

TEXARKANA v. JAMES & MAYO REALTY COMPANY.

4-3067

Opinion delivered July 10, 1933.

BROKERS—OCCUPATION TAX.—Under Crawford & Moses' Dig., § 7618, authorizing cities to impose an occupation tax on persons engaged in business therein, a city ordinance imposing a broker's tax on persons engaged in buying and selling real estate therein is valid though they did not maintain an office in such city, but only in another State.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; reversed.

STATEMENT BY THE COURT.

This appeal comes from a decree of the chancery court of Miller County, Arkansas, perpetually enjoining the city of Texarkana, its mayor, the city secretary and chief of police from collecting or attempting to collect an occupation tax against the appellees, who engage in the real estate business in the city of Texarkana, Arkan-

sas, but maintain their offices in the city of Texarkana, Texas.

All of the appellees are residents of the city of Texarkana, Arkansas, with the exception of Mrs. C. E. Swindell and Joe Eldridge, who live in the city of Texarkana, Texas. The appellees deny that they are engaged in the real estate business in the city of Texarkana, Arkansas, but admit that they buy and sell, lease and rent real estate located in the city of Texarkana, Arkansas. The appellee's sole defense in this case is that they have no offices or places of business in the city of Texarkana, Arkansas, and are not subject to any occupation tax attempted to be imposed upon them by the city of Texarkana, Arkansas, for engaging in the real estate business therein. There is little dispute about the facts. All of the appellees, with the exception of Mrs. Swindell, have procured a license from the Real Estate Commission of the State of Arkansas, pursuant to act 148 of 1929 as amended by act 142 of 1931.

The city of Texarkana, Arkansas, enacted and published an ordinance B. No. 488 requiring payment of an occupation tax or license for engaging in certain callings or pursuits, brokers, defining them, being required to procure said license and "each person or firm acting as a broker in the city of Texarkana, Arkansas, shall obtain from the city collector a license for which he shall pay as follows: grain brokers, per year, \$20 * * * real estate, per year, \$25."

"Item No. 2544—Real Estate.

"Each person, firm or corporation engaged in buying and selling real estate in the city of Texarkana, Arkansas, \$25."

"Section 8. All licenses under the provisions of this ordinance are due and payable between the first day of January and the 20th day of January of each year and shall be paid for one year in advance and are so named in the ordinance unless otherwise stated."

Section 9 requires the designation of the place where the business is to be transacted or carried on; that the license to be issued shall designate such place and author-

ize the carrying on of such trade, business, occupation, vocation, calling or profession only at such place; and a license fee shall be taxed for each place at which said trade, business, etc., is carried on. Section 11 requires the license to be exhibited in a conspicuous place where the business is carried on, and the holder must show same to the license inspector or collector, his deputy or any police officer. Section 12 makes it unlawful for any person, firm or corporation, whether principal or agent, to commence, engage in or carry on in the city of Texarkana, Arkansas, any of the businesses named in this ordinance without first procuring a license from the city to do so, and each and every day said business is so carried on constitutes a separate violation of the ordinance. The ordinance further provides for a penalty or fine for violation thereof in any sum not less than \$5 nor more than \$25.

All of the appellees are engaged in the occupation of real estate dealers in the city of Texarkana, Arkansas, but maintain their places of business in Texarkana, Texas. They admit that they sell, lease and rent real estate located in Texarkana, Arkansas, and that, in order to negotiate for sales and rentals of property located in the city of Texarkana, Arkansas, they are forced to take their clients to the location of the property in Texarkana, Arkansas, to show same to them, to collect the rents and do other things in connection with the sale and renting of property located within this city. All admitted that they were licensed real estate dealers under said act 148 of 1929 as amended by act 142 of 1931, with the exception of Mrs. C. E. Swindell.

The chancery court found the appellees not liable to the payment of the occupation tax because the city was without power to tax real estate dealers who did not keep an office in the city; that the business done by them in the city of Texarkana, Arkansas, was merely incidental to the carrying on of their respective businesses in the city of Texarkana, Texas; and that they were not engaged in business within the meaning or intent of the occupation tax ordinance of the city of Texarkana, Ark-

ansas, and the statutes of the State of Arkansas. Appellants excepted to the findings and decree of the court, and prayed and were granted an appeal.

Willis B. Smith, for appellant.

Frank S. Quinn, for appellees.

