No. 26925

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

The Board of Trustees of the Town of Minturn, Colorado, Defendant-Appellant, vs. Foster Lumber Company, Inc., a Colorado corporation, Plaintiff-Appellee.	)	APPEAL FROM THE DISTRICT COURT OF THE COUNTY OF EAGLE

BRIEF OF THE COLORADO MUNICIPAL LEAGUE

AS AMICUS CURIAE

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE

Municipalities today are facing severe financial difficulties. Many of the attempts to resolve those difficulties have been well-publicized --reducing municipal services, laying off employees or simply not filling employee vacancies. While municipal governing bodies do have the ability to control certain types of municipal expenditures relating to the scope and nature of municipal services and the numbers of municipal employees, their ability to control other types of necessary expenditures is limited.

This case presents an example of a type of municipal expenditure over which the municipal governing body has limited control. The stipulation of the parties and the affidavit of the Minturn police chief, for example, indicate that the Minturn building and construction material businesses place greater burdens on the Town's expenditures in terms of road maintenance, traffic congestion and the need for increased police protection, than other types of businesses within the municipality. Since the ability of the municipality to control the amount of such increased expenditures is limited, some equitable method of obtaining revenues to finance those expenditures is necessary. The Town of Minturn adopted an occupation tax on the building and construction material businesses located within the Town in order to provide a "just and proper distribution of expenditures required to be made by the Town with respect to such businesses and occupations and for a just and proper distribution of tax burdens within the Town." (Minturn Ordinance No. 129)

The Colorado Municipal League, an association of 228 cities and towns located throughout the State of Colorado, does not appear as Amicus Curiae in this case to urge judicial approval of some new and unique type

of municipal tax. Instead, the League appears as Amicus Curiae to urge continued judicial protection for a municipal tax, the business occupation tax, which has received consistent judicial approval since at least 1895. While the total number of Colorado municipalities having adopted business occupation taxes is not known, the League is aware that a significant number of Colorado municipalities are imposing business occupation taxes similar to the tax adopted by Minturn--an occupation tax imposed upon a specific type of business with the amount of tax liability measured by a percentage of the business' gross receipts derived from certain local transactions. Thus, an invalidation of the Minturn tax could have a substantial impact not only upon the Town of Minturn, but also upon those numerous other municipalities throughout the State whose existing taxes could be drawn into question.

STATEMENT OF THE ISSUES

The League adopts the statement of the issues appearing in the brief of the Town of Minturn.

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the Town of Minturn.

SUMMARY OF ARGUMENT

THE DISTRICT COURT ERRED IN ITS RULING THAT THE MINTURN BUSINESS OCCUPATION TAX IS NULL AND VOID:

I. The Minturn Tax is a Valid Business Occupation Tax, Authorized Pursuant to Statute and Prior Judicial Decisions, and, as such, It is Neither a Tax on Income Nor a Tax on Sales.

II. The Minturn Tax is Not Confiscatory and Does Not Deprive Plaintiff of Due Process of Law.

III. The Minturn Tax is Not Discriminatory and Does Not Deprive Plaintiff of Equal Protection under the Law.

ARGUMENT

THE DISTRICT COURT ERRED IN ITS RULING THAT THE MINTURN BUSINESS OCCUPATION TAX IS NULL AND VOID:

I. The Minturn Tax is a Valid Business Occupation Tax, Authorized Pursuant to Statute and Prior Judicial Decisions, and, as such, It is Neither a Tax on Income Nor a Tax on Sales.

A. Introduction

At issue in this case is the validity of an occupation tax imposed on building and construction material businesses by the Town of Minturn, a statutory (non-home rule) town. In the ordinance adopting the occupation tax, the Town's governing body stated that the tax was "necessary for the just and proper distribution of expenditures required to be made by the Town with respect to such (building and construction material) businesses and occupations and for a just and proper distribution of tax burdens within the Town."

Following adoption of Minturn's business occupation tax ordinance, Plaintiff Foster Lumber Company - one of the building and construction material

businesses subject to the Minturn tax - brought suit in the District Court alleging in part that the tax is discriminatory, confiscatory, denies the Company equal protection under the law, and is an invalid tax on income or on sales transactions.

