

Taxation, local business tax

Number: INFORMAL

Date: March 23, 2011

Mr. James D. Class
City Clerk
City of Dade City
Post Office Box 1355
Dade City, Florida 33526-1355

Dear Mr. Class:

You have asked this office for assistance in determining whether an individual whose business address is listed as his home in Dade City is subject to the city's business tax, when the individual operates a business licensed by the Florida Department of Business and Professional Regulation (DBPR) and has a business license from another city or the county where he also owns property.

The factual scenario you have provided is that an individual living within the city operates a medical physics practice regulated by DBPR. You indicate that the business's articles of incorporation, reports filed with the Division of Corporations, website, business cards, email signature, and local phone voice mail message reflect that the individual's home in Dade City is his place of business, although the individual works outside the city and the county. The individual has apparently procured a business license in another county where he also owns property.

It is unclear whether your duties as clerk for the City of Dade City involve merely the exercise of a ministerial act in collecting the business tax that may be due from a business or if you are authorized to enforce the provisions of the city's business tax ordinance. In light of this ambiguity, the following general comments are provided.[1]

Section 205.042, Florida Statutes, authorizes municipalities to impose a business tax on:

- "(1) Any person who maintains a permanent business location or branch office within the municipality, for the privilege of engaging in or managing any business within its jurisdiction.
- (2) Any person who maintains a permanent business location or branch office within the municipality, for the privilege of engaging in or managing any profession or occupation within its jurisdiction.
- (3) Any person who does not qualify under subsection (1) or subsection (2) and who transacts any business or engages in any occupation or profession in interstate commerce, if the business tax is not prohibited by s. 8, Art. I of the United States Constitution."

Section 205.065, Florida Statutes, however, limits the authority of local governments to impose business taxes, by providing:

"If any person engaging in or managing a business, profession, or occupation regulated by the Department of Business and Professional Regulation has paid a business tax for the current year to the county or municipality in the state where the person's permanent business location or branch office is maintained, no other local governing authority may levy a business tax, or any registration or regulatory fee equivalent to the business tax, on the person for performing work or services on a temporary or transitory basis in another municipality or county. Work or services performed in a place other than the county or municipality where the permanent business location or branch office is maintained may not be construed as creating a separate business location or branch office of that person for the purposes of this chapter. Any properly licensed contractor asserting an exemption under this section who is unlawfully required by the local governing authority to pay a business tax, or any registration or regulatory fee equivalent to a business tax, has standing to challenge the propriety of the local government's actions, and the prevailing party in such a challenge is entitled to recover a reasonable attorney's fee."

Thus, the statute requires only that a municipality refrain from imposing a business tax on a regulated business which: 1) works within the jurisdictional boundaries of the town, but has no permanent business location or branch office there, and 2) has paid an occupational license tax for the current year to another jurisdiction where the business has a permanent business location.[2] If a "regulated" business does not meet either of these requirements, it is still liable for payment of a business tax to the City of Dade City. A review of the legislative history of the act shows that the statute is directed at eliminating the imposition of a business tax on transitory business activity.[3]

The critical determination, therefore, appears to be whether a business has established a permanent business location or branch office within the jurisdiction of a municipality or county, regardless of whether it may hold a business license from another municipality or county. The determination of whether a business has established a permanent business location or branch office in a particular jurisdiction is a mixed question of law and fact that may not be made by this office.[4]

This office has previously been asked to comment on whether certain activity could be considered the establishment of a permanent business location, but has not directly answered the question.[5] In Attorney General Opinion 79-31, this office considered whether an individual selling wares at a flea market or a swap shop was subject to an occupational license tax by the establishment of a permanent business location. The opinion expressed a reluctance to find that such a person had established a permanent business location by engaging in such sales and suggested a consideration of the discussion in *City of Lakeland v. Lawson Music Co., Inc.*,[6] regarding the term "permanent" to guide a municipality in formulating its ordinance imposing an occupational license tax.

