211 VA 595

Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 7275

In the
Supreme Court of Appeals of Virginia
at Richmond

CLIFF WEIL, INCORPORATED, t/a, etc.

v.

CITY OF RICHMOND

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7275

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 17th day of June, 1969.

CLIFF WEIL, INCORPORATED, T/A TOBACCO CITY WHOLESALE, CO., Plaintiff in error,

against

CITY OF RICHMOND, Defendant in error.

From the Law and Equity Court of the City of Richmond
Alex H. Sands, Jr., Judge

Upon the petition of Cliff Weil, Incorporated, t/a Tobacco City Wholesale Co., a writ of error and *supersedeas* is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 23rd day of December, 1968, in a certain motion for judgment then therein depending, wherein the City of Richmond, a municipal corporation, was plaintiff and Cliff Weil, Inc., t/a Tobacco City Wholesale Company, was defendant.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of $12,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

page 11 } LAW AND EQUITY COURT
of
CITY OF RICHMOND

Richmond, Virginia
23219

March 18, 1968

Harold H. Dervishian, Esq.
Attorney at Law
200 West Grace Street
Richmond, Virginia 23220

William L. Wimbish, Esq.
Assistant City Attorney
402 City Hall
Richmond, Virginia 23219

In re: City of Richmond v. Cliff Weil, Inc.

Gentlemen:

After hearing argument of counsel this morning and after carefully reviewing Virginia Code Section 8-198, I am of opinion that this case, at least at this stage, does not fall under this section.

Section 8-198 states as a condition precedent to its application that the Court must "be satisfied that a fair and impartial trial cannot be had by a jury selected from the county or corporation in which the trial is to be." The Court would have to reach a determination of this question based upon the answers of the jurors when examined on *voir dire*.

While I realize that counsel for defendant contends, based upon the authorities reviewed in his letter of February 26th, that the fact that a juror is from the City *ipso facto* establishes bias in a suit brought by the City, the Court does not agree with such reasoning nor do I believe that
page 12 } Section 8-198 could be stretched to justify the Court in accepting any such presumption as sufficient evidence to satisfy the Court that the defendant would not receive a fair and impartial trial at the hands of a Richmond jury.

Defendant's motion for a jury outside the City will, therefore, be overruled. Counsel may, at the appropriate time submit sketch for order overruling defendant's motion preserving defendant's exceptions.

Yours very truly,

Alex H. Sands, Jr.

* * * * *

page 13 }

* * * * *

ORDER

On this day the defendant's motion for a jury from outside the City of Richmond came to be heard and it being the opinion of the Court that there is no sufficient evidence that the defendant would not receive a fair and impartial trial at the hands of a Richmond jury, the Court doth

Order that the defendant's motion be overruled.

To which ruling of the Court the defendant, by counsel duly excepted.

I ask for this:
William L. Wimbish
Counsel for Plaintiff

Seen and objected to:
Harold H. Dervishian
Counsel for Defendant

Enter 4/11/68

AHS, Jr.

* * * * *

page 15 } INSTRUCTION X

The Court instructs you that the question which you must resolve in this case is whether the defendant in opening its operation on Admiral Street was beginning a business. If you believe from a preponderance of the evidence that such

was the case then defendant is subject to the tax here sought to be collected and you must in such event find for the plaintiff in the amount of $9,708.12. If on the other hand you believe defendant was not beginning a business then your verdict must be for the defendant.

AHS, Jr.

* * * * *

page 17 } LAW AND EQUITY COURT
of the
CITY OF RICHMOND

Richmond, Virginia
23219

September 24, 1968

Harold H. Dervishian, Esq.
Attorney at Law
200 West Grace Street
Richmond, Virginia 23220

William L. Wimbish, Esq.
Assistant City Attorney
402 City Hall
Richmond, Virginia 23219

Re: City of Richmond v. Cliff Weil, Inc.—Case No. 18

Gentlemen:

This case comes before the Court upon defendant's motion to set aside the verdict of the jury in favor of plaintiff rendered April 11, 1968, and to enter judgment in favor of defendant.

FACTS

Cliff Weil, Inc., defendant herein, a Virginia Corporation t/a Tobacco City Wholesale Co., had, for some forty years prior to 1963, been operating as a wholesale merchant with its principal office and distribution facilities located at 1315 East Main Street, Richmond Va.

On March 22, 1963, plaintiff applied for, and was issued, a license to engage in business at 1209 Admiral Street in the

City and paid the required $30.00 entry fee. Under the evidence, it is clearly established that all records for both locations, including purchase as well as shipping orders were handled at the Main Street location, including all billing and collections. The primary purpose of the opening of the Admiral Street location was to alleviate the conjested traffic condition at the Main Street office incident to the
page 18 } receipt and shipping of merchandise. For the years 1963 and 1964, defendant reported all purchases[1] for both locations under the Main Street location and paid the appropriate tax thereon as a basis for receiving its license for the following years respectively. Defendant reported no purchases for the Admiral Street location for these two years and paid only the $30.00 fee for its license for this location each year. As the result of an audit run in 1966 which showed that a substantial portion of defendant's purchases for these two years were handled through the Admiral Street location, plaintiff assessed a tax against the purchases handled at that location as a basis during the years 1963 and 1964.

OPINION

Defendant contends that plaintiff acted erroneously in making the assessments in that (a) defendant's operation on Admiral Street was treated as a "beginning business" when, in fact, it was but a "continuation" of defendant's business at a different location, (b) that the language of the sections of the City Code relied on by plaintiff was ambiguous and did not justify the construction adopted by plaintiff and (c) that the interpretation placed upon these sections by plaintiff resulted in double taxation of the same property.

It would appear to be of little consequence whether as to its Admiral Street operation defendant be considered a "Beginner" or a "non beginner" who had operated only part year in 1963 since, under City Code 33-185 (h) both categories are subject to the same treatment in arriving at the basis for license tax for the succeeding year. The Commissioner of Revenue under this section is charged with the ultimate duty of correcting the estimates upon which the license tax is based to reflect the "correct amount of purchases actually made". In the case at bar the Commissioner went

1. City Code. Sec. 33-185 (c) defines "purchases" as "all goods, wares and merchandise received for sale" by a wholesaler.

about this by adjusting the 1963 and 1964 license taxes to reflect the actual purchases at the Admiral Street address for those two years and then adopted as the basis for the 1965 tax the actual purchases made in 1964. This procedure was strictly in accord with the provisions of 33-96 and 33-185 of the City Code.

Nor is the language of these sections ambiguous as defendant contends but, on the contrary, is clear and simple. The first two defenses posed by defendant are, therefore, considered to be without merit.

page 19 } The method employed by plaintiff in applying these provisions in the instant case, however, gives pause. It is conceded that the purchases at the Admiral Street location for that part of 1963 when defendant conducted business at that address was $2,070,127.00 and for the year 1964 $3,883,250.00. Had defendant correctly reported these figures as Admiral Street purchases in the beginning no problem would have arisen, for Admiral Street would have paid a license tax for each of these years based upon these figures and Main Street would have made its return for its purchases in the correct amounts of $2,850,488.00 for 1963 and $3,507,491.00 for 1964. Through either error or misinterpretation, however, defendant lumped all purchases for these two years under the Main Street address and paid license taxes for the Main Street location based upon the aggregate purchases at both Main Street and Admiral Street.

Defendant was clearly in error as to the Admiral Street operation by reporting the purchases as "none" for 1963 and 1964. When the error was brought to the attention of the Commissioner by the 1966 audit, it became his duty under Sec. 33-185 (h) to correct this error and assess the Admiral Street operation for the years 1963 and 1964 with a tax "finally based upon the correct amount of purchases actually made". This was done and as a result, the Admiral Street operation became, and is, liable for a tax based upon purchases in the amount of $5,175.32 for the year 1963 and of $9,708.12 for the year 1964. Having made these corrections to reflect the true license tax liability for Admiral Street for these two years, the Commissioner properly allowed Main street a credit for the year 1963 for the $5,175.32 but did not allow credit for the year 1964 of $9,708.12. The end result is that defendant is being required to pay twice upon the same purchases.

This does not really involve the question of double taxa-

tion but rather the question of whether, under the applicable provisions of the City Code the Commissioner has allowed proper credit for that portion of the license tax paid by defendant based upon its erroneous inclusion in its Main Street purchases for the year 1964 those purchases actually chargeable to Admiral Street.

To hold that proper credit has been allowed would be to read into the code provisions relating to the opening of a new business location a penalty in the form of exacting a double payment upon the parent company for all purchases made the first full year at the new location. The City unquestionably would have the power to impose such condition for the granting of a license for the new location, but the Court

page 20 } finds difficulty in reading any such intention into the pertinent language of the City Code.

Granted that the Admiral Street operation is to be considered a "new business" under City Code Sec. 33-96, we turn to Sec. 33-185 to determine how the taxes are to be calculated. 33-185 (a) defines the type business considered as a "wholesale" business. Sec. (b) fixes the tax rate. Sec. (c) defines "purchases" as used to determine the tax base. Sec. (d) requires a separate license for each location operated by a wholesaler. Sec. (e) is inapplicable. Sec. (f) provides the basis for the computation of the license for the first year and provides for corrections to reflect actual business done at the end of that year. Sec. (g) sets forth the basis for fixing the tax for a business operating at a location for less than a full first year. Sec. (h) provides that both as to beginning businesses and those operating for less than a full year the first year, the amounts originally assessed shall be subject to correction to reflect the *true* picture as based upon actual business done.

