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Municipal Corporations--Taxation--Validity of License and Use Taxes on Public Utility

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is broad in scope, it is not an unlimited power. It may not transcend constitutional limitations.

"A reasonable exercise of the police power is one required by public necessity, and a public necessity is the legitimate exercise of its power." 6 McQUILLIN, MUNICIPAL CORPORATIONS § 24.09, 460 (3d ed. 1949).

The court in the principal case, in reaching its decision, relied on the case of *Givner v. State,* 210 Md. 484, 124 A.2d 764 (1956), which held that an ordinance, reciting that inspection was necessary to combat growth of slum conditions, was not unconstitutional when the inspections were to be made at reasonable, daylight hours and were of a routine nature.

However, it would seem that in view of the firmness with which the right of a man to the privacy of his home has been established, the better view would be to protect this right in the absence of a clear necessity for its invasion. As was stated in the *Little* case, *supra:* "If an acute emergency occurs precluding reference to a court or magistrate, public officials must take such steps as are necessary to protect the public. But, absent such emergency, health laws are enforced by the police power and are subject to the same constitutional limitations as are other police powers. It is wholly fallacious to say that any particular police power is immune from constitutional restrictions." At 16. Thus, in balancing the power of a municipality to protect the health, safety and welfare of its citizens against the individual's right to the privacy of his home, the test of reasonableness now appears to be the deciding factor. It is submitted that considerations of health, safety and welfare of the community may require that a municipality be permitted to exercise the police power to its fullest extent. On the other hand, the privacy of the home has long been considered a most sacred right, one not to be hastily surrendered or chipped or frittered or worn away by the exigencies of the times. COOLEY, CONSTITUTIONAL LIMITATIONS 73 (8th ed. 1927).

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MUNICIPAL CORPORATIONS—TAXATION—VALIDITY OF LICENSE AND USE TAXES ON PUBLIC UTILITY.—Upon expiration of *P*'s public utility franchise for telephone services in a municipality, the utility continued to use and occupy the city streets for its telephone facilities and equipment. Five of *P*'s employees were arrested by the munici-

pality for stringing telephone wires incident to its utility services. Shortly thereafter the municipality adopted an ordinance imposing on certain utilities a "service fee" to cover the cost of permanent injury to the surface of the streets and a "use fee" for the right and privilege to use and occupy the streets and other public ways of the municipality for public utility purposes. The "service fee" was regulatory in nature whereas the "use fee" was apparently for general revenue purposes. *P*, being included within the broad reaches of the ordinance, sought and obtained an injunction in the circuit court restraining enforcement of the ordinance primarily on grounds of its invalidity. On appeal by the municipality, *held*, that while the provisions of the ordinance relating to the "service fee" for regulatory purposes are valid, the provisions relating to and imposing the "use fee" are invalid and beyond the powers of the municipality. *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 105 S.E.2d 260 (W.Va. 1958).

Primary interest in this comment will be centered on the "use fee" which the municipality conceded was imposed purely for revenue purposes but justified as a rental charge on the utility for the portion of the streets occupied by it. It will be well, therefore, to survey briefly the law relating to the powers and authority of a municipality to impose a "use fee" for general revenue purposes and, in particular, where the "use fee" is attempted to be justified as a rental charge for use of the streets.

It is well settled in West Virginia and a majority of jurisdictions that a municipal corporation can exercise only those powers expressly granted or fairly implied from such an express grant. *Maynard v. Layne*, 140 W. Va. 819, 86 S.E.2d 733 (1955). A city has no inherent power to tax and can do so only when this power is delegated. *Hukle v. City of Huntington*, 134 W. Va. 249, 58 S.E.2d 780 (1950). If the city of Morgantown has the right to levy a "use fee" for revenue purposes, the right is clearly not inherent or implied. Therefore, the right must be delegated to the city specifically in its charter or to all cities generally by statute.