In *Lawson Music Co.*, the court began its discussion by noting that minimum contacts may be sufficient to bring a foreign business within the jurisdiction of a local government for taxing purposes. The court found that the leasing of space within a commercial establishment for the installation of coin-operated music and amusement machines was more than minimum contact. In determining whether such installations were permanent, the court then considered that the machines had been in place for eight years and but for their presence in the remote locations, the business would not exist. The court also noted that the term "permanent" does not always

mean lasting forever; rather, in tax cases, permanency may be found where the presence of the business is continuous and not sporadic or temporary.[7]

The Supreme Court of Florida in *Isern v. City of West Miami, et al.*,[8] reviewed the authority of municipalities to impose an occupational license tax on extermination businesses performing services within certain cities, but maintaining their places of business in Dade County municipalities outside the jurisdiction of the ones seeking to collect the tax. The cities argued that the exterminators performed their services entirely upon the premises of the customer within their jurisdiction, thereby establishing a business location. While the conclusion of the Court was based upon the limited ability of a municipality to impose an occupational tax and the requirement that exterminators first obtain state licensure for "each business location," thereby effectively removing the ability of a municipality from making a determination that a business location had been established, the discussion regarding what constitutes a business location is instructive.

In *Isern*, the Court looked to section 482.021(3), Florida Statutes (1969), defining "[b]usiness location" as "[a]ny advertised location in or from which pest control business is solicited, accepted and conducted." The statute presently defines business location in the same terms. The Court further stated that the "temporary presence of a fumigation tent or a spraying truck within a municipality, necessitated merely by a job contract, and under control and operation of properly licensed authorities, does not lay a predicate for the municipality to demand that an occupational license be purchased." [9] The Court concluded that the absence of a relatively permanent presence, such as "offices or places of business," located within a municipality would preclude local licensure. Other examples, provided by the Court, which would establish a permanent presence of a business were "a warehouse or storage facility, or any other facility which would be involved in the operation of [a] business[.]" [10]

The discussions in *Isern* and *Lawson Music Co.* may be helpful in making a determination of whether a business operating within the city has established a permanent business location subject to the city's business tax.

I trust that these informal comments will be of assistance.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tsh

cc: Karla S. Owens, City Attorney

[1] There is an apparent difference of opinion between you (that the individual is operating a business within the city and is subject to the business tax) and the city's attorney (the individual licensed by DBPR maintains a license in another jurisdiction and is, therefore, exempt from the

local business tax). See Letter from Ms. Karla S. Owens, Dade City Attorney, to David A. Hernandez, Ph.D., M.P.H., dated January 5, 2011, and Memorandum to Mr. James D. Class, City Clerk/Finance Director from Ms. Karla S. Owens, City Attorney, dated January 30, 2011.

[2] See Op. Att'y Gen. Fla. 92-74 (1992) (municipality precluded from imposing an occupational license tax on DBPR regulated business that does not establish a permanent business location while working within the municipality, but has an occupational license from another city or county in which the business maintains a permanent business location); *but see* Op. Att'y Gen. Fla. 92-83 (1992) (county may impose occupational license tax on business maintaining a permanent business location within a municipality within the county and possessing an occupational license from such city).

[3] See Final Bill Analysis and Economic Impact Statement of the Florida House of Representative Committee on Regulatory Reform on HB 2341 (enacted as Ch. 92-203, Laws of Fla.). *And see* Final Bill Analysis and Economic Impact Statement for CS/HB 1731 (which contained language identical to that passed in s. 32, Ch. 92-203, Laws of Fla.), Florida House of Representatives Committee on Regulatory Reform, dated April 15, 1992, stating:

"The bill prohibits any local governing authority from levying an occupational tax or an equivalent registration or regulatory fee on a person engaging in a business or profession licensed by the Department of Professional Regulation. The prohibition applies only if the person has paid an occupational license tax and *only if no permanent business location or a branch office is located within the jurisdiction.*" (e.s.)

[4] See "Frequently Asked Questions About Attorney General Opinions;" I. General Nature and Purpose of Opinions at: www.myfloridalegal.com.

[5] See Ops. Fla. Att'y Gen. 76-234 (1976) (doubtful that a typical construction project or projects, standing alone, constitutes a permanent business location) and 79-31 (1979).

[6] 301 So. 2d 506 (Fla. 2d DCA, 1974) (leasing of space within commercial establishments in a taxing municipality for placement of amusement machines constituted a permanent business location within the taxing municipality so as to subject it to that municipality's taxing power). Section 205.0537, Fla. Stat., relating to vending and amusement machines was subsequently created (s. 10, Ch. 93-180, Laws of Fla.), providing that a "business premises where a coin-operated or token-operated vending machine that dispenses products, merchandise, or services or where an amusement or game machine is operated must assure that any required municipal or county business tax receipt for the machine is secured."

[7] *Id.* at 508.

[8] 244 So. 2d 420 (Fla. 1971).

[9] *Isern, supra* at 422.

[10] *Id.* at 423.