excepted income from investments -- i.e., interest and dividends, rents and profits from real estate, and income from other investments. In so doing, the electorate assured that title insurers, despite their different basis, would nevertheless, like other insurers, be free of taxation on investment income. (See First American Title Ins. & Trust Co. v. Franchise Tax Bd., supra, 15 Cal.App.3d 343, 346-347.)

The new section also recognized that the trust business of title insurers is different from insurance business. "It was clearly the purpose of the new section that the trust portion of the business done by [title insurance] companies . . . was not to be considered as insurance business and therefore should not be taxed as insurance business." (Title Ins. etc. Co. v. Franchise Tax Board, supra [***16] , 145 Cal.App.2d at p. 63.) Rather, the provision was so phrased "that the trust business of title companies shall be required to pay the same type tax as trust companies and banks doing a trust business are required to pay." (Id. at p. 64.)

[**1002] In the title insurance provision, therefore, the electorate demonstrated both their intention to exempt insurers' investment income from taxation [*412] and their

ability, when they wish, to tax insurers' noninsurance business. Where the electorate has demonstrated the ability to make their intent clear, it is not the province of this court to imply an intent left unexpressed. "It is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning. [Citations.] An intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein.'" (Hennigan v. United Pacific Ins. Co. (1975) [***17] 53 Cal.App.3d 1, 7 [125 Cal.Rptr. 408].)

In Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco, supra, 129 Cal.App.3d 876, relied on by petitioner, the Court of Appeal rejected the plain meaning of the "in lieu" provision in favor of an interpretation it believed was consonant with the policy underlying the constitutional provision. In that case, the insurer owned the Hyatt Hotel on Union Square in San Francisco and agreed with another corporation that the latter would operate the hotel for 20 percent of the profits. The Court of Appeal upheld the city's imposition of ad valorem taxes against the insurer on hotel personal property owned by it and leased to the hotel operator.

Stating that the quid pro quo for the "in lieu" tax exemption is the imposition upon insurers of a tax on gross premiums, rather than net profits, as in the common commercial case (129 Cal.App.3d at p. 881), the Massachusetts Mutual court reasoned: "Since the in lieu' exemption is granted in return for imposition of a tax on gross, rather than net, receipts, and is functionally related to the tax which insurers must pay on gross premiums paid to the company for insurance benefits [***18] [citation], in our view it would be inappropriate to allow a tax exemption for property owned by an insurer but not used to produce taxable gross premiums. If it were otherwise, an insurer could entirely escape taxation of all revenue-producing property not used to generate gross premiums.' Under such circumstances, . . . the quid pro quo for the in lieu' exemption no longer exists; the insurer retains the privilege of doing business, and derives profits, but pays the state nothing for property owned and used in deriving a conceivably substantial source of its income. We do not think the electors intended such a result." (Id. at p. 882.)

Massachusetts Mutual is faulty in several respects. First, the court completely overlooked this court's opinion in Consolidated Title Sec. Co. v. Hopkins, supra, 1 Cal.2d 414. There, in interpreting the in lieu provision, we stated: "The insurance company gross premiums tax frees from local taxation, [*413] except taxes on real estate, all property of such companies.' Use of personal property in the conduct of the insurance company's business is not the factor which determines freedom from local taxation." (Id. at [***19] p. 420, italics added.)

Second, the court based its holding on its unsupported view of the result dictated by the quid pro quo policy underlying the constitutional provision, rather than the particular constitutional language. The court thereby violated the fundamental principle of interpretation that "[when] statutory language is . . . clear and unambiguous there is no need for construction and courts should not indulge in it." (Solberg v. Superior Court (1977) 19 Cal.3d 182, 198 [137 Cal.Rptr. 460, 561 P.2d 1148], italics added.)

Third, the court's premise, that the operation of an active business that generates gross operating revenues is not used to produce gross premiums (129 Cal.App.3d at pp. 882, 886), is contrary to both the testimony in the present case and the undisputed fact that income from investments, of whatever kind, is necessary to maintain sufficient reserves to [**1003] meet policyholders' claims. As the United States Supreme Court has observed: "An insurance company obtains most of its funds from premiums paid to it by policyholders in exchange for the company's promise to pay future death claims and other benefits. The company is also obligated to [***20] maintain reserves, which, if they are to be adequate to pay future claims, must grow at a sufficient rate each year. The receipt of premiums necessarily entails the creation of reserves and additions to reserves from investment income. Thus the insurance company is not only permitted to invest, but it must invest; and it must return to the reserve a large portion of its investment income. As no insurance company would deny, there is sufficient economic and legal substance to the company's obligation to return a large portion of investment income to policyholder reserves to warrant or require the exclusion of investment income so employed from the taxable income of the company." (United States v. Atlas Ins. Co. (1965) 381 U.S. 233, 247 [14 L.Ed.2d 358, 367, 85 S.Ct. 1379], first italics added, remaining italics in original.)

In its quid pro quo analysis, the court failed also to acknowledge the authority of the Legislature, by majority vote, to increase the rate of the gross premiums tax. (§ 28, subd. (i).) n5 So long as the Legislature has authority to adjust the tax rate on gross premiums, the quid pro quo for exempting insurers from all other taxes obtains. [***21] If the Legislature determines insurers are not bearing their fair share of the tax burden, it need only increase the rate of taxation on gross premiums.

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n5 Subdivision (i) of section 28 was amended in 1976 to permit increase of the tax rate by a majority, rather than a two-thirds, vote of the Legislature, as had previously been the case. (Historical Note, 3 West's Ann. Cal. Const., supra, art. XIII, § 28 (1990 pocket supp.) p. 60.)

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[*414] Finally, the court's conclusion, that revenues from a so-called "active" business are taxable, leads to inconsistent results. The exemption from taxation of income from "passive" investments, such as stocks and bonds, has been established for more than half a century. (See Consolidated Title Sec. Co. v. Hopkins, supra, 1 Cal.2d at p. 419.) If income and profits from investment in intangibles, such as stocks, bonds, mortgages and other securities, is exempt from taxation, what justification is there to except income and profits from investment in real estate? An [***22] investment of premiums, whatever its manner or means, is an investment; its purpose, irrespective of the form it takes, is in each instance the same: to accrue income to cover operating expenses and return to the company's reserve sufficient funds to pay future claims. n6

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n6 It is interesting to note that the dissent accepts that the "in lieu" provision confers on insurers the advantage of exemption from taxes on income from so-called "passive" investments, yet finds it "unthinkable" and "inconceivable" that the electorate intended to confer a comparable advantage for income from "active" investments. (Post, pp. 418, 425.) Cries of alarm aside, where does it find the distinction? Certainly not in the Constitution. Subdivision (f) of section 28 plainly exempts insurers from "all other taxes," not, as the dissent would have it, from all other taxes except those imposed on revenue from so-called active investments.

The dissent misses the point in footnote 4 of its opinion, where it tells us that federal income tax law draws a distinction between active and passive investments in the context of determining whether certain losses are deductible. Federal law specifically recognizes the distinction; our Constitution does not. Indeed, the dissent does not even claim a constitutional basis for the distinction. Rather, the dissent is frankly engaged in an attempt to legislate according to its view of desirable policy -- of what it deems "fair." This is apparent from the very outset of the opinion where, admittedly "[without] considering the language or history of subdivision (f) [of section 28] or the cases interpreting [it]," the dissent declares it "obvious from the consequences which will follow the majority's holding that the construction [the majority] advances is unsound." (Dis. opn. of Mosk, J., post, at p. 417 (italics added).) With this result-oriented beginning, the opinion's conclusion comes as no surprise. Our task, however, is to construe the Constitution, not to rewrite it.

