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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 74-1178

CITY OF PORTSMOUTH,

Appellants,

v.

CITIZENS TRUST COMPANY, TRUSTEE, ETC., ET AL.,

Appellees.

JOINT APPENDIX

Gordon B. Tayloe, Jr.
City Attorney
P.O. Box 820
Protsmouth, Virginia 23705
Counsel for Appellants

J. Stanley Livesay, Jr.
P.O. Box 1137
Portsmouth, Virginia 23705
Counsel for Appellees

INDEX

	Page
Petition To Correct Erroneous Tax Assessment	1
Final Order	4
Notice of Appeal and Assignments of Error	6
Statement of Facts	8
Trial Court's Opinion	11
Ordinance No. 1971-52	12
Ordinance No. 1973-97	13

IN THE

SUPREME COURT OF VIRGINIA

At Richmond

CITY OF PORTSMOUTH,

Appelant,

v. Record No. 741178

CITIZENS TRUST COMPANY,
TRUSTEE, ETC., ET AL.,

Appellee.

APPENDIX

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY, Trustee
under the Will of Francis E. Whitlock,
Deceased,

Petitioner

- vs -

CITY OF PORTSMOUTH,
a municipal corporation,

Defendant

Serve: W. A. O'BRIEN
City Attorney
#1 High Street
Portsmouth, Virginia

MARGARET JONES
Treasurer of the City of Portsmouth
#1 High Street
Portsmouth, Virginia

ROBERT G. ESLEECK
Commissioner of the Revenue
of the City of Portsmouth
#1 High Street
Portsmouth, Virginia

PETITION TO CORRECT ERRONEOUS LICENSE TAX ASSESSMENT

Now comes your petitioner and sets forth the following:

1. Your petitioner, Citizens Trust Company, Trustee under the Will of Francis E. Whitlock, Deceased, as such rests twelve (12) units located in the City of Portsmouth and paid rental tax in the amount of $146.00 for the year 1972 and in the amount of $146.00 for the year 1973.

2. That on June 22, 1971, the Council of the City of Portsmouth, Virginia, enacted Ordinance Number 1971-52 which ordinance amended the license tax ordinance of the said City by adding Section 87.1, a copy of which is attached hereto as Exhibit "A".

3. That said ordinance is the same type of ordinance as has been subsequently held to be invalid under the rule of Krauss v. City of Norfolk, 214 Va. 93 (1973), rehearing denied 214 Va. , 199 S. E. 2d 529 (1973).

4. That said ordinance is invalid in that the City had by its ordinance extended the definition of "engaged in business" so as to controvene the general law of this state and Section 1-10

of the Code of Virginia.

5. That your petitioner has requested refunds of the aforesaid payments from respondents and said requests have been denied.

6. That this petition is brought pursuant to Virginia Code Section 58-1145 et seq.

7. That this improper assessment is in no way due to petitioner's failure to provide all information to respondent required by law.

WHEREFORE, your petitioner requests the Court to correct this erroneous assessment; order the respondent to refund all sums paid pursuant to this assessment along with interest at the rate of six per cent (6%) per annum from the date of said payments; and provide such other relief as the law may require.

CITIZENS TRUST COMPANY, Trustee
under the Will of Francis E.
Whitlock, Deceased

By: /s/ Dean W. Sword, Jr.
Dean W. Sword, Jr., Co-Counsel

DEAN W. SWORD, JR., Esq.
SCHLITZ, LEVY AND LIVESAY, LTD.
301 Central Building
Portsmouth, Virginia 23705

NORRIS HALPERN, Esq.
Maritime Tower
Norfolk, Virginia 23510

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY, Trustee
under the Will of Francis E.
Whitlock, Deceased,

Petitioner,

vs.

CITY OF PORTSMOUTH,
a municipal corporation,

Defendant.

FINAL ORDER

THIS CAUSE came on to be heard upon the petition to correct erroneous license tax assessment filed by petitioner herein pursuant to Code, Section 58-1145; the demurrer of the defendant, City of Portsmouth; the stipulations of fact made by counsel for the parties both orally and in writing; the briefs of the parties; and was argued by counsel.

WHEREUPON it appearing to the Court that:

1. The City Attorney for the City of Portsmouth defended in this cause, after due notice, and that the Commissioner of the Revenue was examined as a witness touching this cause;

2. Section 20-104 of the Code of the City of Portsmouth, as adopted and as amended, is invalid for the reasons stated in the opinion letters of the Court dated July 22, 1974;

3. The petitioner paid to the City Treasurer on account of the so-called rental tax the sum of One Hundred Forty-Six Dollars ($146.00) for the license year 1972 and One Hundred Forty-Six Dollars ($146.00) for the license year 1973;

It is accordingly ORDERED that:

A. Said Section 20-104 of the Code of the City of Portsmouth, as adopted and as amended, is invalid, and the defendant and its officials are restrained from collecting any taxes thereunder from the petitioner;

B. The City Treasurer of defendant shall refund to the petitioner the sum of One Hundred Forty-Six Dollars ($146.00) for the license year 1972 and One Hundred Forty-Six Dollars ($146.00) for the license year 1973, together with interest at the legal rate from the date of this order, plus costs of this cause; and

C. The Clerk of this Court shall certify two copies of this order and deliver same forthwith to the City Treasurer and the Commissioner of the Revenue, respectively.

