

NOTES

CONSTITUTIONALITY OF MUNICIPAL PERSONAL INCOME TAX WITH PARTICULAR REFERENCE TO ST. LOUIS

The planlessness of American municipal growth and the progressive decay of the older sections of our cities have driven many for whom the cities still serve as centers of employment and of marketing to suburban residential areas. In consequence has come an aggravation of the difficulties of metropolitan management and, not least, in financing the increased services demanded from revenues constantly decreased by the steady migration of taxpayers beyond their borders.¹

In this disturbing development, St. Louis has had its full share and is seeking in common with other similarly situated municipalities a solution to the vexing problems presented thereby. Consolidation with or annexation of the surrounding areas, expedients fashionable at one period in American municipal development, have latterly fallen into substantial disuse,² perhaps because of resistance on the part of dwellers in the affected areas. Such measures are only feebly and occasionally advanced as methods for relieving the pressures arising from fugitive resources.

As a more feasible plan for overcoming this financial loss to St. Louis, it has been suggested that the city adopt a municipal income tax, to be levied on the gross income received by all persons employed in the city of St. Louis—non-residents as well as residents. While no such ordinance has yet been submitted to the Board of Aldermen, there has already been much discussion of the legal validity of an ordinance of this nature and of its desirability from an economic and a sociological standpoint. This note will concern itself only with the question of the legal validity of such a municipal income ordinance.

It may be stated generally that a municipal corporation is a government of enumerated powers. More specifically, a municipal corporation possesses and can exercise the following classes

1. Mumford, *The Future of the American City*, St. Louis Post-Dispatch, Dec. 11, 1938, Sixtieth Anniversary Section, pp. 7-8.

2. In recent years only Detroit and Los Angeles have made any large additions in this manner. New York has annexed no territory for over 35 years, Philadelphia is only .1 of a square mile larger than in 1854, San Francisco is the same size as in 1856, and St. Louis preserves the straitened confines of 1876. Lepowsky, *Changing Bases of American Municipal Government* (1938) 199 Annals 212.

of powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.³

St. Louis is a home rule city, authorized as such by the Constitution of Missouri to adopt its own charter.⁴ The charter itself provides that "It [the city of St. Louis] shall have power to assess, levy, and collect taxes for all *general special*⁵ purposes on all subjects or objects of taxation."⁶ The power to levy and enforce an income tax is not conferred *eo nomine* in the charter or in any of the constitutional or statutory provisions relating to St. Louis. Therefore, in order for a tax of this nature to be sustainable, it must appear (1) that the power to levy such a tax may be implied from the general grant of taxing power in the charter; (2) that such implication does not conflict with any state laws; and (3) that the tax proposed would not violate any state or federal constitutional provisions.

I. IMPLIED POWER TO TAX

The charter itself prescribes the rules for construction of the enumerated powers, providing *inter alia* that "the enumeration of particular powers in this charter is not exclusive of others, nor restrictive of general words or phrases granting powers * * *."⁷ This proposition may be stated affirmatively thus: the city may exercise all the powers within the fair intent and pur-

3. 1 Dillon, *Municipal Corporations* (5th ed. 1911) 448, sec. 237, quoted and followed in: *St. Louis v. Kaime* (1903) 180 Mo. 309, 79 S. W. 140; *Electric Light and Power Co. v. St. Louis* (1913) 253 Mo. 592, 161 S. W. 1166. To the same effect: *St. Louis v. Telephone Co.* (1888) 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; *Independence v. Cleveland* (1902) 167 Mo. 384, 67 S. W. 216; *Joplin v. Jacobs* (1906) 119 Mo. App. 134, 96 S. W. 219. "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of the corporation, the mode in which they are organized and which in which their affairs must be conducted." *Spaulding v. Lowell* (1839) 40 Mass. (23 Pick.) 71, 74, per Shaw, C. J.

4. See discussion supported by note 29, *infra*.

5. The charter provision actually reads "general special purposes." It would seem that "and" or "or" should be inserted between the words "general" and "special." The italics are supplied. In *Automobile Gasoline Co. v. St. Louis* (1930) 326 Mo. 435, 446, 32 S. W. (2d) 281, 285, the word "and" is inserted without comment, so that the charter provision is there quoted "general and special purposes."

6. Art. I, sec. 1, subsec. 1.

7. Art. I, sec. 2.

pose of the creators of the municipal corporation which are reasonably proper to give effect to or supplement powers expressly granted.⁸ As noted earlier, the charter gives the city of St. Louis the power to levy and collect taxes "for all *general special*⁹ purposes on all subjects or objects of taxation."¹⁰ While courts in general adopt a strict rather than a liberal construction of charter powers of municipalities,¹¹ the power granted in the charter is so broad and all-inclusive that it is difficult to conceive of any tax which does not fall within its language.