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Observing that until 1945 insurers were prohibited by law from investing in real property not used for a home office, petitioner seeks justification in the argument that the electorate could not have intended [**1004] to except such income and profits from taxation. But the electorate expressly did just that in the provisions relating to title insurers; petitioners do not attempt to explain why the electorate should have had a different intent with respect to insurers not transacting title insurance and which, unlike title insurers, are not even taxed on income. The dissent likewise fails to address this issue, preferring instead to conjure up visions of the "gross injustices" our decision assertedly will create. Rhetoric aside, however, the fact is that in the constitutional provision applicable to title insurers the electorate has expressly adopted the very exemptions the dissent finds so unjust. (§ 28, subd. (c).) The dissent fails entirely to explain why the electorate should have thus favored title insurers, but not others.

[*415] The issue, moreover, is not what the insurers' investment practices may have been when section 28 was originally adopted, but whether, under the constitutional [***24] provision, income and profits from investments, then or now, is subject to local taxation. As indicated, the answer plainly is in the negative. As this court stated in the analogous context of construing the public land-tax exemption (Cal. Const., art. XIII, former § 1; see now § 3, subds. (a) and (b)), " The fact that social, economic, and political conditions in this state have undergone great changes since the adoption of our present Constitution . . . would not justify a construction of this provision which would in effect result in its amendment by the courts and not by the people.'" (Anderson-Cottonwood I.

Dist. v. Klukkert (1939) 13 Cal.2d 191, 197 [88 P.2d 685].) Section 28, moreover, has been amended numerous times since 1945, most recently in 1976 (see Historical Note, 3 West's Ann. Cal. Const., supra, art. XIII, § 28 (1990 pocket supp.) p. 60); the "in lieu" tax provision was reenacted on each occasion (see Smith v. Board of Trustees (1926) 198 Cal. 301, 306 [245 P. 173]), presumably with the voters' full knowledge of the investment practices of insurance companies.

As further justification, petitioner raises the specter of insurers exploiting the [***25] exemption by conducting extensive commercial enterprises under the umbrella of the constitutional tax exemption, to the disadvantage of citizens not favored by such an exemption. The dissent likewise invokes a "parade of horrors" that assertedly will follow from our decision. Neither, however, recognizes that the constitutional exemption applies only to insurers -- that is, organizations whose primary purpose and function is to assume the risk of loss under contracts of insurance or reinsurance. (See Ins. Code, § 826; cf. 26 C.F.R. § 1.801-3 (1989).) Insurance companies, moreover, are highly regulated and strictly limited by law as to their permissible investments. (Ins. Code, §§ 1100- 1107, 1150- 1250.) Except in the context of investments in stock or other securities, the provisions of the Insurance Code that authorize and regulate insurance company investments simply do not mention nonreal-estate commercial enterprises. Moreover, the state Legislature, in the exercise of its authority to regulate insurers' investments, could, if it wished, eliminate any perceived abuse of insurers' tax status simply by amending the laws governing their permissible investments. n7

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n7 Because insurance companies' permissible investments are limited and subject to comprehensive regulation, unlike the dissent we place little weight on counsel's "concession" at oral argument that, if the "in lieu" provision means what it says, as we hold it does, an insurance company may own and operate a doughnut shop, a bowling alley, a department store, or any other venture, and the profits from the enterprise will be virtually free of all taxes. Neither the record nor authority supports such a conclusion.

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Nor, in any event, would the claimed consequence alter our conclusion. "[Courts], in construing the constitution, are bound to suppose [*416] that any inconveniences involved in the application of its provisions, according to their plain terms and import, were considered in its formation, and voluntarily accepted as less intolerable than those which are thereby avoided, or as fully compensated by countervailing advantages." (People v. Pendegast (1892) 96 Cal. 289, 294 [31 P. 103]; Sturges [**1005] v. Crowninshield (1819) 17 U.S. (4 Wheat.) 122, 202-203 [4 L.Ed. 529, 550].)

In sum, the court's holding in Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco, supra, 129 Cal.App.3d 876, is unsupported and unpersuasive, and we disapprove it.

Finally, petitioner cites in support a Delaware case, Continental Amer. Life Ins. Co. v. City of Wilmington (Del.Super.Ct. 1970) 273 A.2d 277. n8 There, the state statute

provided that the state's fee, charges and premium taxes should be "in lieu of all county and municipal license fees and taxes upon the business of insurance in this State, excepting property taxes." (273 A.2d at p. 278, italics added.) [***27] California's gross premiums tax, by contrast, is in lieu not merely of taxes on the business of insurance, but of taxes "upon such insurers and their property." (§ 28, subd. (f).) The Delaware case, therefore, has no bearing on the application of our constitutional provision.

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n8 Two New Mexico cases also cited by petitioner, First Nat. Bank of Santa Fe v. Commissioner of Rev. (1969) 80 N.M. 699 [460 P.2d 64] and Santa Fe Downs, Inc. v. Bureau of Revenue (1973) 85 N.M. 115 [509 P.2d. 882], are inapposite in light of the different state and federal statutes there at issue, and need not be discussed.

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In the face of the foregoing, for this court to read an "active" investment exception into section 28 would be nothing more than judicial legislation. The Constitution not having provided such an exception, it is not within our province to do so. "The constitution is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in [***28] definite language than they are to disregard any of its express provisions." (People v. Campbell (1902) 138 Cal. 11, 15 [70 P. 918]; see Ross v. City of Long Beach (1944) 24 Cal.2d 258, 260 [148 P.2d 649].) The wisdom of the constitutional provision is not for us to judge, and any inequity resulting is for the people or the Legislature to correct.

Considerations of policy, in any event, arguably support the exemption of investment income from taxation. Because insurance companies do not generate sufficient income from premiums to pay their operating expenses and claims, they must invest their premiums in order to stay in business and make a profit. The drafters of section 28 undoubtedly were mindful that insurance companies are unique in their exposure to payouts [*417] far in excess of premiums received and, unlike other businesses, need substantial reserves to meet potential claims in addition to operating expenses. Public policy is served when insurance companies remain solvent, and only by investment of premiums can an insurer maintain the necessary reserves. To tax investment income would be to minimize the value of the investment and reduce the sums available [***29] for the reserves, to the potential detriment of policyholders. The Legislature, moreover, has, as previously noted, imposed extensive statutory restrictions on insurers' permissible investments (e.g., Ins. Code, §§ 1100- 1107, 1150- 1250) and has specifically limited to 10 percent the amount of capital insurers can invest in real estate enterprises (Ins. Code, § 1194.8), the investment here at issue; if these limitations are insufficient, it is for the Legislature to address the problem, not this court.

In adopting section 28, the electorate clearly intended to exempt from taxation the income generated by insurers' so-called "passive" investments. (See Consolidated Title Sec. Co. v. Hopkins, supra, 1 Cal.2d at p. 419.) To exclude investments in real estate on grounds that they are "active" rather than "passive" investments, would arbitrarily and unjustifiably limit insurers' business judgment as how best to maximize their return on

the investment of premiums. Absent an express directive requiring such a distinction, we decline to make it.

The judgment of the Court of Appeal is affirmed.

DISSENTBY:

MOSK

DISSENT: [**1006] MOSK, J.

I dissent.

The majority's construction of the "in lieu" provision creates [***30] a loophole in the tax laws in favor of insurance companies so sweeping, so obvious, and so burdensome on other taxpayers that it manifestly violates the intent of the voters in adopting section 28 of article XIII of our Constitution (section 28).

Without considering the language or history of subdivision (f) of that provision or the cases interpreting its language, it is obvious from the consequences which will follow the majority's holding that the construction it advances is unsound. If, as the majority hold, an insurer is exempt from taxation (except for real property and motor vehicle taxes) on any noninsurance business it may conduct solely because the business is owned by an insurance company, it may operate a chain of restaurants, a department [*418] store, theaters, clothing stores, video parlors, or any other enterprise, and the profits of these businesses will be virtually free of taxation because the insurer pays 2.35 percent of the gross premiums produced by its insurance business to the state. (Rev. & Tax. Code, § 12202.) Even if the premiums realized would be relatively low and the profits from noninsurance businesses in the millions, nevertheless the exemption [***31] granted by the majority's interpretation of subdivision (f) would render those profits exempt from taxes with the minor exceptions stated above. Thus, the ordinary citizen who owns a neighborhood grocery store will be subject to taxes on his profits, as well as other business taxes, whereas his competitor down the street, a profitable chain grocery store owned and operated by an insurance company with huge assets, will be virtually exempt from all business taxes.

