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September 5, 2019

Jennifer Shifflett, Deputy Clerk
Albemarle County Circuit Court
501 East Jefferson Street, Third Floor
Charlottesville, Virginia 22902

HAND DELIVERED

Re: Hart v. Albemarle and Letteri, CL19-1167

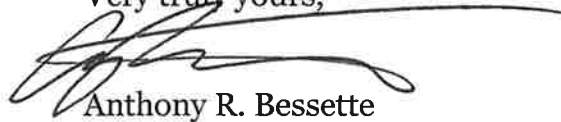
Dear Jennifer:

On behalf of the County and Mr. Letteri, please find enclosed a Demurrer. I ask that these please be filed with your Office.

Please let me know if there is anything further I must do in this regard. Thank you for your help.

With kindest regards, I am

Very truly yours,



Anthony R. Bessette

VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JOHN HART, JR.,

DATE: 09/05/2019 @16:22:40

Plaintiff

TESTE: _____
CLERK/DEPUTY CLERK

Case No. CL19-1167

v.

THE COUNTY OF ALBEMARLE, VIRGINIA,

and

**WILLIAM LETTERI, in his official capacity as Chief
Financial Officer,**

Defendants.

DEMURRER

Defendants County of Albemarle, Virginia and William Letteri (collectively, the “County”), by counsel, demur to Plaintiff’s “Complaint and Application for Relief from Business-License Tax Assessment” (“Complaint”). In support of its demurrer, the County states as follows:

BACKGROUND

1. On January 22, 2019, the County assessed Plaintiff John Hart, Jr. (“Hart”) a business license tax for tax years 2013-2018. (Complaint, ¶ 28.) According to the Complaint, the business license tax was assessed under Albemarle County Code (“County Code”) § 8-712.* (Complaint, ¶¶ 51-53.)

* In fact, current County Code § 8-712, to which the Complaint refers, did not apply from 2013-2018, the tax years that form the basis of the Complaint. That ordinance is a 2019 recodification and extensive rewriting of former County Code § 8-616, the ordinance that applied to taxpayers such as Hart in 2013-2018. That ordinance was the subject of an amendment in 2017, as well, but that amendment did not make any change that would affect this case. While that superseded ordinance differs significantly from current County Code § 8-712, the merit of Plaintiff’s claims under either section is the same. A copy of former County Code § 8-616 is attached for the Court and Plaintiff’s ease of reference. This demurrer addresses Hart’s Complaint under both the former and current County Code provisions, because the Complaint demands both retrospective and prospective relief.

2. The County assessed the business license taxes on Hart because he earned more than \$100,000 in gross receipts per year between 2013-2018, from writing activity conducted in the County. (Complaint, ¶¶ 25 and 28.)

3. Hart paid these assessments and related penalties. (Complaint, ¶¶ 29-33.)

4. On July 24, 2019, Hart filed the Complaint. On August 16, 2019, Hart perfected service of the summons and Complaint.

COUNT I: FIRST AMENDMENT

5. The County assessed a business license tax on Hart as an independent writer, but Va. Code § 58.1-3703(C)(3) precludes assessment of local business license fees and taxes upon newspapers, magazines, newsletters, and other publications issued daily or regularly, as well as radio and television broadcasting stations and services. (Complaint, ¶¶ 28, 41-45.)

6. Content-based discrimination occurs when the government burdens speech based on (a) particular viewpoints or (b) entire topics. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Where the government burdens speech based on the viewpoint it espouses or the topic it addresses, strict scrutiny – also referred to as “stringent standard” – applies. *Id.* at 2228.

7. The Complaint argues that a differential burden, without regard to whether it attaches to particular viewpoints or entire topics, constitutes content-based discrimination under the First Amendment, and is thus subject to strict scrutiny. (Complaint, ¶ 61.) However, “a differential burden on speakers is insufficient by itself to raise First Amendment concerns[.]” *Leathers v. Medlock*, 499 U.S. 439, 452 (1991). “[A] tax scheme does not become suspect simply because it exempts only some speech.” *Id.* at 451 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983)). The Complaint argues precisely that. (Complaint, ¶ 61.)

8. The Complaint argues that the County’s business license tax must be both (a) substantially related to an important governmental interest and (b) narrowly tailored toward achieving

that interest. (Complaint, ¶¶ 62-65.) However, that stringent standard applies only to governmental actions that target speech on the basis of content; it does not apply to governmental actions that neither burden speech on a particular viewpoint nor an entire topic. *Nat'l Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Leathers*, 499 U.S. at 447; *Reed*, 135 S. Ct. at 2228.