That municipal corporations in Missouri have implied powers has been affirmed by judicial decision.¹² This doctrine of implied powers has been freely used in the states to mitigate the harshness of the rule that a city may exercise only expressly delegated powers.¹³ However, in seeking what powers will be implied, one must bear in mind the rule that a municipal corporation can do no act which may not be reasonably inferred or implied from some authority expressly granted.¹⁴

The field of implied powers has been so broadened that, in the absence of express limits, cities possessing only the ordinary general powers usually granted to municipal corporations fifty years ago, are measurably able to cope with present day problems. In the main, the courts seem to be guided here more by reason than by precedent. In New York, for example, an ordinance prohibiting the emission of dense smoke was sustained under the general "power to enact sanitary ordinances having the force of law."¹⁵ Similarly in the notable case of *St. Louis Gunning Advertising Co. v. St. Louis*¹⁶ an ordinance limiting the size of billboards was sustained under the general power to regulate the morals, health, and public safety. In a case decided by the United States Supreme Court in 1844,¹⁷ the power of Philadelphia to take and administer property bequeathed in trust to the city for specified charitable, educational, and other purposes

8. See *Bridgeport v. Housatonic R. R.* (1843) 15 Conn. 475, 501.

9. *Supra*, note 5. The italics are supplied.

10. Art. I, sec. 1, subsec. 1.

11. *Thomson v. Lee Co.* (1865) 3 Wall. 327; *Thomas v. Richmond* (1871) 12 Wall. 349; *Lafayette v. Cox* (1854) 5 Ind. 38.

12. *Aurora Water Co. v. Aurora* (1895) 129 Mo. 540, 576, 31 S. W. 946.

13. 6 McQuillin, *Municipal Corporations* (2d ed. 1928) 275, sec. 2523.

14. *Ex parte Marmaduke* (1886) 91 Mo. 228, 4 S. W. 91; *Hill v. St. Louis* (1900) 159 Mo. 159, 60 S. W. 116; *State ex rel. Reid v. Walbridge* (1894) 119 Mo. 383, 394, 24 S. W. 457.

15. *People v. Horton* (Sp. Sess. 1903) 41 Misc. 309, 84 N. Y. S. 942; *Dep't of Health v. Ebling Brewing Co.* (Mun. Ct. 1902) 78 N. Y. S. 11.

16. (1911) 235 Mo. 99, 137 S. W. 929.

17. *Vidal v. Girard's Ex'rs*, 2 How. 127.

was in question. Although it was not contended that the charter of the city conferred this power *eo nomine* or even by specific implication, the court held that the city did have such power under a charter provision empowering the city "to have, purchase, take, receive, possess, and enjoy lands," and a preamble referring broadly to the "promotion of trade, industry, and happiness."

To return to taxation, it is pertinent to note that in the fairly recent case of *Automobile Gasoline Co. v. St. Louis*¹⁸ it was held that charter provisions delegating the power to tax "all subjects or objects of taxation" include power to tax persons and occupations, even occupations already subject to a license tax. It was argued that "subjects or objects of taxation" was intended to include only real and personal property, but the court rejected the contention, saying:

The language used in clause 1 is not restricted to real and personal property. It says "all subjects or objects of taxation," which, as above stated, includes persons * * *. We think it apparent from other provisions of the charter as well as from the wording of clauses 1 and 2 that said clauses were intended to mean just what they said. * * * It is probably true that the framers of the charter thought, from some decisions prior to the adoption of the present charter, that they could give and were giving to the city power to tax any business [or person] by the use of general language such as was used in clause 1 * * *. It was evidently their purpose so to do.* * *

It is said in *St. Louis v. Herthel*, 88 Mo. 128, that in construing a charter, "we are to construe it according to the intent of the framers, and that intent must be gathered from the language and object of the charter provisions, and giving that language an interpretation neither strict nor strained."¹⁹

Congress, in establishing the Organic Act for the Territory of Hawaii, provided that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."²⁰ Three years after the Act was passed, it was held that the legislative power of the territory includes full and comprehensive power to legislate in the matter of taxation.²¹ In

18. (1930) 326 Mo. 435, 32 S. W. (2d) 281.

19. 32 S. W. (2d) at 285. See also *Ruschenberg v. Southern Electric R. Co.* (1901) 161 Mo. 70, 84, 61 S. W. 626; *Westerman v. K. of P.* (1906) 196 Mo. 670, 708, 94 S. W. 470, 5 L. R. A. (N. S.) 1114; *St. Louis v. Baskowitz* (1918) 273 Mo. 543, 556, 201 S. W. 870.

20. (1900) 31 Stat. 150, (1928) 48 U. S. C. A. sec. 562.

21. *W. C. Peacock & Co. v. Pratt* (Hawaii 1903) 121 Fed. 772.