It is accordingly held that the procedure followed by the City insofar as relating to assessment of license tax for the Admiral Street location based upon business done (purchases

It is accordingly held that the procedure followed by the City insofar as relating to assessment of license tax for the Admiral Street location based upon business done (purchases conducted) for the years 1963 and 1964 was correct and that the basis of Admiral tax for these two years was properly shown as $5,175.32 for 1963 and $9,708.12 for 1964. It is further held, however, that while the City correctly allowed credit for the $5,175.32 erroneously included under Main Street's operation for 1963, it has erroneously withheld credit due defendant for the identical reasons for 1964

of $9,708.12. In other words, the fault of the City is not in assessing Admiral Street location based upon its full business done in 1964 as a basis for *it's* 1965 license, but in assessing Main Street with business it did *not* do in 1964 as a basis for its 1965 tax.

The case, in fact, should never have been submitted to a jury as there was no real issue of fact involved. The evidence conclusively showed the Admiral Street operation to be a "new business" in contemplation of Sec. 33-96 of the City Code and this was the only question submitted to the jury. The jury were instructed that if they found the Admiral Street operation to be a "new business" that they should find for the plaintiff. For the above reasons this instruction was patently erroneous.

Since plaintiff is entitled to $9,708.12 from defendant as the basis for its issuance of the 1965 license for the Admiral Street operation (based on its 1964 purchases at that location) and since defendant is entitled to a credit in the exact same amount for overpayment of the 1965 license for the Main Street operation (based on its 1964 erroneous inclusion of the Admiral Street purchases for the year in the Main Street report of purchases at the Main Street location), judgment will be for the defendant.

page 21 } Counsel may present sketch for order to this effect.

Yours very truly,

Alex H. Sands, Jr.

* * * * *

page 22 } LAW AND EQUITY COURT
of the
CITY OF RICHMOND

Richmond, Virginia
23219

November 20, 1968

William L. Wimbish, Esq.
Assistant City Attorney
402 City Hall
Richmond, Virginia

Harold H. Dervishian, Esq.
Attorney at Law
200 West Grace Street
Richmond, Virginia

Re: City of Richmond v. Cliff Weil, Inc., Case No. 18

Gentlemen:

Having reviewed its memorandum opinion of September 24th in the light of briefs subsequently furnished and oral argument presented and in particular plaintiff's exhibit #1 attached to its letter of October 1, 1968, it is readily apparent to the Court that its conclusion reached in its memorandum opinion was based upon a misunderstanding upon its part of the method adopted by City in estimating the Main Street and the Admiral Street licenses for the years 1963 and 1964.

Overlooking the fact that the basis for the Main Street tax for 1963 was based on its 1962 sales (when Admiral Street was not in existence) the Court had proceeded on the premise that the 1963 basis for Main Street included Admiral Street sales (which was true as to the 1964 basis) which, of course, was not the case at all. Main Street, therefore, has only one year, 1964, in which the basis for its license included Admiral Street sales (a duplication) and a credit was allowed for this overlap.

Plaintiff's diagram in its exhibit #1 with its letter of October 1, makes it abundantly clear that the basis for the tax as to Main Street was properly calculated for each year, except 1964, upon the business actually done dur-
page 23 } ing the preceding year at the Main Street prem-
ises and for the year 1964 where this was not done there has, as stated, been allowed the appropriate credit.

Turning to Admiral Street, the license taxes for the years 1963 and 1964 appear to have been computed upon a basis adopted strictly in accordance with Sec. 33-185 of the City Code.

Conclusion

For the above reason, judgment will be for plaintiff in the amount of $9,708.12. Counsel may present sketch for order in accordance with the above ruling.

Yours very truly,

Alex H. Sands, Jr., Judge

page 24 }

* * * * *

ORDER

This day came again the parties, by their respective attorneys, and the Court having now reconsidered the defendant's motion for summary judgment made the morning of April 11, 1968, prior to the trial by jury, which motion was based on the supplementary summary of facts prepared and submitted to the Court pursuant to the Court's request that summaries of the facts expected to be proven by the respective parties be supplied to the Court, which supplementary summary on behalf of the plaintiff was dated April 8, 1968, and received by counsel for the defendant on April 10, 1968, the defendant's motion for summary judgment having been based on the grounds that the ordinances under which the plaintiff claims a license tax due are unconstitutionally vague and indefinite, that the ordinances under which the plaintiff claims the license tax assessable does not lawfully authorize the imposition and collection of the license tax, page 25 } and that they thus result in double taxation in violation of the constitutions of Virginia and of the United States, which motion the Court doth now overrule; and the defendant having moved that the original summary of facts which the plaintiff expected to prove, the defendant's summary of facts and the plaintiff's supplementary statement of facts aforesaid, be made a part of the record, the Court doth overrule said motion to which ruling of the Court, the defendant by counsel, duly objected and excepted.

Enter:

Judge

Enter 12/23/68

AHS, Jr.,
Judge

* * * * *

page 33 }

* * * * *

SUMMARY OF FACTS

* * * * *

page 35 }

* * * * *

We also quote in part from §33-98 of the Richmond City Code:

"Every license to engage in any business, occupation or profession, unless expressly authorized elsewhere or otherwise by law, shall designate the place of such business, occupation or profession at some specified house or other definite place within the city. Engaging in any such business, occupation or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall constitute a violation of the provisions of this article. A license which does not specify such house or definite place shall be void; ***"

In this case, the defendant engaged in his business at more than one specified house or definite place within the City and as such had to have a license for each location. As set out in paragraph numbered one above, the defendant did in fact purchase a license for the second location which was known as Tobacco City Wholesale Co., 1209 Admiral Street, Richmond, Virginia.

page 36 } 4. Irrespective as to the defendant's reasons for opening at a second location, and the plaintiff alleges that the reasons as set out by the defendant are irrelevant to the merits of this case, the facts are uncontroverted that defendant did open at a second location in the City of Richmond and had purchases at the second location in amounts as hereinbefore set out.

5. The plaintiff fully concedes that if the defendant told the Deputy Commissioner of Revenue (now Commissioner) that the defendant wished to buy a license and pay the $30 entry fee and that the defendant would have no purchases, then the Deputy Commissioner was proper in telling the de-

fendant that the $30 fee was sufficient. However, the defendant did in fact have purchases at such second location and must pay the tax based upon the amount of such purchases. Sec. 33-185—Richmond City Code, 1957 (c) defines purchases in part as follows:

("c) The word 'purchases' as used in this section shall be construed to include all goods, wares and merchandise received for sale at EACH (emphasis added) definite place of business of every wholesale merchant, and shall not be construed to exclude any goods, wares and merchandise otherwise coming within the meaning of the word."

* * * * *

page 37 }

* * * * *

It matters not where the purchases were paid for or billed. If such merchandise was delivered to the second location, then such second location had purchases as defined above.

In summary, the defendant operated a wholesale business at two locations in the City. The Richmond City Code and the Code of Virginia afforded the authority for the City to collect a license tax at each location. License taxes were due and payable at the second location in the amount of $14,883.44.

A credit in the amount of $5,175.32 was given to the defendant for purchases paid on at the first location which should have been paid at the second location. The defendant has not paid the remaining $9,708.12 for the second location.

There is no provision in the City or State Code for the obtaining of any type of license other than a beginners license. The requiring of a separate license for each location would have no effect if the net tax would be the same. The City has authority to support its proposition that where the business is operated at different locations a license may be required for each location.

page 38 }

* * * * *

6. Tax is assessed under the powers granted to the City

of Richmond by the Commonwealth of Virginia and such ordinances which the City has adopted pursuant thereto. Chapter 33, Article 41, the Code of the City of Richmond, Virginia, 1957 contains the language applicable to this case.

* * * * *

City of Richmond

By Counsel

* * * * *

page 39 }

* * * * *

ORDER

On this day came the parties by counsel, and the plaintiff moved the Court to make a certain diagram known as Exhibit #1 and tendered to the Court on October 1, 1968, by the plaintiff, a part of the record; And the Court having referred to such Exhibit #1 in its opinion letter of November 20, 1968, and being of the opinion that such Exhibit #1 should be made a part of the record, doth so order. To which action of the Court the defendant, by counsel, objected and excepted.

