TAXATION: LICENSE TAXES.

Determination regarding whether locality may impose flat tax on itinerant merchants and peddlers without violating Commerce Clause depends on resolution of questions of fact that may establish genuine administrative burden experienced by locality. Attorney General traditionally has declined to render official opinions when request involves question of fact rather than one of law.

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April 12, 2002

Issue Presented

You ask whether a locality may impose a $500 flat-fee license tax on out-of-state itinerant merchants and peddlers without violating the Commerce Clause of the Constitution of the United States.

Response

I regret that I am unable to render an opinion on your question, because such a determination depends on a resolution of questions of fact. Attorneys General traditionally have declined to render official opinions when the request involves a question of fact rather than one of law. I have outlined, however, the state of the law for your consideration in making a factual determination.

Facts

You advise that Alleghany County imposes on every itinerant merchant or peddler subject to a business, professional and occupational license, a $500 flat tax. Such tax is imposed regardless of the in-state or out-of-state status of the itinerant merchant or peddler. You advise that the Alleghany County Code specifically provides that the terms "peddlers" and "itinerant merchants" shall have the same meaning as prescribed in § 58.1-3717 of the Code of Virginia, which establishes a maximum $500 license tax per year that localities may impose on peddlers and itinerant merchants. You relate that Homier Distributing Company, Inc., an itinerant out-of-state merchant, objects to the county's $500 license tax, claiming that the tax discriminates in favor of local interests, in violation of the Commerce Clause of the United States Constitution.

You relate that Homier paid the county's $500 license tax for a one-day sale held in the county, and that Homier's gross receipts from the sale were $15,983. Homier argues that a nonitinerant local retailer would have been taxed only $15.98 for the same sale (i.e., a rate of 10 cents per $100 of gross receipts), while Homier was taxed $500 (i.e., a rate of $3.13 per $100 of gross receipts).

Constitutional Considerations
The Commerce Clause of the Constitution of the United States provides that Congress shall have the power "[t]o regulate commerce … among the several states." The Supreme Court of the United States has long construed the Commerce Clause as a restraint on state and local power. Modern jurisprudence regarding state and local taxation under the Commerce Clause emerged in the late 1930s, when the Court began to shun formalistic distinctions that lacked substance and to focus on the practical effect of the tax imposed, or its effect despite any distinctions in form. In prior decisions, the Court merely held that a state or locality could regulate "local," but not "national," commerce.

After 1938, the apportionment of a local tax to cover those activities rationally related to a taxing authority's power and interest became the central inquiry. The Court announced that, for a tax to be valid under the Commerce Clause, the tax cannot, in effect, reach revenue generated by activities lacking a substantial nexus with the taxing jurisdiction. The Court spelled out this apportionment rule, announcing a four-pronged test to assess the validity of a local tax under the Commerce Clause. The tax must be (1) applied to an activity with a substantial nexus with the taxing authority, (2) fairly apportioned, (3) nondiscriminatory to interstate commerce, and (4) fairly related to the services provided by the state or locality. The Court also restated the realist approach, noting that the focus is not on the tax statute's formal language, but rather on its practical effect.

Discussion

Your question relates to the classification of itinerant and fixed merchants for purposes of analysis of Commerce Clause implications. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." In General Motors Corporation v. Tracy, the Court held that regulated and unregulated sellers of natural gas served different markets, so that sales of each may be taxed differently without violating the Commerce Clause. "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." Fixed and itinerant merchants both sell merchandise at retail from stores or other places of business, the difference between them being the expected period of occupancy in those stores or places of business. Therefore, it is clear that fixed and itinerant merchants serve the same market for the purposes of Commerce Clause analysis.

The fact that a local $500 flat tax burdens all in-state and out-of-state itinerant merchants equally, regardless of where else they travel or where they are based, reflects that the tax does not discriminate against interstate commerce when addressing only the taxation of itinerant merchants. Analysis must, however, be made of both the burdened class and the preferred class. Should itinerant merchants be compared with fixed merchants, it becomes apparent that the fixed merchants' receiving the more favorable tax rates are located within the locality.

In the case of American Trucking Associations, Inc. v. Scheiner, the Court reviewed the Commerce Clause cases involving flat taxes. The Court concluded that a flat tax "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" The "hydraulic pressure" arises because "[f]lat-rate license taxes, 'if adopted by many cities and states, bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical (and, in particular, with the same total quantity of sales) that sells in only one place.'"
Indeed, the Court has suggested that a flat tax, which "bears no relationship to the taxpayers' presence or activities in a State," will invariably fail the fourth prong of the test articulated in *Complete Auto Transit*.19 Even before the *Complete Auto Transit* case, the Court struck down flat taxes when local merchants paid a graduated rate. In the case of *West Point Wholesale Grocery Co. v. Opelika*, the Court wrote: In our opinion the tax here in question falls squarely within the ban of those cases. This is particularly so in that Opelika places no comparable flat-sum tax on local merchants. Wholesale grocers whose deliveries originate in Opelika, instead of paying $250 annually, are taxed a sum graduated according to their gross receipts. Such an Opelika wholesaler would have to gross the sum of $280,000 in sales in one year before his tax would reach the flat $250 amount imposed on all foreign grocers before they may set foot in the City. The Commerce Clause forbids any such discrimination against the free flow of trade over state boundaries.20

