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MUNICIPAL RESEARCH
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AND SERVICES CENTER

NEWS RELEASE--January 10, 1973

OLYMPIA--If a city levies a gross receipts tax on certain categories of businesses selling tangible personal property at retail, it must tax all categories of firms engaged in that type of sale.

That was the gist of a formal legal opinion issued today by Attorney General Slade Gorton.

The opinion concerned a 1972 statute requiring that if a city instituted such a tax, it must be imposed "at a single uniform rate upon all such business activities."

Thus, according to the law, not only must the tax be at the same rate for each category, but if it is applied at all, it must be extended equally to all categories of businesses which sell tangible personal property to the public.

The opinion was requested by James E. Keefe, State Senator, Third District.

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CITIES AND TOWNS--TAXATION--BUSINESS LICENSES--MUNICIPAL EXCISE TAXES ON GROSS RECEIPTS OF FUEL OIL SALES

Because of the legislature's enactment of §§ 6 and 7, chapter 134, Laws of 1972, Ex. Sess., a city or town may only impose a license fee or excise tax upon the business of making retail sales of fuel oil measured by the gross receipts from such sales to the extent that such city imposes the same gross receipts tax at the same rate upon all other retail sales of tangible personal property occurring within the city.

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January 9, 1973

Honorable James E. Keefe
State Senator, Third District
Legislative Building
Olympia, Washington 98504

Cite as:
AGO 1973 No. 2

Dear Sir:

This is written in response to your recent request for our opinion on a question which we divide and paraphrase as follows:

(1) In view of §§ 6 and 7, chapter 134, Laws of 1972, Ex. Sess., may a city which imposes a license fee or excise tax upon the business of making retail sales of fuel oil measured by the gross receipts from such sales impose this tax at a rate different from those rates which apply to all other retailing activities (i.e., of tangible personal property) within the city which are similarly taxed?

(2) Under this 1972 enactment, may a city impose any license fee or excise tax upon the business of making retail sales of fuel oil which is measured by the gross receipts from such sales where such city does not impose the same gross receipts license fee or tax upon all other such retailing activities within the city?

We answer both of these questions in the negative for

the reasons set forth in our analysis.

ANALYSIS

It is well established in this state that cities and towns possess the authority to license businesses for the purpose of revenue and to measure the amount of such a license tax on the basis of the gross revenues of the licensed businesses. See, Pacific Tel. and Tel. Co. v. Seattle, 172 Wash. 649, 21 P. 2d 721 (1933), affirmed 291 U.S. 300, 78 L. ed. 310, 54 S. Ct. 833; and Wells & Wade Hdwe. v. Wenatchee, 64 Wn. 2d 103, 390 P. 2d 701 (1964). As stated in the first of these two cases:

> "This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue. Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L.R.A. 205; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51 L.R.A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652."

Moreover, as recently indicated in an opinion dated August 14, 1972, to the Municipal Research Council (copy enclosed),

> ". . . it has been held to be constitutionally permissible to establish several classes of business activities on the basis of gross income (each class including all businesses whose gross receipts range between designated minimum and maximum amounts) and to impose such a municipal license tax at a different flat rate on each such class. See Clark v. Titusville, 184 U.S. 329, 46 L. Ed. 569, 22 S. Ct. 382 (1902), in which this type of classification was held to be reasonable and, therefore, not to violate the equal protection clause of Amendment 14 to the United States Constitution. . . ."

By its enactment of §§ 6 and 7, chapter 134, Laws of 1972, Ex. Sess., the legislature has, however, restricted the

exercise of this taxing authority. These two sections apply, respectively, to cities and towns which have not come under the optional municipal code and those which have; otherwise, they are identical and may be exemplified by quoting the text of § 6 only, as follows:

> "Any city which imposes a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, shall impose such tax <u>at a single uniform rate upon all such business activities.</u> This section shall not apply to any business activities subject to the tax imposed by chapter 82.16 RCW." (Emphasis supplied.)