9. The Complaint does not allege that the County business license tax burdens either the viewpoint Hart espouses, or the topic on which he chooses to write. Thus, in seeking to apply the stringent standard to the County's business license tax, Hart is in error.

10. "Legislatures have especially broad latitude in creating classifications and distinctions in tax structures." *Leathers*, 499 U.S. at 451, quoting *Regan*, 461 U.S. at 547. A tax that is facially content-neutral will fall within that broad latitude where it (i) is a tax of general applicability, and (ii) does not unduly burden a narrow subset of speakers. *See id.* at 445-446, discussing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

11. County Code § 8-712 is a "catch-all" provision – a tax of general applicability – that also applies to speakers other than Hart, as well as businesses whose service is not primarily speech. (Complaint, ¶¶ 51-53.) Former County Code § 8-616 does not differ from current County Code § 8-712 in this regard.

12. To the extent that the Complaint alleges that County Code § 8-712 or former County Code § 8-616 unduly burdens a subset of speakers, that subset would be every person whose business involves speech, other than the press. That is not a narrow subset of speakers.

13. A plaintiff must allege, as a threshold to bringing a First Amendment challenge to a governmental action, that the challenged governmental action amounted to a prior restraint upon his speech. *See Chesterfield Cablevision v. Chesterfield*, 241 Va. 252, 255 (1991) (citing *Grosjean*, 297 U.S. at 248-249); *see also Judson v. Mathews County*, 18-cv000121 (E.D.Va, June 20, 2019) (holding that, to

challenge a board of supervisors' rules restricting speech at public meetings, the plaintiff must have shown that he attempted to speak and was rebuffed). Hart's Complaint fails to allege that the assessment of a business license tax on his writing amounts to a prior restraint.

14. To the extent that a prior restraint argument may be implied in the Complaint, the Complaint fails to allege any facts that would support a finding that the business license tax acted as a prior restraint to Hart's speech. In fact, Hart continues to write novels in the County. (Complaint, ¶¶ 17 and 21.)

15. Because the Complaint does not allege that the business license tax was assessed on Hart based on the content of his speech, that it is not a law of general applicability, or that it acted as a prior restraint upon his speech, Count I of the Complaint fails to state facts upon which the relief demanded can be granted.

COUNT II: FOURTEENTH AMENDMENT DUE PROCESS

16. Hart argues that the business license tax at issue is unconstitutionally vague as applied to him. (Complaint, ¶ 68.)

17. The vagueness doctrine that Hart invokes applies to instances where the government has prohibited certain conduct. *See County of Fairfax v. Southern Iron Works*, 242 Va. 435 (1991).

18. The tax that Hart challenges prohibits neither Hart's speech, nor conduct of any kind. Thus, the vagueness doctrine does not apply to it.

19. Even assuming, for sake of argument, that the vagueness doctrine were applicable, the business license tax is not vague. The business license tax at issue, County Code § 8-712, is a catch-all provision that applies to repair, personal, business, and other services. (Complaint, ¶¶ 52-53.) The County Code defines "services" as "things purchased by a customer that do not have physical characteristics, or that are not goods, wares, or merchandise." (Complaint, ¶ 56.) In other words, it applies to every service not taxed, or expressly exempted, elsewhere in the County Code.

20. Former County Code § 8-616 was, like current County Code § 8-712, a catch-all provision. It applied to repair, personal, business, and amusement services. That section listed examples of such services, but also applied, through the definition of “business service,” to “rendering for compensation any service to any business... unless the service is specifically provided for under another section of this chapter.” In other words, it applied to every service not taxed elsewhere in the County Code.

21. While the Complaint argues that the new County Code does not define “repair services,” “personal services,” “business services,” or “other services,” – the categories covered by the catch-all tax provision – it does not argue that they are not “services.” (Complaint, ¶ 53.) The Complaint does not allege that the manuscripts that Hart writes and sells to publishers do not meet the definition of “services.”

22. Former County Code § 8-616, which applied during the years for which Hart was taxed, did define “business services.” (*See* para. 22, *supra*.)

23. Because Count II rests upon the application of the vagueness doctrine to the business license tax, but the vagueness doctrine does not apply where the government has not prohibited any conduct, Count II of the Complaint fails to state facts upon which the relief demanded may be granted. Even if the Court were to find that the vagueness doctrine applies here, the Complaint fails to allege any facts that would support a finding that the business license tax is vague as applied to Hart. Thus, Count II of the Complaint would still fail to state facts upon which the relief demanded can be granted.

