

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**JAMES M. CAGLE,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 02-C-3200**

**CITY OF CHARLESTON, WEST  
VIRGINIA, a municipal corporation,**

**And**

**KENNETH GUTHRIE, in his capacity  
as City Collector, City of Charleston,  
West Virginia,**

**Defendants.**

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Come now Defendants the City of Charleston and Kenneth Guthrie, in his capacity as City Collector for the City of Charleston, West Virginia, by and through their undersigned counsel, and move this Court for an Order granting Defendants' Motion for Summary Judgment pursuant to Rule 56(b) of the West Virginia Rules of Civil Procedure. In support of their motion, Defendants submit the attached Memorandum of Law.

Dated: \_\_\_\_\_

Respectfully submitted,

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## **I. TABLE OF AUTHORITIES**

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3. Law v. Monongahela Power Co.  
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4. Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.  
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5. Williams v. Precision Coil, Inc.  
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6. Miller v. City Hospital, Inc.  
197 W.Va. 403, 475 S.E.2d 495 (1996).
7. Hydraulics, Inc. v. Dailey,  
161 W.Va. 94, 239 S.E.2d 605 (1983).
8. Virginia Foods of Bluefield, Inc. v. Dailey  
161 W.Va. 94, 239 S.E.2d 770 (1977).
9. Western Maryland Railway Co. v. Goodwin  
167 W.Va. 804, 282 S.E.2d 240 (1981).
10. Town of Burnsville v. Kwik Pik, Inc.  
185 W.Va. 696, 408 S.E.2d 646 (1991).
11. Neal v. City of Huntington  
151 W.Va. 1051, 158 S.E.2d 223 (1967).
12. Verba v. Ghaphery  
552 S.E.2d 406 (W.Va. 2001)
13. Sale ex rel. Sale v. Goldman  
539 S.E.2d 446 (W.Va. 2000).
14. Citizens Bank of Weston, Inc. v. City of Weston  
209 W.Va. 145, 544 S.E.2d 72 (2001).

15. Washington v. Davis  
426 U.S. 229, 96 S.Ct. 2040 (1976).
16. Lewis v. Casey  
518 U.S. 343, 116 S.Ct. 2174 (1996).
17. Lewis v. Canaan Valley Resorts, Inc.  
185 W.Va. 684, 408 S.E.2d 634 (1991).

## II. INTRODUCTION

The Plaintiff filed suit pursuant to the Uniform Declaratory Judgments Act to challenge various ordinances of the City of Charleston (hereinafter “City”) and the interpretation of these ordinances by City Collector, Kenneth Guthrie. This action was apparently precipitated by his receipt of correspondence from the City stating that plaintiff’s Business & Occupation Privilege Tax (hereinafter “B & O Tax”) returns had been selected for examination, and scheduling a date to perform an audit of those records. Plaintiff claims the City’s B & O Tax ordinances violate the principles of equal protection and equal and uniform taxes. Further, plaintiff claims that the City’s B & O tax has no rational relationship between the tax sought and plaintiff’s business activities and, therefore, the tax is not fairly apportioned. Plaintiff seeks a declaratory judgment that the municipal ordinances of the City identified as Article III, §§ 6-115 and 6-127, as well as Defendants’ interpretation of those ordinances, are invalid and unenforceable. Complaint at 5. Subsequent to the filing of plaintiff’s civil action, the West Virginia Supreme Court of Appeals definitively ruled on the issues plaintiff raises in this case and judgment as a matter of law is now appropriate.

In City National Bank v. City of Beckley, \_\_\_\_ W.Va. \_\_\_\_, 579 SE2d 543 (W. Va. 2003), the West Virginia Supreme Court has affirmed the fact that municipal B & O tax is a tax upon the privilege of conducting business in a particular city. Id. at 6. While gross income is the measure by which the tax is assessed, it is not what is being taxed. Id. Accordingly, the City and Kenneth Guthrie, in his capacity as City Collector, now seek summary judgment and dismissal of the instant case.

