Regulus Books LLC
v.
City of Charlottesville

Allegations

1. **The City's Business License Tax, as applied to the plaintiff, violates the First Amendment to the U.S. Constitution.**

- The plaintiff, through his literary holding company, produces speech, which is protected by the First Amendment.
- The City discriminates against freelance writers when they have to pay the tax, while newspapers, magazines, periodicals, radio, and television are exempt.

2. **The City's Business License Tax is unconstitutionally vague as applied to the plaintiff.**

- The ordinance does not define repair service, business service, or personal service. (hint – it doesn't have to)
- A reasonable person or business cannot tell from the statute whether they will be taxed. (even though the first sentence in the ordinance declares that all businesses are to be taxed!)

Originally Sued City and Commissioner

1. **The Commissioner of Revenue is not a proper party in an assessment challenge.**
   - Provided a copy of the Fredericksburg Circuit Court ruling sanctioning the attorney bringing suit against the Commissioner of Revenue in the National Slavery Museum matter.
     - The Commissioner of Revenue is a constitutional officer and can be called as a witness, but is not a 'sue and be sued' party like a city or county. *Town of Leesburg v. Loudoun National Bank, 141 Va. 244 (1925).*
   - Plaintiff's Counsel voluntarily agreed to nonsuit the Commissioner

Demurrer – City asked for dismissal on the following grounds:

1. **The City's BPOL tax ordinance does not violate First Amendment because…**

- Exemptions for newspaper and periodicals are required by State Code;
- The tax does not target any narrow subset of speakers or suppress any ideas or viewpoints;
- The tax is content neutral.

2. **The City's BPOL tax ordinance is not unconstitutionally vague because…**

- void-for-vagueness doctrine does not apply to measures that do not prohibit conduct or speech;
- the ordinance is simply not vague – a reasonable author that consulted the statute would understand that he is required to pay business license upon reporting self-employment income;
- the tax is uniformly imposed on any author similarly situated (reporting self-employment income).

Demurrer Overruled

The Court ruled from the bench calling into question the First Amendment arguments stating that not all speech is "free", but permitted the claim to move forward.

The Court also questioned the 'service' that was provided by Regulus and indicated pleadings were sufficient to move forward to a trial.

City's Motion for Summary Judgment

1. **The City's BPOL ordinance does not violate the First Amendment to the U.S. Constitution.**

- There should be a presumption of constitutionality since the ordinance has no First Amendment implications - the City's BPOL ordinance is neutral with respect to speaker and speech content. The ordinance pertains to economic regulation and taxation – not speech.
- Leathers v Medlock (1991) – A speaker-based tax is only suspect under the First Amendment if the tax (1) targets the press, (2) burdens a small group of speakers with the full weight of the tax, or (3) on its face distinguishes between speakers based on content. The City's ordinance does none of those things

City’s Motion for Summary Judgement

2. **The City’s BPOL ordinance is not unconstitutionally vague.**

- Applicability to ALL businesses is established in the very first section of the ordinance:

It is hereby declared to be the intent of this chapter that, in order to distribute the tax burden of the city, any business, employment or profession located or conducted in the city, and the persons, firms, associations and corporations engaged therein and the agents thereof, ***shall, except as otherwise specifically provided, be subject to an annual license issuance fee and license tax under this chapter.***

City's Motion for Summary Judgement

2. **The City's BPOL ordinance is not unconstitutionally vague.**

- The prohibited activity is made abundantly clear:

  It shall be unlawful for any person to engage in any business, employment or profession within the city for which a license issuance fee or license tax is imposed by this chapter, without first obtaining a city business license and paying the required fee or tax.

City's Motion for Summary Judgement

2. **The City's BPOL ordinance is not unconstitutionally vague.**

- It's not hard to tell if you are subject to the license tax:
  1) Are you engaged in business (i.e. did you file a Schedule C with your tax returns)?
  2) Do you make more than $100,000 in your business?
  3) Are you classified as a Class I (contractor), Class II (retail merchant), or Class III (financial/real estate/professional services)?
  4) If not, then you are a Class IV (repair, personal, or business service) business.
  5) Locate your particular subclassification in Class IV, and if it is not specifically listed then you would fall under §14-19(i)(12) *any other repair, personal or business service not specifically included in any other subclassification under this section.*
  6) If you're still not sure call the Commissioner of the Revenue.

City's Motion for Summary Judgement

2. **The City's BPOL ordinance is not unconstitutionally vague.**

- It does not matter that repair, personal or business services are not defined since the Tax Commissioner has clearly established in the Virginia Administrative Code (VAC 10-500-480 and VAC 10-500-500) that the category refers to all non-real estate, professional and financial services.
- The plaintiff clearly offers business services to his various publishers and distributors through negotiated contracts.

Plaintiff's Motion for Summary Judgment

- **Basically reiterated the First Amendment nonsense and vagueness argument.**
- **Asked for a refund of tax and various overly broad court-related costs.**

Circuit Court Ruling

1. City's Ordinance is content-neutral. Does not violate First Amendment to the United States Constitution.
2. Since plaintiff produces books, which have physical characteristics, plaintiff is neither a service nor a service provider. Therefore, it does not fit into the "any other repair, personal, or business service" classification.
3. City's BPOL ordinance is unconstitutionally vague as to plaintiff. Plaintiff's business cannot be found elsewhere in the City Code and cannot be taxed under the City's ordinance.
4. Ordered City to Refund Tax.
5. Also ordered City to reimburse plaintiff for some seriously odd charges incurred by the law firm (transcript fees, shipping fees, pro hac vice admission fees, fees for copies).

Supreme Court of Virginia

1. **Freelance writer licensing their work is not a "service".**
2. **Freelance writer's business is not covered by the ordinance's catchall provision.**
3. **Court did not reach the question of whether the ordinance is unconstitutionally vague as applied to freelance writer. It applied the "Right result, wrong reason" doctrine.**
4. **Upheld Circuit Court's order for the City to refund plaintiff his tax payments.**
5. **Circuit erred by awarding costs not essential for the prosecution of the suit. Remanded the case back to the Circuit Court to deduct such costs from its award.**

How do we move forward?

We were already planning to do an overhaul of the BPOL Ordinance. Hopefully, we will remove the litany of subclassifications that caused the plaintiff such confusion. Will stick to the broad categories as stipulated in 58.1-3706:

- Contracting
- Retail sales
- Financial, real estate & professional services
- Repair, personal and business services, **AND ALL OTHER BUSINESSES AND OCCUPATIONS NOT SPECIFICALLY LISTED OR EXCEPTED IN THIS SECTION***

* this was missing from our ordinance

Lessons Learned…

1. **The Division of Risk Management will not protect you if you get sued over a tax dispute (which is what you are most likely to be sued for):**

   "III. RESTRICTIONS

   The following matters are not eligible for this Plan's protection:

   …

   K. Tax assessment disputes including but not limited to, those described in §58.1-3984 of the Code, disputes over property valuation or similar matters…"

Lessons Learned…

2. **The City Attorney is not YOUR attorney.**

- If your interests ever diverge from those of the City, you will need to find your own counsel.
- Code allows you to petition the Court to appoint counsel for you, at the locality's expense.

Lessons Learned…

3. **The “Institute for Justice” is coming for all of us… and they will trash you in the media.**