



## II. Background

2. The SOB Tax imposes a \$5.00 fee for each entry of each customer of a sexually oriented business. "Sexually oriented businesses," are statutorily defined as nightclubs, bars, restaurants, or similar commercial enterprises that:

(A) provide for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorize on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

TEX. BUS. & COM. CODE § 47.051(2). The statutory definition of a "sexually oriented business" in the SOB Tax is different than the definition of "sexually oriented business" in section 243.002 of the Texas Local Government Code. The SOB Tax singles out certain sexually oriented businesses.

3. The SOB Tax allocates one-hundred percent of its revenue to two specific funds. The first \$25 million of taxes raised will be deposited in a revenue fund to the credit of the Sexual Assault Program Fund, and funds in excess of the first \$25 million will be deposited to the credit of the Texas Health Opportunity Pool.<sup>1</sup> TEX. BUS. & COM. CODE § 47.054-.055.

## III. Argument

4. Summary judgment is appropriate when no material facts are at issue and the moving party is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548--49 (Tex. 1985). Construction of a statute is a question of law for the courts. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989).

---

<sup>1</sup> The SOB Tax provided for an alternate allocation of the funds in excess of \$25 million if the Texas Health Opportunity Pool was not established. But the pool was established by S.B. 10 which passed the Senate and the House and was approved by the Governor.

**A. The SOB Tax is an occupation tax.**

5. The statute creates an occupation tax. An occupation tax is defined generally as "a form of excise tax imposed upon a person for the privilege of carrying on a business, trade, or occupation." *Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 624 (Tex. 1975); *see also* 35 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 13.15 (2d ed. 2002) ("An occupation tax is, as the name implies, a tax on a profession, business, vocation, trade or other means of livelihood."). Here, the tax is imposed on admissions to sexually oriented businesses in order to raise revenue not used to regulate the businesses, and therefore constitutes an occupation tax. *See, e.g., H. Rouw Co. v. Texas Citrus Comm'n*, 247 S.W.2d 231, 234 (Tex. 1952) (tax on citrus fruit packagers to fund advertisements of Texas citrus industry constituted an occupation tax); *Calvert v. McLemore*, 358 S.W.2d 551, 552 (Tex. 1962) (tax on admissions to motion pictures, operas, plays and other such entertainments constituted an occupation tax); *Hurt v. Cooper*, 110 S.W.2d 896, 900-01 (Tex. 1937) (charges to chain stores to meet state's need for general revenues constituted an occupation tax); Op. Tex. Att'y Gen. No. JC-001 (1999) (admission fee to racetracks constitutes an occupation tax).

6. The Texas Supreme Court has articulated the distinction between fees and occupation taxes; revenue generating statutes are taxes:

It is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure. The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless of the name by which they are designated. On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes.

*Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937), *quoted in H. Rouw Co.*, 247 S.W.2d at 234. In this case, the funds raised by the statute will not be used to regulate the businesses that pay the fees. All of the revenue generated will go to the Sexual Assault Program Fund and the Texas Health Opportunity Pool. TEX. BUS. & COM. CODE §§ 47.054, 47.055. The SOB Tax's sole purpose is to raise revenue, not to defray costs of regulating sexually oriented businesses. HOUSE WAYS & MEANS COMM., BILL ANALYSIS, Tex., H.B. 1751, 80th Leg., R.S. (2007). Because the statute's sole purpose is to raise revenue rather than to defray costs to regulate the sexually oriented business industry, the statute is an occupation tax. *H. Rouw Co.*, 247 S.W.2d at 234; *Hurt*, 110 S.W.2d at 899; *Conlen Grain*, 519 S.W.2d at 623-4.

**B. The SOB Tax is unconstitutional because it does not allocate one-fourth of its revenue to public schools.**

7. The SOB Tax violates the Texas Constitution because it does not set aside one-fourth of its revenue for the public free schools. TEX. CONST. ART. VII, § 3; *see also Conlen Grain*, 519 S.W.2d at 627 n.3 (McGee, J., dissenting) (noting that one challenge to an occupation tax would be that the tax fails to set aside one-fourth of its revenue for the public free schools); Op. Tex. Att'y Gen. No. V-1027 (1950) (one-fourth of occupation tax must be set aside for the benefit of the public free schools). The Texas Tax Code contains many examples of occupation taxes that, in accordance with the Texas Constitution, expressly allocate a quarter of their revenue to the public free schools.<sup>2</sup> The SOB Tax, on the other hand, makes no such provision.

---

<sup>2</sup> *See, e.g.*, TEX. TAX CODE §§ 182.122 (occupation tax on public utility) ("Revenues collected under this chapter are allocated: (1) one-fourth to the foundation school fund; and (2) three-fourths to the general revenue fund"), 152.122 (taxes on sale, rental and use of motor vehicles), 162.504 (diesel fuel tax), 162.503 (gasoline tax), 162.505 (liquefied gas tax), 181.202 (occupation tax on cement production), 191.122 (occupation tax on oil well services), 191.145 (production), 201.404 (occupation tax on gas production), 201.353 (occupation tax on oil production), 203.152 (occupation tax on sulphur production); TEX. INS. CODE §§ 227.001 (occupation tax on insurance companies).