*Robertson v. Pratt*²² the income tax law of Hawaii was construed in relation to the provisions of the quoted section. The power to levy an income tax was recognized as having been granted to the territory under this grant of the "legislative power"—a grant even less specific in its reference than the general grant of taxing power in the St. Louis charter upon which the power to pass an income tax reposes.

In Virginia it has been similarly held, in a long line of decisions, that a legislative grant to a municipal corporation of the general power of taxation includes the whole power of the state over subjects of taxation.²³ The power to tax businesses and occupations has consequently been held to result from a general grant of the taxing power.²⁴

While proponents of a strict rather than a liberal construction of implied powers under city charters are not lacking, this position appears upon examination to be asserted in those instances where a municipality is undertaking to exercise powers of a business or proprietary nature, as distinguished from purely governmental functions.²⁵

The following propositions would seem to summarize the matter of implied power: (1) municipal corporations may and frequently do exercise implied powers;²⁶ (2) the power granted the city of St. Louis by the charter to collect taxes "on all subjects or objects of taxation" is indeed a broad and comprehensive one; (3) income is a fit "subject or object of taxation" in Missouri;²⁷ (4) other jurisdictions have construed the implied power to levy an income tax to be conferred by grants of power at least as general as that contained in the St. Louis charter.²⁸

II. CONFLICT WITH STATE LAWS

Power to levy an income tax, though reasonably to be implied from the charter provision, must further hurdle the problem of

22. (1901) 13 Hawaii 590. See also *Keola v. Parker* (1913) 21 Hawaii 597.

23. *Ould v. Richmond* (1873) 64 Va. 464, 14 Am. Rep. 139; *Norfolk v. Norfolk Landmark Pub. Co.* (1898) 95 Va. 564, 128 S. E. 959; *Woodall v. Lynchburg* (1902) 100 Va. 318, 40 S. E. 915; *Norfolk v. Griffith-Powell Co.* (1903) 102 Va. 115, 45 S. E. 889; *Norfolk & W. R. Co. v. Suffolk* (1905) 103 Va. 498, 49 S. E. 658; *Standard Oil Co. v. Fredericksburg* (1906) 105 Va. 82, 52 S. E. 817. But see *Schoolfield v. Lynchburg* (1884) 78 Va. 366; and *Wytheville v. Johnson's Ex'r* (1908) 108 Va. 589, 62 S. E. 328.

24. *Ibid.*

25. 1 McQuillin, *Municipal Corporations* (2d ed. 1928) 930-956, secs. 373-385.

26. 6 McQuillin, *Municipal Corporations* (2d ed. 1928) 275, sec. 2523.

27. *Infra*, notes 50 and 51.

28. For a good general discussion of the construction of municipal powers, see *McBain, American City Progress and the Law* (1918) 30, c. II.

possible conflict between the charter provision and state laws. The Constitution of 1875 provides that "the city of St. Louis may * * * frame a charter for the government of the city * * * in harmony with and subject to the Constitution and laws of Missouri * * *";²⁹ also that "notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of the State."³⁰ Acting under the power thus conferred, the city by a duly chosen board of freeholders drafted and submitted a charter which was ratified at the polls on August 22, 1876.³¹ The charter thus locally begotten—the first of its kind in the United States³²—survived with a few amendments until superseded by another similarly adopted June 30, 1914.

Examination of the provisions of the Missouri constitution reveals that the drafters went to great pains to keep the city, thus liberated as to its own government, in subordination to the state. It is provided with abundant repetition that the charter so framed and adopted shall "always be in harmony with and subject to the Constitution and laws of the state."³³

It was inevitable that in the course of time question should be raised as to the existence and effect of supposed conflicts between state laws and charter provisions. In *St. Louis v. Meyer*,³⁴ the question concerned the authority of the city to enact a revenue ordinance imposing a license tax upon "peddlers or hawkers" and defining a hawker in such manner as to include farmers who sold products of the soil by outcry or by going from place to place. There existed at the time of the passage of this ordinance a state statute excepting from those thereby "declared to be peddlers" itinerant persons who sold "agricultural and horticultural products." The ordinance of the city was held to be invalid. It was urged upon the court that the definition prescribed by the general law was only for purposes of state taxation and nowhere evinced an intention to define who are or are not peddlers for

29. Sec. 20.

30. Sec. 25.

31. State ex rel. Beach v. Sutton (1877) 3 Mo. App. 388; State ex rel. Beach v. Finn (1877) 4 Mo. App. 347.

32. 1 McQuillin, *Municipal Corporations* (2d ed. 1928) 386, sec. 341.