In order to take advantage of this enormously lucrative loophole, existing insurance companies would be well advised to invest in profitable businesses of all types; in order to render its profits free of taxation, a corporation could purchase an insurance company, even one that operates at a loss; and it is not inconceivable that insurance companies would be organized for the purpose of realizing tax-free profits from noninsurance related enterprises, with the insurance business being only a minor factor in their operations.

The majority's only answer to these obviously inequitable consequences which follow from its interpretation of the constitutional provision is that this potential scenario is unsupported by the record [***32] or authority. But these possibilities cannot be dismissed as merely the exaggerated fancies of a suspicious mind. Counsel for Mutual Life Insurance Company of New York (MONY) freely conceded at oral argument that if

the majority's construction of the "in lieu" provision prevails an insurance company may own and operate a doughnut shop, a bowling alley, a beauty parlor, a restaurant, an auto shop or any other venture, and the profits and operations of these enterprises would be free of all taxes except for real property and motor vehicle taxes. Indeed, he conceded that if Allstate Insurance Company owned and operated the numerous Sears department stores Sears's profits would be exempt from taxation with these minor exceptions.

Although the majority refer to these prospects as a "parade of horribles," they do not deny that insurers may in fact take advantage of the "in lieu" provision in this manner, as MONY conceded. It is almost certain that following the filing of the majority opinion insurers, anxious like everyone else to reap tax-free income, will increase their investments in such enterprises.

It is unthinkable that the voters intended to grant insurers such an enormous competitive [***33] advantage in the operation of a noninsurance related [*419] business over other businesses, or for that matter over the [**1007] nonbusiness taxpayer who must pay taxes on his wages.

The majority's policy arguments to support their broad construction of the exemption are untenable. They point to the fact that the tax imposed by section 28 is on gross premiums, and state that the "in lieu" provision was granted in exchange for the payment of a tax on gross rather than net premiums. But business taxes on gross receipts are not unusual, and in no other context do they exempt the taxpayer from other types of taxes. To hold that not only is the insurer granted exemption from taxes for its insurance business and its passive investment income under the "in lieu" provision but that it is also exempt from taxation as to other noninsurance businesses in which it may engage, merely because its gross premiums are taxed, is manifestly discriminatory.

In fact, the taxes on the rental business and the business of operating a parking lot involved in this case are on gross receipts. It is difficult to justify a holding which allows an insurance company simply because of its status as an insurer to escape [***34] taxes on such enterprises on the ground that it pays taxes on its gross receipts in the insurance business, whereas the owner of a commercial building or a parking lot not in the insurance business who pays taxes on his gross receipts enjoys no such privilege.

Another policy argument made by the majority is that insurers must invest their income from premiums to generate sufficient funds to pay the claims of policyholders and that public policy is served when insurers remain solvent. Contrary to the majority's criticism, I freely concede the correctness of these propositions. But they are a non sequitur, irrelevant to the conclusion reached by the majority. Since the founding of this state, insurers have been able to sustain their operations with income derived from premiums and passive investments like stocks and bonds; the taxation of revenues from such investments is not challenged in this proceeding. There is no evidence that unless insurance companies can also operate carwashes, boutiques and department store chains virtually free of taxation they will be unable to pay the claims of their policyholders. And the majority do not mention that excess income of an insurer realized [***35] from the advantage gained by such investments may not be necessarily used to pay off policyholders but may increase the dividends received by investors.

The majority also seek to justify their holding by pointing out that the Legislature has limited the amount insurers may invest in unrelated businesses. (Ins. Code, §§ 1100-1107; 1150-1250.) For example, they point out that insurers are permitted to invest no more than 10 percent of their admitted assets in real estate. (Ins. Code, §§ 1194.8.) Presumably, the [*420] inference the majority draw from these limitations is that insurers cannot take advantage of the "in lieu" provision to reap large profits from noninsurance business. But because insurance companies have such enormous assets, the limitations still allow insurers to obtain large profits from noninsurance business practically tax free, since even 10 percent of their admitted assets amounts to many millions of dollars.

The majority opine that we must turn a blind eye to the gross injustices created by their holding because the Constitution must be interpreted according to its "plain terms" in spite of "any inconveniences" that may be result, that the wisdom of a constitutional [***36] provision is not for the court to judge, and any inequity resulting from our interpretation is for the people or the Legislature to correct. I disagree. There is no principle of statutory or constitutional construction that takes precedence over the rule that an interpretation which leads to unreasonable and inequitable results will not be adopted if there is a reasonable alternative. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 232 [110 Cal.Rptr. 144, 514 P.2d 1224]; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 260 [104 Cal.Rptr. 761, 502 P.2d 1049]; People ex rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal.2d 533, 543-544 [72 Cal.Rptr. 790, 446 P.2d 790].) Sutherland calls this the "golden rule of statutory interpretation." (2A [**1008] Sutherland, Statutory Construction (4th ed. 1984) § 45.12, p. 54.)

As I shall demonstrate, there is such an alternative: the "plain meaning" rule does not call for the result reached by the majority because the "in lieu" provision is ambiguous; even if that was not the case, we would not be prohibited from considering whether the voters intended subdivision (f) to mean that insurance [***37] companies would be virtually free from taxation on any extraneous business conducted by them simply because of their status as insurers; and finally, the legislative history of section 28 shows that the voters made clear in successive elections precisely that they did not wish to grant such unprecedented privileges to insurance companies.

Section 28 is in fact ambiguous. Subdivision (b) provides that an annual tax is imposed "on each insurer doing business" in California, and subdivision (c) states that the basis of the tax is the "gross premiums received . . . by such insurer upon its business done in this state." (Italics added.) Under subdivision (f), the tax imposed by the section is "in lieu of all other taxes . . . upon such insurers and their property." As amicus curiae point out, n1 it is not clear from this language whether the term "insurer doing business" in California in subdivision (b) refers to any type of business operated by an [*421] insurer in this state, or only to the insurer's participation in what is ordinarily viewed as the insurance business, i.e., issuing policies and paying claims and activities ancillary to these functions. The language could [***38] be viewed to favor the position of amicus, since the reference in subdivision (c) to gross premiums on an insurer's "business done in this state" can mean only insurance business, and it may be argued that the phrases underlined

above in subdivision (b) and (c) should be interpreted in a similar fashion. On the other hand, subdivision (b) must be read in conjunction with subdivision (f), which broadly exempts insurers and their property from "all other taxes." In view of this ambiguity as to the meaning of the section, a consideration of its origins and purpose would clearly be justified. n2

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n1 The City and County of San Francisco, and the Cities of San Diego, Roseville, Santa Clara, Tustin and Santa Barbara have filed an amicus curiae brief on behalf of the City of Los Angeles.

n2 I am unimpressed with the majority's reliance on Pacific Gas & Electric Co. v. Roberts (1914) 168 Cal. 415 [143 P. 597], for the proposition that the "in lieu" provision is not ambiguous. The issue there was whether the motor vehicle tax was included in the "in lieu" exemption as a privilege or excise tax. In the first place, the constitutional provision applicable in that case provided an exemption only for property "used exclusively" in the operation of the business of the utility. Second, the case was decided at a time when insurers such as MONY were confined to passive investments and decades before they were permitted to invest in real estate (see Stats. 1945, ch. 1073, § 3, p. 2072) or to operate any other business aside from the insurance business. The statement in the decision that the "in lieu" provision was clear must be read in the light of these crucial differences.