I ask for this:
William L. Wimbish
Assistant City Attorney
Counsel for Plaintiff

Seen and objected to:
Harold H. Dervishian
Counsel for Defendant

Enter 12/23/68

AHS, Jr.

page 40 }

* * * * *

FINAL ORDER

This day came the plaintiff, the City of Richmond, Virginia, by its attorney, and the defendant, Cliff Weil, Incorporated, by its attorney, and after having heard all the evidence and having considered all the briefs and papers filed by each party, and after having heard the argument by each counsel, and the defendant's motion for summary judgment made prior to the trial, the defendant's motions to strike the plaintiff's evidence and the defendant's motion to set aside the verdict rendered by the jury in favor of the City of Richmond, and all other motions made by the defendant, the Court doth overrule such motions, and being of the opinion that the jury was proper in finding that the defendant in opening its operation on Admiral Street was a beginning business, and being of the opinion that as a matter of law the plaintiff properly assessed the license tax against the defendant, it is considered by the Court that the

page 41 } plaintiff recover of the defendant the sum of Nine Thousand Seven Hundred Eight and 12/100 ($9,708.12) Dollars, with interest to be computed at the rate of 6% per annum from the date hereof and costs expended thereon.

To which action of the Court the defendant, by its attorney, objected and excepted.

And the defendant having indicated its intention to file a petition in the Supreme Court of Appeals of Virginia for a writ of error from, and *supersedeas* to, the judgment now entered, it is ordered that execution thereon be suspended for a period of four months from this date and thereafter until such time as such petition is acted upon by said Court, if such petition be filed within said time, provided that the defendant, or someone for it, shall, within 21 days from this date, enter into a bond in the penal sum of $12,000.00 conditioned in accordance with Sec. 8-477 of the Code of Virginia before the Clerk of this Court, with surety to be approved by the said Clerk.

I ask for this:
William L. Wimbish
Assistant City Attorney
Counsel for Plaintiff

Seen and objected to:
Harold H. Dervishian
Counsel for Defendant

Enter 12/23/68

AHS, Jr.

* * * * *

page 44 }

* * * * *

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

* * * * *

1. The Court erred in overruling the defendant's motions for summary judgment, to strike the plaintiff's evidence, to set aside the verdict and to enter final judgment for the defendant on the grounds that the ordinances under which the plaintiff claimed a license tax due were unconstitutionally vague and indefinite, that the ordinances did not lawfully authorize the imposition and collection of the license tax, that the plaintiff was undertaking to extend the plain words of the ordinances by numerous implications, and that they thus would result in double taxation in violation of the Constitutions of Virginia and the United States.

2. The Court erred in overruling the defendant's motions to strike the plaintiff's evidence, to set aside the verdict and enter final judgment for the defendant on the ground that there was no evidence upon which any finding of liability of the defendant under the license tax ordinances could be found by the jury.

3. The Court erred in overruling the defendant's motions to strike the evidence, to set aside the verdict and to enter final judgment for the defendant on the ground
page 45 } that the uncontradicted evidence established that the defendant simply moved its local business division to the Admiral Street location, and there was no evidence before the jury on which the jury could find the defendant's business was a beginning business.

4. The Court erred in overruling the defendant's objections to the testimony of the plaintiff's witnesses undertaking

to interpret the ordinances instead of being confined to testimony of facts on which the jury's verdict could only be based.

5. The Court erred in overruling the defendant's objections to the admissibility of evidence relating to the imposition of license taxes under the ordinances of any different taxing jurisdiction or for any subsequent license tax paid by a different corporation to such different taxing jurisdiction.

6. The Court erred in making, by its order No. 2 of December 23, 1968, a part of the record a certain diagram known as Exhibit No. 1 tendered to the Court by the Plaintiff on October 1, 1968, on which the Court based its memorandum-opinion of November 20, 1968; on the grounds that said diagram constituted a matter of argument only and was based not only on the plaintiff's attempted construction of its own license taxing ordinances but also on the license tax imposed four years later by Henrico County, a separate and independent taxing jurisdiction, on a different corporation, the license taxing ordinances of which County were not properly in evidence nor admissible in evidence, and based solely on a letter by a license supervisor as to the County's procedure which was also inadmissible.

7. The Court erred in refusing by its order No. 1 of December 23, 1968, to make apart of the record the plaintiff's supplementary statement of facts dated and filed April 8, 1968, and received by the defendant on April 10, 1968, on which the defendant's motion for summary judgment made on April 11, 1968 prior to the trial by jury was based.

8. The Court erred in overruling the defendant's motion for a jury selected from an adjacent county pur-
page 46 } suant to Section 8-198 of the Code of Virginia, and impanelling a jury from within the City of Richmond.

Cliff Weil, Incorporated

By Harold H. Dervishian
Of Counsel

• • • • •

page 3 }

* * * * *

JESSE L. CRALLE, called on behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wimbish:

Q. State your name and occupation to the Court.

page 4 } A. I am Field Auditor, License Bureau. Jesse L. Cralle.

Q. Where do you live?

A. 214 Ross Road.

Q. Will you speak up and tell the Court where you work and how long you say you are employed with the License Bureau of the City of Richmond?

A. Yes, sir, the past 18 years.

Q. Mr. Cralle, do you make audits for the License Bureau of the City of Richmond?

A. Yes, I do.

Q. I have before me a report of the Field Audit. I would like you to identify this.

A. (Viewing exhibit.) These are the copies of the audit I made.

Q. Speak up. Tell the Court what brought about this audit.

A. The audit on Cliff Weil was assigned to me. I called on the Admiral Street location and I was referred to their accountant or comptroller at 1315 East Main Street. It was noted on the audit assignment that they had begun business in March, 1963.

Mr. Dervishian: I object, Your Honor. That is a matter for the Court to decide whether they had begun or not.

He can testify that he was assigned to make

page 5 } an audit of these, of Cliff Weil, Incorporated, and of both locations.

The Court: He can state the information and the basis on which he made the audit. I take it that is what he is undertaking to do now, isn't it?

Mr. Dervishian: I thought he said that he was assigned

to do it because the Admiral Street location was a beginner. That is the very thing the Court is going to determine.

The Court: That is the basis. He may have been right and he may have been wrong. That is the reason he made the audit, and I think it is admissible. Go ahead, sir.

A. Yes, sir. It was noted on the audit it was a beginner and I was assigned to investigate, to arrive at the figure.

By Mr. Wimbish: (Continued)

Q. Would you just briefly explain what you determined, what your audit determined?

A. Well, I saw Mr. Cary. I saw the comptroller down there and talked to him. We agreed on these figures that are on this audit or report here and based on the policies of the License Bureau I proceeded to turn in my report as we had treated all other wholesale merchants in the City.

Mr. Dervishian: I object.

page 6 } The Court: I think he can tell the basis for that.

Mr. Dervishian: No, if you permit me, I think the Court is entitled to have the basis for the objection. Retail merchants are entirely different from wholesale merchants. It is a separate ordinance and how he treated retail merchants or how he treated other wholesale merchants will depend on which ones are involved.

The Court: That is a matter you are going to have an opportunity to cross-examine him on, Mr. Dervishian. It may be that the testimony in this respect may relate just to the retail. I do not know, but I think it is a matter he is entitled to testify to, as to the basis. If it was erroneous, that is all right. If it is correct it is all right. I think that is a matter to be dealt with on cross examination.

Mr. Dervishian: If Your Honor please, if he had accessed another merchant on this basis and this merchant had not contested it, that has nothing to do with this particular case. In other words, that merchant might have had the right to contest it like we are contesting it. Or, the amount involved may have been so small the mer-

page 7 } chant preferred not to incur the expense of defending a case. Therefore, Your Honor, I feel like that ought to be excluded. The jury ought to be instructed to disregard it.

The Court: All right. I will overrule it. Your exception is noted.

By Mr. Wimbish: (Continued)

Q. Mr. Cralle, just would you tell us whether or not after you made this audit that you found that the Admiral Street location had purchases for 1963 and 1964.

Mr. Dervishian: I object, Your Honor. The question is whether purchased or not depends on a little construction of the statute. And the question, I object to the question in that fashion.

The Court: There again, it is the basis of his action and his determination. I will overrule the objection. Go ahead.

Mr. Dervishian: If Your Honor please, I would not object to a question that said did he determine that the deliveries made from the Admiral Street location had cost this much money.

The Court: I think it is a proper objection. Rephrase the question.

Mr. Wimbish: Yes, sir, although I do not think
page 8 } Mr. Cralle has any knowledge of the deliveries, as such. He can tell us what the information given to him was and the terminology placed on the information given him.

The Court: He can certainly testify as to what information was given him by the defendant.

Mr. Wimbish: Yes, sir.

The Court: If the defendant used the term purchases then I think it is proper to use that term. If the defendant uses the word deliveries—

Mr. Wimbish: No objection. If the defendant used that terminology.

Q. Tell the Court what terminology the defendant used?

A. Purchases. That is the only thing I deal with. I do not deal with deliveries. The information comes off books and records. They would not on their deliveries because—

The Court: Go ahead.

A. I noted one other thing.

Jesse L. Cralle

Mr. Dervishian: I object and except, Your Honor.
The Court: Yes, sir.

A. One other thing that led me, I have to make the report out.
page 9 } Q. Answer the question, if you will. Tell us whether or not in 1963 and 1964 you found that the Admiral Street location had purchases, and if so would you tell how much for each year.

Mr. Dervishian: The same objection and exception.
The Court: Yes, sir. It will be noted that your objection and exception goes to this entire line of testimony.
Mr. Dervishian: Yes, sir.

