

Memorandum

To : Honorable Betty T. Yee, Chairwoman
Honorable Judy Chu, Ph.D., Vice Chairwoman
Honorable Bill Leonard, Member, Second District
Honorable Michelle Steel, Member, Third District
Honorable John Chiang, State Controller
Ms. Marcy Jo Mandel, Deputy State Controller

Date : May 15, 2007

From : Todd C. Gilman, Chief 
Taxpayers' Rights and Equal Employment Opportunity Division

Subject : **Follow-up to March 20, 2007 Taxpayers' Bill of Rights Hearings
Business and Professions Code Section 16102 (Veterans Exemption)**

At the March 20, 2007 Business Taxpayers' Bill of Rights Hearings Mr. William Connell requested that the Board of Equalization revise its interpretation of Business and Professions Code section (Section) 16102, which he contends creates an exemption under the Sales and Use Tax Law for veteran retailers. At the Hearing, the Members asked that I work with Board staff to research this request and to provide the following information:

- The number of veterans that are itinerant vendors who would be affected if the proposed change in interpretation were to be made;
- The legislative history of Section 16102; and
- An analysis of the 1915 court case, *In re Gilstrap*, mentioned by Mr. Connell in support of his interpretation.

Attached for your consideration are reports from Mr. Joe Fitz, Chief Economist, and Mr. Randy Ferris, Tax Counsel IV. Highlights of their reports are as follows:

Number of Veterans Affected

Mr. Fitz provided estimates of the numbers of veterans affected and the related revenue impact of the proposed exemption interpretation of Section 16102 under two alternative interpretations: (1) an exemption for taxable sales made by veteran sole proprietors who are itinerant vendors, and (2) an exemption for taxable sales made by all veteran sole proprietors. Mr. Fitz estimates under the first interpretation that there are about 1,000 veteran sole proprietors, married co-owners or registered domestic partners who are itinerant vendors who hold sales and use tax permits, and that the related revenue impact would be \$14.5 million. The number of veterans affected under the second interpretation is 5,600 and the related revenue impact is estimated to be approximately \$272.6 million.

Legislative History, Case Law, Implications under the Sales and Use Tax Law

Mr. Ferris provided an analysis of the relevant legislative history of Section 16102 and its related statutory antecedents, and provided a discussion of all relevant case law including *In re Gilstrap* (1915) 171 Cal. 108 (*Gilstrap*) and *Brooks v. County of Santa Clara* (1987) 191 Cal.App.3d 750 (*Brooks*). Based on his analyses, Mr. Ferris opined that “. . . there does not appear to be an adequate basis for the Board to conclude that Section 16102 establishes an exemption for veteran retailers under the Sales and Use Tax Law. . . . In short, Section 16102’s exemption appears to be limited to license taxes and fees.” He also notes that even if Section 16102 could be read to create a sales tax exemption, it would not appear to relieve veterans of their use tax collection obligations: “Veterans would still owe a debt (not a tax or a fee) to California for failure to collect the use tax their customers would owe based on their customers’ purchases of goods from them in California.”

Mr. Ferris also points out that if the Board were to rule that Section 16102 creates an exemption applicable to both the sales and use taxes, the exemption could not be limited to itinerant veteran-retailers, pursuant to the *Brooks* opinion, which held that veterans selling from fixed locations and through agents and employees can qualify for Section 16102’s exemption. Further, Mr. Ferris notes that if the Board ruled that Section 16102’s exemption is *not* limited to license taxes and fees, it would appear that the exemption would also have to apply to other special taxes and fees administered by the Board that are associated with sales of nonalcoholic goods, including fuel and cigarette and tobacco products taxes.

I hope the attached reports are helpful and have adequately responded to your requests. If you require additional information about the estimates of number of affected veterans and revenue estimates, please contact Mr. Joe Fitz at 916-323-3802. If you have questions about the legal analysis, you may contact Mr. Randy Ferris at 916-322-0437.

Approved:


Ramon J. Hirsig
Executive Director

TCG: ls

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Attachments

cc (with attachments):

- Mr. Ramon J. Hirsig (MIC 73)
- Ms. Kristine Cazadd (MIC 83)
- Ms. Margaret S. Shedd (MIC 66)
- Ms. Randie L. Henry (MIC 43)
- Acting Deputy Director, Property and Special Taxes Department (MIC 63)
- Mr. Dave Hayes (MIC 67)
- Mr. Randy Ferris (MIC 82)
- Mr. Joe Fitz (MIC 67)



Proposed Application of Section 16102 of the California Business and Professions Code

Application of Section 16102 of the California Business and Professions Code to the sales tax would enable U.S. veteran sole proprietors to sell taxable goods (except alcoholic beverages) without paying the sales tax. Two alternative interpretations are: (1) taxable sales made by veteran sole proprietors who are itinerant vendors, or (2) taxable sales made by all veteran sole proprietors.

Background, Methodology, and Assumptions

(1) Itinerant Vendor Sole Proprietor Veterans. Per our request the Sales and Use Tax Department tabulated taxable sales made by itinerant vendors. California taxable sales by itinerant vendors were about \$6.752 billion in 2005. Sales and Use Tax Department staff estimates that about 95 percent of these sales were related to sales taxes and 5 percent were related to use taxes. Data from the U.S. Bureau of Economic Analysis indicate that about 5 percent of the value of these sales were alcoholic beverages if we assume all these sales were made by retailers. Sales and Use Tax Department records indicate that about 31 percent of taxable sales made by itinerant vendors were from sole proprietors, married co-owners or registered domestic partners combined. About 9.4 percent of U.S. veterans living in the nation reside in California, and about 12.5 percent of U.S. self-employed individuals are veterans. California has about 12 percent of U.S. population. These data imply that about 9.7 percent of self-employed Californians are veterans.

Table 1 shows how the data discussed above were used to calculate sales that would no longer be subject to taxation under this proposal. As shown in the table, we believe that about \$183 million in taxable sales would no longer be subject to sales and use taxes under this proposal. We estimate that there are about 1,000 veteran sole proprietors, married co-owners or registered domestic partners that are itinerant vendors who hold sales and use tax permits.

(2) All Sole Proprietor Veterans. California taxable sales were about \$537 billion in 2005. Sales and Use Tax Department staff estimate that about 97 percent of these sales were related to sales taxes and 3 percent were related to use taxes. Data from the U.S. Bureau of Economic Analysis indicate that about 3 percent of the value of these sales were alcoholic beverages. Sales and Use Tax Department records indicate that about 7 percent of taxable sales were from sole proprietors, married co-owners or registered domestic partners combined. Again we will assume that about 9.7 percent of self-employed Californians are veterans.

Table 2 shows how the data discussed above were used to calculate sales that would no longer be subject to taxation under this proposal. As shown in the table, we believe that about \$3.433 billion in taxable sales would no longer be subject to sales and use taxes under this proposal. We estimate that there are about 5,600 veteran sole proprietors, married co-owners or registered domestic partners that hold sales and use tax permits.

Table 1	
Itinerant Vendor Sole Proprietor Veterans	
Section 16102 - Veterans Exemption	
	Millions of Dollars
Taxable Sales in 2005 by Itinerant Vendors	\$6,752
Proportion Related to the Sales Tax	95.0%
Estimated Taxable Sales (Sales Tax Only)	\$6,413
Estimated Alcohol Sales % of Taxable Sales ^{1/}	4.8%
Estimated Nonalcohol Sales % of Taxable Sales	95.2%
Estimated Nonalcohol Taxable Sales	\$6,106
Percent Sales by Sole Proprietors, Married Co-Owners and Domestic Partners	30.7%
Estimated Sole Proprietors Taxable Sales	\$1,873
Estimated Percent Veteran Sole Proprietors ^{2/}	9.7%
Estimated Veteran Sole Proprietors Taxable Sales Relevant to Section 16102	\$183
<p>1/ Source: U.S. Bureau of Economic Analysis. 2/ Sources: <i>The Small Business Economy</i>, December 2006, U.S. Small Business Administration and the <i>2007 U.S. Statistical Abstract</i>, U.S. Census Bureau.</p>	

Table 2	
All Sole Proprietor Veterans	
Section 16102 - Veterans Exemption	
	Millions of Dollars
Total 2005 Taxable Sales	\$536,904
Proportion Related to the Sales Tax	97%
Estimated Taxable Sales (Sales Tax Only)	\$520,797
Estimated Alcohol Sales Percent of Taxable Sales ^{1/}	3.4%
Estimated Nonalcoholic Sales Percent of Taxable Sales	96.6%
Estimated Nonalcoholic Taxable Sales	\$503,300
Percent Sales by Sole Proprietors, Married Co-Owners and Domestic Partners	7.0%
Estimated Sole Proprietors Taxable Sales	\$35,231
Estimated Percent Veteran Sole Proprietors ^{2/}	9.7%
Estimated Veteran Sole Proprietors Taxable Sales Relevant to Section 16102	\$3,433
<p>1/ Source: U.S. Bureau of Economic Analysis. 2/ Sources: <i>The Small Business Economy</i>, December 2006, U.S. Small Business Administration and the <i>2007 U.S. Statistical Abstract</i>, U.S. Census Bureau.</p>	

Revenue Summaries

(1) Itinerant Vendor Sole Proprietor Veterans. The annual revenue loss from applying California Business and Professions Code Section 16102 to the sales tax is \$14.5 million, distributed as follows:

	<u>Revenue Effect</u>
State loss (5%)	\$9.1 million
Fiscal Recovery Fund loss (0.25%)	<u>\$0.5 million</u>
State loss	\$9.6 million
<u>Local & district loss</u>	
Local loss (2.00%)	3.6 million
Special District loss (0.69%)	<u>1.3 million</u>
Local loss	\$4.9 million
Total loss	\$14.5 million

(2) All Sole Proprietor Veterans. The annual revenue loss from applying California Business and Professions Code Section 16102 to the sales tax is \$272.6 million, distributed as follows:

	<u>Revenue Effect</u>
State loss (5%)	\$171.6 million
Fiscal Recovery Fund loss (0.25%)	<u>8.6 million</u>
State loss	\$180.2 million
<u>Local & district loss</u>	
Local loss (2.00%)	68.7 million
Special District loss (0.69%)	<u>23.7 million</u>
Local loss	\$92.4 million
Total loss	\$272.6 million

Preparation

Joe Fitz, Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. Mr. Dave Hayes, Manager, Research and Statistics Section, Legislative and Research Division and Mr. Todd Gilman, Taxpayers' Rights Advocate, reviewed this revenue estimate. For additional information, please contact Mr. Fitz at (916) 323-3802.

Current as of May 10, 2007.