Of the remaining cases relied on by the majority for the proposition that no court "faced with the issue ever found" the "in lieu" provision ambiguous, only one case cited discussed the question of ambiguity (First American Title Ins. & Trust Co. v. Franchise Tax Bd. (1971) 15 Cal.App.3d 343 [93 Cal.Rptr. 177]), and it refused to consider the legislative history and purpose of the predecessor provision to section 28 on the ground that its meaning was clear and no extrinsic aids to construction were required. For the reasons stated below, this refusal to look beyond the statutory language even to decide whether a literal interpretation of a statute is consistent with its purpose is incorrect.

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But even if section 28 did not contain an ambiguity, we would not be prohibited from attempting to determine whether the voters intended it to be read, as MONY contends, to exempt insurers, solely because of their status as such, from all taxes except those specified on the revenues and property of any business they may own and operate.

It is often said that the words of a statute should be given the meaning they bear in ordinary use (e.g., In re Rojas (1979) 23 Cal.3d 152, 155 [151 Cal.Rptr. 649, 588 P.2d 789]), and that there is no need for construction if the language used in the provision is unambiguous (In re Lance W. (1985) 37 Cal.3d 873, 886 [210 Cal.Rptr. 631, 694 P.2d 744]). But these rules do not prevent a court from determining whether the literal meaning of a statute is consistent with its [**1009] purpose. (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67, 743 P.2d 1323]; County of San Diego v. Muniz (1978) 22 Cal.3d 29, 36 [148 Cal.Rptr. 584,

583 P.2d 109]; Younger v. Superior Court (1978) 21 Cal.3d 102, 113 [145 Cal.Rptr. 674, 577 P.2d 1014]; People v. Davis (1978) 85 Cal.App.3d 916, [***40] [*422] 924 [149 Cal.Rptr. 777].) The intent of a statute prevails over the letter, and the letter will, if possible, be read so as to conform to the spirit of the enactment. (People v. Belton (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485]; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) In order to make sense out of an initiative voted on by the people, we held in People v. Skinner (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752], that "and" really meant "or." We declared that where the purpose or intent of a statute seems clear, drafting errors or uncertainties "may properly be rectified by judicial construction." (Id. at p. 775; see also People v. Horn (1984) 158 Cal.App.3d 1014 [205 Cal.Rptr. 119].)

As an eminent authority on statutory interpretation has observed, "Although many expressions favoring literal interpretation may be found in the cases, it is clear that if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute [***41] will be modified to agree with the intention of the legislature . . . . While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words.'" (2A Sutherland, Statutory Construction, supra, § 46.07, p. 110.) These rules apply to the interpretation of constitutional provisions as well as to statutes. (Stanton v. Panish (1980) 28 Cal.3d 107, 115 [167 Cal.Rptr. 584, 615 P.2d 1372].)

The literal interpretation of section 28 would lead to a result obviously not intended by the voters who adopted that provision. Its language is sweeping: it provides that the gross receipts tax is "in lieu of all other taxes and licenses, state, county, and municipal, upon insurers and their property" except taxes on real estate and motor vehicles. (Italics added.) Construed literally, the provision would lead to the unreasonable and unjust results referred to above. Unless it is clear that the voters intended that insurers were to be exempted from taxes on any type of business in which they chose to engage, we should not slavishly adhere to the [***42] literal language of the section. The voters have made clear in several elections their intention not to grant such unprecedented benefits to insurance companies.

The tax on gross premiums and the "in lieu" provision first appeared in the Constitution in 1910 as subdivision (b), section 14 of article XIII. It was part of a "radical change in the system of taxation" in that it divided "the subjects of state and location taxation by imposing on . . . corporations engaged in certain callings [including] insurance companies . . . the obligation to pay certain taxes to be applied exclusively to state purposes. At the same time, the persons engaged and the property employed in these callings [*423] were, to a greater or less degree, to be free from the burden of local taxation." (San Francisco v. Pacific Tel. & Tel. Co. (1913) 166 Cal. 244, 247 [135 P. 971].) Over the years, the constitutional provision has been amended a number of times. The history of these amendments makes it abundantly clear that section 28 was not to be construed to afford insurance companies a competitive advantage in the operation of a commercial real estate business or any other business over others [***43] engaged in similar enterprises. While the matters discussed below refer to the gradual elimination by the voters of an exemption for real property taxes which insurers were granted in the original

"in lieu" provision of 1910, the reasons for the elimination of that exemption are instructive in determining the intent of the voters regarding the taxes involved in this case as well.

[**1010] As noted above, the tax on gross premiums and the "in lieu" exemption first appeared in the Constitution in 1910 as section 14, subdivision (b) of article XIII. It provided that insurers would be taxed 1 1/2 percent of their gross premiums, and that this tax was in lieu of any other state, county, or municipal taxes, except for local taxes on real estate. However, to the extent real estate taxes were paid, they were deducted from the gross premiums tax payable to the state. In effect, therefore, insurance companies were exempt from the payment of real estate taxes.

In 1942, this provision was amended (by the addition of former section 14 4/5 to article XIII) to deprive insurance companies of the deduction of real estate taxes from the state tax (over a five-year period), except for the taxes paid on their [***44] principal or home offices, which would continue to be deductible from the gross premiums tax. The reason for the change, as explained in the argument in favor of the measure in the voter's pamphlet, was that the deduction of real estate taxes from the gross premiums tax had an unexpected and unintended effect. In 1942, insurance companies were permitted to own real property for use as their home offices, or, for a period of five years, property acquired by foreclosure of loans. Insurers that had made loans on property during the depression and had foreclosed on those loans, acquired more real estate than they would have under normal circumstances. As a result, they paid higher real estate taxes to local governments and deducted these payments from their gross premiums tax, depriving the state of much needed revenue. These companies thus "inadvertently" received preferential treatment over insurers which had not invested in mortgages as well as "over citizens who own and operate similar properties in that the insurer's expense of operation of such properties is lessened by the credit against State taxes in the amount of local real estate taxes thereon. [para.] This amendment [***45] was drawn to correct these inequalities. . . ." (Ballot Pamp., argument in favor of Prop. 7, Gen. Elec. (Nov. 3, 1942) pp. 12-13.)

[*424] Thus, after 1942, except during a five-year phase-out period, insurance companies were in effect exempt from real estate taxes only to the extent that they owned property used for their principal or home office. The voters then turned their attention to this exemption. In a report issued by the Assembly Interim Committee on Revenue and Taxation in 1964, which contained a thorough review of the history and effects of the principal office deduction, it was recommended that the deduction be eliminated altogether. (See 4 Rep. of the Assem. Interim Com. on RevenueOand Taxation No. 15, The Insurance Tax, A Major Tax Study, pt. 8 (Dec. 1964) 1 Appen. to Assem. J. (1965 Reg. Sess.) hereafter cited as Assem. Com. Rep.) The report observed that some insurance companies, spurred on by the advantage of owning real estate without being obligated to pay property taxes, had built large buildings, occupying only a small part and leasing the rest to other tenants (id. at pp. 44-45, 53). It concluded that the exemption should be repealed because it gave [***46] insurance companies which owned office buildings a competitive advantage over other owners of such buildings as well as over insurers which did not own these facilities, in the form of a tax-sheltered rental income, amounting to an unfair subsidy. (Id. at pp. 39, 44, 53.)

However, the Legislature proposed a modified version of this recommendation to the electorate as Proposition 8 at the election in 1966. The measure limited but did not eliminate the home office deduction, basing the deduction on the amount of space occupied in the building by the insurance company and its affiliates, and making the measure prospective as to California insurers. The argument in favor of the measure stated that it would remove the advantage enjoyed by out of state insurance companies which owned large office buildings rented to others, over other suppliers of office space. (Ballot Pamp., argument in favor of Prop. 8, Gen. Elec. (Nov. 8, 1966) pp. 13-14.) The argument against the measure advocated the repeal of the entire home office deduction on the ground [**1011] that it is "inequitable as between various insurance companies as well as with regard to other industry." (Id., argument against Prop. [***47] 8, p. 14.) The proposal was adopted by the voters as an amendment to section 14 4/5 of article XIII.