33. See *e. g.*, art. IX, sec. 23.

34. (1904) 185 Mo. 583, 84 S. W. 914. For earlier cases on this point see State ex rel. Halpin v. Powers (1878) 68 Mo. 320; State ex rel. Hunt v. Bell (1893) 119 Mo. 70, 24 S. W. 765, where the court said: "We think it was the purpose of the act of 1893 to provide for a commissioner who should have the sole power to issue city dramshop licenses as well as licenses on behalf of the state; and, this intention appearing, the ordinances of St. Louis must give way to the act as far as they are in conflict with it."

the purpose of prohibiting municipalities from exacting a license from such persons; but this contention was summarily rejected.³⁵ The court commented:

The General Assembly has * * * undoubted power to legislate for St. Louis, as for all other cities * * * to enforce direct mandates of the fundamental law by appropriate statutes, and to pass all proper laws that are general throughout the State.³⁶

Here was formulation of a doctrine to be applied in determining what laws a home rule charter must be "consistent with" and "subject to"—a doctrine which was founded upon the distinction between matters of statewide and those of merely local concern. The prevalence of a state law over a charter provision was to be determined by applying the test of whether the statute dealt with a matter of state, as contrasted with local, concern. Thus the court in part clarified the ambiguity of the constitution by declaring that home rule charters must be "in harmony with" and "subject to" those "laws of the state" which are of general as distinguished from local concern. The latest reference to this question is found in *Tremayne v. St. Louis*,³⁷ involving a condemnation proceeding under the city charter, where the court said:

We shall take the applicable statutes first, because, in a broad sense, the charter of the city of St. Louis cannot contravene a state statute.³⁸

Apparently the Missouri courts recognize a domain of municipal affairs, however vaguely defined, in which the municipality is free to operate. Beyond this sphere the legislative power of the state, within the limitations set for it by the constitution, is operative and transcends all inconsistent municipal action.

But manifestly the power to frame a charter would be illusory if the city could not, within the framework of state laws, exercise sufficient taxing power to enable it to carry on its functions. This was recognized in the early case of *St. Louis v. Sternberg*,³⁹ where, in answer to the contention that the city could not levy a license tax upon lawyers because this taxing power had not been specifically conferred, the court declared:

35. Reliance for this contention was placed on the decision in *Moberly v. Hoover* (1902) 93 Mo. App. 663, 67 S. W. 721.

36. *State ex rel. Ziegenhein v. St. Louis & S. F. Ry.* (1893) 117 Mo. 1, 22 S. W. 910, affords an illustration of legislation of the latter sort.

37. (1928) 320 Mo. 120, 6 S. W. (2d) 985.

38. 6 S. W. (2d) at 941.

39. (1879) 69 Mo. 289.

Neither state, county, nor municipal government can be maintained without revenue, and revenue cannot be raised without the exercise of the taxing power in some form. * * * If the General Assembly should pass a law declaring that no license should be required of lawyers by any municipal corporation in the state, then such conflict would exist between the charter provision and the law.⁴⁰

The Missouri courts have on the whole been liberal in sanctioning the exercise of financial powers by home rule cities where no question of conflict with a state law is raised.⁴¹ But there is no instance of record in which a charter provision on the subject of local revenue has been held paramount to a state law with which it was deemed to be out of harmony. Nor do the decisions reveal any consistent course of reasoning or lay down any definite rules by which to determine when issues of supremacy are involved in this connection.

*Keane v. Strodtman*⁴² affords an illustration of a municipal tax held invalid because it conflicted with a "state law." St. Louis sought to tax persons erecting, maintaining, and repairing awnings. The applicable section of the charter⁴³ enumerates a number of callings but does not mention this particular calling. A statute⁴⁴ provides:

No municipal corporation in this state shall have the power to impose a license tax upon any business, avocation, pursuit, or calling, unless such business, avocation, or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute.

The tax ordinance was, therefore, declared void because in conflict with the statute and the charter.⁴⁵ Probably, however, it would be comparatively simple for a home rule city that was really bent on taxing some particular trade or calling despite the statute to alter its charter. Other cities in the state would of course have to await legislative action. The case just dis-

40. The doctrine of the Sternberg case was reaffirmed in *St. Louis v. Bircher* (1882) 76 Mo. 431, no additional point of importance being recorded.

41. *Siemens v. Shreeve* (1927) 317 Mo. 736, 296 S. W. 415; *State ex rel. Carpenter v. St. Louis* (1928) 318 Mo. 870, 2 S. W. (2d) 713; *State ex rel. Zoological Board of Control v. St. Louis* (1928) 318 Mo. 910, 1 S. W. (2d) 1021. The contrary view is suggested by dictum in *Commerce Trust Co. v. Syndicate Lot Co.* (1921) 208 Mo. App. 261, 235 S. W. 150; *Halbruegger v. St. Louis* (1924) 302 Mo. 572, 262 S. W. 379. The question has never been clearly determined in Missouri.

42. (1929) 323 Mo. 161, 18 S. W. (2d) 896.