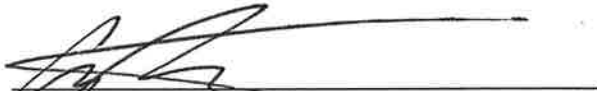
CONCLUSION

WHEREFORE, the County requests that the Complaint be dismissed with prejudice, with costs awarded to the County.

Respectfully Submitted,

COUNTY OF ALBEMARLE &
WILLIAM LETTERI

By Counsel



Greg Kamptner VSB #33788
Andrew H. Herrick, VSB #37236
Anthony R. Bessette, VSB #80135
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FAX: (434) 972-4068


CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer was sent by mail on the 5th of September 2019, to:

Paul Sherman & Renée D. Flaherty
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203

Neal L. Walters
Scott Kroner, PLC
P.O. Box 2737
Charlottesville, VA 22902

Counsel for Plaintiff



Anthony R. Bessette

ALBEMARLE COUNTY CODE

**DIVISION 4. PERSONAL, PROFESSIONAL, BUSINESS, AMUSEMENT OR REPAIR
SERVICE BUSINESS, OCCUPATIONS AND PROFESSIONS**

Sec. 8-615 Financial, real estate and professional services.

Each person engaged in a financial, real estate or professional service shall be subject to the license tax, and other provisions, set forth herein:

A. Each person engaged in a financial, real estate or professional service shall be subject to a license tax of fifty-eight cents (\$0.58) for each one hundred dollars (\$100.00) of gross receipts.

B. For purposes of this chapter, the following definitions shall apply:

1. *Financial services.* The term "financial services" means the service for compensation by a credit agency, an investment company, a broker or dealer in securities and commodities or a security or commodity exchange, unless such service is otherwise provided for in this chapter. For purposes of this definition, the term "broker" means an agent of a buyer or a seller who buys or sells stocks, bonds, commodities, or services, usually on a commission basis; the term "commodity" means staples such as wool and cotton which are traded on a commodity exchange and on which there is trading in futures; the term "dealer" means any person engaged in the business of buying and selling securities for his own account, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as part of a regular business; and the term "security" has the same meaning as in the Securities Act (§§ 13.1-501 et seq.) of the Code of Virginia, or in similar laws of the United States regulating the sale of securities.

2. *Real estate services.* The term "real estate services" means rendering a service for compensation as lessor, buyer, seller, agent or broker and providing a real estate service, unless the service is otherwise specifically provided for in this chapter.

3. *Professional services.* The term "professional services" means rendering a service expressly enumerated in paragraph (C)(3) or engaging in any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study is used by its practical application to the affairs of others, either advising, guiding, or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The terms "profession" and "professional" imply attainments in professional knowledge as distinguished from mere skill, and the application of knowledge to uses for others as a vocation

C. Financial, real estate and professional services are identified below:

1. *Financial services.* Those persons engaged in a financial service include, but are not limited to, the following:

- Buying installment receivables.
- Chattel mortgage financing.
- Consumer financing.
- Credit card services.
- Credit unions.
- Factors.
- Financing accounts receivable.
- Industrial loan companies.
- Installment financing.
- Inventory financing.
- Loan or mortgage brokers.
- Loan or mortgage companies.
- Safety deposit box companies.
- Security and commodity brokers and services stockbroker.

ALBEMARLE COUNTY CODE

Working capital financing.

2. *Real estate services.* Those persons engaged in a real estate service include, but are not limited to, the following:

Appraisers of real estate.
Escrow agents, real estate.
Fiduciaries, real estate.
Lessors of real property.
Real estate agents, brokers and managers.
Real estate selling agents.
Rental agents for real estate.

3. *Professional services.* Those persons engaged in a professional service include, but are not limited to, the following:

Architects.
Attorneys-at-law.
Certified public accountants.
Dentists.
Engineers.
Land surveyors.
Practitioners of the healing arts (the art or science or group of arts or sciences dealing with the prevention, diagnosis, treatment and cure or alleviation of human physical or mental ailments, conditions, diseases, pain or infirmities).
Surgeons.
Veterinarians.

(Ord. 96-11(1), 11-13-96, § 11-65; Ord. 97-11(1), 5-7-97, § 11-65; Code 1988, § 11-65; Ord. 98-A(1), 8-5-98)

State law reference—Va. Code § 58.1-3706.

Sec. 8-616 Repair, personal, business, amusement and other services.

Each person engaged in a repair, personal, amusement or business service shall be subject to the license tax, and other provisions, set forth herein:

A. Each person engaged in a repair, personal, amusement or business service shall be subject to a license tax of thirty-six cents (\$0.36) for each one hundred dollars (\$100.00) of gross receipts.