The Court has recognized that a discriminatory tax may be upheld if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."21 An example may be found in the compensatory tax doctrine. "[F]or a tax system to be 'compensatory,' the burdens imposed on interstate and intrastate commerce must be equal."22 Another example of a legitimate local purpose is when administrative difficulties make collection of more finely calibrated user charges impracticable.

In the case of *American Trucking Association v. Scheiner*,23 after noting that the pre-*Complete Auto Transit* cases injudiciously upheld various flat taxes without regard to their discriminatory consequences for interstate businesses, the Court noted:

Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated [sic] user-fee schedule would pose genuine administrative burdens.24

Moreover, while the Court has struck down flat taxes, with statements such as "when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State ... under the fourth prong of the *Complete Auto Transit* test ... the State is imposing an undue burden on interstate commerce,"25 it has not specifically concluded that the only mode of taxation available to states involves graduated taxes on gross receipts or other activity.

There are instances where genuine administrative burdens exist due to the nature of a particular taxpayer's activities. For instance, it would not be unreasonable to conclude that out-of-state itinerant merchants might be less inclined to report their gross sales after leaving a locality. Similarly, such merchants may be less inclined to register with the State Corporation Commission to do business in the Commonwealth, and might create additional litter or public safety problems. Finally, such merchants might be less likely to register as a dealer and report and pay over sales and local excise taxes, such as meals taxes, and less likely to file income tax returns and satisfy the
corresponding liabilities. Any such conclusion, however, must be based upon factual considerations.

Ultimately, any determination regarding whether a flat tax on itinerant merchants offends the Commerce Clause depends on a resolution of questions of fact. This Office traditionally has declined to render official opinions when the request involves a question of fact rather than one of law.\(^2\)

**Conclusion**

Accordingly, I am unable render an opinion as to whether a locality may impose a $500 flat fee license tax on out-of-state itinerant merchants and peddlers without violating the Commerce Clause of the United States Constitution due to the factual nature of any such determination.


\(^2\)Id. § 38-2.

\(^3\)Section 58.1-3717 provides:

"A. For the purpose of license taxation pursuant to § 58.1-3703, any person who shall carry from place to place any goods, wares or merchandise and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler.

"B. For the purpose of license taxation pursuant to § 58.1-3703, the term 'itinerant merchant' means any person who engages in, does, or transacts any temporary or transient business in any county, city or town and who, for the purpose of carrying on such business, occupies any location for a period of less than one year.

"C. Any tax imposed pursuant to § 58.1-3703 on peddlers and itinerant merchants shall not exceed $500 per year. Dealers in precious metals shall be taxed at rates provided in § 58.1-3706.

"D. This section shall not apply to a peddler at wholesale or to those who sell or offer for sale in person or by their employees ice, wood, charcoal, meats, milk, butter, eggs, poultry, game, vegetables, fruits or other family supplies of a perishable nature or farm products grown or produced by them and not purchased by them for sale. A dairyman who uses upon the streets of any city one or more vehicles may sell and deliver from his vehicles, milk, butter, cream and eggs in such city without procuring a peddler's license.

"E. The local governing body imposing such tax may by ordinance designate the streets or other public places on or in which all licensed peddlers or itinerant merchants may sell or offer for sale their goods, wares or merchandise."

\(^4\)Alleghany County, Va., Code, supra § 38-9(2)(b).

\(^5\)U.S. Const. art. 1, § 8, cl. 3.
See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (ruling that laws of New York State, granting certain individuals exclusive navigational rights of state waters for term of years, violated Commerce Clause by prohibiting vessels involved in interstate commerce from navigating said waters).

See, e.g., Western Live Stock v. Bureau, 303 U.S. 250 (1938) (ruling as to whether state tax received from sale of advertising space by newspaper or magazine publishers imposes unconstitutional burden on interstate commerce).


See, e.g., Greyhound Lines v. Mealey, 334 U.S. 653, 663 (1948) (holding that state tax on gross receipts from transportation of passengers must be fairly apportioned as to mileage within state; tax on mileage outside state unduly burdens interstate commerce, in violation of Commerce Clause).


Id. at 279.


General Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997).

Id. at 278.

Id. at 300.


Id. at 286-87 (quoting U.S. Const. art. I, § 8, cl. 3).

Id. at 285 n.20 (quoting Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1188 (1986)).


483 U.S. at 266.

Id. at 296.


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