A. Well, the figures that we agreed on, the comptroller and I, was in 1963 purchases were $2,070,127.00. For 1964, $3,883,250.00.
Q. Mr. Cralle, I would like for you to identify this.
Mr. Dervishian: It is more confusing.
Q. Can you identify this?
A. Yes, sir. These are my reports to the License Inspector.
Q. Tell us when these papers were filled out.
A. Filled out in December, 1966.
Q. On what occasion?
A. After I returned to the office from the office of Cliff Weil on East Main Street.

page 10 } Mr. Wimbish: I would like to move all of this be introduced into evidence, the audit and the copies.
Mr. Dervishian: I would like to see them.
Note: At this point Mr. Dervishian views the exhibits.
The Court: I will receive this as Plaintiff Exhibit 2.
Mr. Dervishian: No objection to these.
Mr. Wimbish: No further questions.
The Court: This is Plaintiff Exhibit 3.

CROSS EXAMINATION

By Mr. Dervishian:
Q. Mr. Cralle, these assessments which were made based

on your reports were for the license tax years 1963 and 1964. Is that right?

A. Yes, sir, the additional assessment was.

Q. That is right. You did not undertake to go down and audit these returns until 1966. Is that right?

A. Well, I only go when assigned to me.

Q. I did not ask you that, Mr. Cralle.

page 11 } A. Yes, sir.

Q. You were not assigned nor did you go to make any inquiry or audit until 1966.

A. That is correct, December, 1966.

Q. Yes, sir. When you went to do this and went to the Admiral Street location they told you, did they not, all of the figures and purchases were made through the Cliff Weil office and location on Main Street?

A. I called out there and talked to the gentleman. He referred me to the comptroller. He said he has got some records out there but permanent records were kept here on East Main Street.

Q. All right, sir. So you found when you went down there on Main Street that all the purchases had been made and the bills had been paid from the Main Street location, did you not?

A. I found that they had reported all their purchases at one location.

Q. You say you made an audit?

A. Yes, sir.

Q. Didn't you look at the purchase invoice or report?

A. Yes, sir.

Q. All right.

A. I looked at what Mr. Cary and I agreed on

page 12 } and his financial reports and papers.

Q. You did not ask any questions about who had bought and paid for these?

A. I asked him for the purchases of 1208 Admiral Street.

Q. Yes, sir.

A. That is what I was mainly interested in when I went down there but he told me included for one year, he had included the purchases at Admiral Street on East Main Street.

Q. As a matter of fact, it was for two years?

A. Yes, sir.

* * * * *

Jesse L. Cralle

page 19 }

* * * * *

Q. It is only if you make, if it becomes a beginner or is a beginner, first starting in business, that you go back and charge him for current year purchases?

A. They are adjusted to the current year until they get a full past years experience. They have to have one-twelve full months experience.

Q. And that is what you all are trying to do here, isn't it, claim this was a beginner and therefore, it did not have a full twelve months experience since it started in March?

A. The years concerned are on a beginner basis, 1963 and 1964.

page 20 } Q. Yes, sir. Isn't it true, Mr. Cralle, that if Cliff Weil is found in this Court not to be a beginner as far as the Admiral Street location is concerned that the City is trying to collect double taxes on that portion?

Mr. Wimbish: I object.

A. No, sir, I do not.

Q. On the portion of the purchases?

The Court: Wait a minute.

Mr. Wimbish: I feel he is calling for a conclusion on double taxation that this man is not qualified to answer. It is a legal question.

The Court: I think it is a proper objection. I think the facts would speak for themselves but I do not think he can draw a conclusion as to whether it was double taxation or not, Mr. Dervishian.

I sustain the objection.

Mr. Dervishian: Exception, Your Honor.

* * * * *

page 25 }

* * * * *

Q. Mr. Cralle, if you will answer my questions. The Assistant City Attorney will take care of the City's position.
A. Yes, sir.
Q. Deliveries out of the Admiral Street location in 1965 on the license application was how much?
A. For East Main Street?
Q. Well, all right, East Main Street.
A. $3,507,491.00.
Q. All right. They declared that and paid a license tax on it?
A. Yes, sir, that is right.
page 26 } Q. You audited it and found not a penny out of the way?
A. For that location, yes, sir.
Q. The Admiral Street location, the report was how much?
A. $3,883,250.00.
Q. Cliff Weil paid a license tax based on that figure?
A. Yes, sir.
Q. And you audited that figure?
A. Yes, sir.
Q. And you found it to be correct to the penny?
A. Yes, sir, to the best of my ability.

* * * * *

MERLE P. GANZERT, called on behalf of the plaintiff; first being duly sworn, testified as follows:

page 33 }

* * * * *

REDIRECT EXAMINATION

By Mr. Wimbish:
Q. Mr. Ganzert, you mentioned the term "purchases". Can you distinguish the lay terminology of purchases as opposed to the terminology of purchases as this law Mr. Dervishian referred to?

Merle P. Ganzert

Mr. Dervishian: I object. That is a legal question this Court has to determine.

The Court: I think the Court certainly does not want to have—

I overrule the objection. I think he can give his interpretation. Rather he can give the accepted definititon if it is commonly accepted in the wholesale business. If there was a different connotation, other than the ordinary connotation, to be put on it he can certainly state that connotation and if that is the basis on which they operate, I think.

page 34 } Mr. Dervishian: I do not think the question was asked on the theory there was a connotation in the wholesale business.

Mr. Wimbish: I did not finish the question before you objected.

Mr. Dervishian: I think he can ask for what interpretation this gentleman is now going to make on the statutory definititon of purchases.

The Court: Suppose you go ahead and rephrase the question.

By Mr. Wimbish: (Continued)

Q. I just want to ask Mr. Ganzert to tell us whether or not there is any difference between the so-called lay terminology of purchases which would mean somebody buying a quantity of things as opposed to the terminology of purchases related to your determining whether or not a license is due.

A. Well, if we are speaking of a wholesale merchant it depends on how he is going to sell the merchandise. The definition is set forth in both the State Code and the City Ordinance as to what constitutes purchases.

Q. All right, sir. Can you tell us, please.

Mr. Dervishian: I object.

page 35 } Mr. Wimbish: It is already in the evidence. I withdraw the question. It is in evidence.

The Court: All right.

Mr. Wimbish: No further questions

The Court: I am going to permit him to answer the question if you put the question, so perhaps that will be a subject for the Court to instruct on later. I will overrule the objection. I think he can answer the question.

Mr. Dervishian: Note an exception.

Q. (Mr. Wimbish continuing) Tell the gentlemen of the jury what the term purchases means as used in the City Code?
A. Do you have a copy of the City Code?
Q. Yes, sir.

Mr. Dervishian: Perhaps it ought to be done in the absence of the jury because if he gets into reading the Code and interpreting it I am going to have to cross-examine him on the basis of the law involved.
The Court: This Section of the Code has been introduced into evidence without objection. This goes to the jury.
Mr. Dervishian: That is right. If all he is going to do is read it—that one thing.
The Court: That is all I take it he is doing. I
page 36 } am going to permit him to read the section out of the exhibit.

Q. Read from 33-185(c) Code of the City of Richmond, Exhibit Plaintiff 1.
A. "The word 'purchases' as used in this section shall be construed to include all goods, wares and merchandise received for sale at each definite place of business of every wholesale merchant, and shall not be construed to exclude any goods, wares and merchandise otherwise coming within the meaning of the word.
"All goods, wares and merchandise manufactured by a wholesale merchant and sold or offered for sale as wholesale merchandise, shall be considered as purchases within the meaning of this section provided that this section shall not be construed to apply to manufacturers who offer for sale at the place of manufacturer, goods, wares and merchandise manufactured by them, but such manufacturer may without a wholesale merchant license sell at the place of manufacturer the goods, wares and merchandise, manufactured by him.
"If a manufacturer desires to sell at a definite place or store, other than the place of manufacturer, to others for resale, or to institutional, commercial or industrial, the goods, wares and merchandise manufactured by him, then such manufacturers must take out a wholesale merchants license.
"When a manufacturer establishes a place or
page 37 } store for the sale of his goods, wares and mer-

chandise, other than at his place of manufacture to others for resale, the amount of the license tax is to be measured, not only by the amount of purchases made by such manufacturer, from others, if any, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale, if any, and he is required to report as hereinafter provided, not only the amount of goods, wares and merchandise, purchased by him, from others and offered for resale, but also the amount of goods, wares and merchandise manufactured by him either within or without the City and offered for sale by him at his store or definite place in this City other than the place of manufacture.

"The word 'purchases' as used in this section is in relation to the purchase price of goods, wares and merchandise sold by a manufacturer at a place of business other than the place of manufacture shall be the cost of manufacturing such goods, wares and merchandise, together with the factory markup and overhead."

* * * * *

page 38 }

* * * * *

D. ANDREW WELCH, called on behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wimbish:

Q. State your full name and your occupation to the Court.

A. D. Andrew Welch, License Inspector, City of Richmond.

Q. Would you tell the Court how long you have been in this present occupation?

A. Since February 1, 1940.

Q. You have heard the testimony today concerning the basis of the audit which was made by the person working under you, Mr. Cralle, and could you tell the Courth whether or not this is the standard procedure for treating wholesale merchants which operate in the City of Richmond. Tell us whether or not it is.

page 39 } Mr. Dervishian: May I hear the question again.