B. For purposes of this chapter, the following definitions shall apply:

1. *Repair service.* The term “repair service” means repairing, renovating, cleaning or servicing of some article or item of personal property for compensation, unless the service is specifically provided for under another section of this chapter.

2. *Personal service.* The term “personal service” means rendering for compensation any repair, personal, business, amusement or other services not specifically classified as “financial, real estate or professional service” in section 8-615, or rendered in any other business or occupation not specifically classified in this chapter unless exempted from local license tax by Title 58.1 of the Code of Virginia.

3. *Business service.* The term “business service” means rendering for compensation any service to any business, trade, occupation or governmental agency, unless the service is specifically provided for under another section of this chapter.

ALBEMARLE COUNTY CODE

C. Repair, personal, business, and amusement services include, but are not limited to, the following:

Addressing letters or envelopes.
Advertising agencies.
Airline passenger carrier.
Airplane repair.
Airports, private.
Ambulance services.
Amusement park.
Animal hospitals, grooming services, kennels or stables.
Arcade or building devoted to general amusement or entertaining.
Auctioneers and common criers.
Auditorium, arena or coliseum with a maximum seating capacity less than 10,000 persons and open to the public.
Auto repair, engine repair of any type.
Automobile driving schools.
Barbershops, beauty parlors and hairdressing establishments, schools and services.
Bicycle repair.
Bid or building reporting service.
Billiards or pool.
Bill poster or distributor.
Blacksmith or wheelwright.
Booking agents or concert managers.
Bookkeeper, public.
Bottle exchanges.
Bowling alley.
Brokers and commission merchants other than real estate or financial brokers.
Business and office machine repair.
Business research and consulting services.
Buyers, gold and silver.
Cable television.
Chartered clubs. Licensee hereunder may without additional license operate service of retail merchant and restaurant. The term "chartered club" means any nonprofit corporation or association which is the owner, lessee or occupant of an establishment operated solely for objects of a national, social, patriotic, political or athletic nature or the like, but not for pecuniary gain, the advantages of which belong to all the members; the term shall also mean the establishment so operated.
Child care attendants or schools.
Cleaning chimneys, furnaces.
Clinical laboratories.
Clothes, hats, carpets or rugs, repair of.
Collection agents or agencies.
Commercial photography, art or graphics.
Commercial sports.
Computer service operated for compensation.
Correspondence establishments or bureaus.
Dance halls, except restaurants licensed to serve food and beverages having a dance floor with an area not exceeding ten percent (10%) of the total floor area of the establishment and for which no admission is charged.
Dance studios and schools.
Data processing, computer and systems development services.
Day nursery (other than foster homes).
Detectives and watchmen. Each person shall be registered by name and service with the county chief of police.
Developing or enlarging photographs.

ALBEMARLE COUNTY CODE

Dog or water raceway.
Drafting services.
Drive-in theaters.
Engraving.
Eradication or extermination of rats, mice, termites, vermin or bugs.
Erecting, installing, removing or storing awnings.
Freight traffic bureau or agency.
Fumigating or disinfecting.
Funeral services and crematories.
Furnishing clean diapers.
Furnishing closed circuit musical entertainment.
Furnishing closed circuit television entertainment.
Furnishing house cleaning service.
Furnishing janitor service.
Furnishing labor service.
Furnishing statistical service.
Furniture, upholstering, repair of.
Gardens.
Golf driving range.
Gunsmith, gun repairing.
Hauling of sand, gravel or dirt.
Hauling or transfer, not in connection with taxicab business.
Holding companies, including holding company for mass media communications.
Hotels, motels, tourist courts, boarding and rooming houses, trailer parks, campsites, and other facilities offering guest rooms rented out for continuous occupancy for fewer than thirty (30) consecutive days.
Information bureaus.
Instructors, tutors, schools and studios of music, ceramics, art, sewing, sports and the like.
Interior decorating.
Job printer, printing shop, bookbinding, duplicating processes.
Laundry, cleaning and garment services including laundries, dry cleaners, linen supply, diaper service, coin-operated laundries and carpet and upholstery cleaning.
Locksmith.
Machine shop, boiler shop.
Mailing, messenger and correspondent services.
Marinas and boat landings.
Mattresses, repair of.
Miniature golf.
Motor vehicle transportation of passengers.
Movie theaters.
Music teacher.
Newspaper delivery service.
Nickel plating, chromizing and electroplating.
Nurses and physicians registries.
Nursing and personal care facilities including nursing homes, convalescent homes, homes for the retarded, old age homes and rest homes.
Operating a scalp treating establishment.
Packing, crating, shipping, hauling or moving goods or chattels for others.
Paint shop, other than contractor.
Parcel delivery services.
Parking lots, public garages and valet parking.
Parks, athletic fields.
Personnel services, labor agents and employment bureaus.
Photographers and photographic services; the license tax on photographers with no regularly established place of business in the state shall not exceed thirty dollars (\$30.00).