43. Sec. 20.

44. R. S. Mo. (1929) sec. 7287.

cussed makes it abundantly clear that the tax involved would be permitted if authorized in the city charter, provided there was no conflict with any other state laws.

The proposed income tax provision may be readily distinguished from the license tax condemned in *St. Louis v. Meyer*.⁴⁶ That tax was held invalid because there was a statute already in force specifically dealing with the subject with which the ordinance imposing the license tax conflicted. There are neither constitutional nor statutory provisions, however, which purport to deal with the power of St. Louis to impose an income tax; hence, it is reasonable to conclude that there is no "state law" with which the ordinance could conflict. The proposed tax can likewise be distinguished from the tax held invalid in *Keane v. Strodtman*⁴⁷ because there a statute expressly prohibited the tax. In *St. Louis v. Sternberg*⁴⁸ the court acceded to the reasoning that while the constitution or the statutes could conceivably contain provisions which would be controlling, the absence of such provisions excludes the issue of conflict.

The question of conflict between the city's power to establish an income tax and the "laws of the state" may be thus summarized: (1) although St. Louis has full home rule powers, it may not exercise any power in conflict with any "state laws"; (2) there are no constitutional or statutory provisions which expressly prohibit the imposition of the tax in question and, therefore, no "state law" with which it could conflict; (3) while the power to impose this particular tax is not expressly delegated by constitutional, statutory, or charter provisions, it may reasonably be implied.

III. CONSTITUTIONALITY OF THE TAX

It cannot be seriously contended today that income is not a fit subject of taxation in Missouri. As early as 1865 the Missouri Legislature passed a statute imposing a tax on income.⁴⁹ In *Glasgow v. Rowse*⁵⁰ this statute was claimed to violate the constitutional mandate that taxes must be levied uniformly in proportion to the value of the property taxed, and that no tax may be levied except on property; but the court rejected this contention and upheld the statute, declaring that incomes are proper subjects of taxation in Missouri. The court added that, while it

45. To the same effect see *Kansas City v. Lorber* (1896) 64 Mo. App. 604.

46. (1904) 185 Mo. 583, 84 S. W. 914, cited supra, note 34.

47. (1929) 323 Mo. 161, 18 S. W. (2d) 896, cited supra, note 42.

48. (1879) 69 Mo. 289, cited supra, note 39.

49. Mo. Laws of 1865, p. 112.

50. (1869) 43 Mo. 479.

is true that the constitution lays down a uniformity rule as to the imposition of taxes on property, this does not abridge the legislative power to provide for revenue from other sources.⁵¹

The proposals and discussions with regard to a St. Louis income tax have premised the following features as items in the ordinance as, if, and when it is adopted:

(1) A tax on the gross earned income of every person residing, or employed or engaged in business, or in the practice or pursuit of any profession, trade, vocation, or occupation of any kind, nature, or character whatsoever within the territorial limits of the city of St. Louis.

(2) Exemptions for incomes paid by the United States, incomes derived exclusively from capital investments, and pensions and payments made pursuant to workmen's compensation acts or as damages for injuries to person or property, thus leaving wages, salaries, fees, commissions, gains, profits, royalties, bonuses, donations, honorariums, and all other amounts received as compensation for personal services actually rendered, to constitute the incomes subject to tax.

(3) Authorized deduction from the tax of a sum equal to all other taxes levied by, and paid directly to, the city of St. Louis by the taxpayer in the previous year, upon certification of such payment by the license collector.

(4) Employer collection of the tax at its source by withholding the amount of the tax from payments of earned income to employees, less any deduction for other taxes paid, as certified by the license collector, other persons subject to the tax, from whose earned income the tax has not been deducted by an employer, to be required to keep accurate records of gross earned income and make periodic reports to the license collector.

Item three, the "deductions" clause, in the above summary outline is of particular interest inasmuch as application of this clause might conceivably result in discriminations violative of the equal protection clauses of the Federal and Missouri constitutions. Concretely the particular incidence of the discrimination would be upon residents of St. Louis County and of the neighboring section of the state of Illinois. It is a matter of common knowledge that a large though unascertained number of such suburban residents earn their livelihoods within the city, pursuing their several occupations side by side with residents of

51. To the same effect see *Ludlow-Saylor Wire Co. v. Wollbrinck* (1918) 275 Mo. 339, 205 S. W. 196; see also Note (1939) 24 WASHINGTON U. LAW QUARTERLY, 242, 247.

the city of St. Louis. Whether this commuting element in the city's economic life must pay a tax on income from which associates and competitors resident in the city are relieved is a matter of practical and legal moment.