KIRBY, J., (after stating the facts). The statutes of the State authorize cities of the first class to levy an occupation tax requiring any person, firm, individual or corporation, who shall engage in, carry on or follow any trade, business, profession, vocation or calling within the corporate limits of such city, to take out and procure a license therefor and pay into the city treasury such a sum or amount of money as may be specified for such license and privilege. Section 5 of article 16 of the Constitution of 1874; § 7618, Crawford & Moses' Digest. See also 37 C. J. 181.

The State can levy an occupation tax on all persons engaged in the real estate business herein, but appellees insist that they are not subject to any such tax for engaging in the real estate business in the city of Texarkana because they don't maintain offices or places of business in the city of Texarkana, Arkansas, although they do all other things necessary to be done in carrying on such business there, but maintain their places of business on the Texas side of the town.

The ordinance was not intended to license a place for carrying on a real estate business but the persons actually carrying on such business itself; and it is undisputed that the appellees were doing everything necessary to carrying on the business of real estate brokers (§ 2, act 142 of 1931) in the city of Texarkana, Arkansas, except that they had their places of business situated across the State line in Texas, where most of the negotiations for carrying on the business were consummated. It is the right to engage in the real estate business, the privilege itself, that is taxed, regardless of whether the operatives live or maintain their offices or places of business in the city where the business is carried on.

It is true that the statute provides that no person, firm or corporation shall pay license fees or taxes men-

tioned in this act (§ 7618, Crawford & Moses' Digest) in more than one city in this State, unless such persons maintain such place of business in more than one city. But a fair construction of this provision does not indicate that the license is not required to be paid by only those who have or maintain regular offices inside the city. It is the privilege of engaging in such business, the occupation, that is taxed, rather than the place or office for carrying it on.

Appellees deny that they are engaged in the real estate business in the city of Texarkana, Arkansas, within the meaning and intent of the occupation tax ordinance and the statute, (§ 7618, Crawford & Moses' Digest), but each and all of them, except Mrs. Swindell, had taken out and procured a license from the Arkansas Real Estate Commission under act 148 of 1929 as amended by act 142 of 1931 for engaging in the real estate business in the State of Arkansas. These statutes provide that no recovery may be had by any broker or salesman in any court in this State in a suit to collect a commission due him unless he is licensed under the provisions of the act and such facts are stated in the complaint.

The conduct of business in the city of Texarkana, Arkansas, by appellees brings them easily within the terms of the definition of a real estate broker as provided in § 2 of act 142 of 1931. There a person who does any of the things specified in said definition in the carrying on of his business comes within the terms of the statute and ordinance, and the undisputed testimony shows the appellees were engaged in the real estate business in the city of Texarkana, Arkansas, in violation of the ordinance requiring the payment of an occupation tax for carrying on such business. The person carrying on the business of a real estate broker or dealer need not do all the things mentioned as constituting or defining such broker within the limits of the city in order to become liable to the payment of an occupation tax therein.

In *Blytheville v. Webb*, 172 Ark. 874, 290 S. W. 589, under the terms of a city ordinance imposing a license tax on dealers engaged in selling oil and gasoline within

the city limits, a wholesale dealer in oil and gasoline who maintained his place of business without the city limits but caused his trucks to be driven into the city for sale and delivery of oil and gasoline therefrom was held liable for the tax, regardless of the fact that his storage tanks for loading gasoline and oil to be carried into the city were entirely outside the city limits.

The appellees could be real estate brokers within the meaning of the ordinance and statute and violate its terms and become liable to its penalty, although they did not live in the city of Texarkana, Arkansas, nor have a place of business there. See also *Town of Winston v. Taylor*, 99 N. C. 210, 6 S. E. 114; *City of Memphis v. Battaile*, 6 Heisk. 524, 24 Am. Rep. 285; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370, 19 S. W. 1053.

It was held in *Texarkana v. Taylor*, 185 Ark. 1145, 51 S. W. (2d) 856, that a nonresident attorney, having no office in the city of Texarkana, Arkansas, was not subject to the license tax imposed in the ordinance upon practicing attorneys, since he was only practicing law incidentally therein and subject only to payment of the fee for enrollment of nonresident attorneys as provided by the statute, § 605, Crawford & Moses' Digest. Said statute has no application in the instant case, real estate dealers not being included within its terms.

It follows from what has been said that the court erred in rendering its decree, which is reversed, and the cause remanded with directions for further proceedings in accordance with this opinion and not inconsistent with the principles of equity.

JOHNSON, C. J., disqualified and not participating.