ALBEMARLE COUNTY CODE

Piano tuning.
Picture framing and gilding.
Porter services.
Press clipping services.
Private hospitals.
Private schools (other than religious and nonprofit).
Promotional agents or agencies.
Protective agent or agency.
Public relations counselor.
Publicity service, furnisher of; booking agent, concert manager.
Radio engineer.
Radios, televisions, refrigerators, electrical appliances, home appliances, repair of.
Realty multiple listing services.
Recorder of proceedings in any court, commission or other organization.
Refrigeration engineer.
Renting airplanes.
Renting or leasing any items of tangible personal property.
Renting bicycles.
Renting or furnishing automatic washing machines.
Renting wall signs or billboards.
Reproduction services.
Reweaving.
Riding academy.
Rifle ranges or shooting galleries, except those operated by private or nonprofit gun clubs.
Road machines, farm machinery, repair of.
Rug cleaning.
Sales agent or agency.
Saws, tools, repair of.
Scales, repair of.
Scientific research and development service.
Sculptor.
Secretarial service.
Septic tank cleaning.
Shades, repair of.
Shoe repair, shoe shine and hat repair shops.
Sightseeing carriers.
Sign painting.
Skating rink.
Stenographer, public.
Storage, all types.
Supplying clean linen, coats, aprons, towels.
Swimming pools open to the public.
Tabulating service.
Tax consultant.
Taxicabs.
Taxidermist.
Telephone answering service.
Theaters.
Theatrical performances.
Theatrical performers, bands and orchestras.
Tire repair.
Title abstract company.
Title insurance company.
Towing services.
Translator of foreign languages.

ALBEMARLE COUNTY CODE

Transportation consultant.
Transportation services including buses and taxis.
Travel bureaus or tour agents.
Tree surgeons, trimmers and removal services.
Turkish, Roman or other like baths or parlors.
U-drive-it firm or business.
Umbrellas, harnesses, leather goods, repair of.
Undertaker, embalmer.
Vehicle title service.
Vehicular advertising, electric advertising, bus advertising, commercial advertising.
Wake-up services.
Washing, waxing, auto; cleaning of automobiles.
Watches, clocks, repair of.
Welding shop.

Persons accepting or offering to accept or place orders, which such person will deliver at a later date, for the sale of medicines, perfumes, salves, liniments, cosmetics, cookware, plastic wares, brushes, books, magazines, vacuum cleaners or any other merchandise and not having a regular place of business in the county but who sell or offer to sell from house to house, or at parties or meetings arranged for that purpose.

All other similar personal service, business service, amusement service or repair service, occupations, trades or businesses not included herein and not otherwise taxed by this chapter.

(3-15-73, §§ 39.1, 53; 4-21-76; 3-10-82; 11-14-84; 4-13-88; Ord. 96-11(1), 11-13-96, § 11-66; Code 1988, § 11-66; Ord. 98-A(1), 8-5-98; Ord. 00-8(1), 10-11-00; Ord. 17-8(1), adopted 6-14-17, effective 8-1-17)

State law reference--Va. Code §§ 58.1-3706, 58.1-3727.

Sec. 8-617 Retailers or retail merchants.

Each person engaged as retailer or retail merchant shall be subject to the license tax, and other provisions, set forth herein:

A. Each person engaged as a retailer or retail merchant shall be subject to a license tax of twenty cents (\$0.20) for each one hundred dollars (\$100.00) of gross receipts, other than as provided in subsection (B) herein.

B. Each person engaged as a retailer or retail merchant shall be subject to a license tax of ten cents (\$0.10) for each one hundred dollars (\$100.00) of gross receipts for direct retail sales. For purposes of this section, a "direct retail sale" is defined as a retail sale made to a remote buyer ordering by telephone, internet, or mail, in which the item(s) sold is/are shipped by common carrier or by the U.S. Postal Service.

C. Retailers or retail merchants include, but are not limited to, the following:

Aircraft or aircraft parts.
Alcoholic beverages.
Antiques.
Auto accessory, tire, battery.
Automobile graveyards.
Auto sales, motor vehicle dealers.
Bakeries, caterers.
Bicycles.
Boats, motors.
Books, stationery.
Building materials.