1974 S.C. Op. Atty. Gen. 62 (S.C.A.G.), 1974 S.C. Op. Atty. Gen. No. 3708, 1974 WL 21227

Office of the Attorney General

State of South Carolina
Opinion No. 3708
February 8, 1974

Section 47–271 of the Code does not grant a city the authority to impose a tax on soft drink cans.

***1** Assistant City Attorney
The City of Greenville

This is in reply to your request of January 31, 1974, for the opinion of this office on 'whether the City of Greenville has the power to impose a city tax or surcharge on soft drink cans within the city to help clean up the environment'.

It is our opinion that the city does not have the power to impose such a tax. Cities have only such powers as are expressly granted by statute, unless necessarily implied, and any doubt concerning the existence of municipal power is resolved by the courts against the municipality. See *Marshall v. Rose*, 213 S. C. 428, 49 S. E. 2d 720.

Research has revealed no statutory authority for the City of Greenville except the general business and occupation license tax authorized by Section 47–271 of the Code. Businesses may be classified for the purpose of the ordinance levying the tax and those so classified may be taxed at different rates. See *Forest Lake v. Forest Acres*, 227 S. C. 163, 87 S. E. 2d 587. The possibility of classifying businesses which sell drinks in cans has been considered by us, however, as stated in the case of *Ponder v. Greenville*, 196 S. C. 79, 12 S. E. 2d 851, the classification must be reasonable. The statute authorizing the license tax provides that it must be graduated according to the gross income of the entity required to pay it or upon the amount of capital invested in the business. The method of determining the tax is, therefore, stated. Once a business is classified, the tax must be based on gross income or capital and could not be based on the number or volume of drinks sold in cans.

If an attempt to classify businesses according to whether or not they sold drinks in cans was made, a business selling a few can drinks would have to pay the same tax as a business with a large volume of such sales (provided the gross income or capital of the two businesses was the same). In other words, because the tax must be based on gross income from the entire business (or capital), it would not be possible once the class was established to tax a business selling only one can crink any differently than a business which sells a thousand can drinks. The tax must be uniform within the designated class. *Hill v. City Council*, 59 S. C. 396, 38 S. E. 11. It is most doubtful that a classification based on whether or not a business sold drinks in cans would be held by the courts to be reasonable. We do not, therefore, believe that the statute under which cities levy the business license tax can be used as authority to require businesses selling drinks in cans to pay license taxes at a higher rate than those businesses which do not sell can drinks.

The question of whether or not legislation could be passed which would impose a tax on the cans is, of course, a different matter. We would be glad to consider the constitutionality of such legislation when we have a specific proposal before us.

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