M e m o r a n d u m

To : Mr. Todd Gilman, Chief
Taxpayers' Rights and Equal Opportunity Division
(MIC:70)

Date: May 8, 2007

From : Randy Ferris
Tax Counsel IV (MIC:82)

Telephone: (916) 322-0437

Subject: Business and Professions Code Section 16102

Your March 23, 2007, memorandum to various Board department heads included a request that the Legal Department provide you with certain information related to Business and Professions Code section (Section) 16102 and whether it creates an exemption under the Sales and Use Tax Law for veteran retailers. Specifically, you have asked for an analysis of *In re Gilstrap* (1915) 171 Cal. 108 (*Gilstrap*), a case mentioned during remarks at the Board's Business Taxpayers' Bill of Rights hearing on March 20, 2007. You also have asked for an analysis of other relevant case law, including *Brooks v. County of Santa Clara* (1987) 191 Cal.App.3d 750 (*Brooks*). Per your request, copies of the *Gilstrap* and *Brooks* opinions are attached for your reference. Further, you have asked for an analysis of the legislative history of Section 16102 and its related statutory antecedents.

This memorandum serves to provide the requested analyses and will be organized as follows. First, I will analyze the relevant legislative history. Next, I will analyze the relevance of *Gilstrap* and other relevant case law, including *Brooks*. Finally, I will discuss whether the legal authorities analyzed provide an adequate basis for the Board to rule that Section 16102 establishes an exemption for veteran retailers under the Sales and Use Tax Law and, if such were the case, what the extent of this exemption would be.

Legislative History

Section 16102, which contains the veterans' exemption at issue, was codified in the Business and Professions Code in 1941. (Stats. 1941, ch. 61, § 1, pp. 718-719.) In the same 1941 legislative session, Section 16102 was amended to add the requirement that, for the exemption to apply, the goods sold must be "owned by" the veteran seeking the exemption. (Stats. 1941, ch. 646, § 646, p. 2101.) As so amended, Section 16102 provides:

"Every soldier, sailor or marine of the United States who has received an honorable discharge or a release from active duty under honorable conditions from such service may hawk, peddle and vend any goods, wares or merchandise owned by him, except spirituous, malt, vinous or other intoxicating liquor,

without payment of any license, tax or fee whatsoever, whether municipal, county or State, and the board of supervisors shall issue to such soldier, sailor or marine, without cost, a license therefor.”

The Legislature has not enacted any further amendments to Section 16102, and, thus, the text of this statute, as quoted above, has remained unchanged since 1941. The key phrase of the exemption has only one inserted comma, found between the words “license” and “tax” (i.e., “without payment of any license, tax or fee whatsoever”).

Section 16102’s earliest statutory antecedent appears to be from a noncodified 1893 act to “establish a uniform system of county and township governments” (County Government Act of 1893). The County Government Act of 1893 enumerates various powers the Legislature conferred on the counties. As relevant to the instant analysis, subdivision 27 of section 25 of the County Government Act of 1893 provides that a county has the power:

“To license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, and all shows, exhibitions, and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise; *provided*, that every honorably discharged soldier, sailor, or marine of the United States, who is unable to obtain a livelihood by manual labor, shall have the right to hawk, peddle, and vend any goods, wares, or merchandise, except spirituous, malt, vinous, or other intoxicating liquor, without payment of any license, tax, or fee whatsoever, whether municipal, county, or State; and the Board of Supervisors shall issue to such soldier, sailor, or marine, without cost, a license therefore. A certificate of disability by a surgeon of the United States Army or Navy shall be sufficient proof of such disability, and a certificate of honorable discharge from the United States Army or Navy, or an exemplified copy thereof, shall be sufficient proof of such service and honorable discharge, and upon presentation a license shall be issued as aforesaid.”

(Stats. 1893, ch. 234, § 25, subd. 27, p. 358 [emphasis in original].) It should be noted that the key phrase of the exemption has a comma inserted between the words “license” and “tax” and between “tax” and “or” (i.e., “without payment of any license, tax, or fee whatsoever”). The notes published by the state printer in the official bound volume of the 1893 legislative session (i.e., the “reference comments” in the margin that summarize the subject matter of each legislative enactment) for the above-quoted provision state: “Licenses” and “Union sailors, soldiers, etc.” (*Ibid.*) However, the express language of the statute does not limit the exemption to Civil War veterans.

Significantly, subdivision 5 of section 4 of the County Government Act of 1893 conferred on counties the power “[t]o levy and collect such taxes, for purposes under its exclusive

jurisdiction, as are authorized by law.” (Stats. 1893, ch. 234, § 4, subd. 5, p. 347.) As discussed further below, the power to raise revenue through license taxes was apparently a new (and, ultimately, short-lived) power for counties. Power to impose or assess various other taxes (e.g., property taxes, a “tax” on dog owners to mitigate damage by dogs to sheep, etc.) was also conferred on the counties, but without any mention of a veterans’ exemption. (See, e.g., Stats. 1893, ch. 234, § 25, subds. 13 & 29, pp. 353 & 358 [conferring property tax and “dog tax” powers, respectively].) It should also be noted that, unlike Section 16102, the exemption originally enacted in 1893 was limited to disabled veterans who were unable to make a living by manual labor.

Similar language to this above-quoted portion of the County Government Act of 1893 was re-enacted as subdivision 25 of section 25 of the County Government Act of 1897. The County Government Act of 1897 was apparently enacted to supersede the County Government Act of 1893. With one minor capitalization difference (namely, the word “state” is not capitalized in the 1897 provision), the first sentences of the 1893 and 1897 versions are identical, including the punctuation of the key phrase of the exemption (i.e., “without payment of any license, tax, or fee whatsoever”). (See Stats. 1897, ch. 277, § 25; subd. 25, p. 465.) However, the second sentence of the 1893 version (which begins “A certificate of disability . . .”) was deleted and replaced with the following sentence:

“The [Board of Supervisors] may provide that any such license shall cease upon the non-payment of such tax, and any person, firm, or corporation transacting or carrying on such business, without such license whenever prescribed, is guilty of a misdemeanor.”

(*Ibid.*) The official notes in the margin of the 1897 version state: “Issue licenses” and “No license tax on soldiers and sailors.” (*Ibid.*)

Both the 1893 and 1897 provisions were enacted to empower counties to impose license taxes for both regulatory and revenue-raising purposes.¹ (See *Ex parte Pfirrmann* (1901) 134 Cal. 143 (*Pfirrmann*)). Under these authorities, a county could impose license taxes to regulate its unincorporated areas, but not its incorporated areas, and could impose license taxes for revenue purposes in both its incorporated and unincorporated areas. (See *Pfirrmann, supra*, at p. 146.) However, honorably discharged, disabled veterans were provided an exemption from such license taxes with respect to making retail sales of nonalcoholic goods. Just like the County Government Act of 1893, the County Government Act of 1897 also empowered counties to impose and assess various other taxes and fees (e.g., property taxes, “tax” on dog owners, etc.). Again, no veterans’ exemption was included in any of the other separate provisions pertaining to other taxes and fees.

¹ Please note: The distinctions often observed today between “taxes” and “fees” had apparently not yet been fully refined by California’s lawmakers and courts.

In 1901, the Legislature repealed the power conferred on counties to impose license taxes for revenue purposes by enacting Political Code section 3366. This abrogation, which affected other local governments besides counties, is set forth in the opening words of former Political Code section 3366:

“Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license”

(Stats. 1901, ch. 209, § 1, pp. 635-636.) After limiting the scope of license taxes to regulation only, the remainder of Political Code section 3366 is substantially similar to the relevant language from the County Government Acts of 1893 and 1897, including the provision of an exemption for honorably discharged, disabled veteran retailers. (See *ibid.*) However, the key phrase of the exemption does not contain a comma between the words “license” and “tax” or between “tax” and “or” (i.e., “without payment of any license tax or fee whatsoever”). The official notes in the margin for the 1901 enactment state: “License tax, upon whom may be imposed.” (*Ibid.*)

As a result of this 1901 legislation, in an effort to ease the general tax burden on businesses in the state, cities established under the General Municipal Corporation Act (i.e., cities not created by special constitutional or legislative charters) and counties could only impose license taxes for regulatory (but not revenue) purposes within their respective jurisdictions. (See *Pfirmsmann, supra*, 134 Cal. at p. 149; *City of Sonora v. Curtin* (1902) 137 Cal. 583; *Ex parte Braun* (1903) 141 Cal. 204; *Ex parte Helm* (1904) 143 Cal. 553; *County of Plumas v. Wheeler et al.* (1906) 149 Cal. 758.)

Political Code section 3366 was amended numerous times over the years and, in 1941, was reorganized and codified as Business and Professions Code sections 16000 through 16003, which pertain to the licensing power of cities. At present, Business and Professions Code section 16001, which provides the veterans’ exemption from license taxes imposed by cities, still does not have a comma between the words “license” and “tax” or between “tax” and “or” in the key phrase of the exemption (i.e., “without payment of any license tax or fee whatsoever”). (Bus. & Prof. Code, § 16001.)

In 1905, the Legislature enacted a noncodified statute that provided a similar, but independent, veterans’ exemption (1905 Exemption Act). The 1905 Exemption Act provided:

“Section 1. That on and after the passage of this act all ex-Union soldiers and sailors, honorably discharged from the military or marine service of the United States, shall be permitted to vend, hawk, and peddle goods, wares, fruits or merchandise not prohibited by law, in any county, town, village, incorporated city or municipality within this state without a license; *provided*, said soldier or sailor

is engaged in the vending, hawking and peddling of the goods, wares, fruits or merchandise for himself only.

“Sec. 2. Upon the presentation of his certificate of discharge to the license collector of any county, town, village, incorporated city or municipality in this state, and showing proofs of his identity as the person named in his certificate of honorable discharge, the license collector shall issue to said ex-Union soldier or sailor a license, but such license shall be free, and said collector shall not collect or demand for the county, town, village, incorporated city or municipality any fee therefor; *provided*, that nothing in this act shall authorize said soldiers or sailors to sell intoxicating liquors.

“Sec. 3. This act shall take effect and be in force from and after its passage.”

(Stats. 1905, ch. 297, §§ 1-3, pp. 307-308 [emphasis in original].) It should be noted that the 1905 Exemption Act does not make any mention of *state* license taxes or fees. Nothing in the legislative history suggests that the 1905 Exemption Act was ever codified or repealed. However, because this exemption was expressly limited to certain Civil War veterans (i.e., ex-Union soldiers and sailors), its present effect would appear to be moot.

In 1907, the Legislature enacted Political Code section 4041, which superseded the County Government Act of 1897. (Stats. 1907, ch. 282, § 1, p. 370.) As enacted, subdivision 22 of Political Code section 4041 contains the same substantive language with regard to the veterans' exemption from license taxes contained in the two prior noncodified versions, including the insertion of a comma between the words “license” and “tax” but not between “tax” and “or” (i.e., “without payment of any license, tax or fee whatsoever”). The 1907 version also reflects changes that harmonize with the limitations imposed on license taxes for revenue purposes that had been established by Political Code section 3366 in 1901. As with the two prior noncodified versions, in addition to license taxes, Political Code section 4041 empowered the counties to impose and assess other taxes and fees. Again, a veterans' exemption was only codified in the subdivision pertaining to license taxes.