### III. STANDARD FOR SUMMARY JUDGMENT

Rule 56(b) of the West Virginia Rules of Civil Procedure states, “A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part thereof.” Subdivision (c) of this rule establishes the standard for determining whether summary judgment is proper and should be granted. Rule 56(c) of the West Virginia Rules of Civil Procedure states, “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The rule governing summary judgment is designed to allow prompt disposition of claims on their merits without lengthy trial, if there is no true dispute as to salient facts or if it only involves questions of law. HN Corp. v. Cyprus Kanawha Corp., 195 W.Va. 289, 465 S.E.2d 391 (1995). A motion for summary judgment should be granted when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning facts is not desirable to clarify the applicable law. Law v. Monongahela Power Co., 210 W.Va. 549, 558 S.E.2d 349 (2001). The party moving for summary judgment does not need to negate elements of claim on which the non-moving party would bear the burden at trial; rather, the non-moving party must produce evidence which is sufficient to enable it to survive a motion for directed verdict at trial. If the non-moving party fails to meet that burden, then the motion must be granted. Powderidge Unit Owners Ass’n v.

Highland Properties Ltd., 196 W.Va. 692, 474 S.E.2d 872. (1996). Speculation without support is not enough to defeat a motion for summary judgment. Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995). Nor are bare allegations sufficient to show there is a genuine issue for trial. Miller v. City Hospital, Inc., 197 W.Va. 403, 475 S.E.2d 495 (1996).

#### IV. **ARGUMENT**

##### **The City of Charleston’s municipal ordinances do not violate the West Virginia or United States Constitutions.**

Plaintiff cannot establish that the City’s challenged ordinances, or the interpretation of those ordinances are unconstitutional in any way. The relevant ordinances <sup>1</sup> do not violate the principles of equal protection, uniform and equal taxation, rational relationship, or fair apportionment. The subject ordinances are consistent with United States and West Virginia law. Accordingly, the City of Charleston, and City Collector Kenneth Guthrie are entitled to judgment as a matter of law.

From its inception, the state B & O tax was recognized as a tax on the privilege of doing business in the state of West Virginia. Hydraulics, Inc. v. Dailey, 161 W.Va. 94, 102, 239 S.E.2d 605 (1983). The West Virginia Supreme Court has clearly stated, “Our Business & Occupation tax is levied on the *privilege* of selling or serving within the state and not on sales themselves, or on income.” Virginia Foods of Bluefield Inc. v. Dailey, 161 W.Va. 94, 239 S.E.2d 770 (1977). (emphasis added). The court further defined what activity qualifies for application of the privilege tax. “Purposive, revenue generating activities in the state are sufficient to render a person liable for taxes.” Western Maryland Railway Co. v. Goodwin, 167 W.Va. 804, 282 S.E.2d 240 (1981).

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<sup>1</sup> Plaintiff challenges § 6-115 and § 6-127 of the City’s Municipal Code.

In 1985, the State of West Virginia began eliminating the state B & O tax for most business activities with an effective date of July 1, 1987. As a result of this change in the state tax structure, municipalities were expressly authorized to continue to assess and collect B & O taxes under W. Va. Code § 8-13-5 (1998), (Supp. 2002), as long as the business activity or occupation which the city sought to tax was subject to the state B & O tax prior to July 1, 1987. Town of Burnsville v. Kwik Pik, Inc., 185 W.Va. 696, 705, 408 S.E.2d 646, 654 (1991).

The practice of law previously fell under the state tax category of “service business or calling not otherwise specifically taxed” found in West Virginia Code § 11-13-2(h). Neal v. City of Huntington, 151 W.Va. 1051, 158 SE2d 223 (1967). Practicing attorneys were previously assessed a state B & O tax prior to the change on July 1, 1987. As early as 1967, the West Virginia Supreme Court ruled that the amended legislative intent that year was to include professionals, including attorneys, within the ranks of those subject to B & O tax assessment. Id. The same tax category entitled “service business or calling not otherwise specifically taxed” previously applicable to state B & O tax now appears as § 6-115 of the City’s Municipal Code. Therefore, municipalities like the City of Charleston are expressly authorized to assess such taxes upon those whose profession is the practice of law, including the Plaintiff.

**A. Equal Protection/Uniform & Equal Taxes**

Plaintiff’s assertion that he is being subjected to taxation which is not imposed upon others in the same class within the practice of law is without merit.

Where economic rights are at issue, the court reviews the classification to determine if there is a rational relationship between the classification and a proper governmental

purpose and whether members of the class are treated equally. When the classification is rational and has the required reasonable relationship to a proper governmental purpose, the statute does not violate equal protection. Verba v. Ghaphery, 552 S.E.2d 406 (W.Va. 2001).