The power of taxation is fundamental to the very existence of government. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws has been held not to compel the adoption of an iron-clad rule of equal taxation nor to prevent all differences in tax laws.⁵² The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction,⁵³ or if any state of facts reasonably can be conceived to sustain it.⁵⁴

The limitations of the Federal Constitution apply with the same force to local as to state taxes,⁵⁵ on the theory that acts of a local government constitute acts of the state. These applicable limitations include, in addition to the equal protection clause,⁵⁶ the commerce clause⁵⁷ and due process with its various ramifications as to retroactivity,⁵⁸ arbitrary or unfair procedure,⁵⁹ and the requirement that the tax be for a public purpose.⁶⁰ In addition there is the problem of exemption of all federal instrumentalities under the doctrine of intergovernmental immunity.⁶¹

52. *State Board of Tax Comm'rs v. Jackson* (1930) 283 U. S. 527; *Bell's Gap R. R. v. Pennsylvania* (1890) 134 U. S. 232; *Southwestern Oil Co. v. Texas* (1910) 217 U. S. 114; *Brown-Forman Co. v. Kentucky* (1910) 217 U. S. 568.

53. *American Sugar Refining Co. v. Louisiana* (1900) 179 U. S. 89.

54. *Rast v. Van Deman* (1916) 240 U. S. 324; *Quong Wing v. Kirkendall* (1912) 223 U. S. 59.

55. *Home Tel. & Tel. Co. v. Los Angeles* (1913) 227 U. S. 278; *Atlantic Coast Line R. R. v. N. C. Corp. Comm.* (1907) 206 U. S. 1; *Carter v. Texas* (1900) 177 U. S. 442; Willis, *Constitutional Law* (1936) 573.

56. U. S. Const. Amend. XIV, Sec. 1. See *Puget Sound v. Seattle* (1934) 291 U. S. 619; *State Board of Tax Comm'rs v. Jackson* (1931) 283 U. S. 527.

57. See Powell, *Indirect Encroachment on Federal Authority through the Taxing Power of the States* (1918) 32 Harv. L. Rev. 907; Powell, *Commerce Clause Controversies over State Taxation* (1928) 76 U. of Pa. L. Rev. 773; U. S. Const. Art. I, Sec. 8, cl. 3.

58. *Untermeyer v. Anderson* (1928) 276 U. S. 440.

59. *Dukich v. Blair* (E. D. Wash. 1925) 3 F. (2d) 303, appeal dismissed (1925) 270 U. S. 670.

60. *Nashville, C. & St. L. Ry. v. Wallace* (1935) 288 U. S. 249. See also *State ex rel. Kansas City v. Orear* (1919) 277 Mo. 303, 210 S. W. 392, where the taxpayer obtained no special benefit.

61. For recent discussions of this problem see Freedman, *Government-owned Corporations and Intergovernmental Tax Immunity* (1938) 24 WASHINGTON U. LAW QUARTERLY 46; Miller, *The Intergovernmental Problem in Taxation of Officers and Securities* (1936) 2 Legal Notes on Local Gov't 3. See also Powell, *Indirect Encroachment on the Federal Authority*

Philadelphia is, so far as the writer has been able to ascertain, the only city in the United States which has a municipal income tax, and its ordinance was only recently adopted.⁶² The Supreme Court of Pennsylvania has in its current term upheld the impost.⁶³ The tax purports to be levied on all persons employed in Philadelphia, regardless of where they reside. The ordinance provides, however, that every resident of Philadelphia may deduct from the amount of his income before computing the tax, the amount of the real estate tax paid on his dwelling, regardless of whether he is the owner. This deduction was held to be not discriminatory and not violative of the equal protection clause.⁶⁴

No other instances have been found passing on the validity of exemptions or deductions from city income taxes under the equal protection clause. The paucity of authority is no doubt attributable to the novelty and infrequency of the tax. Caution must therefore be exercised in drawing conclusions as to the constitutionality of the proposed tax, with respect to its deductions or exemptions. In decisions on other kinds of taxes, such as license taxes, the issue of discrimination often seems to turn on relatively narrow distinctions in the character of the tax with reference to which the deduction is authorized. Thus in a fairly recent Alabama case⁶⁵ an ordinance imposing a license tax on sellers of motor fuels and other oils, exempting those who purchased from local dealers or distributors, but taxing those who purchased from non-resident dealers under contracts to buy de-

by the Taxing Powers of the States (1919) 31 Harv. L. Rev. 321; Cohen and Dayton, *Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 Yale L. J. 807.