Between 1907 and 1929, various amendments were made to Political Code section 4041 that have no effect on the analysis herein. In 1929, however, the Legislature amended Political Code section 4041 to create separate statutory sections in place of the various subdivisions of the statute. (Stats. 1929, ch. 755, §§ 1-27, pp. 1450-1463.) Consequently, the subdivision addressing the power to impose license taxes, and the related veterans' exemption, was codified as Political Code section 4041.14. (Stats. 1929, ch. 755, § 15, p. 1457.) While the 1929 version made one significant change (namely, like the 1905 Exemption Act, the 1929 version of the exemption was no longer limited to disabled veterans), in all other respects the substantive language of the exemption remained unchanged, including the insertion of a comma only between the words “license” and “tax” (i.e., “without payment of any license, tax or fee whatsoever”). In 1935, an amendment authorizing counties once again to impose, on a limited

basis, revenue-raising license taxes (specifically, license taxes on itinerant vendors) was added to Political Code section 4041.14. (Stats. 1935, ch. 138, § 2, p. 489.)

As indicated above, in 1941, Political Code section 4041.14 was reorganized and codified, in a chapter pertaining to licensing by counties, as sections 16100 through 16103 of the Business and Professions Code. (Stats. 1941, ch. 61, § 1, pp. 718-719.) Section 16102, which contains the veterans' exemption at issue, was also amended to provide the additional requirement that, for the exemption to apply, the goods sold had to be "owned by" the veteran. (Stats. 1941, ch. 646, § 2, p. 2101.) This additional requirement is similar to the requirement from the 1905 Exemption Act that a veteran qualified for exemption only if he was selling "for himself." Section 16104, which also pertains to county licensing powers and provides an exemption not relevant here, was added in 1953. As quoted above, Section 16102 provides the current veterans' exemption from county license taxes. As previously stated, Section 16102 has not been amended since 1941.

Relevant Case Law

Only two published California appellate cases have any discussion directly relevant to the veterans' exemption statutes discussed above. The first of these two cases, *Gilstrap, supra*, 171 Cal. 108, was decided by the California Supreme Court in 1915. In *Gilstrap*, a person who was not an ex-Union soldier or sailor of the Civil War, filed a petition for writ of habeas corpus. The petitioner was held in jail in Stanislaus County for failure to pay a *state* license tax (i.e., *not* a county or municipal license tax) imposed on itinerant drug vendors. This state license tax was created by statute in 1903, and amended in 1907 and 1909, to provide additional funding for the state board of pharmacy to regulate the sale of drugs and the compounding of prescriptions in California. This state license tax did not preempt cities and counties from imposing similar license taxes for their own regulatory purposes. Additionally, the 1907 amendment expressly provided that the Legislature, in enacting this state license tax, had no intent to repeal the Civil War veterans' exemption set forth in the 1905 Exemption Act with respect to county or municipal license taxes.

In discharging the writ and remanding the petitioner to custody, the *Gilstrap* court held, among other things, that the 1907 amendment to the statute creating the state license tax in question, which referenced the 1905 Exemption Act, was irrelevant and could not be used to argue that the state license tax violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. As discussed below, the court's out-of-hand dismissal of this argument may suggest that the court believed that no veterans' exemption existed for the state license tax in question. (See *Gilstrap, supra*, 171 Cal. at pp. 119-120.)

As will be recalled from the discussion above, the 1905 Exemption Act, unlike the statutory antecedents of Section 16102, makes no mention of state license taxes. Noting that the 1905 Exemption Act is silent about state license taxes, the *Gilstrap* court opined: "In our opinion it is not necessary to a decision on the merits of the pending writ to determine the

constitutionality of the exemption act for the reason that the legislature did not intend that it should have any application to a license tax imposed by the state.” (*Gilstrap, supra*, 171 Cal. at p. 119.) The court reached this conclusion because the 1905 Exemption Act “applies only to a license tax of ‘any county, town or village, incorporated city or municipality in the state of California’” (i.e., not to state license taxes). (*Ibid.*) Accordingly, the court held that the 1905 Exemption Act “cannot, therefore, be held to apply to persons required to pay the state license tax. [¶] . . . [¶] It was clearly the intention of the legislature to limit the application of the Exemption Act of 1905 and the proviso of 1907 to local laws and ordinances. They have no other scope or purpose.” (*Id.* at p. 120.)

The *Gilstrap* court makes no mention or analysis regarding whether the reference to state license taxes in the then existing statutory antecedents to Business and Professions Code sections 16001 and 16102 (i.e., Political Code sections 3366 and 4041, respectively) had any relevance to the petitioner’s equal protection argument. In light of the fact that these statutory antecedents, and Sections 16001 and 16102 themselves, have always been chaptered in code sections dealing with city and county licensing powers, this omission could be viewed as casting at least some doubt on whether the reference to state license taxes in Sections 16001 and 16102 has, or ever had, any actual legal vitality. However, it could also be argued that the court merely limited its analysis to the arguments raised by the petitioner and declined to take initiative to examine other potentially relevant statutes.

It should also be noted that, had the court reached the issue, nothing in the *Gilstrap* opinion suggests that the court had any concerns regarding whether license tax exemptions for veterans could pass constitutional muster. It is well settled that special tax exemptions for veterans are constitutional. (See, e.g., *Allied Architects’ Assn. of Los Angeles v. Payne* (1923) 192 Cal. 431, 436.)

The second case of relevance is *Brooks, supra*, 191 Cal.App.3d 750. In *Brooks*, the California Court of Appeal held that Section 16102 exempted an honorably discharged veteran from having to pay county license and permit fees to obtain (or renew) a health permit and license he needed to sell nuts in the county. The County of Santa Clara had improperly attempted to impose the license and permit fees on the veteran in question pursuant to Health and Safety Code section 510.

The *Brooks* court affirmed that “Section 16102 is one of a series of Business and Professions Code provisions for business licensing *at the local level.*” (*Brooks, supra*, 191 Cal.App.3d at p. 755 [emphasis added].) The court also opined that the insertion of the comma in the key phrase of Section 16102, discussed above, between the words “license” and “tax” is “anomalous,” “insignificant” and “inadvertent.” (*Id.* at p. 756.) Further, the court opined that, to the extent that the county fees in question could be viewed as “state” fees because they were imposed to recover costs for enforcement of state health food laws, the reference to state license taxes in Section 16102 sufficed to make the exemption applicable under the facts in *Brooks*. (*Id.* at p. 757.) Additionally, the court held that Section 16102’s veterans’ exemption was not limited

to itinerant veteran-retailers, but was “broad enough to encompass sales from fixed locations.” (*Id.* at pp. 757-759). Finally, the court held that this exemption applied to both sales made by the veteran personally and by his or her agents and employees acting on behalf of the veteran. (*Id.* at p. 760.)

Although not directly relevant to Section 16102, one additional published opinion, pertaining to a veterans’ exemption for property taxes, perhaps warrants at least some discussion. In *Lockhart v. Wolden* (1941) 17 Cal.2d 628 (*Lockhart*), the California Supreme Court affirmed that a property tax exemption for veterans, first enacted by constitutional amendment in 1911, applied to female veterans, as well as male veterans. (See former Cal. Const., art. XIII, § 1 1/4 [the current veterans’ property tax exemption is Cal. Const., art. XIII, § 3(o)].) Some have argued that the purpose of Section 16102 was to remove veterans from California’s “revenue stream” (i.e., that Section 16102’s exemption is not limited to county, municipal and state license taxes, but applies to all county, municipal and state taxes and fees related to veterans’ qualified selling activities). Since the statutory antecedents of Section 16102 were already on the books, it is potentially relevant that the *Lockhart* court did not mention the possibility that veterans had a limited property tax exemption (for their property related to their qualified selling activities) prior to the 1911 constitutional amendment. As the state franchise and income taxes and sales and use taxes were not enacted until approximately 30 years later, in 1911, property taxes represented the main “revenue stream” for government funding. Given that the statutory antecedents to Section 16102 do not appear to have exempted veterans from property tax, and that, as held by the *Brooks* court, Section 16102’s exemption applies to sales made from fixed locations (i.e., from locations potentially subject to property tax), a conclusion that Section 16102 and its statutory antecedents could exempt veterans from income tax and sales and use taxes related to their qualified selling activities (under an “exclusion-from-revenue-stream” theory) would appear to be doubtful.

Implications under the Sales and Use Tax Law

Based on the foregoing, there does not appear to be an adequate basis for the Board to conclude that Section 16102 establishes an exemption for veteran retailers under the Sales and Use Tax Law. The Sales Tax Law was enacted in 1933 (i.e., 40 years after the enactment of Section 16102’s first statutory antecedent), and the Use Tax Law was enacted in 1935. It is unlikely that the Legislature had such state excise taxes in mind when it first enacted the veterans’ license tax exemption in 1893. To this day, the Legislature has not created any exemptions for veteran retailers (based on their veteran status) under the Sales and Use Tax Law. Moreover, when Section 16102 was codified in its current form in 1941, the Sales and Use Tax Law did exist, and nothing in the legislative history indicates that the Legislature believed that Section 16102 had, or has, any effect on the Sales and Use Tax Law. As you know, two previous opinions issued by Office of the Legislative Counsel, dated October 28, 1998, and August 17, 2006, respectively, confirm this conclusion. In short, Section 16102’s exemption appears to be limited to license taxes and fees.

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Finally, even if the key phrase of Section 16102 (i.e., “without payment of any license, tax or fee whatsoever”) could somehow reasonably be read to create a sales tax exemption, it would not appear to relieve veterans of their use tax collection obligations. (See Rev. & Tax. Code, §§ 6203, 6204, 6401.) Veterans would still owe a debt (not a tax or a fee) to California for failure to collect the use tax their customers would owe based on their customers’ purchases of goods from them in California. Assuming such is the case, even if Section 16102 were to create a sales tax exemption, veterans’ net liabilities to the state would remain unchanged.

It should also be noted that, if the Board were to rule that Section 16102 creates a *general* exemption under the Sales and Use Tax Law (i.e., an exemption applicable to both the sales and use taxes), pursuant to the *Brooks* opinion, the exemption could not be limited to itinerant veteran-retailers personally making relatively low levels of sales as street vendors. As discussed above, the *Brooks* court held that veterans selling from fixed locations, and through agents and employees, can qualify for Section 16102’s exemption. It would also appear that such a Board ruling, which would imply that Section 16102’s exemption is *not* limited to license taxes and fees, would also have to be applied to other special taxes and fees administered by the Board that are associated with sales of nonalcoholic goods, including the various fuel and cigarette and tobacco products taxes. In other words, if the Board were to adopt such a ruling, a veteran apparently could make retail sales out of fixed locations throughout the state through a vast network of agents and employees and experience a more favorable tax treatment under California law than even Indian retailers on reservations presently enjoy.