First, the classification of attorneys practicing law within the municipal boundaries of Charleston is a rational one for purposes of the B & O tax assessment. Attorneys are one class of many professions and businesses which pay such a tax to the City.<sup>2</sup> The class is rational because attorneys are part of the group of professionals who work in Charleston, and who also benefit from the services and amenities provided by the City. The classification of professions within the City, including attorneys, bears a reasonable relationship to a proper governmental purpose. Cities have the ability to create ordinances under their general authority to protect and promote the public morals, safety, health, welfare, and good order. Sale ex rel. Sale v. Goldman, 539 S.E.2d 446 (W.Va. 2000). The City uses revenue raised by the B & O tax for the proper governmental purpose of paying for city services and amenities, including police protection, as well as road construction and repair. (*See Affidavit of Kenneth Guthrie, City Collector, attached as Exhibit A*). The B & O tax is certainly permissible under the City's authority to promote the public's welfare and good order and clearly constitutes a proper government purpose.

The Plaintiff asserts that he is subjected to taxes to which other lawyers practicing part time in the City are not subjected. He essentially argues that he may be paying

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<sup>2</sup> Other businesses and professions which are also assessed a municipal B & O tax include, but are not limited to, attorneys; producers of natural resource products, public service businesses, utility businesses, contracting businesses, manufacturing businesses, real estate sales businesses, and businesses selling tangible property. (*See Affidavit of Kenneth Guthrie, City Collector, attached as Exhibit A*.)

B & O tax at a higher rate than other lawyers like him. However, plaintiff is a member of a defined class consisting of professionals, including attorneys, practicing within the City's limits. His objection takes into account people who are not in the same class. Nevertheless, there is no violation of Equal Protection merely because one may pay a greater amount of B & O taxes than others like him.

In 2001, the West Virginia Supreme Court has held there is no violation of equal protection merely because one bank would pay a greater proportion of B & O taxes than other banks. Citizens Bank of Weston, Inc. v. City of Weston, 209 W.Va. 145, 544 S.E.2d 72 (2001). In that case, the Citizens Bank of Weston sued the City of Weston, seeking a declaratory judgment that Weston's B & O tax violated the Equal Protection Clause of the West Virginia and United States Constitutions. Under sections 27-42 of the Weston City Ordinance, banking and other financial institutions were taxed at a rate of .75% of the gross income received from interest, premiums, discounts, dividends, service fees, or charges, commissions, fines, rents, royalties, charges for bookkeeping, data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property. Id. at 147. Citizens Bank of Weston argued that the B & O tax discriminated against Citizens because a local bank such as Citizens would have to pay a disproportionate share of the total tax compared to the branch banks located in the City of Weston. Id. at 148. Citizens Bank argued that the branch banks often transferred assets, or kept their assets at other locations, resulting in a disproportionate tax impact upon Citizens Bank which did not do so. Id. at 148. However, the West Virginia Supreme Court noted that this argument, regarding disparate impact under the Equal Protection Clause, has been considered and rejected by the United States Supreme Court

in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976) and, again, in Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174 (1996).

In Lewis, the United States Supreme Court again concluded, without proof of a discriminatory purpose, a law does not violate the Constitution solely because it has a disproportionate impact. Id. at 374. The West Virginia Supreme Court agreed, adding that the constitutional requirement of equal and uniform taxation means that there shall be uniformity of tax upon all businesses of the same class, and those taxes which are uniform within the same class of business, are not unconstitutional. Citizens Bank, supra.

The same logic holds true for the Plaintiff in the instant case. The same tax is applied identically to all members of “the class”, comprised of professionals and service-oriented business, including attorneys practicing within the Charleston city limits, of which Plaintiff is properly a member. The same rule applies to each member of the class, requiring the same tax, at the same rate, payable at the same time. One percent of such member’s gross income is the *measure* of the tax due. Therefore, the tax is uniform and equal. There is no violation of constitutional requirements.

In this case, the Plaintiff has not presented evidence that he is being subjected to or assessed B & O taxes in a manner requiring him to pay a greater proportion of B & O tax than other attorneys in the class. In fact, the Plaintiff has not been assessed any additional B & O taxes above those which he has already paid to the City of Charleston for the year at issue. The City merely selected his B & O return for an audit to determine if the tax paid by the Plaintiff was correctly computed.