Q. Tell the Court whether or not the treatment by the auditor and the treatment or the basis of the licensing of a merchant operating in two locations as is Cliff Weil, if this is the standard procedure for treating similar businesses which operate in the City of Richmond or have operated in the City of Richmond during your 28 year period, say during the past five years or ten years that you have been License Inspector.

Mr. Dervishian: I object, Your Honor, if the City of Richmond has without valid justification undertaken and imposed any such license tax and has been paid, it doesn't make it legal. I therefore object to what has been done.

It is like the fact that everyone driving down Monument Avenue at 35 miles an hour—it does not make it legal.

The Court: I will overrule the objection.

Mr. Dervishian: My exception, please.

A. It is the practice of the License Bureau as we understand it by Ordinance to reform every beginners assessment from the estimate to the actual experience, wholesale, retailers and other classifications.

Q. Could you explain by reforming the assessment, what you mean?

page 40 } A. One who begins business reports what he anticipates he will do between the beginning date and the end of the then current *calender* year or if not a complete year, the following year he has to do the same thing. We analyze and investigate his records and bring that figure in line with what he actually experiences. In some instances refunds, in other instances, additional assessment.

Q. Mr. Welch, let me pose this question to you: You have heard the testimony today of the operation of Cliff Weil located on Main Street and then they opened another operation on Admiral Street. Suppose this: Disregard this as Cliff Weil. Suppose someone goes to 1209 Admiral Street and opened for the first time a wholesale operation and had the same amount of purchases, or the purchases as have been put into evidence here, what would the tax have been?

A. Anyone who operates or opens a distinct location is treated as a beginner in business. Our records do not corre-

D. Andrew Welch

late one, two, or three locations. They establish per location. Therefore, anyone who applied for license at any location initially at that place would be treated as a beginner irrespective of his relationship somewhere else.

Q. Mr. Welch, will you tell us whether or not there is any type of license available other than a beginners license for someone just starting in a business at another page 41 } location.

A. No, the law establishes the fact that an entry fee plus an estimate, it is conjunctive, and purchases or and gross receipts are required in the issuance of a license according to law.

Q. Can you explain to the jury just breifly what that—

Mr. Dervishian: I object, Your Honor. I ask it be stricken because he is not undertaking to interpret the law.

The Court: He has not finished the question.

Mr. Dervishian: I am talking about the last answer.

The Court: I will overrule the objection.

Mr. Dervishian: I except.

Q. This question, Mr. Welch, what I wanted you to explain to the jury is exactly, or just generally, what takes place when the purchases—when a beginner purchases for the first time his license.

Mr. Dervishian: If Your Honor please, I do not see the relevancy of it unless the Court rules that Cliff Weil was a beginner. That is the determination to be made.

The Court: I understand that but if it be estab- page 42 } lished during this proceeding that it was a beginner then this is going to be—I think the relevancy of it will have to be tied in with it. Whether he does or does not establish it comes under the classification of a beginner, I think it should be subject to that , if not, then the relevancy would go out. It would not be relevant. I will instruct the jury to disregard it. I assume they are going to—we are going to have testimony and they have had some, as a matter of fact, on which that determination has got to be reached. Go ahead. I will overrule it.

Mr. Dervishian: My exception please.

* * * * *

D. Andrew Welch

A. If a person desires to engage in business in Richmond, you visit the office of the Commissioner of Revenue to obtain your license. I am assuming now you have met all other qualifications.

page 43 } He requires normally the gross receipts or gross purchases, depending upon the category, between the day of the beginning and the end of the calendar year accepting whatever figure the taxpayer submits. That figure is submitted to our office and placed on a ledger card.

Mr. Dervishian: I object, Your Honor.

By Mr. Dervishian:

Q. You said "ask for the figures from the time of the beginning to the end of the calendar year?

A. Right.

Q. Don't you really mean ask for an estimate?

A. Well, the figure he thinks he will, or an estimate, you figure you want to use.

Since he has no experience he submits a figure. Any figure he submits becomes an estimate. Then after a calendar year, which in some instances may mean part of a calendar year, and a whole calendar year, we assign an auditor from the License Bureau to visit his location or see his accountant. They secure his actual experience figures and reconcile or adjust them in accordance with his estimate.

We either revise them, which would be an additional assessment, if it be under reported or we make a refund by check, if it is over reported.

page 44 } By Mr. Wimbish: (Continued)

Q. Mr. Welch, into evidence we have admitted the Code of the City of Richmond. 1957. I believe you have an attested copy in your hands. Turn to section 33-185, on Page 48. If you will, read paragraph A.

A. "Every person engaged in the business of a wholesale merchant shall obtain a license for the privilege of doing business in the City and shall pay a license tax therefore to be measured by the amount o f purchases made by him or it during the preceding license year.

"The term 'wholesale merchant', as used in this section, shall include every merchant who sells to others for resale

only, or who sells to institutional, commercial or industrial users, and a separate license shall be obtained for each definite place of business."

Q. All right, sir. Mr. Welch, throughout your experience as License Inspector, to the best of your knowledge and belief, has the law ever provided any type of license other than a beginners license? Is there any separate provision that you know of in your experience in this 28 years which provides for a situation like this and permits the simple payment of $30.00 in lieu of an adjustment as the same as the beginner?

Mr. Dervishian: I object. That is a matter for the Court to consider.

page 45 } The Court: He is asking whether or not there has been any such provision. I think it is a proper question. Overruled.

Mr. Dervishian: Exception.

A. I am not aware of any exception which would follow, any exception. The Ordinance requires the entry fee and an estimate and we are not aware of any, with our consent or our knowledge.

Q. You have heard Mr. Dervishian's opening statement to the jury and you have heard Mr. Dervishian's cross examination of Mr. Cralle. During that questioning Mr. Dervishian has attempted to extract information from Mr. Cralle and has told the jury that had Cliff Weil not opened a second location that everything would have been exactly the same. There would have been no additional tax.

Now, suppose the Admiral Street location was eventually closed and following this theory, would this have any effect on the amount of taxes the City collected? If you followed Mr. Dervishian's theory.

Mr. Dervishian: I do not see the relevancy or see this witness is qualified to pass on any such philosophical approach.

The Court: What is the purpose, Mr. Wimbish?

page 46 } Mr. Wimbish: The purpose is to illustrate the fact if we followed Mr. Dervishian's line of reasoning on the whole case, the City would come up short or that the Admiral Street location, if it went out of business, the Main Street location would still have to report the purchases

for the Admiral Street location for the prior year in order not to win on both ends of the line.

Mr. Dervishian: If Your Honor please, the fallacy of that is self-evident because even by the City's contention after 1964 it issued licenses based on the previous year's sales. Therefore, if the Admiral Street location were closed down those sales would still be computed because of the previous years location.

The Court: I will overrule this.

Mr. Dervishian: Is he contending now that if the Admiral Street location closed down that Cliff Weil's Main Street location, would only have to pay taxes for the subsequent year of say, half of the total purchases?

Mr. Wimbish: That is the question I am asking.

Mr. Dervishian: I am asking you if you contend that.

Mr. Wimbish: I am asking the witness.

page 47 } The Court: I will overrule the objection. I think that he is undertaking to do, your position is that it was six of one and half dozen of the other, as to where it was reported. I think he is undertaking to introduce evidence on his theory which, of course, is his theory of the case.

If your contention is correct, it would not be any tax due.

I will overrule the objection.

Mr. Dervishian: Exception.

By Mr. Wimbish:(Continued)

Q. Do you want me to rephrase it?

A. No. I have to make a qualified statement there. I have stated previously a beginner is adjusted to his actual experience until he has enjoyed a full calendar year. The last year one would terminate business, as an illustration, if he terminated during 1968, and he had a license on last years experience, if his experience exceeded the base for his license, it would be no additional assessment.

Likewise, there would be no refund. So you adjust the beginning period, the last year there is no adjustment at all.

As I understand the question then if there was no beginners adjustment, you would adjust the end which would mean the purchases would have to be included in 1966 and Cliff Weil on Main Street for the purchases bought at Ad-

page 48 } miral Street in 1967, although it went out of business during the year.

D. Andrew Welch

Q. That is the point I want to make.
A. I am stating the answer to the question.

Mr. Wimbish: All right.

CROSS EXAMINATION

By Mr. Dervishian:

Q. As long as the Assistant City Attorney has gotten into the theory and the theoretical approach, Mr. Welch, isn't it true that the reason for this beginners going back and assessing is to prevent someone from coming into town and making a small estimate, paying a nominal tax, and then closing down after Christmas and moving on without paying the City for the sales that it has made or the purchases it has made in competition with the merchants who continue here from year to year?

A. I would say the reason for it is to put everyone on an equal basis.

Q. That's right. Including the man who comes in just before Christmas and moves out after Christmas?

A. There are other licenses that effect him too.

Q. We are talking about this beginners license.

A. Yes. You spoke of those who move out. You page 49 } do not want to get it confused here.

Q. I am talking about an itinerant merchant. I am talking about a man who rents a place and comes in September—and moves out in December.