In sum, while sufficient public policy reasons for creating an exemption under the Sales and Use Tax Law for veterans may exist, especially if limited to disabled veterans making relatively low levels of retail sales as itinerant street vendors, such an exemption would apparently need to be created by legislative action. I trust that this memorandum provides a sufficient response to your various requests. Please feel free to excerpt or attach, in whole or in part, any portions of this memorandum you deem appropriate for inclusion with your anticipated report to the Board Members regarding Section 16102. If any questions or concerns remain, please do not hesitate to contact me directly.

RMF:ef

Attachments: *Gilstrap* opinion
Brooks opinion

LEXSEE 171 CAL. 108



Positive
As of: May 08, 2007

In the Matter of CHARLES GILSTRAP, on Habeas Corpus

Crim. No. 1893

Supreme Court of California

171 Cal. 108; 152 P. 42; 1915 Cal. LEXIS 598

September 30, 1915

PRIOR HISTORY: [***1]

APPLICATION originally made to the Supreme Court for a Writ of Habeas Corpus.

DISPOSITION:

Writ discharged and petitioner remanded.

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Criminal Law--Habeas Corpus--Motion to Quash Writ--Unauthorized Procedure.--A motion to quash a writ of *habeas corpus* is in the nature of a demurrer to the petition, and is not contemplated by the procedure on *habeas corpus* in this state.

Id.--Act Imposing License Tax on Itinerant Drug Venders--Constitutionality of.--The act of 1903 (Stats. 1903, p. 284), as amended in 1907 (Stats. 1907, p. 765) and 1909 (Stats. 1909, p. 419), is not repugnant to section 1 of the fourteenth amendment of the constitution of the United States.

Id.--Definition of Itinerant Venders--Hawkers and Peddlers.--The definition of an itinerant vender as found in section 3 of the act is broad enough to include hawkers and peddlers.

Id.--Police Power--Construction of Constitution.--The fourteenth amendment of the federal constitution was not designed to interfere with the reasonable exercise of the police power in the several states; and said act constitutes a valid exercise of the police power of the state.

Id.--License Tax Act--General Law.--Said act imposing a license tax is a general law, enforceable in every part of the state, regulating the business of selling or in any manner disposing of drugs within the state by itinerant venders, as that term is defined in section 3 of the act.

Id.--Regulation of Business--Act not for Revenue.--By said act the legislature only intended to regulate the business of selling drugs by itinerant venders within the limits of the police power of the state and did not assume to exercise the power of taxation for the purposes of revenue.

Id.--Amendment of 1907--Exemption of Ex-Union Soldiers and Sailors--Constitutionality of Act.--The third proviso of section 2 of the act as amended in 1907, relating to the exemption of ex-Union soldiers and sailors, does not render the act unconstitutional, as it is a general law enforceable throughout the state and the proviso plainly indicates that the exemption applies only to a license tax of any county, town, or village, incorporated city or municipality in the state of California, and is merely a legislative disclaimer of any intention to interfere in any sense with the exemption act of 1905 (Stats. 1905, p. 307), permitting such ex-soldiers and sailors to vend, hawk and peddle goods in any county, town, or village, incorporated city or municipality within the state, without a license, and cannot be held to apply to persons required to pay the state license tax.

Id.--Act of 1903 and Pharmacist Act--Construction of.--The act of 1903, as amended in 1907 and 1909, and the Pharmacist Act to which it refers, are supplementary to each other and together constitute the

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legislative plan for regulating the entire business of selling drugs, nostrums, and ointments, and they indicate an intent to regulate rather than to tax, and cannot be held to arbitrarily place an unequal, burden upon a class.

Id.--Amount of License Fee--Reasonableness of.--

It cannot be held as a matter of law that the legislative judgment as to the amount of fee or charge reasonably necessary for the regulation of the business covered by the act of 1903, viz.: one hundred dollars for each half year, is wrong.

SYLLABUS:

The facts are stated in the opinion of the court.

COUNSEL:

W. J. Brown, and Jay A. Hindman, for Petitioner.

Short & Sutherland, and L. J. Maddux, for Respondent.

JUDGES:

In Bank. Lawlor, J. Sloss, J., and Lorigan, J., concurred. Shaw, J., concurring. Sloss, J., and Melvin, J., concurred. Angellotti, C. J., concurring.

OPINION BY:

LAWLOR

OPINION:

[*109] [**42] The petitioner presented his petition to this court for a writ of *habeas corpus* but before it was considered he interposed an amended petition and the pending writ was issued thereon. The amendment consists of allegations to the effect that petitioner had previously presented a similar petition to the superior court of Stanislaus County and that it was denied.

The amended petition sets forth that upon a complaint sworn to by S. F. Scott, inspector of the California state board of pharmacy, and filed in the justice's court of Modesto township, county of Stanislaus, petitioner was arrested, tried, and convicted and sentenced to pay a fine of one hundred dollars, with alternative imprisonment [***2] in the county jail at the rate of one day for every dollar of said fine remaining unpaid, and the costs of said action, for the offense of misdemeanor, to wit: Carrying on and conducting, as an itinerant [**43] vender, the business of selling drugs without previously obtaining a license therefor (Stats. 1903, p. 284; Stats. 1907, p. 765; Stats. 1909, p. 419). The complaint also avers that petitioner was not then and there an ex-Union soldier or sailor of the civil war,

honorably discharged from the military or marine service of the United States.

[*110] Upon his failure and refusal to pay the fine imposed the petitioner was taken into custody by Arthur S. Dingley, sheriff of the said county and the respondent herein, whose return sets forth the commitment on which the petitioner is held, and avers that petitioner was in such custody when he applied for the writ. No issue of fact was raised by the return, but on the oral hearing of the writ the original commitment was produced by the respondent. At the same time he presented a written motion to quash the writ. But as such a motion is in the nature of a demurrer to the amended petition, and is not contemplated by the procedure [***3] on *habeas corpus* in this state (Pen. Code, tit. XII, part II, c. 1), the court informed the respondent that it was not necessary to make such a motion. Hence, no formal ruling was made upon it, and the points raised therein will not be further referred to other than as they may be involved in a decision on the merits of the writ.

In the original brief of the petitioner, filed before the oral hearing, several grounds were urged in support of the writ, but it will not be necessary to consider all of them here, for in his reply brief, filed some time after the oral hearing, two grounds alone are relied upon:

First: Is the law or statute in controversy valid, if viewed independently from the proviso which attempts to exempt ex-Union soldiers and sailors from payment of the license fee; and

Second: If the law and statute were in all other respects valid, would this proviso render the act unconstitutional?

The two grounds will be considered in the order of their statement.

First: A consideration of this question will be divided into two parts:

(1) Is the legislation repugnant to section 1 of the fourteenth amendment of the constitution of the United States; and (2) Is it a valid [***4] exercise of the police power of this state apart from such amendment?

(1) It is claimed by the petitioner that considered apart from the third proviso in section 2 of the act as amended (Stats. 1907, p. 765), which he asserts purports to exempt ex-Union soldiers and sailors of the civil war from the payment of the license tax, the levying thereof is void, in that it is in violation of section 1 of the fourteenth amendment of the constitution [*111] of the United States in these particulars: (a) It abridges the privileges and immunities of citizens of the United States; and (b) it deprives them of liberty and property without due process of law.

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We will first examine the legislation: The original act prescribing a license tax for itinerant venders of drugs was passed in 1903. (Stats. 1903, p. 284.) Section 2 was amended in 1907 (Stats. 1907, p. 765), and section 1 in 1909 (Stats. 1909, p. 419).

Section 1 of the act as amended reads in part: "No person as principal or agent, shall conduct as an itinerant vender the business of selling or in any manner disposing of drugs . . . within this state, without previously obtaining a license therefor as herein provided." The scope of [***5] this section was enlarged in 1909 by the insertion of the clause "or in any manner disposing of" between the words "selling" and "drugs." But as the complaint charged that the petitioner did carry on and conduct as an itinerant vender the business of "selling" drugs, and not otherwise disposing of them, the change is not important here other than to show the exact state of the legislation at the time the complaint against the petitioner was filed.

Section 2 as amended in 1907 (omitting the clause relating to the exemption of soldiers and sailors) reads in part: "A license fee of one hundred dollars is hereby levied upon all such itinerant venders doing business in this state. Said tax shall be paid to the state board of pharmacy, for the use and benefit of the state of California, and shall constitute a special fund for the enforcement of this act, and of the provisions of the act or acts creating such board of pharmacy. Upon the receipt of said sum from any persons desiring to conduct such business within this state, the secretary of said board of pharmacy shall issue a license to such person to carry on such business within this state for the term of six months next ensuing; provided [***6] that nothing in this act shall be construed to prevent the collection of any tax or license that may be imposed by any county or municipal authority. . . ."

The amendment of this section in 1907 relates to the following cognate particulars: (a) "The license fee" was substituted for "an annual license fee," the effect of which is, when read in connection with change "(c)," to impose a semiannual instead of an annual license tax; (b) the expression [*112] "for the payment of the expense of said board of pharmacy and," which preceded "for the enforcement of this act," was omitted; (c) "for the term of six months" took the place of "until the first day of July," thereby abolishing a uniform date for the issuance of the licenses and insuring a full term of six months in the first as well as the succeeding terms; (d) the words "or license" in the first proviso, are added after the word "fee"; and (e) the word "authority" was substituted for "authorities" in the first proviso following the word "municipal."

Section 3 provides that "Itinerant venders under the meaning of this act shall include all persons who carry on the business above described by passing from house to house or by [***7] haranguing the people on the public streets or in public places, or use the various customary devices for attracting crowds and therewith recommending their wares and offering them for sale."

[**44] Section 4 requires the board of pharmacy to file an annual statement with the controller of state, and section 5 prescribes the penalty for a violation of the act.

Section 6 provides that in all actions or prosecutions under this act it need not be alleged in the complaint nor proved by the prosecution that the defendant has not a license as required in this act, but the fact that he has such license may be plead as a matter of defense.

Section 7 repeals all acts or parts of acts in conflict with this act.

The definition of an itinerant vender as found in section 3 of the act, is broad enough to include hawkers and peddlers. (Standard Dictionary; *Pegues v. Ray*, 50 *La. Ann.* 574, [23 *South.* 904, 905]; *Andrews v. White*, 32 *Me.* 388, 389; note to *Hager v. Walker*, 129 *Am. St. Rep.* 276, [25 *Cent. Dig.* 1114-1116]; *Emert v. Missouri*, 156 *U. S. Rep.* 296-306, [39 *L. Ed.* 430, 5 *Inters. Com. Rep.* 68, 15 *Sup. Ct. Rep.* 367]; *Baccus v. Louisiana*, 232 [***8] *U.S.* 334-338, [58 *L. Ed.* 627, 34 *Sup. Ct. Rep.* 439]; and 21 *Cyc.*, p. 370.)

Is such legislation violative of the fourteenth amendment of the constitution of the United States? The petitioner claims that "it is not a police regulation, but a mere trade or commercial regulation, and not within the power of the legislature to enact."