Before proceeding to consider your questions in the light of this statute, we think it would be well, lest there be any misunderstanding, to note and emphasize the rather limited scope of its provisions. In order for whatever restrictions are imposed by the statute to apply, there are two distinct situations which must exist: First, the city in question must be taxing or licensing the business activity of making "retail sales of tangible personal property" - as distinguished, for example, from sales of services or intangible commodities such as electrical power, telephone communication, or the like.[1] And

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1 Compare, in this regard, the text of §§ 6 and 7, <u>supra</u>, with the broader provisions of an earlier version of this proposed legislation, as considered by the state senate on February 19, 1972, which would, instead, have provided as follows:

> "NEW SECTION. Sec. 6. There is added to chapter 35.21 RCW a new section to read as follows:
>
> "Any city or town which levies and collects a tax for the act or privilege of engaging in the business activity of making sales at retail shall measure such tax by the application of a single uniform rate against the value of the gross proceeds of such retail sales.

secondly, the fee or tax must be measured by the gross receipts derived from such sales, rather than some other measure such as the number of outlets,or of employees, etc.

With these two points in mind, we turn now to the questions here to be answered.

Question (1):

We believe the language of the subject statute is clear in requiring that any gross receipts tax imposed by a city on the business activity of making retail sales of tangible personal property must be imposed at a single uniform rate upon all such activities which are similarly taxed. In our opinion to the Municipal Research Council, supra, we advised that because of this enactment a city or town may no longer impose a multiple rate tax on the gross receipts of business activities which consist of making retail sales of tangible personal property. In so concluding, we characterized the effect of the statute as requiring that the tax imposed be at a uniform tax rate without regard to the respective amounts of the gross receipts or gross income. Similarly, we would also conclude that the tax must be imposed at a uniform rate without regard to the subject matter of the particular sale of tangible personalty; e.g., whether it is fuel oil or furniture, drug products or clothing, etc. Thus, the first question above stated is readily answerable in the negative.

Question (2):

But does this clear prohibition against applying different rates to different categories of retailers who are made subject to such a municipal business license fee or tax as is regulated by §§ 6 and 7, chapter 134, supra, mean, also, that in order to impose such a business tax upon any

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1 Cont'd:

> "NEW SECTION. Sec. 7. There is added to chapter 35A.82 RCW a new section to read as follows:
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> "Any code city or town which levies and collects a tax for the act or privilege of engaging in the business activity of making sales at retail shall measure such tax by the application of a single uniform rate against the value of the gross proceeds of such retail sales."

given category of retailers of tangible personal property, a city or town is required to impose this same flat rate gross receipts tax upon every other category of retailer also engaged in such activities therein?

We think that in order to effectuate the apparent purpose of the legislature in enacting this 1972 legislation an affirmative answer to this question must be reached. Otherwise, under the guise of classifying retailers according to their principal goods or commodities a city or town might still remain free to (in effect) impose one rate of tax against certain retailers and another rate against others - keyed in fact to gross receipts or income to the extent that the gross receipts of some categories of retailers are, because of the things they sell, generally higher or lower than those of others dealing in different commodities.

If we were to hold it possible for a city to impose (for example) a five percent license tax on all retail dealers in fuel oil or furniture while imposing no license tax at all on pharmacies or grocery stores, what would be left in the law to prevent, instead, a one percent or a two percent tax upon the latter? Obviously a decision by a city to exclude a particular type of retailer from the payment of any business license tax at all is just as much a classification as is a decision to impose one tax rate against a certain category of retailers and another rate against others.

It is our opinion, therefore, that §§ 6 and 7, chapter 134, supra, must be taken to mean that whenever a city or town determines, in the exercise of its discretion, to impose a license fee or tax ". . . upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, . . ." such a city may not limit the applicability of this fee or tax only to certain categories of such retailers but, instead, ". . . shall impose such tax at a single uniform rate upon all such business activities. . . ." Accordingly, if a particular city determines to impose a license fee or business tax measured by gross receipts or income upon the business of making retail sales of fuel oil it may only impose and collect such fee or tax to the extent that the same flat rate fee or tax measured by gross receipts is also

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1 Cont'd:
However, although initially adopted in this form as a senate amendment to House Bill No. 414, the amendment was then reconsidered (later the same day) and replaced with the version ultimately passed and made a part of the law. See, Senate Journal, 1971, pp. 679-80 and 690-91.

imposed upon all other such retailing activities (i.e., of tangible personal property) occurring within such city.

We trust that the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Deputy Attorney General

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