A. He would be an itinerant under law.

Q. At what point would he not be an itinerant?

A. It would be after a stipulated lease for a term period.

Q. How long?

A. I think the law says for a year or more.

Q. What section of the law?

A. That is State law, not a City Ordinance.

Q. What section of the State law?

A. I can read the itinerant section under the Code, that deals with retail merchants.

Q. I am talking about wholesale.

A. There would be no itinerant wholesalers.

Q. That is right. I am saying the purpose of the beginners license is just what I asked you and just what you said.

So a guy, a fellow, moving in during the year could not make a small estimate, pay less license than the regular year?

A. It could apply to one who was going to continue in business as well.

page 50 } Q. Mr. Welch, a man who is staying in business and is continuing in business, after one full calendar year, even under your interpretation, would only be paying on his previous year?

A. That is correct but he could very well get in for a normal license if he did not have the beginners adjustment.

Q. Are you familiar with the assessments, Plaintiff Exhibit 2?

A. I am familiar with the report the auditor made, yes, sir.

Q. Cliff Weil, when it obtained its 1963 license, it reported a total of $5,409,464.00 done in 1962?

A. (Nodding head in affirmative). It is on the report, yes.

Q. Is that correct?

A. Yes, that is right.

Q. Normally, that would cover all of Cliff Weil's operations if all of it had remained at the Main Street location?

A. Correct.

Q. All right. So part of the 1963 deliveries being made from Admiral Street actually reduced or would have reduced the basis of Cliff Weil's 1963 license. Wouldn't

page 51 } A. It does reduce it by the audit I have because the credit is given for fifty one seventy-five.

Q. That is on the 1964 license. You did not give them a refund for 1962?

A. That was on his previous years experience.

Q. That is right. So you charged Cliff Weil on the basis of 1962, $5,409,464.00 in purchases in 1962 but you did not give them a refund on the license that it paid for 1963. Based on those purchases when you turned around and assessed it again—

A. You are back to the legal point, Mr. Dervishian, that we began with. It is a beginners adjustment.

Q. In other words, what you are saying is—

A. I am saying the form you are holding in your hand is purely and simply a beginners adjustment at the new location and allowing for certain amounts that were reported at lo-

D. Andrew Welch

cation number one, whether right or wrong, is why we are here.

Q. One more time, in 1962 Cliff Weil made purchases of $5,409,464.00. Only one location, Main Street.

A. Correct.

Q. If it had not opened the Admiral Street location that was all it had to pay on.

page 52 } A. Remember this, Mr. Dervishian, that report was made in January, at which time he only had one location and all the purchases related exclusively and completely to Main Street.

Q. That is right. If it had continued on only on Main Street that is all. You would not have dreamed of suggesting they ought to pay for it. Is that right?

A. I do not know.

Q. Suppose.

A. I do not know what you are implying. We make assessments according to law, not what the taxpayer or I dream about.

Q. Mr. Welch, all I am asking you is if in 1963, all of the business that was done by Cliff Weil had been only out of the Main Street location, it would have been required to pay a license tax on $5,409,464.00?

A. Yes.

Q. Which it paid?

A. Right.

Q. Now you undertake to say that the Admiral Street location which began in March or April or May—

A. March.

Q. Of 1963, since it made deliveries of items purchases at a cost of $2,070,000.00, that Cliff Weil for 1963 instead of being able to do its business on a license of $5,409,000.00 ought to pay for $7,070,000.00?

page 53 } A. These purchases, Mr. Dervishian, were made in 1963. They were not made in 1962.

Q. That is right.

A. Again, this is for a separate location.

Q. Yes, sir.

A. I read the law previously and said you would need a separate license for each separate place of business.

Q. Yes, sir. I know what it says. That is the reason we are in Court, because you and I do not agree.

A. Yes, sir.

D. Andrew Welch

The Court: Is there anything further, Mr. Dervishian?

Q. I am asking you again, since Cliff Weil paid on five million and some odd dollars, I just read out of purchases that it made in 1962, it was entitled to operate in 1963 if he had kept everything down on Main Street?

A. Right, or stayed—I stated it three times.

Q. Well, maybe I am dense but if you will excuse me a minute and let me ask you this. Having purchased in 1962, $5,000,000.00 in purchases, and if it had stayed on Main Street it only had to pay for its 1963 license, the sum which it did pay?

A. In January, yes, sir. If only they had one page 54 } location.

Q. May I finish the question and if it had never set up the Admiral Street location but had done $20,000,000.00—

A. Purely proper under law.

Q. Proper, and would not have to pay another penny's worth?

A. If no other location, no other license.

Q. When you undertook, having charged Cliff Weil for this 1963 license, on the basis of $5,000,000.00, when you undertook to charge it for an additional $2,000,000.00 worth of business done in 1963 by deliveries out of Admiral Street location, did you go back and reduce Cliff Weil's license fee that was paid for 1963?

A. I do not see how. They were analyzed.

Q. I asked did you reduce it?

A. I was telling you why nothing was done. I think you are entitled to explain it.

The Court: He can answer the question which he has done and he can explain.

Mr. Dervishian: Yes, sir. First I want him to admit that he did not go back and give them credit for it.

The Court: He answered the question and he was page 55 } going to give an explanation or the reason.

Mr. Dervishian: I see. I misunderstood. I thought he started in on the explanation without answering.

A. You can ask me again. I will be glad to answer.

Q. I said, having charged Cliff Weil for its 1963 license

for the total amount of its purchases in 1962, so it would have been able to run on even had it done $20,000,000.00 worth of business. Yet, when part of its operation emanated from the Admiral Street location and you undertook to charge Cliff Weil for those purchases emanating or deliveries emanating from the Admiral Street location, for an additional $2,000,000.00 worth of purchases, as you claim, did you go back and give a credit to Cliff Weil on its 1963 license tax?

A. In the first place, January, 1963 licenses were due on Main Street on purchases for the previous year which they applied for themselves.

And, which were properly paid.

The second location was not opened until March, purchases relating to that year were not made until during that year. Therefore, that figure could not possibly have been involved because no one could foresee what they were going to do. The law says a separate location requires a separate license. The law also provides—

page 56 } Mr. Dervishian: If Your Honor please, I think the Assistant City Attorney is supposed to argue the case. He still has not answered the question of whether he gave any credit for—

The Court: He said no, he did not because none was due. He went on to undertake to give his explanation of why none was due.

Mr. Dervishian: All right, Sir.

The Court: Anything further?

Mr. Wimbish: I have one more question when you finish.

Mr. Dervishian: Just a minute. That is all.

REDIRECT EXAMINATION

By Mr. Wimbish:

Q. Mr. Welch, would you examine this exhibit, if you will, please sir.

A. (Viewing exhibit.)

Q. Tell us the final amount at the bottom of the page.

The Court: In Plaintiff 2?

Q. Yes, sir. Plaintiff Exhibit 2.

A. The total assessment with the two beginner adjustments

in question on Admiral Street amounted to
page 57 } $14,883.44.

Credit was allowed for certain gross purchases reported on Main Street. In the tax amount of fifty-one seventy-five thirty-two which leaves an unpaid tax balance as of this time of $9,708.12.

Q. Would you tell the Court whether or not Cliff Weil has been billed this amount that you just recited?

A. Subsequent to the report of the Field Audit.

Mr. Dervishian: We admit we were billed and refused to pay it, Your Honor.

Mr. Wimbish: I wanted to make sure of that, Your Honor.

RECROSS EXAMINATION

By Mr. Dervishian:

Q. Mr. Welch, you said credit was given for $7156.12 but that was on the 1964 license, Wasn't it?

A. The credit was given on the four-year report audit. I was reading from the figures. It is five thousand and something.

Q. Didn't I say $5175.32?

A. I thought you said seven thousand.

Q. I may be mistaken. That is $5,175.32.

A. Right.

Q. That credit was given on the 1964 license?
page 58 } A. Correct, but applied across the board for four years.

Q. Why did you give credit for 1964 and not for 1963?

A. I explained it to the best of my ability. I cannot go into it any more unless you want to belabor the Court.

The Court: I think he answered that.

Mr. Dervishian: I object and I except. I object to the answer and I object to the witness undertaking to make the objection. But it will speak for itself.

* * * * *

page 65 } Jury Out.

Mr. Dervishian: If Your Honor please, the defendant

moves to strike the plaintiff's evidence on the ground that it is contrary to the law and is without any evidence to support any verdict or finding that could be found for the plaintiff in this case.

The Ordinances are in evidence. The definitions are in evidence.

I am sure the Court was startled when it read the Code section that Mr. Welch referred to, 33-96. Beginners. Every person beginning a business, occupation or profession that is subject to a tax equal to an entry fee, etc.

How the City could contend that this would be a beginning business is not possibly comprehended by me under that definition.

The Court: The definition, that is, this definition is, I think, it does not attempt to define what they mean by it, I think.

I think this section while headed "beginners" it means—it relates to the tax to be imposed, license tax to be imposed, once a person is established as a beginner.