Finally, the Plaintiff has offered no evidence of a discriminatory purpose by the City, therefore; the existence of an alleged disparate impact on the Plaintiff does not

establish a constitutional violation. Even if the Plaintiff were able to present such evidence that he received a higher assessment than other attorneys, this factor alone is insufficient to establish a violation of Equal Protection under the West Virginia and United States Constitutions because it is the privilege of doing business that is taxed. Gross income is only the measure of the amount of taxes due. The Plaintiff is treated the same as the other members of the attorney class and therefore receives equal protection.

**B. Rational relationship**

Plaintiff has further alleged there is no rational relationship between the tax sought and the activity of the Plaintiff. First, it must be clarified that the Plaintiff has not been assessed any additional taxes by the City; therefore no tax is currently being sought from the Plaintiff. However, if the City determined it should assess further B & O taxes upon the Plaintiff, the relationship between Plaintiff's activity as a practicing attorney in the City and the tax assessed is clear and rational, easily meeting constitutional thresholds.

The tax is levied upon attorneys practicing within the City limits in exchange for the privilege of practicing law there. The amount of tax due from such attorneys is measured by a percentage of their gross income derived from the practice of law, here 1%. The relationship connecting the activity of practicing law and the gross income derived from that practice is clearly rational.

Furthermore, the classification is reasonably related to the achievement of a legitimate state purpose. Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 408 S.E.2d 634 (1991). Attorneys working within the City limits pay the tax to support City services from which they benefit. In West Virginia, classifications including those which

involve economic rights are subjected to the most lenient level of scrutiny. Under that scrutiny, the classification will be upheld if it is reasonably related to a legitimate state purpose. Id. at 691. As previously noted herein, the tax is reasonably related to the state purposes of paying for city services and amenities, including police protection, as well as road construction and repair. Paying for City services and amenities are legitimate ways for the state to protect the public morals, safety, health, welfare, and good order. Sale, supra.

Finally, the question of law presented by plaintiff's complaint was clearly settled by the West Virginia Supreme Court in City National Bank v. City of Beckley, 2003 WL 1203320 (W.Va. 2003).<sup>3</sup> In City National Bank, the trial court determined that the underlying banking activity, loan issuance, was the critical factor in resolving the issue of proper taxing situs. The Court succinctly stated,

“Because the tax is a tax on the privilege of doing business, the location of where the subject funds are processed is, in our judgment, an extraneous matter that does not bear on the fundamental issue of the banking business for which the tax is being levied. Although gross income is the measure by which the tax is assessed, it is not what is being taxed, the privilege of conducting the business of banking in the locale of Beckley is the taxable event. The bank's decision to process and handle customer paperwork and payments in a centralized manner does not alter the essence of the banking business, which is subject to a municipal business and organization tax for the privilege of conducting business within a particular city.” Id. at 548.

In a nutshell, the bank's decision to centrally process payments in other locations outside of the city of Beckley, cannot be used as a mechanism to avoid the assessment of B & O taxes by the City of Beckley.

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<sup>3</sup> A copy of the West Virginia Supreme Court's opinion is attached for the Court's convenience.

The B & O tax is levied to tax the privilege of conducting business in a particular city. Therefore, much like the bank, a practicing attorney's decision to perform certain tasks or services related to his practice, in locations outside the City of Charleston, cannot be used to avoid the assessment of taxes by the City. The Plaintiff's claim that his income includes activities which are substantially outside the geographical confines of Charleston and Kanawha County, including activities outside of the State of West Virginia does not overcome the proper application of B & O taxes to those activities which are fundamental to and make up the essential essence of the practice of law in Charleston, West Virginia.

**C. Fair apportionment**

Among the Plaintiff's claims, he asserts that the tax which is sought is not fairly apportioned and violates the West Virginia Constitution, Article X, Section 1. Section 8-13-5(e) of the W. Va. Code addresses how a municipal B & O tax is to be apportioned between two or more municipalities.

“Whenever the business activity or occupation of the taxpayer is engaged in or carried on in two or more municipalities of this state, the amount of gross income, or gross proceeds of sales, taxable by each municipality shall be determined in accordance with such legislative regulations as the tax commissioner may prescribe. It being the intent of the Legislature that multiple taxation of the same gross income, or gross proceeds of sale, under the same classification by two or more municipalities shall not be allowed.” West Virginia Code § 8-13-5(e).

The Plaintiff does not allege that he has been subjected to double taxation by paying B & O tax in the City of Charleston, in addition to other municipalities, stemming from the same activity. Therefore, the apportionment mechanism in West Virginia Code § 8-

13-5(e) is inapplicable in this case because the required factual scenario of two taxing municipalities is not present. City National Bank v. City of Beckley, *supra*.