The principal office deduction was eliminated entirely in 1976, when the voters amended the section (renumbered section 28 of article XIII), to except real estate taxes from the scope of the "in lieu" provision altogether, so that all insurers are now liable for the payment of real property taxes even if the property is the home office of the company, without any deduction of such payments from the gross premiums tax. The 1976 ballot argument of the proponents of the measure noted that the deduction was a "65-year old tax loophole which allows a few big insurance companies to escape paying their fair share of state taxes," and that the tax was "unfair to the [*425] average taxpayer, . . . [and] gives On unwarranted competitive advantage to these specially privileged companies." (Ballot Pamp., argument in favor of Prop. 6, p. 28, rebuttal to argument against Prop. 6, Primary Elec. (June 8, 1976) p. 29.)

This history demonstrates unmistakably that the voters wanted to deny to insurance companies an exemption from taxes on real property which they operated as a commercial rental business. [***48] An important reason for eliminating the exemption was that it gave an insurer operating such a business a competitive advantage over similar businesses conducted by noninsurers as well as over insurance companies that did not own real estate. It is inconceivable, then, that the electorate intended by the "in lieu" provision to exempt insurers from taxes, such as those in issue here, which are incident to the operation of a commercial real estate business. Whether the tax is on the real property as such, or on the business of operating it as a commercial venture in competition with other like enterprises, the advantage enjoyed by the insurance company is the same: it is exempt from taxes that other owners of commercial property must pay. This reasoning applies with equal force to other kinds of businesses operated by an insurance company. n3

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n3 The majority miss the point in claiming that we are compelled to adopt their interpretation of the "in lieu" provision because the Constitution itself does not make a distinction between an insurer's investment in stocks and bonds and operating a chain of video parlors. At the time the constitutional provision was adopted in 1910, insurance companies like MONY were not permitted to own real estate for investment or to engage

in any other noninsurance business. Our task is to decide whether the voters intended by the "in lieu" provision to open the floodgates so as to render any business in which an insurance company chooses to engage virtually free of taxation. In making this determination, the majority give no consideration whatever to the consequences of their holding, in violation of the rules of construction noted above.

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The majority's criticism of the holding in Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco (1982) 129 Cal.App.3d 876 [181 Cal.Rptr. 370], is unwarranted. They state, for example, that the decision was wrong in holding that profits derived by an insurer from the operation of a noninsurance business are not used to produce gross premiums because, according to the majority, income from investments is necessary to maintain sufficient reserves to meet policyholders' claims. As I observe above, there is no evidence that income derived by an insurer from the active operation of a business, as opposed to passive investments, is "necessary" to maintain reserves to pay claims. Even if there were some indirect connection between the profits of an unrelated business and the production of premiums, nothing prevents profits from such a business to be used not to make payments to policyholders but to increase the dividends paid to the stockholders of the insurer.

[*426] Although the majority criticize Massachusetts Mutual for failing to recognize that the Legislature can raise the tax on gross premiums from 2.35 percent if it chose to do so, such an action [***50] would have little effect on the situation sanctioned by the majority's holding, i.e., the minor insurance business tail wagging the hugely profitable noninsurance business dog.

Finally, I draw a different inference than that drawn by the majority from the fact [**1012] that the voters decided in 1942 that trust business of title insurers, which is classified as noninsurance business, was subject to taxation to the same extent as other trust businesses. Prior to the 1942 amendment to former section 14 4/5 of article XIII of our Constitution, the trust business engaged in by title insurers was exempt from taxation to the same extent as its other operations. In 1942, however, the electorate made it clear that a title insurer was not to be permitted to operate under the insurance exemption for revenues produced by its noninsurance trust business, even though the trust business was the only noninsurance enterprise that title insurers had traditionally conducted. Although the majority draw from this the inference that the electorate knows how to exclude insurers from the "in lieu" exemption when it wishes, in my view it demonstrates, rather, that when the electorate was given a choice whether [***51] or not to withdraw the insurance exemption from noninsurance business conducted by an insurance company, it chose to do so. So far as I am aware, there was no suggestion prior to the Massachusetts Mutual case that insurance companies (with the exception of title insurers) were actively operating businesses unrelated to their insurance business, except for the "home office" exemption discussed above. When the electorate was asked whether insurers should enjoy tax exemptions on their noninsurance business, they unmistakably responded in the negative, even as to the trust business that title insurers had traditionally conducted. It is unreasonable to hold that the voters intended the far broader exemption granted by the majority, which will allow insurance companies to realize tax sheltered income,

amounting to a subsidy (Assem. Com. Rep., pp. 39, 44, 53) in the operation of any extraneous business in which the insurer chooses to engage. n4

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n4 Although the majority are critical of the fact that I offer no guidance for drawing a line between passive and active investments, a similar distinction exists in the federal income tax laws for the purpose of determining whether certain losses or credits may be used as deductions. (See 26 U.S.C.A. §§ 162, 469; Bittker & Lokken, Federal Taxation of Income, Estates and Gifts (2d ed. 1989) §§ 20.1.1 et seq.; 28.1 et seq.) Certainly there can be no problem in distinguishing between the traditional investments made by insurance companies in stocks, bonds and mortgages and the operation of a parking facility.

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In the final analysis, the majority decision grants insurance companies that operate extraneous businesses a virtual exemption from taxes, a benefit [*427] that has heretofore belonged only to churches and charities. I know of no insurance carrier that qualifies as a church or charity. n5

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n5 But see Jimmy Swaggart Ministries v. Bd. of Equalization (1990) 493 U.S. [107 L.Ed.2d 796, 110 S.Ct. 688] in which even a church activity was subject to taxation.

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It now appears that the people must amend section 28 of the Constitution or the Legislature must confine insurance company investments to the traditional source of nonpremium income, i.e., passive investments like stocks and bonds, to correct the unconscionable advantage granted to insurers by the majority's unprecedented holding.

87 Cal. App. 2d 727; 197 P.2d 788;
1948 Cal. App. LEXIS 1385

ALAN FRANKLIN, Appellant, v.
WALTER C. PETERSON, as City Clerk etc., et al., Respondents

Civ. No. 16329

Court of Appeal of California, Second Appellate District, Division One

87 Cal. App. 2d 727; 197 P.2d 788; 1948 Cal. App. LEXIS 1385

September 28, 1948

SUBSEQUENT HISTORY: [***1]

Appellant's Petition for a Hearing by the Supreme Court was Denied November 22, 1948. Schauer, J., Voted for a Hearing.

PRIOR HISTORY:

APPEAL from a judgment of the Superior Court of Los Angeles County. Hartley Shaw and Jess E. Stephens, Judges.

Action for declaration of invalidity of an ordinance impossing a gross receipts tax.

DISPOSITION: Affirmed. Judgment for defendants affirmed.

CORE TERMS: ordinance, charter, municipal, profession, municipality, occupation, license, municipal affair, practicing law, gross receipts, license tax, power to impose, persons engaged, practice of law, power to levy, levy, occupation tax, single act, income tax, uniformly, exemption, complain, taxation, availed, levied, fractional part, enumeration, violence, invalid, taxed

COUNSEL: Alan Franklin, in pro. per., for Appellant.

Ray L. Chesebro, City Attorney, William H. Neal, Bourke Jones, Assistant City Attorneys, and Lester L. Nev, Deputy City Attorney, for Respondents.

JUDGES: White, J. York, P. J., and Doran, J., concurred.

OPINIONBY: WHITE

OPINION: [*729] [**789] This cause comes before us on an agreed statement on appeal (Rule 6, Rules on Appeal). It is a declaratory relief action wherein an attack is made upon the constitutionality of section 21.190 of the Los Angeles Municipal Code, being an amendment to article I, chapter 2 of said code. The section in question imposes a

gross receipts tax upon persons engaged in various trades, callings, occupations, professions or other means of livelihood, in the sum of $ 12 per calendar year or fractional part thereof, for the first $ [***2] 12,000 or less of gross receipts, and in addition thereto the sum of one dollar per year for each additional $ 1,000 or fractional part thereof of gross receipts in excess of $ 12,000.