[*113] It is well established that the fourteenth amendment of the federal constitution was not designed to interfere with the reasonable exercise of the police power in the several states. In *Barbier v. Connolly*, 113 *U.S.* 29, 31, [28 *L. Ed.* 923, 5 *Sup. Ct. Rep.* 357]), passing on the constitutionality of a laundry ordinance of the city and county of San Francisco, it is said:

"In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the constitution of the state. . . . (p. 31.) The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person [***9] within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and

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security should be given to all under like circumstances in the enjoyment of their personal and civil rights. . . . But neither the amendment -- broad and comprehensive as it is -- nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." (*Powell v. Pennsylvania*, 127 U.S. 683, [32 L. Ed. 353, 8 Sup. Ct. Rep. 992]; *Mugler v. Kansas*, 123 U.S. 623, [31 L. Ed. 205, 8 Sup. Ct. Rep. 273]; *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746-751, [28 L. Ed. 585, 4 Sup. Ct. Rep. 652]; *Yick Wo v. Hopkins*, 118 U.S. 356, [30 L. Ed. 220, 6 Sup. Ct. Rep. 1064]; *Minnesota Ry. Co. v. Beckwith*, 129 U.S. 28, 33, [32 L. Ed. 586, 9 Sup. Ct. Rep. 207]; [***10] *Giozza v. Tiernan*, 148 U.S. 662, [37 L. Ed. 599, 13 Sup. Ct. Rep. 721]; *In re Kemmler*, 136 U.S. 436, [34 L. Ed. 519, 10 Sup. Ct. Rep. 930]; *Davis v. Massachusetts*, 167 U.S. 47, [42 L. Ed. 71, 17 Sup. Ct. Rep. 731]; *Jones v. Brim*, 165 U.S. 180, 182, [41 L. Ed. 677, 17 Sup. Ct. Rep. 282]; *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519, [29 L. Ed. 463, 6 Sup. Ct. Rep. 110]; *In re Rahrer*, 140 U.S. 554, [36 L. Ed. 572, 11 Sup. Ct. Rep. 865].)

[*114] There is nothing in any of the authorities cited by the petitioner to the contrary of this doctrine. Applying the foregoing authorities to the case here, the recent cases of *Emert v. Missouri*, and *Baccus v. Louisiana*, seem to us conclusive on the question of the constitutionality of the legislation under the fourteenth amendment. *Emert v. Missouri* upheld a statute of the state of Missouri requiring the payment of a license tax by itinerant peddlers. The legislation was declared not to be repugnant to the grant by the federal constitution to Congress of the power to regulate commerce among the several states. The case cites many authorities on the general subject [***11] with reference to the fourteenth amendment of the federal constitution, and holds that such legislation is a valid exercise of the power of the state over persons and business within its borders.

Baccus v. Louisiana sustained a statute of the state of Louisiana, passed in 1894, prohibiting the sale of drugs by itinerant venders or peddlers, in the following language [232 U.S. 337, 58 L. Ed. 627, 34 Sup. Ct. Rep. 440]:

". . . Thus considering the case in its true aspect, the single issue to be decided is, Did the state have power, without violating the equal protection or due process of law clause of the fourteenth amendment, to forbid the sale by itinerant venders of 'any drug, nostrum, ointment, or application of any kind intended for the treatment of disease or injury,' although allowing the sale of such articles by other persons? That it did have such authority

is so clearly the result of a previous ruling of this court (*Emert v. Missouri*, 156 U.S. 296, [39 L. Ed. 430, 15 Sup. Ct. Rep. 367]), or at all events is so persuasively made manifest by the authorities cited, and the reasoning which sustained the ruling of the court in the case just stated, as to leave [***12] no room for controversy on the subject (pp. 306, 307). Moreover, the power which the state government possessed to classify and regulate itinerant venders or peddlers exerted in the statute under consideration is cumulatively sustained and made, if possible, more obviously lawful by the fact that the regulation in question deals with the selling by itinerant venders or peddlers of drugs or medicinal compounds, objects plainly within the power of government to regulate."

In the opening brief of the petitioner, section 3 of article I of the constitution of this state is cited to the proposition [*115] that the constitution of the United States is the supreme law of the land, which is undoubtedly true "as to all matters provided for therein . . . whether so recognized or not . . ." (*People v. Nolan*, 144 Cal. 75, [77 Pac. 774], and authorities are then cited to the point that a statute may be rendered invalid either by the express or implied terms of the federal constitution.

[**45] But it is manifest from the foregoing authorities that the levying of a license tax by the state for the purpose of regulating the business of selling drugs by itinerant venders is not [***13] repugnant to the fourteenth amendment or to the constitution of the United States as a whole.

(2) The next question is, does the legislation constitute a valid exercise of the police power of the state apart from the federal guaranties?

The constitutional limitations of the power to impose license or occupation taxes is discussed at length and many authorities are collated in a note to *Hager v. Walker*, 129 Am. St. Rep. 249, [128 Ky. 1, 15 L. R. A. (N. S.) 195, 107 S. W. 254], wherein an occupation tax on real estate agents was declared unconstitutional. Under the head of mercantile pursuits, the right to impose a license tax on the occupation of vending milk, meats, weapons and ammunition, tobacco and the like is supported. Upon the subject of licensing the occupation of hawkers and peddlers (paragraph 7), it is said:

"The occupation of hawkers and peddlers is one which from early times has been deemed a proper subject for special legislative control and restriction, particularly in cities. The primary purpose for regulating this occupation should be to protect the public from imposition from dishonest traders. It is probable, however, that most regulations find their [***14] impulse in the demands of established shopkeepers for

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protection from competition with hawkers and peddlers. So that it may be said that the purpose of regulating the occupation of peddling is to protect, on the one hand, fair traders, especially established storekeepers residing permanently in cities and towns and there paying rent and taxes for the local privilege, from being undersold by itinerant persons, and, on the other hand, to guard the public from fraud and imposition not infrequently practiced by such traders who have no known residence or responsibility." (*State v. Cedaraski*, 80 Conn. 478, [69 Atl. 19]; *State v. Looney*, 214 Mo. 216, [29 L. R. A. [*116] (N. S.) 412, 97 S. W. 934, 99 S. W. 1165]; *Saulsbury v. State*, 43 Tex. Cr. 90, [96 Am. St. Rep. 837, 63 S. W. 568].)

". . . That persons who desire to peddle may be required to obtain a license and pay a fee therefor, or may be required to pay a tax for the privilege of following their occupation, is attested by numerous recent decisions. . . . Such regulation and taxation are valid, unless made partial, unreasonable, oppressive, or discriminatory. . . . There is no doubt, as the authorities [***15] in the preceding paragraph all recognize, that hawkers and peddlers may be placed in a class by themselves for license purposes." (129 Am. St. Rep. 277. See 25 Cent. Dig., pp. 1113-1128; 21 Cyc. 364; and 15 Am. & Eng. Ency. of Law, pp. 290-303.)

It is clear that the license tax is a general law, enforceable in every part of the state, regulating "the business of selling or in any manner disposing of drugs . . . within this state" by itinerant venders, as that term is defined in section 3 of the act. That it is a general law of the state is shown by the language "within this state" in section 1 and "itinerant venders doing business in this state" in section 2 of the act; that the license tax must be paid to the state board of pharmacy "for the use and benefit of the state of California"; that it shall constitute a special fund for the enforcement of this act, and of the provisions of the act or acts creating such board of pharmacy; and that an annual statement is required to be filed by such board with the controller of the state. The charge, it is to be noted, was brought by an inspector of the state board of pharmacy.

On the subject of the police power, it was said by Mr. Justice [***16] Sloss in *County of Plumas v. Wheeler*, 149 Cal. 762, [87 Pac. 910], which declares constitutional a county ordinance fixing a license fee on the business of raising, herding, grazing, and pasturing sheep and lambs within the county:

"The principles affecting the right of legislative bodies in the exercise of what is known as the 'police power,' to place restrictions upon the conduct of lawful pursuits and occupations, are well settled, although there is often great difficulty in applying these principles to a

given state of facts. It is within the legislative discretion to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, comfort, or health. "The police power, the power to make laws to secure [*117] the comfort, convenience, peace, and health, of the community, is an extensive one and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested." (*Ex parte Whitwell*, 98 Cal. 73 [35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 879].) 'Rights of property, like [***17] all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.' (*Commonwealth v. Alger*, 7 Cush. (Mass.) 53). . . . The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the legislature had, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation. But the legislative determination is not conclusive."

We think that the legislation is well within the police power of the state. The subject matter is one "which from early times has been deemed a proper subject for special legislative control and restriction." (*Hager v. Walker*, 128 Ky. 1, [129 Am. St. Rep. 249, 15 L. R. A. (N. S.) 195, 107 S. W. 254].) The amount of the license tax cannot be said to be "oppressive or discriminatory." (*County of Plumas v. Wheeler*, [***18] 149 Cal. 763, [87 Pac. 909]; *In re Miller*, 13 Cal. App. 567, [110 Pac. 139].) The law applies uniformly upon the whole of a single class of clearly defined individuals, and the classification is founded upon a natural, intrinsic and constitutional distinction. (*Ex parte Koser*, 60 Cal. 177; *Abeel v. Clark*, 84 Cal. 226, [24 Pac. 383]; *Cody v. Murphey*, 89 Cal. 522, [26 Pac. 1081]; *Foster v. Police Commissioners*, 102 Cal. 483, [41 Am. St. Rep. 194, 37 Pac. 763]; *People v. Central Pac. R. R. Co.*, 105 Cal. 576 [38 Pac. 905]; *Murphy v. [***46] Pacific Bank*, 119 Cal. 334, [51 Pac. 317]; *Rode v. Siebe*, 119 Cal. 518, [39 L. R. A. 342, 51 Pac. 869]; *Vail v. San Diego*, 126 Cal. 35, [58 Pac. 392]; *Murphy v. Pacific Bank*, 130 Cal. 542, [62 Pac. 1059]; *Ruperich v. Baehr*, 142 Cal. 190, [74 Pac. 782]; *Kaiser Land and Fruit Co. v. Curry*, 155 Cal. 638, [103 Pac. 341]; *Lewis v. Curry*, 156 Cal. 93, [103 Pac. 493]; and *Matter of Yun Quong*, 159 Cal. 508, [Ann. Cas. 1912C, 969, 114 Pac. 835].)

[*118] And it is plain that the legislature only intended to regulate the [***19] business of selling

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drugs by itinerant venders within the limits of the police power of the state and did not assume to exercise the power of taxation for the purposes of revenue.

Second: If the law is in all other respects valid, does the third proviso of section 2 of the act as amended in 1907 (Stats. 1907, p. 765), relating to the exemption of ex-Union soldiers and sailors, render the act unconstitutional?

The grounds urged by the petitioner against the constitutionality of the third proviso are thus stated in the final brief:

"1. It contravenes section one of the fourteenth amendment of the constitution of the United States, in this:

"(a) It denies to persons within the jurisdiction of the United States the equal protection of the law.