Nothing remaining to be done, this cause is ended.

I ASK FOR THIS:

/s/ Dean W. Sword, p.q.

SEEN AND OBJECTED TO:

/s/ Daniel R. Hagemeister, p.d.

ENTER: August 6, 1974
/s/ Robert F. McMurran

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY, Trustee under the Will of Francis E. Whitlock, Deceased,	:	
Petitioner,	:	
vs.	:	AT LAW DOCKET NO. L-73-298
CITY OF PORTSMOUTH, a municipal corporation,	:	
Defendant.	:	

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Comes now the City of Portsmouth, Virginia, a municipal corporation, and states that it is aggrieved by a decision of the Circuit Court in this matter and that it hereby gives Notice of Appeal to the Supreme Court of Virginia. The City of Portsmouth sets forth the following matters as its Assignments of Error in this cause:

1. The Trial Court erred in holding that Section 20-104 of the Code of the City of Portsmouth, 1973 (originally adopted as Portsmouth City Ordinance 1971-52) was invalid as originally adopted, since the invalid definition of engaging in business contained in that ordinance was manifestly severable from the remainder

of the ordinance.

2. The Trial Court erred in holding Section 20-104 of the Code of the City of Portsmouth, Virginia, 1973, invalid in its present form, since such code section is wholly consistent with existing state law.

The statement of facts contemplated by Rule 5:9 of the Rules of the Supreme Court of Virginia will hereafter be filed.

CITY OF PORTSMOUTH

By: /s/ Daniel R. Hagemeister
City Attorney

Daniel R. Hagemeister, p.d.
City Attorney
Claude M. Scialdone, p.d.
Assistant City Attorney
Steven Lieberman, p.d.
Assistant City Attorney
P. O. Box 820
Portsmouth, Virginia 23705

I hereby certify that I have this 18th day of August, 1974, and prior to filing of the foregoing Notice of Appeal and Assignments of Error, mailed a true copy thereof, postage prepaid, to Dean W. Sword, Jr., Esquire, at the offices of Schlitz, Levy and Livesay, Ltd., P. O. Box 1137, Portsmouth, Virginia 23705, Counsel of record for the petitioners.

/s/ Daniel R. Hagemeister

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

CITIZENS TRUST COMPANY,	:	
Petitioner	:	
v.	:	LAW DOCKET NO. L-73-298
CITY OF PORTSMOUTH, VIRGINIA	:	
Defendant	:	

STATEMENT OF FACTS

Pursuant to Rule 5:9(c) of the Rules of the Supreme Court of Virginia and the Notice of Appeal and Assignments of Error filed in this cause, the City of Portsmouth herewith submits the following statement of facts:

Portsmouth City Council enacted Ordinance No. 1971-52 on June 22, 1971. A copy of such ordinance was appended to the petition filed with the court in this matter, such document being designated as Exhibit "A" to that pleading. Thereafter, Ordinance No. 1971-52 was duly enforced by officials of the City of Portsmouth charged with such duties.

As a result of the passage of such ordinance and the City's enforcement of same, petitioner has paid the taxes sought to be recovered in this action. After payment of such taxes, petitioner sought refunds of same on the grounds that such tax was illegally collected. Petitioner's claim was refused by the City.

The Virginia Supreme Court rendered its decision in the case of Krauss v. City of Norfolk on June 11, 1973. This case held invalid a Norfolk ordinance which was very similar to Ordinance No. 1971-52. Portsmouth City Council thereafter enacted Ordinance No. 1973-97, a copy of which is attached hereto as Exhibit "A" and is a part of this statement of facts. Petitioner asserted by written memorandum that the legal issues in dispute were as follows: 1. Can the City by ordinance tax persons who rent four or more units in the City be extending the common law definition of doing business?; 2. Can the definition portion of the ordinance be severed from the rest of the ordinance?, and 3. Is such a tax discriminatory in that it arbitrarily taxes a select group of individuals who may own and rent real property while excluding others. Each of these issues was presented to the Trial Court in writing by the Petitioner, and a sritten reply to them was made by the City.

Following the argument of these points, the Trial Court considered the ordinance as originally enacted and as amended by Ordinance No. 1973-97 and determined that the ordinance in its original and amended forms was invalid which conclusion is reflected in the opinion letter of July 22, 1974. A final order was entered sustaining the petition in this case and ordering the City to refund sums paid and enjoining the City from collecting future sums. By

agreement between counsel, sanctioned by the Trial Court, the disposition of this case at the trial level is governed by the court's decision in Chelsea Corporation v. City of Portsmouth (Law Docket No. L-73-302), it being stipulated and agreed that the legal question as to the validity of the ordinance is the same as in the aforementioned case. The opinion letter of July 22, 1974, resolving that legal issue is attached hereto as Exhibit "B" and is made a part of this statement of facts.