If the arguments raised against the tax by Foster Lumber Co. sound all too familiar, they should. The various arguments (except for the "sales tax" argument) have historically provided the basis for attacking a variety of municipal business occupation taxes. They have also, however, been consistently and properly rejected by the Colorado Supreme Court. See Tom's Tavern, Inc. v. Boulder, ____ Colo. ____, 526 P.2d 1328 (1974); Springston v. Fort Collins, ____ Colo. ____, 518 P.2d 939 (1974); Denver v. Duffy, 168 Colo. 91, 450 P.2d 339 (1969), appeal dismissed, 396 U.S. 2 (1969); Englewood v. Wright, 147 Colo. 537, 364 P.2d 569 (1961); Ping v. Cortez, 139 Colo. 575, 342 P.2d 657 (1959); Jackson v. Glenwood Springs, 122 Colo. 323, 221 P.2d 1083 (1950); Post v. Grand Junction, 118 Colo. 434, 195 P.2d 958 (1948); Hollenbeck v. Denver, 97 Colo. 370, 49 P.2d 435 (1935); Denver City Ry. Co. v. Denver, 21 Colo. 350, 41 P. 826 (1895).

B. The Town of Minturn has been granted specific statutory authority to adopt its business occupation tax.

The Town of Minturn, as a statutory town, must look to the Colorado Constitution or to the state statutes for its authority to adopt revenue raising measures. In C.R.S. 1973, 31-15-501 (1)(c) (H.B. 1089, 1975), municipalities (including towns)* are authorized:

> "To license, regulate, and tax, subject to any law of this state, any lawful occupation, business place, amusement, or place of amusements and to fix the amount, terms, and manner of issuing and revoking licenses issued therefor...." (Emphasis added.)

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* See definition of word "municipality" in C.R.S. 1973, 31-1-101 (6) (H.B. 1089, 1975).

The statutory language quoted above [located in C.R.S. 1973, 31-15-301 (1)(b); C.R.S. 1963, 139-78-3 (2); C.R.S. 1953, 139-78-3 (2); C.S.A. 1935, Chapter 163, Section 89; and see legislative history at end of C.S.A. 1935, Chapter 163, Section 89 for location of the language in earlier Colorado legislation] has been specifically held by the Colorado Supreme Court to authorize adoption of municipal business occupation taxes. In Jackson v. Glenwood Springs, supra, the Court reviewed the authority of the City of Glenwood Springs - then a statutory city - to adopt a business occupation tax. The Court quoted the above language (then located in Section 89, Chapter 163, 1935 C.S.A.) and stated:

> "When, therefore, counsel for plaintiffs argues that there should be a grant by the state legislature of power to the municipal corporation to impose a tax, such as the ordinance provides, it is apparent that the legislature in Colorado has specifically granted such power to the City of Glenwood Springs." Jackson v. Glenwood Springs, 122 Colo. at 327.

See also, Englewood v. Wright, supra; and Denver City Ry. Co. v. Denver, supra. In 1948, the Colorado Supreme Court observed that:

> "municipal authority, in the absence of constitutional restrictions, to impose occupational excise taxes purely for revenue for the support of its government, no longer is open to serious question." Post v. Grand Junction, 118 Colo. at 435.

That the Colorado General Assembly did not intend the above-quoted statutory language to be viewed in any narrow sense is apparent from C.R.S. 1973, 31-15-101 (2), a subsection added to the general municipal laws by H.B. 1089, adopted in 1975:

> "All such municipalities shall have the powers, authority, and privileges granted by this title and by any other law of this state together with such implied and incidental powers, authority, and

> privileges as may be reasonably necessary, proper, convenient, or useful to the exercise thereof. All such powers, authority, and privileges are subject to the restrictions and limitations provided for in this title and in any other law of this state." (Emphasis added.)

While the Colorado legislature has the authority to limit or place restrictions upon business occupation taxes adopted by statutory cities and towns [as indicated by the language quoted previously from C.R.S. 1973, 31-15-101 (2) and 31-15-501 (1)(c) (H.B. 1089, 1975)] it has not done so.