"2. Said statute is inhibited by section eleven (11) of article one (1) of the constitution of California in this:

"(a) It is of a general nature and does not have uniform operation.

"3. It is repugnant to section twenty-one (21) of article one (1) of the constitution of California, in this:

"(a) It grants to a certain class of citizens privileges and immunities which, upon the same terms, are not granted to all citizens."

The act creating [***20] the exemptions was adopted by the legislature in 1905 (Stats. 1905, p. 307), and provides:

"Section 1. That on and after the passage of this act all ex-Union soldiers and sailors, honorably discharged from the military or marine service of the United States, shall be permitted to vend, hawk and peddle goods, wares, fruits or merchandise not prohibited by law, in any county, town, village, incorporated city or municipality within this state without a license; provided, said soldier or sailor is engaged in the vending, hawking and peddling of the goods, wares, fruits or merchandise for himself only.

"Section 2. Upon the presentation of his certificate of discharge to the license collector of any county, town, village, incorporated city or municipality in this state, and showing proofs of his identity as the person named in his certificate of honorable discharge, the license collector shall issue to said ex-Union soldier or sailor a license, but such license shall be free, and said license collector shall not collect or demand for the county, town, village, incorporated city or municipality [*119] any fee therefor; provided that nothing in this act shall

authorize said soldiers [***21] or sailors to sell intoxicating liquors."

The third proviso reads: "Provided, however, that nothing in this act shall be held to repeal or modify the provisions of an act approved March 20, 1905, 'An act permitting all ex-Union soldiers and sailors of the civil war, honorably discharged from military or marine service of the United States, the right to vend, hawk and peddle goods, wares, fruits or merchandise not prohibited by law, in any county, town or village, incorporated city or municipality in the state of California, without paying a license.'"

The language of the complaint regarding the exemptions is as follows: ". . . and that the said Charles Gilstrap was not then and there an ex-Union soldier or sailor of the civil war, honorably discharged from military or marine service of the United States, as defined in an act entitled 'An act permitting all ex-Union soldiers and sailors of the civil war, honorably discharged from the military or marine service of the United States, the right to vend, hawk and peddle goods, wares, fruits or merchandise not prohibited by law, in any county, town or village, incorporated city or municipality in the state of California, without paying [***22] a license,' approved March 21, 1907."

The petitioner admitted on the trial in the justice's court that he was not a discharged ex-Union soldier or sailor of the United States.

In our opinion it is not necessary to a decision on the merits of the pending writ to determine the constitutionality of the exemption act for the reason that the legislature did not intend that it should have any application to a license tax imposed by the state.

The legislation in which the proviso is found, it has been shown, is a law enforceable throughout the state, and the language of the proviso plainly indicates that the exemption applies only to a license tax of "any county, town or village, incorporated city or municipality in the state of California."

The office of a proviso is described in *Minis v. United States*, 40 U.S. (15 Pet.) 445, where it is said: "The office of a proviso, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as [*120] extending to cases not intended by the legislature to be brought within its purview." (The italics are ours.)

The Exemption [***23] Act of 1905 (Stats. 1905, p. 307) provides that all ex-Union soldiers and sailors honorably discharged from the military or marine service of the United States shall be permitted to vend, hawk and peddle goods "in any county, town or village,

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incorporated city or municipality within this state" without a license. The third proviso is to the effect that the legislation imposing the license tax shall not be held to repeal or modify the Exemption Act as it affects the legislative authority of counties, towns, villages, incorporated cities or municipalities within the state. In other words, the proviso is merely a legislative disclaimer of any intention to interfere in any sense with the Exemption Act of 1905. But this is not the equivalent of extending its operation and it cannot, therefore, be held to apply to persons required to pay the state license tax.

Upon the subject of exemptions in a license tax see 32 Cent. Dig., p. 2567 and 25 Cyc. 621.

It is to be noted that the Exemption Act of 1905 is only referred to in the amending statute of 1907. The subject of exemptions forms no part of the original statute of 1903, nor is it referred to in the [**47] amendment of 1909. Nor [***24] again does the Exemption Act directly or indirectly refer to the act of 1903. These omissions are significant since the acts of 1903, 1907 and 1909 all relate, as we have seen, to a general law of the state as distinguished from a local law or ordinance. The complaint expressly refers to the license statute of 1907.

It was clearly the intention of the legislature to limit the application of the Exemption Act of 1905 and the proviso of 1907 to local laws or ordinances. They have no other scope or purpose.

The conclusion that the proviso is not aimed at the state license tax obviates the necessity of deciding whether ex-Union soldiers and sailors who, "as principal or agent, shall conduct as an itinerant vender the business of selling or in any manner disposing of drugs, nostrums, ointments or any appliances for the treatment of disease . . ." belong in the category fixed by the Exemption Act, which declares that ex-Union soldiers and sailors "shall be permitted to vend, hawk and peddle goods, wares, fruits or merchandise . . .," provided they so vend, hawk and peddle for themselves only.

[*121] It having been held that the legislation prescribing the license tax is valid, [***25] and that the third proviso of the Amendatory Act of 1907 has no application thereto, the question now remains whether the writ should be granted because of the allegations of the complaint referring to the proviso. But since the proviso has no application to the state license tax, such allegations must be treated as surplusage and disregarded. The complaint still states facts sufficient to constitute the offense, and the justice's court having acquired jurisdiction over the person of the petitioner, it had authority to hear and determine the charge.

Writ discharged and petitioner remanded.

CONCUR BY:

SHAW; ANGELLOTTI

CONCUR:

SHAW, J., Concurring. I see nothing in this case requiring elaborate statement, prolonged discussion, or the citation of many authorities. Assuming that the law in controversy is an exercise of the police power and not of the power of taxation, the questions presented have long been settled by numerous decisions and are comparatively simple and easy of solution. Upon that hypothesis, the decisions in *Baccus v. Louisiana*, 232 U.S. 337, [58 L. Ed. 627, 34 Sup. Ct. Rep. 439], *Ex parte Campbell*, 74 Cal. 20, [5 Am. St. Rep. 418, 15 Pac. 318], and *Ex [***26] parte Coombs*, 169 Cal. 484, [147 Pac. 131], establish the proposition that a law regulating a business which, if unrestricted, may be injurious to the public health or safety, violates neither the state nor the United States constitution.

If, however, the act is not a police regulation but an act imposing a tax for revenue, it might, perhaps, be plausibly urged that a law imposing an occupation tax solely upon itinerant drug peddlers, leaving all other peddlers and all other mercantile pursuits free from such taxes, would be an improper discrimination against one class of peddlers, on the ground that there is no just basis for the classification. The petitioner argues that it is a revenue tax and that it arbitrarily places an unequal burden upon a class. Justice Lawlor has not discussed this objection. The terms of the act, and of the Pharmacist Act to which it refers, satisfactorily show that it was enacted for the purpose of regulation and not for revenue. The charge is denominated "a license fee." [*122] It is required to be paid to the state board of pharmacy for use in enforcing this act and the Pharmacist Act also. The latter creates a state board of pharmacy and [***27] regulates the business of selling drugs and compounding prescriptions in this state, being undoubtedly a police measure. The two acts are, therefore, supplementary to each other and together constitute the legislative plan for regulating the entire business of selling drugs, nostrums, and ointments. The legislative conclusion that the fees received from the peddlers should be added to the fees paid under the Pharmacist Act, and the whole devoted to the use of carrying out and enforcing the general plan, is a legitimate exercise of its discretion to apportion and apply the fund, in view of the fact that the two laws are to be regarded as one covering the entire subject. This indicates the intent to regulate, rather than to tax. The law comes within the rule thus stated in *Plumas v. Wheeler*, 149 Cal. 763, [87 Pac. 911]. "It is also well

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settled that the power to regulate a business may be exercised by means of a license fee or charge. The amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought, i. e., the regulation of the business." The legislative judgment as to the amount is conclusive, unless it clearly appears to be [***28] wrong. In view of the uses to which the license fees are to be devoted we cannot say it exceeds the amount reasonably necessary.

The objection growing out of the supposed exemption of ex-Union soldiers and sailors has no foundation in fact. As Justice Lawlor shows, there is no exemption from the state license fee. The act of 1905 merely exempts peddlers of all kinds of goods who are honorably discharged ex-Union soldiers and sailors from

paying local license fees imposed by county, city, or town ordinances. It has no application to a state license.

I believe that the law in question is valid and I concur in the judgment that the petitioner be remanded.

ANGELLOTTI, C. J., Concurring. I concur in the judgment, and generally in the views expressed in the opinion of Justice Lawlor. [**48] That the act involved was intended solely as a regulatory measure designed to regulate the business of [*123] selling "drugs, nostrums, ointments or any appliances for the treatment of diseases, deformities, or injuries" by *itinerant venders* is very clear to me. I am also satisfied that it cannot be held as matter of law that the legislative judgment as to the amount of fee or charge [***29] reasonably necessary for the regulation of *that* business, viz.: one hundred dollars for each half year, is wrong.

LEXSEE 191 CAL.APP.3D 750



Analysis

As of: May 08, 2007

HENRY FRANKLIN BROOKS, Plaintiff and Respondent, v. COUNTY OF SANTA CLARA et al., Defendants and Appellants

No. H001935

Court of Appeal of California, Sixth Appellate District

191 Cal. App. 3d 750; 236 Cal. Rptr. 509; 1987 Cal. App. LEXIS 1677

April 29, 1987

SUBSEQUENT HISTORY: [***1]

Appellants' petition for review by the Supreme Court was denied July 29, 1987.

PRIOR HISTORY: Superior Court of Santa Clara County, No. 551477, Taketsugu Takei, Judge.

DISPOSITION:

The judgment is affirmed.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered summary judgment for an honorably discharged veteran who operated a nut vending business, in a class action by veterans for declaratory and injunctive relief brought against a county. The county refused to renew the veteran's health permit and license to operate the business without payment of a fee. The veteran sold nuts from both a vehicle and a fixed location, and operated the business personally and through his son and daughter and possibly other agents and employees acting for him. (Superior Court of Santa Clara County, No. 551477, Taketsugu Takei, Judge.)

The Court of Appeal affirmed. It held that *Bus. & Prof. Code, § 16102*, exempting honorably discharged veterans from license fees for hawking, peddling and vending, includes in its exemption fees charged as a means of cost recovery for the expenses of a county health officer authorized under *Health & Saf. Code, §*

510. The court also held that § 16102 applies to sales from fixed locations as well as from vehicles. The court held further that the § 16102 exemption extends to sales made by agents and employees of the veteran as well as the veteran himself or herself. (Opinion by Agliano, P. J., with Brauer and Capaccioli, JJ., concurring.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a) (1b) Business and Occupational Licenses § 7 -- Exemptions and Exceptions -- Fees -- Honorably Discharged Veterans -- Expenses of Health Officer. -- Under *Bus. & Prof. Code, § 16102*, exempting honorably discharged veterans from license fees for hawking, peddling, and vending, a veteran operating a nut vending business was exempt from fees imposed by a county under *Health & Saf. Code, § 510*, authorizing recovery of the expenses of a county health officer by imposition of fees, so long as he otherwise met the requirements of § 16102.