Enter: /s/ Robert F. McMurran
Judge

August 20, 1975
Date

I hereby certify that I have this 18th day of November, 1974, and prior to filing of the foregoing Statement of Facts and the Notice attached thereto, mailed a true copy thereof, postage prepaid, to Dean W. Sword, Jr., Esquire, at the offices of Schlitz, Levy and Livesay, Ltd., P. O. Box 1137, Portsmouth, Virginia, 23705, Counsel of record for the petitioners.

/s/ Daniel R. Hagemeister

COMMONWEALTH OF VIRGINIA

THIRD JUDICIAL CIRCUIT

CIRCUIT COURT OF THE CITY OF PORTSMOUTH

July 22, 1974

Mr. Daniel R. Hagemeister
City Attorney
#1 High Street - Municipal Building
Portsmouth, Virginia 23704

Mr. Dean W. Sword, Jr.
Attorney at Law
P. O. Box 1137
Portsmouth, Virginia 23705

Re: Rental Tax Litigation
Chelsea Corporation v. City of Portsmouth

Gentlemen:

Having read and re-read the ordinance in question and the very fine memoranda of law supplied by you gentlemen, I am of the opinion that these cases are governed by the decision of the Virginia Supreme Court in the case of Krauss v. City of Norfolk, 214 Va. 93. In the new ordinance I do not believe when the entire ordinance is considered that the definition of doing business can be severed from the remainder of the ordinance. The City is therefore bound by the above mentioned case, and the assessment of the rental tax is erroneous.

Will counsel please prepare the appropriate order in each of the cases.

Yours very truly,

/s/ Robert F. McMurran
Robert F. McMurran

RFM:jlg

ORDINANCE NO. 1971-52

AN ORDINANCE TO AMEND THE LICENSE TAX ORDINANCE TO THE CITY OF PORTSMOUTH, 1969, BY ADDING THERETO A NEW SECTION NUMBERED 87.1, IMPOSING A LICENSE TAX ON ENGAGING IN THE BUSINESS OF RENTING RESIDENTIAL PROPERTY, INCLUDING HOUSES, APARTMENTS AND DWELLING UNITS, FOR THE LICENSE TAX YEAR BEGINNING MAY 1, 1972, AND FOR EACH AND EVERY YEAR THEREAFTER BEGINNING WITH MAY 1 OF EACH SUCH YEAR AND ENDING WITH APRIL 30 FOLLOWING.

Be it ordained by the Council of the City of Portsmouth, Virginia:

1. That the License Tax Ordinance of the City of Portsmouth, 1969, be amended by adding thereto a new section numbered 87.1, such new section to read as follows:

Section 87.1. Rental of Residential Property.

Every person engaged in the business of renting residential property, including houses, apartments and dwelling units shall pay an annual license tax of $50.00 for the first four units and $12.00 for each additional unit in excess of four.

For the purposes of this section a person shall not be deemed to be engaged in the business of renting residential property in the City unless such person shall rent four or more such residential units. The business of renting houses, apartments or dwelling units as used in this section shall be construed to mean the renting of building or portions thereof, each designed for residential occupancy as a single dwelling unit by one family but not hotels, motels, mobile home parks, lodging houses or boarding houses for which a license is otherwise required by this ordinance.

2. The taxes imposed by this ordinance shall apply to the license tax year beginning May 1, 1972, and each and every year thereafter beginning with May 1 of each such year and ending with April 30 following.

Adopted by the Council of the City of Portsmouth, Virginia, at a meeting held June 22, 1971.

Teste:

/s/ R. D. Ottavio
City Clerk

ORDINANCE NO. 1973-97

AN ORDINANCE TO AMEND THE LICENSE TAX ORDINANCE OF THE CITY OF PORTSMOUTH, 1969, BY AMENDING SECTION 87.1 THEREOF PERTAINING TO A LICENSE TAX ON ENGAGING IN THE BUSINESS OF RENTING RESIDENTIAL PROPERTY, INCLUDING HOUSES, APARTMENTS AND DWELLING UNITS.

Be it ordained by the Council of the City of Portsmouth, Virginia:

1. That the license tax ordinance of the City of Portsmouth, 1969, be amended by amending Section 87.1, such amended section to read as follows:

Section 87.1. Rental of residential property.

Every person engaged in the business of renting residential property, including houses, apartments and dwelling units, shall pay an annual license tax of $12.00 for each such unit.

For the purposes of this section, the phrase "engaged in business" shall mean a course of dealing which requires the time, attention and labor of the person so engaged for purpose of earning a livelihood or profit and implies a continuous and regular course of dealing, rather than an irregular or isolated transaction. The business of renting houses, apartments or dwelling units as used in this section shall be construed to mean the renting of buildings or portions thereof, each designed for residential occupancy as a single dwelling unit by one family but not hotels, motels, mibile home parks, lodging houses or boarding houses for which a license is otherwise required by this ordinance.

2. This ordinance shall take effect from and after the date of its passage and shall apply to the license tax year beginning May 1, 1973 and each and every year thereafter beginning with May 1 of each such year and ending with April 30 following.

Adopted by the Council of the City of Portsmouth, Virginia, at a meeting held July 24, 1973.

Teste:

/s/ R. D. Ottavio
City Clerk