The case was tried upon a short stipulation of facts wherein it is set forth that plaintiff is an attorney at law duly admitted to practice in the State of California and is an active member of The State Bar of California. That he maintains an office in the city of Los Angeles, where at all times material to this action he has been actually engaged in the practice of law. The licensing ordinance in question, which is conceded to be for revenue purposes only, became effective May 27, 1946, and has continued in effect as amended up to and including the present. Plaintiff has refused to pay said business license [*730] tax and brought this action to have the same declared void as to him and other members of the bar.

Following trial, judgment was rendered upholding the constitutionality, validity and enforceability of the aforesaid section 21.190 of the Municipal Code, and decreeing that "it was the duty of the plaintiff to obtain a license and pay the fee prescribed under said section for engaging [***3] in the practice of law in the City of Los Angeles during the calendar years 1946 and 1947." From such judgment plaintiff prosecutes this appeal.

Appellant first contends that the ordinance in question is indefinite, ambiguous, uncertain and invalid, in that its provisions are not limited to occupations carried on within the city of Los Angeles, but are broad enough to include occupations carried on entirely without the corporate limits of said city by persons who are not residents nor engaged in business within the city. It is true the ordinance does not specifically state that it applies only to persons engaged in business within the city limits, but it is manifest that an ordinance such as the one before us operates only within the territorial limits of the municipality and affects only those engaged in a business or profession within [**790] such limits. It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its [***4] entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the Constitution, but to make a valid statute or ordinance within the scope of its constitutional powers. Read in the light of this rule, the ordinance here in question must be held as intended to operate only upon those subject to the jurisdiction of the city of Los Angeles.

Furthermore, a court will ordinarily inquire into the constitutionality of a statute or ordinance only to the extent required by the case under consideration. In the case at bar the stipulated facts show that appellant maintains a law office within the city of Los Angeles and carries on his law practice there. The construction given the ordinance by appellant would not, therefore, work any injustice upon him or violate his rights. He is therefore confronted with the general rule that one cannot complain of a possible illegal application of [*731] an ordinance if he himself is not a party thereby aggrieved. (In re

Nowak, 184 Cal. 701, 709, 710 [195 P. 402]; Miller v. Municipal Court, 22 [***5] Cal.2d 818, 828 [142 P.2d 297].)

It is next contended that the city of Los Angeles has no legal authority whatever to impose a license tax for revenue purposes upon occupations, and particularly upon such professions as the law, medicine, or other professions or occupations which are licensed by the state, because no such city tax is authorized by the Constitution, the Legislature of the State of California, or by the charter of the city of Los Angeles.

There is nothing new or novel about the imposition of revenue taxes upon the business of practicing law. As far back as 1886, in Royall v. Virginia, 116 U.S. 572 [6 S.Ct. 510, 29 L.Ed. 735], a revenue tax on attorneys was sustained. Conceding that a license requirement cannot be imposed upon a lawyer, nor his business be regulated by ordinance, the tax provided for in the ordinance here under consideration is levied upon the business of practicing law, rather than upon a person because he is an attorney at law. A license to practice law does not carry with it exemption from taxation. Attorneys are not public officers, but are engaged in a private profession pursued primarily for pecuniary profit. It must therefore [***6] be held that the weight of authority in this country is to the effect that there is nothing which particularly exempts the attorney from bearing a just share of necessary public burdens, and that consequently he can claim no specific exemption from an occupation tax imposed for revenue purposes. (In re Johnson, 47 Cal.App. 465, 468 [190 P. 852]; In re Galusha, 184 Cal. 697, 698, 699, 700, 701 [195 P. 406]; City of San Mateo v. Mullin, 59 Cal.App.2d 652, 654 [139 P.2d 351].) In the case of In re Johnson, supra, at page 649, it is said: "A lawyer's office makes certain demands upon the various fire, police, street, and other functions of a city, which differ from above classes only in quantity and not in quality. If the one should be required to assist in keeping up the revenues of a city, no reason is apparent why the other should not." In Redding v. Dozier, 56 Cal.App. 590 [206 P. 465], an occupational license tax on physicians was sustained.

We entertain no doubt that a state license issued to a lawyer authorizing him to practice his profession is not a bar to the right of a municipality to impose a license tax upon attorneys who conduct within [***7] a city the business of practicing law.

[*732] The Los Angeles ordinance does not attempt to regulate the professions, businesses or occupations which are subject to the tax. It provides only for a license for revenue purposes, and is not a regulatory measure affecting the business or profession so taxed.

We come now to a consideration of appellant's contention that respondent [**791] city was without power to levy a business tax for revenue purposes. The claim is without merit. The city of Los Angeles has taken advantage of the privilege of legislative autonomy extended by the provisions of sections 6 and 8 of article XI of the California Constitution. Since the amendment of section 6 of article XI in 1914, the requirement that the state must specifically grant powers to the municipality has been eliminated. From the effective date of the amendment, city charters have been recognized as limitations, rather than grants, of powers as to municipal affairs. Those powers concerning purely municipal

affairs are conferred directly by section 6 of article XI of the state Constitution, which grants to chartered cities authority ". . . to make and enforce all laws and regulations [***8] in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, ..."

That taxation for municipal purposes is a municipal affair and that the power to levy such a tax stems directly from the Constitution is no longer open to question. As was said in West Coast Adver. Co. v. City of San Francisco, 14 Cal.2d 516, 524 [95 P.2d 138], "No doubt is entertained upon the proposition that the levy by a municipality for revenue purposes, including license taxes, is strictly a municipal affair. (Citing cases.) . . . As such a municipal affair it must be deemed to have been included within the special grant and privilege tendered by the constitutional amendment in 1914 and later accepted by the city." The city of Los Angeles has availed itself of the municipal affairs provision of our state Constitution, and is therefore empowered to act thereunder. (Dept. of Water & Power v. Inyo Chemical Co., 16 Cal.2d 744, 753 [108 P.2d 410].)

In the case of West Coast Adver. Co. v. City of San Francisco, supra, at page 521, our Supreme Court declared:

"It is now established by a line of decisions of the courts of this [***9] state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not [*733] its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. (Citing cases.) . . . As stated in In re Galusha, 184 Cal. 697, at page 700 [195 P. 406], 'The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, ...' Also in In re Nowak, 184 Cal. 701, 704 [195 P. 402], it was said: 'The net result . . . is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself. (Citing cases.)'"

It therefore follows that the imposition of the tax here in question for revenue purposes being strictly a municipal affair, [***10] the municipality possessed the power to impose that tax unless such power was taken from it by the charter itself.

An examination of the charter of the city of Los Angeles discloses no limitations whatever upon the right of the city to raise revenue for municipal purposes. On the contrary, such power is specifically provided for in section 2 (subd. 11) of article I, as follows: "Among the rights and powers which may be exercised by the City of Los Angeles, are the following, this enumeration being a partial enumeration and in no sense a restriction or limitation upon the rights and powers of the city: . . . (d) to assess, levy, collect and enforce taxes; (e) to license and regulate, under general and uniform laws, any lawful business or calling, and to impose other license fees; . . . ."

The charter containing no limitations or restrictions upon the power of the city of Los Angeles to levy taxes for revenue purposes, it follows that the municipality is vested with

power to levy business license [**792] taxes for municipal purposes, including a tax upon the business of practicing law.

Appellant's next contention, that the ordinance in question is invalid because it is an income [***11] tax, must be rejected. A long line of decisions rendered in this state has sustained the validity of gross receipts taxes, and furthermore a gross receipts occupation tax is not an income tax. (Philadelphia etc. Mail S. S. Co. v. Pennsylvania, 122 U.S. 326 [7 S.Ct. 1118, 30 L.Ed. 1200].)