(2) Statutes § 39 -- Construction -- Giving Effect to Statute -- Conformation of Parts -- Reference to Entire Statutory System. -- A specific statutory provision should be construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized.

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AGLIANO

(3a) (3b) (3c) Business and Occupational Licenses § 7 -- Exemptions and Exceptions, -- License Fees -- Honorably Discharged Veterans -- Sales From Fixed Locations. -- Under *Bus. & Prof. Code, § 16102*, exempting honorably discharged veterans from license fees for hawking, peddling and vending, an honorably discharged veteran operating a nut vending business from both a vehicle and fixed stand, was exempt from license fees. The terms "hawk, peddle and vend" in § 16102 are not limited to itinerant sales. The Legislature's failure to take any action with respect to § 16102 since 1941 did not amount to an adoption of a 1944 Attorney General's opinion that the term "vend" could not be interpreted as authorizing one to carry on a regular business in an established or fixed place of business without paying for the license necessary for the conduct of such operation.

(4a) (4b) Statutes § 33 -- Construction -- Language -- Words and Phrases --Noscitur a Sociis (Meaning Derived From Context). -- Under the rule of *noscitur a sociis*, general and specific words capable of analogous meaning, when associated together, take color from each other, so that the general words are restricted to a sense analogous to less general words. The rule will not be applied when there is no ambiguity, or to thwart the legislative intent or make general words meaningless.

(5) Business and Occupational Licenses § 7 -- Exemptions and Exceptions -- Exemptions From Fees -- Honorably Discharged Veterans -- Sales by Agents and Employees. -- Under *Bus. & Prof. Code, § 16102*, exempting honorably discharged veterans from license fees for hawking, peddling and vending, an honorably discharged veteran operating a nut vending business by sales through his son and daughter and possibly through other agents as well, was exempt from license fees. Section 16102 places no limitation whatsoever on the manner in which the veteran may "hawk, peddle and vend" his inventory.

COUNSEL:

Donald L. Clark, County Counsel, and Donald J. Fallon, Deputy County Counsel, for Defendants and Appellants.

John Kazubowski and Hamrick, Hoffman, Guillot & Kazubowski for Plaintiff and Respondent.

JUDGES:

Opinion by Agliano, P. J., with Brauer and Capaccioli, JJ., concurring.

OPINION BY:

OPINION:

[*752] [**510] Santa Clara County and certain of its officials (collectively the county) appeal from a judgment which declares that honorably discharged military veterans who sell food owned by them either by "itinerate . . . sales" or from fixed locations, and either personally or through agents or employees, are exempt under *Business and Professions Code section 16102* from license fees including (without limitation) public health license and permit fees imposed by the county under provisions of the Health and Safety Code.

The facts are undisputed; the issues resolved by the trial court were purely legal. Upon independent analysis we agree [***2] with the result the trial court reached. Therefore we affirm.

Plaintiff Henry Franklin Brooks is an honorably discharged soldier who at relevant times operated a nut vending business in Santa Clara County. It appears that he initially conducted his business from a motor vehicle of some kind.

For some years Brooks enjoyed an exemption from county license fees for his business by virtue of *Business and Professions Code section 16102*, which provides that "[every] soldier, sailor or marine of the United States who has received an honorable discharge or a release from active duty under honorable conditions from such service may hawk, peddle and vend any goods, wares or merchandise owned by him, except spirituous, malt, vinous or other intoxicating liquor, without payment of any license, tax or fee whatsoever, whether municipal, county or State, and the board of supervisors shall issue to such soldier, sailor or marine, without cost, a license therefor. "

In 1979 the county enacted an ordinance which required that food vendors, among others, obtain public health permits and licenses for which they would be required to pay specified fees. These requirements [***3] were adopted as a means of discharging the county's general duty "to preserve [*753] and protect the public health" (*Health & Saf. Code, § 450*; cf. *People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal. 3d 476, 484 [204 Cal.Rptr. 897, 683 P.2d 1150]*) and its specific duty to enforce "[statutes] relating to public health" (*Health & Saf. Code, § 452, subd. (c)*). So far as relevant to food vendors, the pertinent public-health statutes are (until Jan. 1, 1985) the former California Restaurant Act (*Health & Saf. Code, former § 28520 et seq.*) and (since Jan. 1, 1985) the California Uniform Retail Food Facilities Law (*Health & Saf. Code, § 27500 et seq.*). The current law entrusts "[primary]" enforcement responsibility to "local

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health agencies" (*id.* at § 27505) and expressly provides that "[a] food facility shall not be open for business without a valid permit. . . . [para.] Any fee for the permit and related services shall be determined by the local governing body. Fees shall be sufficient to cover the actual expenses of administering [***4] and enforcing this program. All moneys collected as fees shall be expended in carrying out the provisions of this chapter. " (*Id.* at § 27551.) The pre-January 1, 1985, statute contained similar provisions. (*Id.* at former §§ 28690, 28693, 28866.)

For direct authority to charge fees for the health permits and licenses in issue here, the county relied on *Health and Safety Code section 510*, which provides that "[whenever] the governing body of any city, county, or city and county determines that the expenses of its health officer in the enforcement of any statute, order, quarantine, rule or regulation prescribed by a state officer or department relating to public health, which either requires or authorizes the health officer to perform specified acts, are not met by any fees prescribed by the state, such governing body [**511] may adopt an ordinance or a resolution prescribing such fees as will pay the reasonable expenses of such officer incurred in such enforcement. The schedule of fees prescribed by ordinance or resolution of the governing body shall be applicable in the area in which the health officer enforces any statute, order, quarantine, [***5] rule or regulation prescribed by a state health officer or department relating to public health. "

Prior to 1984 the county issued a health permit and license to Brooks without payment of fees, but in 1984 the county took the position that the section 16102 exemption does not extend to fees authorized by section 510.

When the county refused to renew Brooks's health permit and license without a fee, and threatened to prosecute him for selling nuts without the health permit and license, Brooks filed this action for declaratory and injunctive relief. He obtained a temporary restraining order and the parties then stipulated to a preliminary injunction. Subsequently Brooks amended his complaint to state a class action in behalf of other veterans similarly situated. The class was duly certified.

[*754] The pleadings framed only the issue whether a license or permit fee authorized by section 510 is subject to the veterans' exemption provided by *Business and Professions Code section 16102*. While the suit was pending, it developed that Brooks was selling nuts not only from a vehicle but also from at least one open food stand in a fixed location, and [***6] not only personally but also through his son and daughter, and possibly other agents and employees, who acted for

Brooks. The county took the position that the section 16102 exemption would not in any event extend to sales from fixed locations or to sales by anyone other than a qualified veteran himself or herself. These new issues were treated by the parties and by the trial court as properly before that court for determination.

In due course the parties filed cross-motions for summary judgment, stipulating that there was no factual dispute. The trial court entered judgment for Brooks, determining (insofar as relevant to this appeal) (1) that the section 16102 exemption does apply to license and permit fees imposed pursuant to *Health and Safety Code section 510*; (2) that the exemption applies to sales both from itinerant facilities and from fixed locations; (3) that the exemption is a "personal privilege" of the veteran but nevertheless extends to sales operations "by the agents and employees of a veteran . . . on behalf of the veteran"; and (4) that Brooks was entitled to recover \$ 13,375. 50 as attorney fees under *Code of Civil Procedure section 1021 [***7]* . 5.

On appeal the county attacks each of the first three enumerated conclusions, and argues that the attorney fee award must be stricken or recalculated depending on the conclusion this court reaches.

We conclude that the language, context, and history of section 16102 all support the trial court's conclusions. We cannot rewrite the statute; contentions that the veterans' exemption should be narrower must be addressed to the Legislature rather than to the courts.

1. *Health and Safety Code section 510.*

The county argues that *Business and Professions Code section 16102* does not extend to fees charged as a means of cost recovery under *Health and Safety Code section 510*.

Brooks replies that the breadth of the language of section 16102 makes clear that the exemption includes fees imposed under section 510.

(2) Both parties rely on the general rule that a specific statutory provision "should be construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme [*755] are harmonized. [Citation.]" [***8] (*Bowland v. Municipal Court (1976) 18 Cal. 3d 479, 489 [134 Cal.Rptr. 630, 556 P.2d 1081]*; cf. *People v. Shirokow (1980) 26 Cal. 3d 301, 307 [134 Cal.Rptr. 630, 556 P.2d 1081]*.)

Section 16102 is one of a series of Business and Professions Code provisions for business licensing at the local level. Sections 16100 through 16104 provide, more specifically, for licensing by counties: Section 16100 authorizes general business licensing by boards of

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supervisors "in the [**512] exercise of their police powers, and for the purpose of regulation" Section 16101 permits counties to license "individuals acting as hawkers, itinerant peddlers or itinerant vendors" "for the purpose of revenue." Sections 16103 and 16104 state exemptions not relevant here.

The progenitor of sections 16100, 16102, and 16103 was Political Code section 3366, added to the California statutes in 1901, which empowered both counties and incorporated cities to license businesses for the purpose of regulation and "to fix the rates of license tax upon the same." (Stats. 1901, ch. 209, § 1, pp. 635-636.) Section 3366 contained a veterans' exemption which was [***9] quite similar to that now embodied in section 16102, except that it required that the veteran be "unable to obtain a livelihood by manual labor" and did not require that the goods to be sold be "owned by" the veteran. (*Ibid.*) The veterans' exemption in section 3366 was substantially amended several times thereafter. (Stats. 1915, ch. 436, § 1, p. 723; Stats. 1917, ch. 188, § 1, pp. 279-280; Stats. 1921, ch. 164, § 1, p. 163; Stats. 1935, ch. 138, § 1, pp. 487-488.) A provision limited to counties, also embodying the substance of what is now sections 16100, 16102, and 16103 and to that extent superficially redundant of section 3366, was added to the Political Code in 1929 as section 4041. 14. (Stats. 1929, ch. 755, § 15, p. 1457.) The veterans' exemption in section 4041. 14 was even more closely similar to present section 16102, although (like section 3366) it did not require that the veteran own the goods. (*Ibid.*) The substance of section 16101, limited to counties and authorizing limited licensing of itinerant sellers "for the purpose of revenue," was not added to the codes until 1935, when it was inserted by amendment to section 4041. 14. (Stats. 1935, ch. 138, [***10] § 2, p. 489.) In 1941 the licensing provisions for cities and counties were separated and moved to the Business and Professions Code, as sections 16000 through 16103 (Stats. 1941, ch. 61, §§ 1, 2, pp. 718-721), and in the same session section 16102 was amended to add the requirement that the goods sold be "owned by" the veteran (Stats. 1941, ch. 646, § 2, p. 2101). None of the relevant sections has been amended since 1941.