C. The Minturn tax is a business occupation tax and, as such, is neither an income nor a sales tax.

In the ordinance adopting the business occupation tax, the Town's governing body determined that the tax was "necessary for the just and proper distribution of expenditures required to be made by the Town with respect to such (building and construction material) businesses and occupations and for a just and proper distribution of tax burdens within the Town". The stipulation of the parties and the affidavit of the Minturn police chief indicate that, in fact, the building and construction material businesses located within the Town impose a greater burden on maintenance of Town roads and create greater traffic congestion problems by reason of large delivery trucks carrying heavy loads, and that such businesses require a greater degree of police protection than other businesses within the Town. Additionally, the stipulation of the parties states that "more than 95% of the gross sales (for Foster Lumber Co.) for the fiscal year ending July 31, 1974, were for use outside the Town of Minturn".

The problem faced by Minturn and other municipalities when confronted with a particular type of business which places additional burdens on the municipality's resources is how to equitably obtain the revenue to

finance such burdens. In making that legislative determination, statutory municipalities (such as Minturn) have three general tax source options -- the property tax, the sales and use tax, and the business occupation tax.

The property tax, while authorized by statute [C.R.S. 1973, 31-15-302 (1)(c) and 31-20-101 et seq. (H.B. 1089, 1975)], is of little assistance in financing the additional burdens and services required for a particular type of business in part because of the uniformity requirement of Colorado Constitution, Article X, Section 3.

The adoption of a municipal sales tax or use tax is authorized by C.R.S. 1973, 29-2-101, et seq. However, C.R.S. 1973, 29-2-105 (1)(b) provides that the sales tax shall not be applicable to any sales where the property sold is to be delivered to a destination outside the boundaries of the municipality. Since, according to the stipulation of the parties, 95% of the gross sales of the Minturn branch of Foster Lumber Co. for the fiscal year ending July 31, 1974, were for use outside the Town of Minturn, any sales tax would be ineffective in providing the revenue necessary to finance the additional services required by the Minturn building and construction material businesses. Moreover, the sales tax would be uniformly applied throughout the municipality on those transactions or services set forth in the applicable state statute. C.R.S. 1973, 29-2-105 (1)(d). A use tax would also be ineffective in providing the necessary additional revenues since a use tax is merely a complement to the sales tax, and is applicable to goods purchased outside a municipality but brought into a municipality for consumption, storage or use. See C.R.S. 1973, 29-2-109.

The remaining general tax source is the business occupation tax. Such a tax may be general in nature, relating to all businesses and occupations (see, Denver v. Duffy, supra; Englewood v. Wright, supra; Ping v.

Cortez, supra; and Jackson v. Glenwood Springs, supra); or, it may be specific in nature, relating to a certain type of business (see, Tom's Tavern, Inc. v. Boulder, supra; Springston v. Fort Collins, supra; and Post v. Grand Junction, supra). The business occupation tax therefore is one general tax source available to the Town of Minturn which could be used to ensure that a business or occupation which places special financial burdens on the municipality bears its fair share of the municipal tax burden.

In reviewing the Minturn business occupation tax, the District Court apparently concluded that the nature of that tax changed somehow because the method used in measuring the amount of taxes due is a percentage of the business' gross receipts from sales transactions occurring within the Town, rather than a flat fee or flat rate measurement. In particular, the Court stated that the Minturn tax is an income tax and - apparently - is an invalid sales tax. The method used in computing the amount a particular business owes under a tax ordinance does not, however, change the nature of the tax. In 16 McQuillin, Municipal Corporations, § 44.192 (3rd Ed. 1972) at 533 it is stated:

> "'Gross receipts tax' is a term or label applied to any tax law in which provision is made for calculation or computation of the amount of taxes due with reference to total revenues arising out of the subject matter taxed. The term, while aptly descriptive of the method of computation, is of no significance in determining the nature of the exaction imposed in any particular tax legislation." (Citations omitted and emphasis added.)

In Englewood v. Wright, supra, the Court stated:

> "It having been determined that Ordinance No. 17 is a true business or occupation tax, it follows that it is not an income tax nor a tax

> on real property. And the fact that the business necessarily involves and concerns realty does not change the nature of the tax." Englewood v. Wright, 147 Colo. at 544. (Emphasis by the Court.)

See also Denver v. Duffy, supra. A business occupation tax measured by a percentage of gross receipts on sales occurring within the municipal limits no more becomes a tax on income or a tax on sales transactions than an occupation tax on the business of selling liquor becomes a tax on the liquor. See Post v. Grand Junction, supra, 118 Colo. at 440.