I do not see this helps me much.

Mr. Dervishian: They are undertaking to tax as though this were a beginner.

page 66 } The Court: That is right, and I understand, and he has given his reason for it. It may or may not be right. That may be a jury question. That is what I want to talk about at the conclusion of the evidence. I do not know, but he has given, I think, very clearly his reason why he considers it to be a beginner.

Mr. Dervishian: I am saying to the Court irrespective of his reasons, if the statute says that, it doesn't say this is a beginner. Then, of course, as Your Honor knows, under the cases all of these Ordinances have to be construed most strictly against the taxing authority.

The Court: I understand that, but, I say, I do not think this section gives a definition, at least I have not read the whole section. I do not know whether some of these other provisions relate to it or not. Finish your Motion.

Mr. Dervishian. Well, that is one basis for it and then, of course, the same basis that I argued on the defendant's Motion for summary judgment, namely, that everything that the City is contending is based on implication and there is not a single Ordinance that says that if a wholesale merchant decides to divide its business between two locations

page 67 } that it shall be taxed double on the next location for the period of a year and a half, two years, or however long it takes.

That is boiling it down to the final analysis.

Judge, I think we are doing the Court, and possibly this jury, a disservice if the Court does not consider at this time the decision of our Court of Appeals in *Marion Bottling Company* versus the *Town of Galax,* 195 Va. 1115. *City of Richmond* versus *Valentine,* 203 Va. 642, *City of Richmond* versus *Lewis H. Bolcher, Junior,* 197Va.192.

In all of which cases the Court repeatedly said, and is not basing it solely on the Virginia law, but on the law that is universally applied throughout the country. Namely, tax laws are to be liberally construed in favor of the taxpayer and are not to be extended by implication beyond the clear import of the language used.

No one can be held to the payment of a tax unless he comes clearly within the terms of the particular act or ordinance and again in *A. & P.* versus *City of Richmond.* I have got one case that is directly, I believe, applicable here.

page 68 } I have underlined pertinent portions in red.

Estes versus *the City of Richmond.*

I have a photocopy of it or we can pick it up. I wonder if I left it on the table in your office.

The Court: Are these three cases cited for the proposition that in the event of any ambiguity that the statute is to be construed most favorably, in favor of the taxpayer?

Mr. Dervishian: That is one. That is not all. The other one is that unless you cannot by implication extend the terms of a license in statute or ordinance—in other words, I do not care how he reasoned this was a beginner and he reasoned as the City Attorney has reasoned in its summary of facts to the Court, that because of the statute does not set up a category of opening another location or dividing its business between two locations because of that, necessarily, the other location becomes a beginner.

That is the way to approach it.

The Court: I will overrule the Motion. That will go to the heart of the argument I expect to hear you

page 69 } gentlemen on a later. I will overrule it at this time.

Mr. Dervishian: Exception.

The Court: What evidence, Mr. Dervishian, are you going to have? Is the textimony you expect to put on going to raise any conflict of fact?

Mr. Dervishian: I think so, Your Honor. I think if the Court will read—

The Court: It is still to me, I am still in the dark as to

what issue do you think is going to be submitted to the jury.

Mr. Dervishian: Mr. Ganzert testified this was subject to adjustment, Mr. Dementi is going to testify there was no such suggestion or even information made to him because—and he is going to testify to what is set forth in this summary.

The Court: The City takes the position that regardless of what he said at the time that the validity or non-validity of this tax depends on actually what transpired thereafter, that whether or not this was a beginner, and if so, what tax would be properly assessed against the purchases of *of* page 70 } that business if it were a beginner.

He says whatever statements that the City man made would be in effect. It would not have any bearing on the situation.

Mr. Dervishian: Is the Court suggesting that it intends to withdraw the question from the jury or is it suggesting that it would not let me put Mr. Dementi on?

The Court: No. I will let you put him on. We are going ahead and finish all the evidence. I thought that perhaps with your having heard the evidence you are of the opinion that there was to be no issue of fact that could be submitted to the jury and it would not be necessary to keep the jury here.

Mr. Dervishian: The Court has allowed the evidence to come in before the Court.

The Court: You are going to put your evidence on either before the Court or the Jury, so I suppose my question is premature. Suppose we go ahead.

I will overrule the Motion at this time. Your motion and exception is noted.

* * * * *

page 71 }

* * * * *

NICHOLAS J DEMENTI, called on behalf of the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Dervishian:

Q. State your name, address and occupation.

Nicholas J. Dementi

A. Nicholas J. Dementi, 22 Glenbrooke Circle, Vice President, Comptroller of Virginia-Carolina Hardware Company.

Q. In 1963, I believe you were the Comptroller
page 72 } for Cliff Weil, Incorporated?

A. Yes, I was.

Q. Cliff Weil had been in business how long as a wholesale merchant?

A. About 1905, something like that.

Q. Would you know how long it had been at its Main Street address, approximately?

A. I guess about 20 years or so.

Q. All right. What brought about this additonal location? I mean, what sort of conditions were you experiencing down there?

A. We were operating the entire business out of one location which is the 1315 East Main Street location.

We found that we were having difficulty taking care of our City business. The drivers had a hard time loading. Drivers at Cliff Weil load their trucks and sell from the trucks to the merchants around the area here and they have to come to the warehouse and load.

Although I think the City was generous in granting loading space in front of the building it was very common to see six or eight Cliff Weil trucks lined up in front of the building. Then, of course, there were other businesses along there trying to share the same loading space.

page 73 } It resulted in a lot of confusion every morning. The drivers were trying to find a place to park, to load and get away and do the day's business.

We also experienced difficulty from our customers, local customers, who would call for merchandise and be unable to find parking facilities. So we thought we should look for another location, still in the City, but with better parking facilities. That prompted our searching for a place in which we eventually ended up, at the Admiral Street location.

Q. When were the trucks able to get away and what were they doing in the meantime if unable to pull in and load?

A. Well, the drivers came in between seven o'clock and seven-thirty, trying to load. Of course, when they were lucky they got away in an hour or so. The others were just there for a matter of several hours. I would say sometimes drivers might be two or three hours before getting away. He would do the best he could. He would either keep circling the block

or just go down the street somewhere and park and keep waiting for an opportunity to get to the front of the building and come back and park.

Q. Mr. Dementi, what has been your education and training in the field of accounting?

A. I am a graduate of the University of Rcihmond. I have a degree in business administration and I have
page 74 } a major in accounting.

Q. With respect to the accounting procedures within Cliff Weil, Incorporated, even before the Admiral Street location was undertaken, what breakdown did you maintain?

A. We kept the out-of-town business and the city business—we separated them for purposes of sales analyses and for salesmen commissions, and so on, since they were different types of operation.

Q. All right, sir. Before signing the lease on the Admiral Street location what did you do to determine what the tax consequences would be?

A. Well, I called on Merle Ganzert with whom we always had a very close relationship, and I laid out the situation before him, telling him that we wanted to operate part of the business from this other location and what would be the tax consequences.

Q. What did he tell you?

A. Well, he said, if you are going to operate a new business, are you going to incorporate it. I said no, we are not. We are just going to operate part of the business from there. He said if you were going to operate a new business and incorporate it you would have to apply for a license as a new business, estimate your purchases and pay an estimated tax.

We went into it very thoroughly and we established we were not starting a new business but it was the same corporation and we were going to make local deliveries from that location and we would make our purchases in the name of Cliff Weil, Incorporated.

Under those circumstances it was agreed between us that we would merely pay the entry fee and continued reporting our purchases as Cliff Weil, Incorporated, and continued paying the tax in the same manner we had been in the past.

Q. State to the Court and jury whether or not Cliff Weil, Incorporated, reported to the City of Richmond for its license tax purposes, all of the purchases made for both the

Admiral Street location and the Cliff Weil location on Main Street?

A. Yes, I can say positively that all purchases were reported to the City of Richmond for the license tax.

Q. State whether or not the tax based on the entire purchases was paid to the City?

A. Yes, the tax was paid each January.

Mr. Dervishian: That is all. Witness with you.

CROSS EXAMINATION

By Mr. Wimbish:

page 76 } Q. Mr. Dementi, were you aware of the fact that if the Admiral Street location was required to buy a separate and beginners license that the tax would be greater than if the license were all paid under the Main Street location?

A. Are you speaking for the year in which—

Q. Any year. In other words, were you aware of the fact that if Admiral Street were treated as a beginning business, the tax would be greater than it would have been had the entire operation continued under the Main Street operation?

A. Naturally I was, yes. For the first year it would be.

Q. At the Admiral Street location was there merchandise, goods, wares or otherwise, was this received at the Admiral Street location? Were there deliveries made to the Admiral Street location?

A. Yes, sir.

Q. These were sold and delivered out of the Admiral Street location to purchasers throughout the City of Richmond. Is that right?

A. Yes.

Mr. Wimbish: No further questions.

REDIRECT EXAMINATION

By Mr. Dervishian:

page 77 } Q. Did you actually just carry over to the Admiral Street location the breakdown that you already were maintaining on Main Street?