Patently the thrust of section 16102 is not to exempt veterans from local *regulation*, but rather to enable specified veterans to engage in specified kinds of business without being required to *pay*. The last several words of the [*756] section make clear the Legislature's assumption that the veteran must have a license, but also its intent that he or she should receive it "without cost," consistent with the antecedent provision that the veteran should be permitted to do business "without payment of any license, tax or fee whatsoever" These provisions have been part of the veterans' exemption

since 1901. The anomalous comma between the words "license" and "tax" appears to us to be insignificant: There was no comma in the phrase in the [***11] 1901 enactment, and we assume that insertion of the comma in section 4041. 14, as enacted in 1929, was inadvertent.

Section 510 is one of a series of provisions of the Health and Safety Code which make clear that counties and cities are obliged to protect the public health and for that purpose to enforce state public-health statutes among other things. The current food-service statute (the California Uniform Retail Food Facilities Law) expressly provides for local enforcement, imposes a permit requirement to be locally administered, and authorizes permit fees sufficient to cover the administrative cost (*Health & Saf. Code*, §§ 27505, 27551). The county might have rationalized its permit fee under either section 510 or the food-service statute itself.

As we have noted, veterans are not exempt from county *regulation*. We entertain no doubt that Brooks could be required to obtain a health license and permit as a condition of doing business, and for that purpose to meet whatever reasonable regulatory requirements might be applicable to his operation. The trial court specified that the section 16102 exemption "does [***12] not exempt such veterans from the requirement of securing a Food Permit"; Brooks has not questioned this conclusion. Indeed, [**513] Brooks had applied for and received a health license and permit, without fee, in 1982. (1b) The narrow question is whether, in light of section 16102, Brooks and other similarly situated veterans could be required to *pay a fee* for the health license and permit.

The county submits that section 16102 must be read in the context of the chapter in which it appears as illuminated by legislative history, and that such an analysis demonstrates that the exemption extends only to fees charged for licenses issued "in the exercise of [the counties'] police powers, and for the purpose of regulation" or "for the purpose of revenue," and should not be construed to apply to what the county calls "cost recovery fees for enforcement of state health food laws under . . . section 510." According to the county, "[the] permit fees challenged herein were not imposed incident to any substantive regulations promulgated by the county -- they were imposed incident to state health food laws and regulations Nor were they imposed in order to generate [***13] revenue for the county -- they were imposed in order to recover county costs for the enforcement of state health food laws and regulations. "

[*757] The county's argument appears to focus on section 16102's reference to a license (inferably the license expressly authorized by section 16100) and to disregard its predominant and much broader provision for exemption from fees. The county cannot avoid the

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plain meaning of 16102, which is that a qualified veteran is entitled to engage in the described business "without payment of any license, tax or fee whatsoever, whether municipal, county or State." The placement of the exemption is not dispositive: If, as we conclude, the Legislature intended to exempt qualified veterans from any fee or tax for doing a specified kind of business, then the Business and Professions Code is an entirely appropriate place for such a provision to appear. Nor are we impressed by the county's argument, based on an opinion of the Attorney General (*14 Ops. Cal. Atty. Gen. 226 (1949)*), that section 16102 cannot apply to a fee related to enforcement of *state* rather than *local* law: The questions to which the Attorney General responded [***14] focused in pertinent part upon the question whether section 16102 applied to *cities* as well as counties; the opinion cannot be construed to reach the question whether a county's fee for a county permit, required to implement a state health statute, is subject to the section 16102 exemption. Whether regarded as a "county fee" or a "state fee," the fee in question comes squarely within the plain language of section 16102.

Accordingly we conclude that Brooks, and similarly situated veterans, would be exempt from the health license and permit fee so long as they otherwise met the requirements of section 16102.

2. Fixed locations.

(3a) The county next argues that section 16102, which in terms exempts only veterans who "hawk, peddle and vend," does not apply to sales from fixed locations, and therefore that neither Brooks nor other similarly situated veterans are exempt from license fees for sales from booths or stands on permanent sites. To support this contention the county relies on another opinion of the Attorney General and on the wording of section 16101.

The Attorney General's opinion (*3 Ops. Cal. Atty. Gen. 195 (1944)*) responded to a county's [***15] question whether a qualified veteran who was an "itinerant" sign painter was entitled to the section 16102 exemption from a local license fee imposed upon sign painters. The Attorney General concluded that "the words 'hawk, peddle and vend' are solely referable to some type or manner of selling," that the license fee in question "is imposed upon the occupation of painting and constructing advertising display, and is not directed to the sale of the finished product," and therefore that the veteran, "even though itinerant and without a fixed place of business," was not entitled to the exemption. (*Id. at pp. 197-198.*) In a passage not apparently [*758] essential to his response to the question asked, [**514] the Attorney General added the language on which the county relies in this case: "Under statutes empowering

municipalities to license 'hawkers' and 'peddlers,' a 'peddler' in ordinary, customary and usual meaning is one who travels about selling wares which he carries with him, while a 'hawker' differs from a peddler only in that he cries his wares or exhibits them for sale. [Citation.] Hawking and peddling connote simultaneous delivery with a sale; [***16] thus solicitation by samples without contemporaneous delivery has been held not to come within their definition. [Citations.] 'Vend' is, of course, a word which in its broadest sense includes all manner of selling. When used, however, in conjunction with the words 'hawk' and 'vend', the rule of statutory interpretation known as *noscitur a sociis* is applicable. (4a) Under this rule, general and specific words capable of analogous meaning, when associated together, take color from each other, so that the general words are restricted to a sense analogous to less general words. [Citations.] Applying the doctrine of *noscitur a sociis*, a New Jersey act providing for the issuance of free licenses by the county clerk to honorably discharged soldiers to 'hawk, peddle and vend' goods and merchandise, was held to give no right to the holder of such a license to sell his wares at a fixed stand in disregard of a valid municipal ordinance requiring a local license therefor. [Citation.] A similar interpretation of the word 'vend' as used in sections 3366 and 4041. 14 of the Political Code has been expressed in a former opinion of this office. [Citation.] According [***17] to this opinion, the term 'vend' cannot be interpreted as authorizing one to carry on a regular business at an established or fixed place of business without paying for any license necessary for the conduct of such operation. "" (*Id. at pp. 196-197.*)

(3b) The county concludes that "the term 'hawk, peddle and vend' describes, and is limited to, itinerant sales." It suggests that this conclusion is "reinforced" by a comparison of sections 16101 and 16102. Section 16101 provides that "[the] boards of supervisors in their respective counties may for the purpose of revenue license individuals acting as hawkers, itinerant peddlers or itinerant vendors, other than merchants having a fixed place of business in the county, their employees, and farmers selling farm products produced by them." The county's position appears to be that the exclusion of "merchants having a fixed place of business" from the class of persons from whom license fees may be required solely "for the purpose of revenue" under section 16101 makes clear that the veterans' exemption provided by section 16102 similarly does not extend to veterans who sell from fixed places of business.

The [***18] comparison between sections 16101 and 16102 does not compel the conclusion the county seeks. Indeed, it may be taken to support Brooks's position. As we have noted, the substance of section

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16101 was first added [*759] to the California statutes in 1935, by insertion into Political Code section 4041. 14. The substance of sections 16100 and 16102 had already been on the books for 34 years. In adding the new provision, the Legislature carefully and even redundantly qualified it: "other than merchants having a fixed place of business"; "itinerant peddlers"; "itinerant vendors. " But at the same time the Legislature left the comparable terms in the veterans' exemption, as it appeared in the same section 4041. 14 and was reiterated in the 1935 chapter, wholly unqualified. It is rational to conclude that the Legislature omitted from the veterans' exemption words which would have expressly limited the exempt activities to those which were "itinerant" and not undertaken from "a fixed place of business" because it intended no such limitation.

(4b) It would follow that the county's reliance on *noscitur a sociis* is misplaced. As a leading commentator points out, "the [***19] maxim *noscitur a sociis* is a mere guide to legislative intent. The rule will not be applied where there is no ambiguity, or to thwart the legislative intent, or to make general words meaningless. The maxim is only an extrinsic aid and should only be used when the clear meaning of the words used in the statute is doubtful. " (2A Sutherland, [**515] Statutory Construction (4th ed. 1984) § 47. 16, p. 161 (fns. omitted); cf. *People v. Fields* (1980) 105 Cal.App.3d 341, 344 [164 Cal.Rptr. 336]; *Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 670 [73 Cal.Rptr. 449].)

(3c) In its reply brief the county argues that this court should assign dispositive significance to the fact that the Legislature has not seen fit to amend section 16102 in light of the Attorney General's 1944 opinion: It suggests that the Legislature's inaction is some evidence that the 1944 opinion "does in fact reflect the Legislature's intent. " But in each of the cases on which the county relies it was of dispositive significance that the Legislature had taken action upon the statute in question at least twice [***20] since publication of the opinion or opinions of the Attorney General. Section 16102 has not been amended since 1941. We are unwilling to infer that the Legislature has been cognizant of the essentially gratuitous discussion of *noscitur a sociis* in the 1944 opinion, and that its failure to take any action whatsoever with respect to section 16102 amounts to an adoption of the Attorney General's position.

As the Attorney General acknowledged in 1944, the word "[vend]" . . . in its broadest sense includes all manner of selling. " (3 Ops. Cal. Atty. Gen., *supra*, p.

197.) We deem the word, as used in section 16102, broad enough to encompass sales from fixed locations.

3. *Personal privilege.*

(5) The county relies on unrelated statutes, general texts, and cases from other jurisdictions to support its contention that the section 16102 exemption does not extend to sales made by agents and employees of the veteran.

[*760] Once again this is a question of statutory construction, as to which general citations render little or no assistance. Nevertheless this is perhaps the county's strongest argument: It may rationally be doubted that the Legislature would [***21] have intended a patriotically inspired exemption to apply to a large organization of retail agents and employees of an individual veteran, or even (as in Brooks's case) to the use of a few agents or employees to conduct the veteran's business at more than one location. It would be an insufficient response to such doubts to suggest that the Legislature would have contemplated, and approved, use of a limited number of agents and employees (perhaps drawn, as in Brooks's case, from the veteran's immediate family) at a single location: There is no practical way, consistent with the language of section 16102, to draw such distinctions. The county's argument is necessarily absolute: The section 16102 exemption, in the county's view, does not extend to agents or employees of any kind.

But once again the county cannot avoid the plain language of section 16102. The section requires that the veteran personally own his inventory, but places no limitation whatsoever upon the manner in which he may "hawk, peddle and vend" it. The use of agents and employees to sell goods has been a well-understood practice throughout commercial history, and surely was within the knowledge (and thus, presumably, [***22] the contemplation) of the Legislature. We are unwilling to write the requested limitation into the statute: The county's concerns should be addressed through the legislative process.

4. *Attorney fees.*

In this court the county's only challenge to the attorney fee award is linked to its argument on the merits: If and to the extent the judgment is reversed, the attorney fee award should be stricken or reconsidered. Since we affirm on the merits, we shall permit the fee award to stand.

The judgment is affirmed.