Courts in other jurisdictions have recognized that a business occupation tax which is measured on some "gross receipts" basis remains an occupation tax -- that its nature is not changed by the method used in determining the tax liability. Specifically, courts have ruled that business occupation taxes measured on some "gross receipts" basis do not become income taxes: See Philadelphia & Southern Mail S.S. Co. v. Commonwealth of Pennsylvania, 122 U.S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118 (1887); Flint v. Stone Tracy Company, 220 U.S. 107, 55 L. Ed. 389, 31 S. Ct. 342 (1911); Town of Hackleburg v. Northwest Alabama Gas Dist., 277 Ala. 355, 170 So. 2d 792 (1974); Pharr Road Investment Company v. City of Atlanta, 244 Ga. 752, 164 S.E. 2d 803 (1968); Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933); Kansas City v. Graybar Electric Co., Inc., 485 S.W. 2d 38 (Missouri, 1972); State v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938); National Biscuit Co. v. City of Philadelphia, 374 Pa. 604, 98 A. 2d 182 (1953); Davis v. Ogden City, 117 Utah 315, 215 P.2d 616 (1950); Langston v. City of Danville, 189 Va. 603, 54 S.E. 2d 101 (1949); and Fisher Flouring Mills Co. v. State, 35 Wash. 2d 482, 213 P.2d 938 (1950).

Courts in other jurisdictions have also recognized that business occupation taxes measured on some gross receipts basis do not become sales taxes: See Gurley v. Rhoden, ____ U.S. ____, 44 L. Ed. 2d 110, 95 S. Ct.

1605 (1975); American Manufacturing Company v. City of St. Louis, 250 U.S. 459, 63 L. Ed. 1084, 39 S. Ct. 522 (1919); Evers v. City of Dadeville, 258 Ala. 53, 61 So. 2d 78 (1952); Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1955); Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 12 N.E. 2d 638 (1938); Department of Revenue v. Jennison-Wright Corp., 393 Ill. 401, 66 N.E. 2d 395 (1946); and Seattle Gas Co. v. City of Seattle, 192 Wash. 456, 73 P.2d 1312 (1937) (and see cases cited therein).

In Springston v. Fort Collins, supra, this Court recognized that the amount of an excise tax is a matter for legislative determination, and that occupation taxes need not be levied and assessed in accordance with municipal costs, so long as they are not confiscatory or prohibitory. As a practical matter, however, a municipal governing body will seek to provide some equitable method of measuring the relative tax liability of the various businesses to be affected by the tax. In Tom's Tavern, Inc. v. Boulder, supra, the Court rightly noted that an occupation tax measured on a flat fee basis will always result in some disparity. In Union Pacific Railroad Co. v. Denver, 182 Colo. 136, 511 P.2d 497 (1973), the Court noted that a business occupation tax measured by the number of employees of a business, while related to the size of the business, may present only a "rough approximation" of the business' use of municipal services and facilities.

A business occupation tax measured by a percentage of gross receipts from sales transactions occurring within the municipality lessens some of the inequities of a flat fee or flat rate method of measurement. It provides an approximation of the burden placed by a particular business on municipal services and facilities since the volume of sales transactions

is related to the size of the business and the size of the business will represent an approximation of the burden placed by the business on municipal services. Thus some distinction is made between the smaller and larger businesses subject to the tax and the varying degrees of burdens placed on municipal services by such businesses. Admittedly, no method of measuring a business occupation tax liability will be exact. Use of a gross receipts method is, however, certainly no less equitable to the affected businesses - and may be more equitable - than some flat fee or flat rate method of measurement. See Davis v. Ogden City, supra, 215 P.2d at 624.

Certainly, the statute authorizing adoption of municipal business occupation taxes [C.R.S. 1973, 31-15-501 (1)(c) (H.B. 1089, 1975)] contains no restrictions on the methods which may be used in measuring the tax liability. That determination is instead left to the local legislative body. If a municipality makes a legislative determination that a business occupation tax is necessary and that the fair amount of tax owed by a certain type of business is in the area of, for example, $20,000 per year, does it make sense to judicially require the municipality to adopt some flat rate basis for measuring the tax liability (as, for example, $50 per employee or per truck, or $2,000 per business) rather than permitting the municipality to use as a measurement a percentage of gross receipts of sales occurring within its limits?