However, even if the Plaintiff can show that he is paying both B & O tax in the City of Charleston and one or more additional municipalities stemming from the same business activity, §110-26-1 of the West Virginia Legislative Regulations provides guidance regarding how the municipal business and occupation tax is to be administered. Pursuant to Part 11.3.6, a fair method of apportionment is provided, which the taxpayer may apply to eliminate that problem. Part 11.3.6 states,

“Persons engaged in a business taxable under the service classification and who maintain places of business both within and without the municipality which contribute to the performance of a service, shall apportion to the municipality that portion of gross income derived from services rendered by them in that municipality. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to each the proportion of total income which the cost of doing business within each bears to the total cost of doing business within and without each municipality.”

Therefore, if the Plaintiff establishes in the future that he is being double taxed, the West Virginia Legislative Regulations section above currently provides a remedy.

Charleston City Ordinance Section 6-115 conforms to this legislative regulation regarding application of the B & O tax. Charleston City Ordinance Section 6-115 states, “Gross income or gross proceeds of sales derived from services within West Virginia *which is not taxed or taxable by any other municipality* are included in the measure of Charleston business and occupation tax if the services are either directed from a Charleston location or the taxpayer’s principal office is located in Charleston. Without limiting the generality of the foregoing, when a taxpayer has only one office location and this office is located within the municipal limits of the City of Charleston *and its activities elsewhere in West Virginia are neither taxed nor taxable by*

*another municipality*, the gross income or gross proceeds from those activities are taxable by the City of Charleston.”

The Plaintiff has not received an assessment, which makes his assertions of unfair apportionment unclear. However, as a result of the apportionment methods provided within the West Virginia Legislative Regulations and the Charleston City Ordinances, the Plaintiff’s claims regarding unfair apportionment are without support. Even if the Plaintiff can show that he has been required to simultaneously pay B & O taxes in the City of Charleston and one or more additional municipalities based upon the same activities stemming from his practice of law, remedies exist within the City of Charleston’s ordinances for the Plaintiff to resolve that dilemma.

**D. Disclosure of Tax Information**

Finally, Plaintiff alleges that Article III, Section 6-127 of the ordinances of the City of Charleston allowing reciprocal exchange of tax return information between government agencies is illegal. On the contrary, reciprocal exchange of tax information does not violate expectations of privacy or other Constitutional rights of the Plaintiff or any other party. Article III, Section 6-127 must be read together with Sections 6-125, addressing secrecy of tax returns and 6-126 addressing the unlawful release of tax information and related penalties. These sections provide protection for taxpayers regarding the release of sensitive tax information. Under §§ 6-125 and 6-126, tax information is used for the significant and limited government purpose of determining the accuracy of B & O taxes paid by the Plaintiff and collecting such taxes where they are properly due. The information is not otherwise released or available in any form. (*See Affidavit of Kenneth Guthrie, City Collector, attached as Exhibit A*). This is a proper, permissible use of such information which does not violate

any West Virginia or United States law cited by the Plaintiff. Thus, Plaintiff's assertion that expectations of privacy are violated is unfounded.

## **V. CONCLUSION**

Based upon the foregoing, Defendants City of Charleston and City Collector, Kenneth Guthrie now move this court for an order granting Defendants' Motion for Summary Judgment pursuant to Rule 56(b) of the West Virginia Rules of Civil Procedure. As stated herein, a motion for summary judgment should be granted when it is evident that there is no genuine issue of material fact to be tried and that further investigation of the facts is not necessary to reveal the applicable law. Neither speculation, nor bare allegations without support are sufficient to create genuine issues for trial and defeat a motion for summary judgment.

Plaintiff cannot show, as a matter of law, that the challenged ordinances violate principles of equal protection, uniform and equal taxes, rational relationship to activity, or fair apportionment. The exchange of tax information does not violate expectations of privacy where it has a significant and limited government purpose, and penalties are in place disallowing unlawful disclosure. No genuine issues of material fact exist for resolution by this Court, therefore, Defendants are entitled to judgment as a matter of law upon all of the Plaintiff's claims, in their entirety.

For the reasons stated herein, Defendants City of Charleston and City Collector Kenneth Guthrie respectfully request that this Court grant them each Summary Judgment in this matter.

Respectfully submitted,

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