A. Positively, yes, sir.

Nicholas J. Dementi

Q. The exact same breakdown?
A. Yes, sir.

Mr. Wimbish: He is leading the witness, I believe.
The Court: Do not lead him. He has answered that question. Go ahead.
Mr. Dervishian: That is all.
Mr. Wimbish: No further questions.

By the Court:
Q. Did Cliff Weil organize another corporation?
A. No, sir, not during that period of time that we are talking about and not while I was comptroller.
Q. You do not know whether they did any subsequent time or not?
A. No, sir, I have no knowledge.

By Mr. Wimbish:
Q. Did you register this new organization on Admiral Street? Did it continue to trade under the name of Cliff Weil, Inc., or did it trade under some other name?
A. The Admiral Street location?
page 78 } Q. Yes, sir.
A. We traded as Cliff Weil, Incorporated, and it was called Tobacco City Wholesale Company of Cliff Weil, Incorporated.
Q. In other words, the stationery would say Tobacco City Wholesale Company. Is that right?
A. The stationery would and our purchase orders. This was quite a point made with Mr. Ganzert that all purchase orders would be issued in the name of Cliff Weil, Incorporated.
Q. They received merchandise at Admiral Street? They made sales from Admiral Street and traded as Tobacco City Wholesale Company?
A. Yes.

Mr. Wimbish: That is all.

By the Court:
Q. Did you inform Mr. Ganzert you were going to operate the Admiral Street business under a different trade name?
A. Yes, sir.

Q. You told him?
A. Yes, sir.

The Court: All right.

By Mr. Dervishian:
page 79 } Q. Say under what name the license for the year 1963 was issued by Mr. Ganzert?
A. Cliff Weil, Incorporated, t/a Tobacco City Wholesale Company.
Q. He knew all about that?

* * * * *

STUART B. CARY, called on behalf of the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Dervishian:
Q. State your name, address and occupation.
A. Stuart B. Cary, address 3031 Marlboro Drive, Richmond, Virginia. I am the Treasurer of Cliff Weil, Incorporated.
page 80 } Q. What training have you had in the field of accounting?
A. I have a B.S. degree from the University of Richmond, Business Administration. I am a Certified Public Accountant, State of Virginia.
Q. You were not present when these arrangements were made between Mr. Ganzert and Mr. Dementi, were you?
A. No, I was not an employee of Cliff Weil, Inc., at that time.
Q. When the audit was undertaken, state whether or not you reviewed these records and determined whether the company's records coincided with the license record.
A. I reviewed them. We mutually agreed the figures and totals were correct and all records that the auditor wanted to be made available to him and all questions he asked were answered to the best of my knowledge.
Q. Where were those records?

Stuart B. Cary

A. 1315 East Main Street.

Q. Mr. Cary, on the basis of those records, state whether or not all taxes theretofore assessed had been paid?

A. To the City of Richmond?

Q. That is right.

A. To the best of my knowledge all taxes had been paid at the time.

page 81 } Q. Was there any difference as to the total amount of sales even to the penny?

A. On purchases? No, they were not. The totals were correct. No adjustment as to total amount or purchases were made.

Mr. Dervishian: I see. Witness with you.

CROSS EXAMINATION

By Mr. Wimbish:

Q. Would you tell us when did you examine this audit Mr. Dervishian speaks of?

A. At the time Mr. Cralle made his review.

Q. You are saying Mr. Cary after he made the audit, you paid this we are suing for today?

A. No.

Q. I thought that was wrong. I think that you stated if all the taxes had been paid we would not be here.

A. All the taxes that were assessed, I think.

Q. Assessed prior to the audit?

A. Assessed at that time.

Mr. Dervishian: Based on all the purchases.

Q. Prior to the audit?

A. Yes, sir.

page 82 } Q. After you audited, you owed $9700—

A. That is why we are here today.

Q. Tell me as a matter of information, is this Admiral Street location still in operation?

A. It is not.

Q. When you purchased your 1968 license did you include in your Main Street application for license the amount of purchases which took place at the Admiral Street location in 1967? Answer the question.

Mr. Dervishian: Let him answer.

The Court: He can answer yes or no, then he can give any explanation he wants.

A. State the question.

Q. When you purchased in 1968 the license for the Main Street location did you include the Admiral Street purchases for 1967 as a basis, as a part of the basis for your 1968 license?

A. We did. They were filed separately, just the same manner they were in 1963 and 1964.

Q. You said you were not in business but purchased a 1968 license for Admiral Street?

A. Yes, this is a point I would like to bring out.

Q. You are not in business in 1968 but you purchased a license?

A. That is correct.

page 83 } The Court: Now—

A. May I qualify that.

The Court: Yes, sir.

A. This is a situation where we paid for the license. This is 1968. We paid to the City of Richmond for the license. Can I back up. My year is wrong.

Q. I believe you are wrong. You are not operating there now but you said you purchased—

A. My years are wrong. The principle and the intent is correct. We moved in 1967. We paid our license in 1967 for the total purchases we made in 1966. We were not entitled to a refund. We paid for the whole license for the whole year of 1967.

We moved from the City of Richmond to the County of Henrico. Consequently we had to take up a new license in the County of Henrico but the full license for the year 1967 was paid to the City of Richmond.

Q. 1968, that is what I am concerned with. For 1968 you had to purchase a license to operate on Main Street?

A. Correct.

Q. Did you include in your total purchases for 1967. Admiral Street even though you had gone out of business? Did you include that in the Main Street application for license for 1968?

A. No.

page 84 } Mr. Wimbish: That is all.

REDIRECT EXAMINATION

By Mr. Dervishian:

Q. The Admiral Street location did not go out of business, did it, Mr. Cary?

A. No, it became incorporated. That is why it was not included in the license. We incorporated May 1, 1967.

Q. And moved into Henrico County?

A. Correct, and paid the new license in the County of Henrico.

Q. If you had included the 1967 purchases into your Main Street operation for 1968, then would not you have been paying—

Mr. Wimbish: He is leading the witness.

Mr. Dervishian: All right.

Q. How many taxes would you have been required to pay on the same receipt to how many jurisdictions?

A. For what year now?

Q. For the year 1968?

A. 1968?

Q. Yes, sir.

A. Assuming that Tobacco City stayed—

Q. No. It went to Henrico?

page 85 } A. It went to Henrico.

Q. And you said it paid a license to do business in Henrico?

A. Right, in 1968.

Q. That is right. If you had included the 1967 purchases of the Admiral Street location in your Main Street license application form, how many jurisdictions would you have been paying a license tax to on the business done by Cliff Weil, Incorporated?

A. One, the City of Richmond.

Q. How about Henrico? State whether or not you would be able to do business in Henrico on the City of Richmond wholesale purchases?

A. No, I would not. The County of Henrico would come into play with that.

By Mr. Wimbish:
Q. One question, Cliff Weil still technically owns Tobacco City Wholesale, Incorporated, in Henrico County?
A. That is correct.
Q. You have to pay on a beginners basis in Henrico County?

Mr. Dervishian: I object. You have a legal issue involved which is an entirely different situation.
page 86 } The Court: I overrule the objection. He testified it is the same. This is the same company, didn't he?
Mr. Dervishian: No, sir. He said that incorporated in May of 1967.
The Court: When they moved.
Mr. Dervishian: And moved to Henrico County.
Mr. Wimbish: He testified it is owned by Cliff Weil. He wanted to ask whether or not—
The Court: I overrule the objection. Go ahead.
Mr. Dervishian: I object.

By Mr. Wimbish:
Q. Did you have to pay a beginners—were you treated as a beginner in Henrico County?
A. Yes, sir.

Mr. Wimbish: No further questions.

By Mr. Dervishian:
Q. State whether or not the corporation was actually a beginner?
A. It was.

* * * * *

Vol. 2
page 7A }

* * * * *

Mr. Dervishian: Yes, sir. He set out the City Code Sec-

tion 33-98 which briefly provides that engaging in a business elsewhere than at a designated place is a violation of the law and then draws the first implication that there had to be a license at each location.

Vol. 2
page 8A } He draws an implication from this, that there has to be a license at each location.

Judge, our position is that this is not only a boot strap operation, that the City is undertaking to take, everything is by implication. If you will note as we go through this, but it looks to me like there are two or three boot straps are in series and maybe two or three thrown in as parallel connections to the boot so it will come up level. Otherwise, it spills out everywhere along the line even in parallel connections. First he draws the implication that by reason of the fact you have to have a license at every location, by reason of this language here, but then he comes along in the first sentence following that quotation and admits that the defendant purchased a license for that location.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Opinion, letter—March 18, 1968	2
Order—April 11, 1968	3
Instruction	3
Opinion, letter—September 24, 1968	4
Opinion, letter—November 20, 1968	8
Order—December 23, 1968	10
Summary of Facts	11
Order—December 23, 1968	13
Judgment—December 23, 1968	14
Notice of Appeal and Assignments of Error	15
Witnesses:	
Jesse L. Cralle	17
Merle P. Ganzert	23
D. Andrew Welch	26
Nicholas J. Dementi	40
Stuart B. Cary	45
Proceedings	18, 24, 30, 37, 49