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FILE NO. S-453

CONSTITUTION:
Local Government -
Unconstitutionality of privilege tax on mobile homes

TAXATION:
Counties -
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Honorable Robert J. Lehnhausen
Director
Department of Local Government Affairs
325 W. Adams
Springfield, Illinois 62601

Dear Director Lehnhausen:

I have your letter of recent date wherein you ask certain questions regarding the privilege tax on mobile homes that is mandated by section 15 of "An Act to provide for, license and regulate mobile homes and mobile home parks and to repeal an Act named herein." Ill. Rev. Stat., 1971, ch. 111 1/2, par. 725. [hereinafter referred to as section 15].

Since I first received your letter, I have received other requests for opinions pertaining to section 15. One of these opinions questioned the constitutionality of section 15. It is my opinion that section 15 is unconstitutional and is separable from the remainder of the Act. Therefore, I find it unnecessary to answer the questions you presented in your letter. Section 15 provides as follows:

> "Mobile homes, in addition to such taxes as provided in the 'Use Tax Act' shall be subject to the following privilege tax only, and to no other ad valorem tax.
>
> "The owner of each inhabited mobile home shall pay to the county treasurer of the county in which such mobile home is located an annual tax to be computed in the following manner: Firstly, the county board of such county shall, by ordinance, determine a tax rate of not less than 10 cents and not more than 15 cents; secondly, the county treasurer of such county shall multiply the number of square feet of floor space contained in such mobile home times the tax rate as set by the county board; thirdly, such county treasurer shall enter such sum in his records as the annual tax of such mobile home for the privilege of occupying the same."

Section 16 of the aforementioned Act (Ill. Rev. Stat., 1971, ch. 111 1/2, par. 726) [hereinafter referred to as

section 16] provides, in part, as follows:

> "* * * The county treasurer shall distribute such taxes to the local governments within the boundaries of which such mobile homes are located, in the same proportion as the property taxes collectable for each such government in the prior year."

Section 26 (Ill. Rev. Stat., 1971, ch. 111 1/2, par. 736) [hereinafter referred to as section 26] provides:

> "This Act does not apply within the jurisdiction of any home rule unit."

Because of the effect of section 26 on the operation of section 15, the privilege tax upon mobile homes applies only outside a home rule unit.

A home rule unit is defined by section 6(a) of Article VII of the Illinois Constitution of 1970, as follows:

> "A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. * * *"

Section 1 of Article VII of the Illinois Constitution of 1970 defines municipalities as follows:

> "'Municipalities' means cities, villages and incorporated towns. * * *"

The interaction of said sections 15 and 26 creates class legislation. Only mobile homes located outside home rule units are affected by the privilege tax, while mobile homes located inside home rule units are subject to the ad valorem personal property tax.

Under section 16 proceeds from the privilege tax go to those local governments in which the mobile home is located in the same proportion as ad valorem property taxes collectable for the prior year. Thus, both the privilege tax on mobile homes located outside a home rule unit and the personal property tax on mobile homes located inside home rule units will, in many cases, go to support identical local governments. Take, for example, county revenue expended for county purposes. An owner of a mobile home located, in a county (other than Cook) but, outside a home rule unit, will

pay a privilege tax, part of which will go into the county general fund and be used for county purposes. An owner of a mobile home located inside a home rule unit in that same county will pay a personal property tax to the county. This, of course, means that owners of mobile homes located outside a home rule unit will pay a different amount toward county government than those located inside a home rule unit. There is, in short, an inequality of taxation. The inequality is dramatized by the fact that the privilege tax is based on square footage and will remain constant throughout the life of the mobile home. However, personal property tax is based on assessed valuation, and, thus, the value of the mobile home will decrease throughout its life.

Whenever legislation limits its applicability to a certain class of individuals or objects, it must satisfy the Federal (U.S. Const., Amend. XIV), and State (Ill. Const., Art. I, sec. 2), constitutional requirements that no person shall be denied the equal protection of the laws.

First, let us analyze the class legislation created by the interaction of sections 15 and 26 in light of the demands of the equal protection clause of the 14th Amendment. That clause does not prohibit class legislation per se. (See, 16 Am. Jur. 2d, Constitutional Law, sec. 494 (1964)). However, the particular classification must have a fair and substantial relation to the object of the legislation. (Royster Guano Co. v. Virginia, 253 U.S. 412, 415; Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37; Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71, 85; Schlesinger v. Wisconsin, 270 U.S. 230, 240; Ohio Oil Co. v. Conway, 281 U.S. 146, 160; Allied Stores of Ohio, Inc. v. Bowers (1959), 358 U.S. 522, 526-27, 79 S.Ct. 437, 3 L. Ed. 2d 480, 484-85; McDougall v. Lueder, 389 Ill. 141, 58 N.E. 2d 899.) A classification cannot be arbitrary or discriminatory. Morey v. Doud, 354 U.S. 457, 1 L. Ed. 2d 1485, 77 S.Ct. 1344; see, also, 16 Am. Jur. 2d, Constitutional Law, sec. 499 (1964)).