In so far as the "use fees" in the principal case is concerned, no right to levy same is found spelled out specifically in the Morgantown charter and no such power is granted by statute to West Virginia cities generally. Charter of City of Morgantown, W. Va. Acts 1933, ch. 126; W. VA. CODE ch. 8, art. 4, § 13b and ch. 11, art. 13, § 2b (Michie 1955). Where a city is granted specific

powers, those not named are withheld. *State ex rel. Bibb v. Chambers,* 138 W. Va. 701, 77 S.E.2d 297 (1953). As the power to levy a "use fee" has not been granted to Morgantown by statute or by any provision in its charter, it is withheld. In addition, the imposition of a municipal privilege tax on a public utility is limited by statute in West Virginia. W. VA. CODE ch. 8, art. 4, § 13b (Michie 1955). Since the city of Morgantown apparently has no authority to impose a "use fee" on public utilities as here attempted, the ordinance relating thereto in the principal case must be invalid if, in fact, the "use fee" be a privilege tax for revenue purposes.

An examination of the tax in the principal case can lead to no conclusion other than that the tax is a use tax. A use tax has two requisites: (1) it is levied on the use or consumption of property, (2) it has no regulatory features and is for revenue only. *State ex. rel. Hansen v. Slater,* 190 Wash. 703, 70 P.2d 1056 (1937). The tax in the principal case is levied on property used by the utility company within the city, thus satisfying the first requisite of a use tax. It contains no regulatory or prohibitive features and is apparently for revenue only, thus meeting the second requirement. Disregarding the relatively nebulous label of "use fee" and examining the tax in substance and form as it is levied, it cannot be reasonably construed to be anything other than a use tax.

Generally, courts have looked upon use taxes imposed by municipal corporations with disfaver and usually have construed ordinances relating thereto in favor of the taxpayer. In some cases attempts to collect use fees for use of public streets have been expressly declared to be invalid. *City of Chicago Heights v. Public Service,* 408 Ill. 604, 97 N.E.2d 807 (1951).

In *Hukle v. City of Huntington, supra,* it was held that statutes delegating power to municipalities to levy taxes must be construed strictly and, if any doubt exists, it should be resolved in the taxpayer's favor. The *Hukle* case also held that a municipal corporation can exercise only those powers expressly granted to it or essential to accomplishing the purpose of the corporation. The case emphasized that these implied powers must be indispensable, not merely convenient, before the corporation could exercise them. It appears obvious, therefore, that the use tax attempted to be imposed on *P* in the principal case, in addition to the valid license tax, is not within any indispensable, implied power of the city of Morgantown. A more logical argument would seem to favor a matter of

mere convenience or a compelling desire for greater revenue. Originally the tax was levied at $240,000. When the company announced it would seek to enjoin the enforcement of the ordinance the schedule of payments was changed thereby, reducing the tax to $40,000. This substantial change strongly indicated an attempt to obtain additional income for the municipality from the utility under the guise of an exercise of nonexistent municipal powers.

In contrast to the obvious invalidity of the use tax, the license tax imposed by the city appears to be valid and wholly consistent with the charter granted to the city as a municipal corporation. A license tax to be valid must be incident to regulation and within the municipal police powers. *Pacific Tel. & Tel. Co. v. Seattle*, 291 U. S. 300 (1934). The sections of the ordinance assessing the license tax clearly meet both requirements as they contain words of regulation and are wholly within the police powers of the city. The tax contains nothing inconsistent with the city's power to tax or power to regulate as a municipal corporation.

The principal case is worthy of a more diligent and learned analysis than has been attempted in this comment for a number of reasons. It will be of considerable value to West Virginia lawyers in general and to those who represent municipalities in particular. The case contains an excellent discussion of the powers of municipalities to tax and of the law of municipal corporations in a comprehensive, though not overly detailed, opinion. Set out in the case itself is the challenged city ordinance containing both valid and invalid tax provisions. This fact facilitates comparison and study of both the valid and invalid provisions of the ordinance. The case carefully defines the extent and limits of taxing areas of West Virginia municipal corporations generally.

While a "judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws including municipal ordinances, supposed already to exist" and while legislation, on the other hand, "looks to the future and changes existing conditions by making a new rule to be applied thereafter", it may be observed that the judicial inquiry in the principal case has found restated and established legal principles which will helpfully serve as survey markers in municipal quests for future revenue sources. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

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