8. Because the SOB Tax does not allocate one-fourth of the revenue raised to the benefit of the public free schools, the entire statute is invalid. Courts cannot add provisions to make a statute constitutional; "it is for the Legislature, not the courts, to remedy defects or supply deficiencies in the laws . . . ." *Board of Insurance Comm'rs. of Texas v. Guardian Life Ins. Co. of Texas*, 180 S.W.2d 906 (Tex. 1944). Furthermore, the tax's allocation provisions are "so connected with the remainder of the act in meaning and purpose that it cannot be presumed that the Legislature would have passed the remainder of the act without" them. *Burns v. Dilley County Line Indep. Sch. Dist*, 295 S.W. 1091, 1095 (Tex. 1927). The legislative history of H.B. 1751 conclusively demonstrates that the statute was passed expressly to provide revenue for certain causes. HOUSE RESEARCH ORG., BILL ANALYSIS, Tex., H.B. 1751, 80th Leg., R.S. (2007). The SOB Tax's stated purpose is to raise money for sexual assault victims and the uninsured. Because the explicit purpose of the statute was to raise money for these causes, it is not clear the Legislature would have passed the tax if the revenues did not go to the programs specified. Thus, because the Legislature failed to allocate one-fourth of the tax's revenue to the public free schools, and because the court cannot rewrite the statute to include a provision that the Legislature did not contemplate, the entire statute is unconstitutional.

**C. The SOB Tax is unconstitutional because it is not an equal and uniform occupation tax.**

9. The SOB Tax violates the Texas Constitution because it is not equal and uniform. The Constitution provides that "occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." TEX. CONST. ART. VIII § 2. The Legislature cannot make an arbitrary, unreasonable, or unreal classification between subjects for purposes of taxation. *Texas Co. v. Stephens*, 103 S.W. 481, 485 (Tex. 1907). A classification violates the Constitution when it "has no reasonable basis in the nature of the business classified,

and . . . the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature." *Id.* For example, in *Calvert v. McLemore*, the Texas Supreme Court held that a statute violated the equal and uniform requirement when it taxed admissions to motion pictures houses, operas, plays "and like amusements held at places other than at a fixed and regularly established motion picture theater." 358 S.W.2d 551, 553 (Tex. 1962). The Court held that the tax created an arbitrary classification because there was no reasonable distinction between a person who exhibited a motion picture in an established theater and one who showed the same picture in a temporary location. *Id.*

10. Similarly, in this case, the statute at issue creates an arbitrary classification because it operates differently on businesses which provide the same entertainment to the same clientele. The statute taxes live nude entertainment and performances for "an audience of two or more individuals" in "a nightclub, bar, restaurant, or similar commercial enterprise." But businesses such as lingerie modeling studios, nude modeling studios, or adult arcades that provide live nude entertainment for an audience of one in a commercial setting are exempted from the tax. These businesses provide the same type of entertainment and serve the same customers as the sexually oriented businesses subject to the tax.

11. In *Bullock v. Texas Skating Association*, the court upheld a tax that operated differently on ballrooms and skating rinks because the type of entertainment and the type of clientele served by the two businesses were clearly distinguishable. 583 S.W.2d 888, 893-94 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.). Here, however, there is no reasonable distinction between the live nude entertainment provided at a nightclub that falls under the statute and that provided at, for example, a lingerie modeling studio, nude modeling studio, or in

an adult arcade theater. *See Calvert*, 358 S.W.2d at 553. Nor is there a difference between the clientele served by such businesses.

12. Lingerie modeling studios, adult arcades and nightclubs that provide live nude entertainment are typically considered sexually oriented businesses, but the statute treats these same subjects differently because it only applies to *certain* sexually oriented businesses.<sup>3</sup> There is no justification for the separate treatment afforded certain sexually oriented businesses by the Legislature, and the statute's classification is unreasonable and arbitrary. Thus, the tax is not equal and uniform and is therefore unconstitutional.

13. Upon declaring that the SOB Tax is an unconstitutional occupation tax, the Court should permanently enjoin the Defendants from enforcing, assessing or collecting the unconstitutional tax and find that no taxes are or will become due and owing.

#### IV. Prayer

14. Plaintiffs pray that the Court grant their Motion for Partial Summary Judgment, declare that Subchapter B of Chapter 47 of the Texas Business and Commerce Code is an unconstitutional occupation tax, permanently enjoin Defendants from enforcing, assessing or collecting the occupation tax, find that no taxes are due and owing or will be due and owing because the tax is unconstitutional, and for any other relief to which they are entitled.

---

<sup>3</sup> The original version of HB 1751 applied to all "sexually oriented businesses," as defined in section 243.002 of the Texas Local Government Code, that provide live nude entertainment, including modeling studios and adult video arcades, among others. But the SOB Tax was later amended to include only *certain* sexually oriented businesses.

Respectfully submitted,

**WINSTEAD PC**  
401 Congress Avenue  
Suite 2100  
Austin, Texas 78701  
512-370-2854 telephone  
512-370-2850 telecopier

By: \_\_\_\_\_  
G. Stewart Whitehead                      SBN 00789725  
Peter A. Nolan                                SBN 15062600  
Elliot Clark                                    SBN 24012428

Douglas M. Becker                          SBN 02012900  
Antoinette D. "Toni" Hunter              SBN 10295900  
**GRAY & BECKER P.C.**  
900 West Avenue  
Austin, Texas 78701  
512-482-0061 telephone  
512-482-0924 telecopier

**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served pursuant to the Texas Rules of Civil Procedure on the 21<sup>st</sup> day of December, 2007 upon the following counsel of record:

James C. Todd  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

  
\_\_\_\_\_  
Elliot Clark