The object or purpose of section 15 is to provide revenue for certain local governments, including counties. There is no reason that an owner of a mobile home located

outside a home rule unit must pay a privilege tax to the county, while the owner of a mobile home inside a home rule unit will pay a different amount in personal property taxes toward county government. These two class distinctions are arbitrary and bear no reasonable relation to the object of the law.

That the interaction of sections 15 and 26 creates unreasonable class legislation violative of the Federal and State equal protection clauses is further illuminated by the reasoning of the Illinois Supreme Court in Flynn v. Kucharski, 45 Ill. 2d 211 and People ex rel. City of Danville v. Fox, 247 Ill. 402.

The Supreme Court of Illinois in Flynn v. Kucharski, 45 Ill. 2d 211, declared that section 36.6 of the Fees and Salaries Act (Ill. Rev. Stat., 1967, ch. 53, par. 55.6) was unconstitutional insofar as it related to the commission allowed to township collectors in Cook County on account of taxes collected by them.

In Flynn v. Kucharski, supra, the plaintiffs ably pointed out that a person living in a township in Cook County could pay his taxes, including taxes levied by the county, to the town collector who would deduct a 2% commission and send 98% to the county treasury. A person living in the City

of Chicago had to pay to the county collector and 100% of his county tax went into the county treasury for county services. Thus, one taxpayer by virtue of location in a township paid 98% of his county tax to support county government while 2% went to support township government, and a person in Chicago paid 100% of his tax for county government.

This method of collection, the complaint alleged, violated the uniformity provisions of the Constitution of Illinois (Art. 9, secs. 9 and 10 [1870]) and the equal protection clause of the United States Constitution. (U.S. Const., Amend. XIV). The test under both of these provisions is one of reasonableness. (See, Grenier & Co. v. Stevenson, 42 Ill. 2d 289; Thorpe v. Mahin, 43 Ill. 2d 36, 45.) In other words, the particular classification must bear a reasonable relation to the object of the legislation. (Royster Guano Co. v. Virginia, supra.) The distinction between classes cannot be arbitrary or discriminatory. Morey v. Doud, supra.

The court in Flynn v. Kucharski, supra, held as follows:

> "The injustice and lack of constitutional uniformity would be no different under a legisla-

> tive scheme of tax collection which required taxpayers in that part of Cook County outside of the city of Chicago to pay their taxes to the county collector, who would deduct a commission and pay it into the county treasury, while taxpayers within the city of Chicago were permitted to pay their taxes to a city collector who would deduct a commission from taxes levied on a county-wide basis, and place it in the city treasury. And the fact that 'without such a fund' the city would be compelled to levy and collect taxes from city residents 'in addition to those they now pay,' would not justify such a violation of the constitutional requirement of uniformity of taxation. See, People ex rel. City of Danville v. Fox (1910), 247 Ill. 402; Town of Dixon v. Ide (1915), 267 Ill. 445."

It is of importance to note that the court cited People ex rel. City of Danville v. Fox, supra, as authority for its holding. Although the Illinois Supreme Court used section 22 of Article IV of the Illinois Constitution of 1870 as the basis for its holding, the Fox case is important to our discussion because it deals with the topic of unreasonable classification based upon population of local government entities.

In People ex rel. City of Danville v. Fox, supra, the Illinois Supreme Court had occasion to consider the constitutionality of section 16 of "An Act in regard to roads

and bridges in counties under township organization and to repeal an Act and parts of Acts therein named," (Laws of 1909, p. 332). Said section 16 provided that taxes levied for road and bridge purposes on property within a city over 20,000 went to the city treasury to use as the city saw fit. However, cities, villages or incorporated towns under 20,000 in population received only one-half of the taxes collected for road and bridge purposes. The taxes they did receive were ear-marked specifically for road purposes. The other half of their taxes remained in the hands of the treasurer of the township highway commissioners. Thus, one-half of the taxes collected from citizens in a municipality of less than 20,000 were used for the benefit of all of the people of the township. Taxes collected from persons in a city of 20,000 or more were turned over to the city to use as it saw fit. The court declared the scheme to be unconstitutional as an unreasonable classification. The court held as follows:

> "It is insisted that the proviso for the payment of all of said tax only to cities of 20,000 population or upward is unconstitutional

as class legislation, and that it violates the constitutional prohibition against the passage of any local or special law granting to any corporation, association or individual any special or exclusive privilege or immunity. In our opinion the objection is well taken. We are unable to see any reasonable basis for the classification made by said proviso. The legislature may classify cities and enact laws applicable to such cities according to their classification, but the classification cannot be an arbitrary one. There must be some reason for the classification, based upon differences in circumstances or condition that will justify it. What reason, within the meaning of the rule, can there be for directing that where a city has 20,000 inhabitants or upwards all the tax levied and collected under sections 13 and 14 shall be paid into its treasury for city purposes, but as to cities having a population of 19,900, or any number less than 20,000, only one-half of said tax shall be paid to the city treasurer, and that to be appropriated to the improvement of roads, streets and bridges either within or without the city, village or town and within the township, under the direction of the corporate authorities of the village, town or city? It seems plain the classification is arbitrary and is based upon no reasonable difference between cities sought to be favored and cities denied the benefits of the provision. Again, it is an unauthorized discrimination in favor of cities against villages and towns having an equal or greater population. An incorporated village or town which has attained a population of 20,000 or upwards is charged with the burden of maintaining its streets, alleys and bridges just the same as a city that has attained that population, and

> if the legislature has authority to grant a city the right to receive and control the expenditure of all the tax levied and collected under sections 13 and 14 on property within its limits, we see no reason why the same privilege should not be granted a village or town under like circumstances and similarly situated."