In addition, with reference to court procedure and legal remedies, there is a limitation imposed by a federal statute upon a local tax which does not prevail in the case of a state tax. Thus a taxpayer cannot sue to obtain an injunction from the federal statutory court to enjoin the collection of an unconstitutional city tax. Sec. 266 of the Judicial Code (1910) 36 Stat. 557, (1928) 28 U. S. C. A. sec. 380. He must make application to a district court judge since it has been uniformly held that the question of constitutionality of legislation enacted by a subdivision of a state cannot be heard by a three-judge court and that local officers cannot be enjoined. *Ex parte Williams* (1928) 277 U. S. 267; see also an illuminating article by Pepper, *Enjoining the Collection of State and Local Taxes in the Federal Court* (1936) 70 U. S. L. Rev. 371. Practically, this means that the taxpayer will lose time and that he can appeal only to the Circuit Court of Appeals and not directly to the Supreme Court, with consequent less chance that certiorari will be granted.

62. St. Louis Post-Dispatch, Nov. 30, 1938, p. 6-A: 1.

63. N. Y. Times, Dec. 6, 1938, p. 15: 4.

64. *Ibid.* However, the court invalidated provisions exempting all incomes up to \$1,000 and all incomes of farmers and domestic workers, holding that they violated state constitutional requirements of uniformity.

65. *Woco Pep Co. v. Montgomery* (1925) 213 Ala. 452, 105 So. 214.

livered in the city was held violative of the Alabama constitution⁶⁶ and the Fourteenth Amendment of the Federal Constitution, as not equal and uniform in its incidence. With this may be compared the *dictum* in *St. Louis v. Consolidated Coal Co.*,⁶⁷ clearly intimating that a St. Louis ordinance exacting a license tax on all boats entering the harbor, but authorizing a reduction of forty per cent in favor of vessels owned by residents of the city and returned and assessed for city taxation during the year specified in the ordinance, did not violate constitutional requirements of uniformity.⁶⁸ Of some relevance here also is the declaration in the later case of *St. Louis v. United Rys. Co.*⁶⁹ that the requirement of uniformity of taxation is intended only to prevent discrimination between objects belonging to the same class and does not apply to licenses or taxes on privileges or occupations.⁷⁰ Similarly in *Arnold v. Hanna*⁷¹ it was held that the exception of live stock dealers and grain dealers from operation of the Commission Merchants Act⁷² is not arbitrary or unreasonable and does not violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The taxation of income earned within the state by nonresidents presents some further questions. No special difficulty is encountered in taxing income from property within the state or the earnings of an employee whose duties lie entirely within the state. The privileges and immunities clause does not entitle citizens of other states to entire immunity from taxation nor to preferential treatment as compared with resident citizens, but only protects against discriminatory taxation.⁷³

The possible objection of non-residents on the ground of double taxation in that they may have to pay a tax on the same income

66. Ala. Const. secs. 1, 35.

67. (1892) 113 Mo. 83, 20 S. W. 699.

68. Mo. Const. art. X, sec. 3. See also *Packet Co. v. St. Louis* (1879) 100 U. S. 423.

69. (1915) 263 Mo. 387, 174 S. W. 78, writ of error dismissed (1915) 241 U. S. 647. See Note (1939) 24 WASHINGTON U. LAW QUARTERLY 242, 249, 253.

70. It has repeatedly been held in Missouri that its constitutional provisions do not preclude a municipal corporation from imposing and collecting a license tax. *St. Louis v. Sternberg* (1879) 69 Mo. 289; *St. Louis v. Spiegel* (1886) 90 Mo. 257, 2 S. W. 839; *St. Louis v. Bowler* (1887) 94 Mo. 630, 7 S. W. 434; *St. Louis v. Consolidated Coal Co.* (1892) 113 Mo. 83, 20 S. W. 699.

71. *Arnold v. Hanna* (1926) 315 Mo. 823, 290 S. W. 416, aff'd (1928) 276 U. S. 591; see also *Watters v. People* (1918) 248 U. S. 65; *Payne v. State* (1918) 248 U. S. 112.

72. R. S. Mo. (1929) sec. 12648.

73. *Shaffer v. Carter* (1920) 252 U. S. 37.

where they reside has been disposed of by the recent holding⁷⁴ of the United States Supreme Court that the imposition of an income tax by different states on the same subject of taxation is not subject to the objection of double taxation. It should be noted that the United States has recognized the existence of international double taxation and, in taxing citizens and domestic corporations on income earned from all sources, allows certain credits for taxes paid to foreign governments or possessions of the United States.⁷⁵ In like manner, New York alleviates the burden of double taxation, although not required to do so by the Federal Constitution, by permitting deductions from taxes payable to the state by non-residents on income earned within the state, amounting to such proportion of the tax paid to the domiciliary state as the income earned in New York bears to the total income.⁷⁶ It is submitted that a similar plan for avoiding double taxation would be equitable if a St. Louis income tax is adopted.