II. The Minturn Tax is Not Confiscatory and Does Not Deprive Plaintiff of Due Process of Law.

The District Court ruled that Minturn's tax was confiscatory in its penalties and assessments, citing no cases or reasons for its ruling. The confiscation argument has, however, been raised and rejected in a number of occupation tax cases. See, e.g., Tom's Tavern, Inc. v. Boulder, supra;

Springston v. Fort Collins, supra; Ping v. Cortez, supra; and Jackson v. Glenwood Springs, supra.

In Tom's Tavern, Inc. v. Boulder, supra, the Court stated:

> "The rule is that a given tax is confiscatory if it is prohibitive of a whole occupation, not just of individual businesses. Kaufman v. City of Tucson, 6 Ariz. App. 429, 433 P.2d 282 (1967); Louisville v. Sagalowski, 136 Ky. 324, 124 S.W. 339 (Ct. App. 1910)." Tom's Tavern, Inc. v. Boulder, 526 P.2d at 1331.

The Colorado rule on confiscation is consistent with the rule recently restated by the United States Supreme Court in City of Pittsburgh v. Alco Parking Corporation, 417 U.S. 369, 41 L. Ed. 2d 132, 94 S. Ct. 2291 (1974). In that case, the Court refused to rule that a municipal ordinance imposing a 20% tax on gross receipts of commercial parking lots violated the Due Process Clause of the United States Constitution, despite evidence that a majority of the affected parking lot operators were unable to conduct their business at a profit by reason of the tax:

> "The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.
>
> * * * *
>
> The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business...had been 'uniformly rejected as furnishing no juridical ground for striking down a taxing act.'" 41 L. Ed. 2d at 136, quoting from Magnano Co. v. Hamilton, 292 U.S. 40 (1934).

In the instant case, no evidence was presented to show that the Minturn tax would prohibit the occupation of selling building and construction materials. Absent such evidence, the Minturn tax is not confiscatory as a

matter of Colorado and federal law.

III. The Minturn Tax is Not Discriminatory and Does Not Deprive Plaintiff of Equal Protection Under the Law.

The District Court ruled that there is no reasonable nor substantial difference between the businesses that are taxed under the Minturn ordinance and those that are not, and that the ordinance deprives Foster Lumber Co. of equal protection under the law. In Tom's Tavern, Inc. v. Boulder, supra, however, this Court adopted the rule set forth in Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923) that a legislative body may, consistent with the Equal Protection Clause of the Fourteenth Amendment:

> "'exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are...dealt with according to uniform rules.'" Tom's Tavern, Inc. v. Boulder, 526 P.2d at 1330.

The Court went on to quote with approval a statement from 9 McQuillin, Municipal Corporations, § 26.60 (3rd Ed. 1972) at 142 to the effect that if any reasonable distinction between subjects can be found, the classification will be sustained even if the distinction is not great; and, where no abuse appears, and particularly in doubtful cases, courts will not interfere with the classification. Finally, the Court noted that if a subject may justifiably be separately classified for regulatory purposes, it may be separately classified for taxing purposes.

Under the standards set forth in Tom's Tavern, Inc. v. Boulder, supra, the Minturn ordinance, which separately classifies building and construction material businesses from other businesses, is not discriminatory and does not - as a matter of law - violate the Equal Protection Clause.

All building and construction material businesses are dealt with uniformly. The stipulation of the parties and the affidavit from the Minturn Chief of Police indicate that the building and construction material businesses located within the Town impose a greater burden on maintenance of roads within the Town and create traffic congestion problems by reason of the large delivery trucks carrying heavy loads, and that such businesses require a greater degree of police protection. The Colorado legislature has recognized that building and construction material businesses present special regulatory problems justifying special regulations (and thus, under Tom's Tavern, Inc. v. Boulder, supra, special taxation). See C.R.S. 1973, 31-15-601 (1)(k) and 31-15-501 (1)(p) (H.B. 1089, 1975) relating to the regulating and keeping of lumberyards within a municipality. Thus, no grounds exist to conclude that the Minturn ordinance is unconstitutionally discriminatory.

CONCLUSION

For the reasons stated and the authorities cited, the Colorado Municipal League prays the Court to reverse the decision of the District Court and remand the case with instructions that judgment be entered dismissing the complaint.

Respectfully submitted,

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