

EPSTEIN AND EPSTEIN
ATTORNEYS AT LAW
P.O. BOX 0266
GEORGETOWN, MA 01833-0366

PHILIP D. EPSTEIN (RETIRED)
STEVEN S. EPSTEIN

TELEPHONE (978) 685-9696
FACSIMILE (978) 685-5363

April 28, 2001

Barbara Anderson
Chip Ford
Citizen's Economic Research Foundation
P.O. Box 408
Peabody, MA 01960-6908

RE: Factual/Legal Basis of Driver's License Fees and MV Registration Fees

Dear Barbara and Chip:

I have completed your requested investigation of the factual and legal basis of the current fees collected by the Registry of Motor Vehicles for Driver's License Renewals and Motor Vehicle Registration and the likelihood of a successful challenge to either or both. In preparing this response I again reviewed the memorandum prepared last year titled, "The Setting of Drivers License Fees And The Legal Use Of The Drivers Renewal Fees" in which I concluded that Governor Cellucci's "freeze" on fee reduction which had been proposed to take effect on May 1, 2000, was illegal.

I have also made further review of: case law both Massachusetts and other jurisdictions referred to in Massachusetts case law; the Constitution of the Commonwealth; statutory law; the Massachusetts Register; the Code of Massachusetts Regulations; the state budget for fiscal year 2000 and 2001.

I am saddened to report that it is my considered opinion that a challenge to the new rates would fail!

By Section 8 of Chapter 87 of the Acts of 2000, titled "An Act Providing Additional Funding For the Central Artery/Ted Williams Tunnel Project and the Statewide Road and Bridge Program" approved with emergency preamble on May 17, 2000, the Great and General Court with the consent of the Governor amended Section 33 of Chapter 90 of the General Laws. The effect of the amendment was in the case of motor vehicle registrations (except commercial vehicles, antique motor cars, auto-homes) to establish

a \$30.00 fee to be collected every two years and for a license to operate a motor vehicle, no matter the class, a fee of \$33.75 to be collected at least once every five years upon renewal.

If they are fees, the registration and license fee are more appropriately classified as regulatory fees, founded on the police power to regulate particular activities

In footnote 1 of Emerson College v. City of Boston the Court notes that:

Proprietary fees do not implicate the taxation power if "based on fair recompense for the public moneys expended for initial construction and for adequate maintenance" of the facilities used. Opinion of the Justices, 250 Mass. 591, 597, 148 N.E. 889 (1924). Similarly, regulatory fees are not taxes if commensurate with governmental expenditures occasioned by the regulated party. The general rule as to regulatory fees is "that the costs . . . which may be considered are [not] simply those which arise directly in the enforcement of the regulatory provisions themselves. The license fee may properly be fixed with a view to reimbursing . . . for all expenses imposed upon it by the business sought to be regulated. 'In fixing upon the fee, it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed.' " United Business Comm'n v. San Diego, 91 Cal.App.3d 156, 166, 154 Cal.Rptr. 263 (1979), quoting County of Plumas v. Wheeler, 149 Cal. 758, 764, 87 P. 909 (1906).

In the above quote "business" is synonymous with "activity" and despite the success in the previous litigation with the administrative branch which reduced the monetary exaction to only the direct costs of registration and licensing the new rates set by the legislature show an intent to recoup some of the incidental costs. A power they have under Part II, c. 1, § 1, art. 4, of the Constitution as limited as to the use thereof to transportation expenses by Art. 104 of Amendments, see below.

The \$30 Registration Fee and \$33.75 License Fee are actually an excise tax!

The nature of the registration fee was raised in 1959 in the case of O'Brien v. State Tax Commission, 339 Mass. 56. In that case O'Brien challenged the constitutionality of the registration "fee" and the motor vehicle excise tax as double taxation. The Supreme Judicial Court agreed with O'Brien that, "Undoubtedly both taxes are excises. They are imposed with respect to 'commodities' very like one

another.” Id. at 62. However, the Court disagreed with O’Brien that the two amounted to unconstitutional double taxation.

The imposition of two such reasonable excises is certainly not in terms forbidden by the Massachusetts Constitution, Part II, c. 1, § 1, art. 4, giving to the Legislature the power 'to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the * * * commonwealth; and also to impose and levy, reasonable duties and excises, upon any * * * commodities * * * within the same.' In the absence of discrimination, clear unreasonableness, denial of due process of law, or denial of the equal protection of the laws by an improper classification, we think that, under art. 4, a clear legislative intention to impose two fair excises with respect to or upon the same subject matter constituting a proper object of excise taxation must be respected.

Id. at 62 – 63.

What the Court said of the Registration Fee is as applicable to the License Fee.

A key distinction to bear in mind between the Motor Vehicle License and Registration Fees and the fee ruled unconstitutional in Emerson College v. City of Boston is that the monetary exaction imposed in Emerson College could not pass muster under a fee analysis nor an excise tax analysis. Characterized in the enacting legislation as a fee for augmented fire services, the Court in Emerson College held: (a) as a fee it failed because fire protection is a public benefit; and, (b), as an excise tax it fails because you can't refuse fire protection so the only way to avoid the excise tax is to sell the improved real property.

The only limits on an excise tax, which the both fees undoubtedly are, is it discriminatory, is it clearly unreasonable, does it violate the principals of due process or equal protection. The burden of proving any one of these four grounds against legislative action would be difficult if not impossible to prove given the power granted the legislature.

Article 104 of the Amendments to the Constitution of Massachusetts provides that:

No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicle on public highways, or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of refunds and adjustments in relation thereto, payment of highway obligations, or cost of

construction, reconstruction, maintenance and repair of public highways and bridges, and mass transportation lines and of the enforcement of state traffic laws, and for other mass transportation purposes; and such revenue shall be expended by the commonwealth or its counties, cities and towns for said highway and mass transportation purposes only and in such manner as the general court may direct; provided, that this amendment shall not apply to revenue from any excise tax imposed in lieu of local property taxes for the privilege of registering such vehicles.

The Court wrote in O'Brien that:

[A]rt. 78 [subsequently replaced by art. 104] is a clear constitutional recognition of the Legislature's power, subject to the limitations of art. 78 where applicable, to impose any or all of the existing excises under G.L. cc. 60A, 64A, and 90 in its efforts to provide revenues to meet the heavy and varied costs of government created by motor vehicles.

O'Brien, supra at 64.

Given this language from O'Brien and the power conferred on the legislature by the Constitution it becomes clear that the need for the additional revenue needed for highway construction which drove the decision of the legislature to establish the new registration and license "fees" would make it extremely unlikely that a majority of the justices would conclude that the increased fees either standing alone or in the aggregate with all other fees and taxes imposed on the ownership and operation of motor vehicles on the roads of the Commonwealth are unreasonable, or in any other respect unconstitutional.

The reasonableness of the fee or excise would never be measured by only the direct costs. Furthermore the legislature need not be exact, provided that all the revenue from the fees, duties, excises or license taxes relating to registration, operation or use of vehicle on public highways, or to fuels used for propelling such vehicles are used for the purposes set forth in Art. 104.