Appellant cites no authority to support his contention that the minimum fee of $ 12 fixed by the ordinance renders the [*734] tax discriminatory, unreasonable and unjust, nor is there any evidence in the record that appellant's gross receipts from the practice of law are less than $ 12,000 annually, thereby entitling him to complain. The fixing of a minimum fee under a tax ordinance does no violence to California decisions, which have been uniformly adverse to the contention of appellant herein. (In re Nowak, supra, p. 709; City of Los Angeles v. Los Angeles etc. Co., 152 Cal. 765, 768 [93 P. 1006].) We find no decision in this state directly holding that a minimum license tax imposed upon all persons whose business produces an annual income up to a certain amount is an unreasonable discrimination. The ordinance here in question operates uniformly on the class to [***12] which it applies and makes no exceptions in favor of or against any one carrying on the business taxed. The fact that there is a difference between the volume of business done by the respective persons engaged therein who are required to pay the minimum tax is not, as was said in City of Los Angeles v. Los Angeles etc. Co., supra, at page 769, ". . . evidence of such a discrimination . . . as to make the ordinance void."

Appellant's claim that an attorney maintaining an office and doing business outside the Los Angeles city limits, who comes to Los Angeles for one day to try a case, would be guilty of a misdemeanor unless he first paid the tax, is untenable. The tax is levied upon the business of practicing law within the corporate limits of the city of Los Angeles. It is therefore the business or occupation, and not an act which is merely incidental thereto, which is subject to the tax. The distinction between a single act and the business in which the act is done is very marked and well recognized. The ordinance must be held, therefore, to impose a tax upon the doing of business within the city of Los Angeles and not upon a single act which is but an incident to the [***13] business maintained, transacted and carried on outside the corporate boundaries of the municipality. (Matter of Application of Smith, 33 Cal.App. 161, 163 [164 P. 618].)

The tax being valid, the judgment must be affirmed. It is so ordered.

CITY OF SAN JOSE, Plaintiff and Respondent, v. RUTHROFF & ENGLEKIRK CONSULTING STRUCTURAL ENGINEERS, INC., Defendant and Appellant

Civ. No. 48964

Court of Appeal of California, First Appellate District, Division One

131 Cal. App. 3d 462; 183 Cal. Rptr. 391; 1982 Cal. App. LEXIS 1576

May 6, 1982

PRIOR HISTORY:

Superior Court of Santa Clara County, No. 431438, Robert P. Aguilar, Judge.

COUNSEL: Paul M. Guyer and Richard J. Meehan for Defendant and Appellant.

Robert J. Logan, City Attorney, and Robert R. Cimino, Senior Deputy City Attorney, for Plaintiff and Respondent.

JUDGES: Opinion by Elkington, J., with Racanelli, P. J., and Newsom, J., concurring.

OPINIONBY: ELKINGTON

OPINION: An ordinance of the City of San Jose (San Jose), a charter city, provides among other things that: "Every person engaged in the City of San Jose, whether or not at a fixed place of business in such City [with an average number of employees in such business of five or less], in the business of: . . . (c) Any profession or semi-profession; or (d) Any other business or businesses; [with certain here inapplicable exceptions] shall pay to the City of San Jose . . . [a minimum] annual license tax of thirty dollars ($ 30.00) per annum, . . ." The tax is levied for revenue, and not for regulatory, purposes.

Defendant and appellant Ruthroff & Englekirk Consulting Structural Engineers, Inc. (Ruthroff) is a professional engineering firm licensed by the State of California (see Bus. & Prof. Code, § 6700 et seq.) as a civil and structural engineer. It maintains offices within, and pays business license taxes to, the cities of Los Angeles, Oakland, and Newport Beach.

A building complex was in the course of construction in San Jose, under direction of an architect whose business headquarters was in Los Angeles. Under a contract with the architect, Ruthroff, *in Oakland*, performed some structural engineering services for the San Jose project mainly under telephone direction from the architect in Los Angeles. The contract price was $ 5,500 based, apparently, upon 220 hours of Ruthroff's employees' time. During the course of the San Jose project's construction an engineer employee of Ruthroff visited the San Jose site to inspect the work progress five or six times, and he, or

another, had accompanied the architect to answer any questions generated upon application for a permit from a San Jose "building official." The total time spent in San Jose during the course of the project by Ruthroff's employees was about 12 hours. All of the remaining work of Ruthroff was performed in Oakland.

San Jose levied the minimum license tax of $ 30 against Ruthroff under its ordinance, based upon Ruthroff's above-described business there during the taxable year. Ruthroff's protest in time led to a determination of the superior court that the tax was properly levied. We review that adjudication upon the superior court's certification under rule 63, California Rules of Court, that a transfer to this court appears necessary to secure uniformity of decision and to settle an important question of law.

City of Los Angeles v. *Shell Oil Co*. (1971) 4 Cal.3d 108 [93 Cal.Rptr. 1, 480 P.2d 953] (cert. den., 404 U.S. 831 [30 L.Ed.2d 61, 92 S.Ct. 73]) and *General Motors Corp.* v. *City of Los Angeles* (1971) 5 Cal.3d 229 [95 Cal.Rptr. 635, 486 P.2d 163] are beyond any doubt the state's leading authorities on the issue here presented. They will be deemed to have superseded inconsistent language, if any, of earlier cases. (In quoting from them the italics, generally, are ours.)

City of Los Angeles v. *Shell Oil Co*. addressed itself to the constitutional implications of *intercity* business license taxes. It was there stated: "Although the Constitution of this state, unlike that of the United States, contains no provision specifically preventing its constituent political subdivisions from enacting laws affecting commerce among them, there is no doubt that many of the considerations relevant to problems of interstate commerce apply in microcosm to the problems of intrastate or intercity commerce in a heavily populated state such as our own. In the words of one perceptive commentator: 'The basic policy underlying the commerce clause of the Federal Constitution [art. I, § 8, par. 3] -- to preserve the free flow of commerce among the states to optimize economic benefits -- is equally applicable to intercity commerce within the state. *If fifty independent economic units within the United States are undesirable, 387 economic enclaves within California would be intolerable. A tax burden which places intercity commerce at a disadvantage in comparison to a wholly intracity business may have such an effect*.'" (4 Cal.3d, p. 119.) "[It] is clear that in spite of the absence of a specific 'commerce clause' in our state Constitution, other provisions in that Constitution -- notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws . . . -- combine with the equal protection clause of the federal Constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not *prohibit* local license taxes upon businesses 'doing business' both within and outside the taxing jurisdiction; *as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction, no constitutional objection appears. However, and conversely, no measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction*." (4 Cal.3d, p. 124.)

The *City of Los Angeles* v. *Shell Oil Co*. court then found invalid, a business license tax "'that has no relation to the taxable event occurring in [the City] or the quantum of business there carried on.'" (4 Cal.3d, p. 125.)

General Motors Corp. v. *City of Los Angeles* reiterated the teaching of *City of Los Angeles* v. *Shell Oil Co*. and emphasized that the city was constitutionally "*free* [*only*] *to tax the business presence within its jurisdiction by reference to the 'taxable events' occurring there*" (5 Cal.3d, p. 242), and that a business license tax "*must be apportioned in a manner which fairly reflects the proportion of in-city to out-of-city* [*business*] *activities*" (5 Cal.3d, p. 244).

In *City of Los Angeles* v. *Shell Oil Co*. and *General Motors Corp.* v. *City of Los Angeles*, the business license taxes involved, even after apportionment and as might well be supposed, represented very substantial sums. In the case here before us, we are concerned with a *minimum* business license tax of $ 30 per year. A question arises whether that relatively small yearly tax, unapportioned on the one hand as to business activity entirely within San Jose, and on the other, as to occasional intercity business transactions therein, meets the constitutional requirement explicated by *City of Los Angeles* v. *Shell Oil Co*.