I am of the opinion that the tax imposed under section 15 is violative of the equal protection clause of the 14th amendment of the United States Constitution and section 2, Article I of the Illinois Constitution of 1970. The next question is whether the entire Act is unconstitutional, which is in turn dependent upon whether section 15 is separable from the remainder of the Act. The Act contains a severability clause. (See, Ill. Rev. Stat., 1971, ch. 111 1/2, par. 734). The rule with regard to severability is as follows:

> "If what remains after the invalid portion is stricken is complete in itself and capable of being executed wholly independent of that which is rejected, the invalid portion does not render the entire section unconstitutional unless it can be said that the General Assembly would not have passed the statute with the invalid portion eliminated."
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> People ex rel. Adamowski, v. Wilson, 20 Ill. 2d 568, 582.

In my opinion it cannot be said that the remainder of the Act would not have been passed by the General Assembly if section 15 had been eliminated. Therefore, section 15 is separable. It would further appear that section 16 and 17 are no longer operative since they implement the tax provided in section 15.

There are further reasons for holding section 15 invalid. I have disagreed with the Illinois Supreme Court's decision in Lake Shore Auto Parts Company v. Korzen, 49 Ill. 2d 137, and have undertaken an appeal to the U. S. Supreme Court. However, the Illinois court's decision in that case is the law in the State of Illinois until it is reversed or otherwise changed. Therefore, prior to the effective date of section 15 (September 8, 1971), there existed a personal property tax on mobile homes. It is the mandate of section 5(c), Article IX, Illinois Constitution of 1970, that personal property taxes abolished after January 2, 1971, be concurrently replaced by statewide taxes. Said section 5(c) reads, in part, as follows:

> "(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. * * *"

Since the privilege tax provided by section 15 does not apply to home rule units, it is not a statewide tax and is therefore unconstitutional.

In addition, a substantial constitutional question exists with regard to the title of the legislation here in question. The title was quoted earlier but bears repeating at this time:

> "An Act to provide for, license and regulate mobile homes and mobile home parks and to repeal an act named herein."
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> Ill. Rev. Stat., 1971, ch. 111 1/2, par. 711, et seq.

Section 15 imposes a privilege tax in lieu of all other ad valorem taxes. The subject matter of section 15 is not included in the title of the act, which includes only the licensing and regulating of mobile homes and mobile home parks. The tax provided in section 15 by its own terms is not a licensing fee. Any fee imposed under the authority to license must reasonably provide only an amount sufficient to finance the cost of inspection and issuance of a license. (Concrete Contractors v. LaGrange Park, 14 Ill. 2d 65; Cook County v. Fairbank, 222 Ill. 578; Clark v. Paul Gray, Inc., 306 U.S. 583, 594). The power to license as a regulatory measure does not include the power to license for revenue purposes. (Lamere v. City of Chicago, 391 Ill. 552, 563). The power to regulate does not include the power to impose a revenue tax. (Lamere v. City of Chicago, 391 Ill. 552; Aberdeen-Franklin Coal Co. v. Chicago, 315 Ill. 99; 3G Distillery Corp. v. Los Angeles County (CCA Cal. 1941), 116 P. 2d 143; Muhlenbrink v. Comrs., 42 N.J.L. (13 Vroom), 364, 367). The subject matter of section 15, therefore, is not included in the title. The Illinois Constitution of 1870 required that all bills be confined to one subject and that the subject be expressed in the title. The

latter requirement was intentionally omitted from the 1970 Constitution. (See, 6th Ill. Const. Con., Maj. Rep., Leg. Art. Comm., pp. 86-87.) Section 15 does not violate the new Constitution in this regard but it does violate the old Constitution which states that "* * * no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. * * *" (Ill. Const., Art. IV, sec. 13 [1870]). Since the act here in question was "passed" prior to July 1, 1971, while the 1870 Constitution was in effect, section 15 was a nullity and was void (Highway Comrs. v. Bloomington, 253 Ill. 164, 176; Hannigan v. Chicago Motor Coach Company, 348 Ill. App. 473, 479) at the time of passage and was not revived by the termination of the old Constitution or the effectiveness of the new on July 1, 1971. People ex rel. Hanrahan v. Caliendo, 50 Ill. 2d 72, 76.

In conclusion, I am of the opinion that section 15 of "An Act to provide for, license and regulate mobile homes

and mobile home parks and to repeal an Act named herein," is unconstitutional and is separable from the remainder of the Act.

Very truly yours,

A T T O R N E Y G E N E R A L