An additional possible ground for attacking the tax might be that by making the employer collect the tax an undue burden is placed on him. This duty of collecting the tax at its source at some possible cost to the employer has been held not to be repugnant to due process of law as a taking of property without compensation.⁷⁷

A final question for consideration is whether the tax or the deductions are so unreasonable as to violate constitutional requirements of uniformity. In *St. Louis v. United Rys. Co. of St. Louis*⁷⁸ it was held that only the clearest case of unreasonableness and unfairness will justify a court in holding invalid on those grounds an ordinance enacted in pursuance of the city's charter and not otherwise violative of the constitution. If such an ordinance is oppressive, the remedy lies primarily with the state or municipal legislative bodies, not with the courts. The same idea was expressed as early as 1869 in an opinion by Judge Wagner, wherein he said:⁷⁹

That the tax in question was exceedingly onerous is undoubted; but it may be said that there is nothing very poetical or romantic about tax laws, at best. They are exacting

74. *People ex rel. Cohn v. Graves* (1937) 300 U. S. 308; see also Note (1937) 108 A. L. R. 727.

75. (1928) 45 Stat. 829, (1928) 26 U. S. C. A. sec. 131.

76. Such credits are allowed, however, only in cases where the other state grants substantially similar credits to New York residents. N. Y. Tax Law (1921) sec. 363.

77. *Brushaber v. Union Pacific R. R.* (1915) 240 U. S. 1.

78. (1915) 263 Mo. 387, 174 S. W. 78.

79. *Glasgow v. Rowse* (1869) 43 Mo. 479, 489.

and remorseless, and do not discriminate with any particular nicety as to individual convenience. But mere oppressiveness is no ground for setting them aside or arresting their operation.

Indeed municipal corporations are *prima facie* the sole judges of the necessity or desirability of their ordinances, and the courts will not ordinarily review their reasonableness when passed in compliance with authority.⁸⁰

It might be contended that to allow a deduction for other taxes paid, as does the proposed municipal income tax under consideration, tends to deviate from the requirements of uniformity and equality. Pragmatically, however, the contrary is true. Equality and not preference is the end sought to be achieved by the deductions and in most instances would be the actual consequence. A somewhat similar situation arose in the "use tax" case recently decided by the United States Supreme Court.⁸¹ The state of Washington had imposed a tax on the use of personality purchased at retail either within or without the state, with provision for an offset if the article had been subjected to an equivalent use or sales tax in the state of purchase. The Court, in sustaining the tax, said:

When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. * * * In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.⁸²

IV. CONCLUSION

A municipal income tax is still a relatively untried revenue device. Only one city in the United States is known to impose such a tax. In one other, there has been action to the same end. The city of New York, acting under an enabling act of the state legislature,⁸³ passed a city income tax⁸⁴ equal to fifteen percent of the amount of the income tax paid by residents and non-residents alike to the Federal Government. It was so strongly opposed by the state as an encroachment on its own sources of revenue, however, that, as a condition for the extension of the

80. *Baker v. Hasler* (1925) 218 Mo. App. 1, 274 S. W. 1095; see 2 Dillon, *Municipal Corporations* (5th ed. 1911) secs. 914, 915).

81. *Henneford v. Silas Mason Co.* (1937) 300 U. S. 577.

82. 300 U. S. at 584.

83. N. Y. Laws of 1934, c. 873.

84. Local Law No. 18 (1934).

enabling act, which also authorized other city taxes more acceptable to the state, the city agreed to its repeal.⁸⁵ In subsequent enabling acts, the power to impose taxes on "net income" has been expressly denied.⁸⁶ Thus the constitutionality of the New York municipal income tax was never tested in the courts.

The evident purpose of the proposed ordinance is to tax those who, while enjoying in some measure the privileges and advantages conferred by the city of St. Louis, do not share the burden of providing these privileges and advantages. Discussion of the practical aspects of this type of local taxation as to either the feasibility or the wisdom of the tax, and of the problems of administration or collection from a local standpoint lies, of course, beyond the proper bounds of the present treatment.

Obviously, the field of municipal excise taxation is not noteworthy for its simplicity. The pioneering character of the tax proposal renders prediction as to its judicial reception hazardous. Nevertheless, with the modesty dictated by the meagerness of direct precedent, it is submitted that while there is probably no conflict between the proposed ordinance and the Missouri constitution and statutes, nor any lack of the requisite basic authority under the city home rule and charter provisions, the possibility that the deductions may amount to unfair discrimination under the equal protection clause of the Fourteenth Amendment to the Federal Constitution may constitute a serious obstacle to validity.

ADOLPH K. SCHWARTZ.

85. The income tax was repealed prior to any collections thereunder by Local Law No. 12 (1935).

86. N. Y. Laws of 1935, c. 601 (extending the city's power to tax to June 30, 1936), and N. Y. Laws of 1936, c. 416 (extending the city's taxing power to June 30, 1937): "This act shall not authorize the imposition of a tax upon the income * * *." It was apparently feared that the threefold tax (federal, state, and local) upon incomes would drive wealthy residents outside of the state, with a consequent loss to the state's revenues.