On this issue we first note the holding of *General Motors Corp.* v. *City of Los Angeles*, that what is *proscribed* is "the *possibility* of duplicate taxation by another taxing jurisdiction based upon the same activity . . . ." (Italics added; 5 Cal.3d, p. 243.) And we consider *City of Los Angeles* v. *Shell Oil Co.'s* emphasized adoption of a legal commentator's conclusion that the *possibility* of unapportioned business license taxation by each of the "387 economic enclaves within California would be *intolerable*." (Italics added; 4 Cal.3d, p. 119.)

It will be remembered that in the case at bench Ruthroff had benefited from about 12 hours of its employees' services in San Jose during the taxable year. An otherwise similarly situated employer, with an average of 5 employees doing business entirely in San Jose over the same period, would benefit from business generated by at least 7,500 hours of employment. Yet the San Jose business license tax of each employer would be the same $ 30. And intercity business employers such as Ruthroff, were such a tax valid as to them, would be exposed to the *possibility* of total statewide taxes of $ 11,610 (387 taxing entities x $ 30).

We find it to be of significance that the *City of Los Angeles* v. *Shell Oil Co*. court relied in large measure upon the earlier cases of *Ferran* v. *City of Palo Alto* (1942) 50 Cal.App.2d 374 [122 P.2d 965] (an intracity and intercity business license tax of $ 15 per quarter where employees were four or less) and *Security Truck Line* v. *City of Monterey* (1953) 117 Cal.App.2d 441, 447 [256 P.2d 366, 257 P.2d 755] (a yearly tax of $ 13.50 on each truck engaged in intracity or intercity deliveries "even if [the intercity truck] transports but a single load into the city").

The *City of Los Angeles* v. *Shell Oil Co*. court stated: "One of the first cases to articulate this doctrine was *Ferran* v. *City of Palo Alto* (1942) 50 Cal.App.2d 374 [122 P.2d 965], . . . There the city imposed a license tax on the business of laundering and taking orders for laundering -- the tax being measured by 'the number of employees at the plant or place of

laundering.' Plaintiff laundry maintained its plant, where 35 persons were employed, in San Francisco but had customers throughout the bay area, including Palo Alto, who were serviced by truck on a pick-up and delivery basis. Of a gross annual income amounting to approximately $ 60,000 only about $ 900 was derived from Palo Alto business, and plaintiff contended that the application of the license tax to it on the basis of its total number of employees was unconstitutional. [para.] The Court of Appeal agreed [holding that] . . . 'the ordinance is void as an unlawful and unreasonable discrimination against and denial of the equal protection of the law to laundries doing their laundering and having their plants outside of Palo Alto, but deriving some of their business from within said city. It also unlawfully discriminates against those engaged in Palo Alto in the business of taking orders for laundering or washing to be done by laundries maintaining their washing plants and doing their business outside the city. The business of such solicitors may be an independent calling having no logical connection whatsoever with the number of employees at the plant where the washing is done.'" (4 Cal.3d, pp. 119-121.) Approving *Ferran* v. *City of Palo Alto*, the Supreme Court found no reason for exception on account of the size of the city's $ 15 quarterly license tax on intercity laundry pickups and deliveries.

The *City of Los Angeles* v. *Shell Oil Co*. court then stated: "In *Security Truck Line* v. *City of Monterey* (1953) 117 Cal.App.2d 441 [256 P.2d 366, 257 P.2d 755], the principles announced in *Ferran* were clarified. There the city sought to levy a business license tax upon highway carriers who hauled fish during canning season from points outside the city to canneries within the city -- the tax being measured by the unladen weight of each vehicle used for this purpose. Plaintiff carrier had its principal place of business outside the city and had neither place of business nor agents nor terminus in the city, but during the autumn and winter canning season it engaged in the hauling of sardines from points in southern California to canneries within the city. Of plaintiff's sixty trucks no more than four were involved in fish hauls at any one time during the season, but its other commitments made it necessary to rotate the use of its trucks so that most of them were used for fish hauling at one time or another during the season; moreover, sometimes it was necessary for plaintiff to augment its own fleet of trucks by subcontracting with independent haulers who would haul fish only occasionally and sometimes only once a season. Prorated on a tonnage mile basis plaintiff's fish deliveries constituted only 1 percent of its total business, but during the season it derived 20 percent of its income from fish hauling. [para.] The plaintiff carrier brought an action to have the tax declared unconstitutional and its enforcement enjoined. It urged that under the ordinance as applied it was required to pay a license fee as to each one of its vehicles used for fish hauling even if that particular vehicle hauled only one load of fish into the city during the season, and that, considering its necessary rotation of trucks, the ordinance would require it to license a substantial portion of its fleet plus the trucks of subcontracted haulers. Such a tax, plaintiff complained, was not reflected in the rate structure governing its compensation, and it urged that the ordinance was unconstitutional on several grounds -- among them that of unlawful discrimination in violation of state and federal Constitutions. The trial court held that the ordinance was 'unconstitutional in its application and wording' (117 Cal.App.2d at p. 449) and issued the injunction." (4 Cal.3d, p. 121; fn. omitted.)

"The Court of Appeal affirming the judgment, stated [among other things, that:] The tax

before it . . . was measured in an invalid manner because the amount of tax was governed by a factor which had no relationship to the actual amount of business done in the taxing city. 'The tax is imposed upon each truck making a delivery or deliveries during the fish hauling season. If that truck makes one hundred deliveries during the season, the maximum tax is but $ 13.50 for that truck. But if the carrier uses one hundred different trucks to make the one hundred deliveries, it must pay $ 13.50 for each truck, or a total of $ 1,350 . . . . The taxable event in both cases is the same -- the delivery of one hundred loads of fish in Monterey -- yet one company would pay one hundred times what the other had to pay. It seems clear that the measure of the tax set forth in the ordinance has no reasonable connection with that taxable event . . . . [The tax] is based upon an arbitrary standard and a purely extraneous event.' . . . 'Here, the standard selected, the number of individual trucks making deliveries, rather than the number of such deliveries or the tonnage carried into the city is a purely accidental and extraneous event that has no relation to the taxable event occurring in Monterey or the quantum of business there carried on. For these reasons, it is our opinion that the measure . . . is capricious, arbitrary and discriminatory.'" (4 Cal.3d pp. 122-123.)

Again the Supreme Court, as had the Court of Appeal, made no exception to application of the above-stated principles because of the amount of the annual license tax of $ 13.50 per truck doing business in the city.

Even more recently, the case of *Brabant* v. *City of South Gate* (1977) 66 Cal.App.3d 764 [136 Cal.Rptr. 150] passed upon a similar issue. There the city had imposed a yearly business license tax of $ 50 and $ 10, respectively, upon real estate brokers and salesmen doing business in the taxing city regardless of their principal business location or the amount of business done in the city. The small but unapportioned taxes were found void as to both a real estate broker and a salesman, for, the court said: "As stated in *City of Los Angeles* v. *Shell Oil Co., supra*, 4 Cal.3d at page 119, 'provisions of the state and federal Constitutions forbid municipal taxation which, by encouraging multiple burdens through the levy of unapportioned or improperly apportioned taxes on intercity business, operates to place such businesses at a competitive disadvantage.'" (66 Cal.App.3d, p. 771.)

(1) We accordingly conclude that the amount of the tax in situations such as that before us is of little, if any, legal significance. Such taxes tend to encourage unconstitutional multiple burdens of taxation on those engaged in intercity business within the state's many local jurisdictions.

The judgment of the superior court must be reversed.

We are cognizant of the practical cost problems often attending apportionment and collection of business license taxes where "the proportion of the taxed activity actually taking place within the taxing jurisdiction" (*City of Los Angeles* v. *Shell Oil Co., supra*, 4 Cal.3d 108, 124) is small. But in such cases it seems reasonable, and more consistent with the above-noted authorities, to treat the matter as de minimis, rather than "to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction." (*Id*., p. 124.)

The judgment is reversed.