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TAX, INTERNAL REVENUE CODE, SECTION 3406 — OHIO SALES TAX COMPUTATION.

1. TAX ON CERTAIN ARTICLES SOLD BY MANUFACTURER, PRODUCER, IMPORTER, IS EXCISE TAX FOR PRIVILEGE OF SELLING — BECOMES PART OF PURCHASE PRICE OF SUCH ARTICLES, WHERE SOLD TO CONSUMER — SHOULD BE INCLUDED IN "PRICE" AS DEFINED, SECTION 5546-1 GENERAL CODE.

2. TAX, INTERNAL REVENUE CODE, CHAPTER 19, UPON RETAIL SALE, JEWELRY, FURS, TOILET PREPARATIONS, INTERPRETED, COMMISSIONER INTERNAL REVENUE, INTERNAL REVENUE REGULATION 51, SECTION 320.7, TAX UPON PURCHASE, EVEN THOUGH COLLECTED THROUGH RETAILER — SHOULD BE EXCLUDED FROM "PRICE" AS DEFINED, SECTION 5546-1 GENERAL CODE.

SYLLABUS:

1. *The tax laid under Section* 3406 *of the Internal Revenue Code upon certain articles sold by the manufacturer, producer, or importer, is an excise tax upon the manufacturer, producer, or importer, for the privilege of selling the articles therein specified, and as such becomes a part of the purchase price of such articles when sold to consumers and should be included in the "price," as defined by section* 5546-1 *of the General Code, of such articles, when computing the Ohio sales tax.*

2. *The tax laid by Chapter* 19 *of the Internal Revenue Code upon the sale at retail of jewelry, furs and toilet preparations, as interpreted by the Commissioner of Internal Revenue (Internal Revenue Regulation* 51, *Section* 320.7) *is in effect a tax upon the purchaser of such articles, even though collected through the retailer and as such should be excluded from the "price" as defined by Section* 5546-1, *General Code, of such articles when computing the Ohio sales tax.*

Columbus, Ohio, October 7, 1941.

Hon. William S. Evatt, Tax Commissioner,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion in which you inquire as follows:

> "Directing your attention to the recently passed federal 'Revenue Act of 1941,' we shall appreciate an expression of your opinion as to whether manufacturers' excise taxes on sales as imposed by the federal 'Revenue Act of 1941' may be deducted from the selling price of tangible personal property in computing Ohio sales taxes.
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> We shall also appreciate an expression of your opinion upon the question of whether or not federal retailers' excise taxes imposed by such act upon sales of certain articles of tangible personal property, may be deducted from the selling price in computing Ohio sales taxes."

The Revenue Act of 1941, which is Public Law 250 (H. R. 5417) enacted by the Seventy-seventh Congress, approved September 20, 1941, amends "The Internal Revenue Code" by adding a new chapter (Chapter 19, entitled "Retailers' Excise Taxes") which imposes a tax upon designated articles sold at retail. Such act further enacts Section 3406 (Title 26, Section 3406, USC) which imposes a tax on designated articles sold by the manufacturer, producer or importer.

In approaching your inquiries, it is necessary to bear in mind the provisions of the Ohio Sales Tax Law (Sections 5546-1 to 5546-18 of the General Code). In Section 5546-2 of the General Code, the General Assembly has laid a tax on the purchaser of goods sold at retail, at certain rates therein set forth measured by the *price* at which the article is sold. By virtue of the specific provisions of section 5546-3, General Code, the tax therein is levied on the consumer rather than on the vendor, with certain minor exceptions not herein material.

Inasmuch as the quantum of the tax under the Ohio law is measured by the price at which the sale is made or consummated, it is necessary to look to the meaning of that term as defined by the Legislature with reference to sales taxable thereunder which are also subject to the tax recently levied by Congress. Such term has been defined by the General

Assembly for the purpose of the Sales Tax Act in Section 5546-1 of the General Code as follows:

> " 'Price' *means the aggregate value in money of any thing or things paid or delivered,* or promised to be paid or delivered *by a consumer to a vendor* in the consummation and complete performance of a retail sale without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or allowed after the sale is consummated, or any other expense whatsoever. 'Price' shall not include the consideration received for labor or services used in installing, applying, remodeling or repairing the property sold if the consideration for such services is separately stated from the consideration received for the tangible personal property transferred in the retail sale. 'Price' shall be deemed to be the amount received exclusive of the tax hereby imposed provided the vendor shall establish to the satisfaction of the tax commissioner that the tax was added to the price.
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> The tax collected by the vendor from the consumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and except for the discount authorized in section 5546-8 of the General Code, no persons other than the state shall derive any benefit from the collection or payment of such tax." (Emphasis added.)

The provisions of the Revenue Act of 1941 which levy the "manufactures' excise taxes" are contained in Section 3406 of the Internal Revenue Code, as so enacted, which reads in part as follows:

> "There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof): * * * "

Similar provisions of law levying a tax against "articles sold by the manufacturer, producer or importer" were contained in Sections 602, 603, 604, 605 and 606 of the "Revenue Act of 1924;" also Sections 607, 608, 609, 610, 612, 613, 615 and 617 of the "Revenue Act of 1918." The United States Supreme Court, in the case of Lash's Products Company v. United States, 278 U.S., 175 (decided January 22, 1929), had occasion to determine the meaning of the term "price" as used in the Revenue Act of 1918 in levying a tax on "soft drinks sold by the manufacturer in bottles or other containers" "equivalent to 10 per centum of the price for which sold." In that case, upon the enactment of such act, the manu-

facturer-vendor notified his customers of the additional tax, computed the tax upon the former regular selling price and billed the customer at the aggregate sum of the regular selling price plus the 10 per centum tax and remitted such 10 per centum of the regular selling price to the collector. The Federal Government took the position that the tax was one laid on the vendor and that the price upon which the tax should be computed was the total amount paid by the purchaser to the vendor and claimed additional tax to be due. The court, in upholding the contention of the government in that case, speaking through Mr. Justice Holmes, said at page 176:

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co. 56 App. D.C. 213, 12 Fed. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more than the goods because of the seller's obligation, but that is all. * * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and nothing else. Therefore, it is a part of the price. * * * "

A similar view was taken by the court with reference to the same Act in Elmer Candy Company v. Fauntleroy, 19 Fed. (2d), 664 (decided May 13, 1927). It should be noted that the language imposing the tax in the Revenue Act of 1918, which was considered in the Lash's Products Company case, supra, is almost identical with that laying the tax in Section 3406, above quoted.

In each case the language of the act is that the tax is levied on the article *sold by the manufacturer*. Similar language is to be found in Section 2000 of Title 26, USC, wherein the tax is levied "upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer," etc. The courts, in construing such section, have held that the tax is laid on the manufacturer-vendor and not on the purchaser. R. J. Reynolds Tobacco Company v. Robertson, 94 Fed. (2d), 167 (Certiorari denied, 304 U. S. 563); Keilson Cigar Company v. Braden, 59 O. App., 562. A similar provision is set forth in Section 3520 of such title with reference to the sale of bituminous coal by the producer, and in many of the former laws imposing so-called luxury taxes, substantially similar language is contained. My examination of the cases construing such Acts indicates that the courts have in each instance, coming to my attention, construed such taxes to have been laid on the manufacturer or vendor and not on the vendee. See Skinner v. United

States, 8 Fed. Supp., 999; Philip Mangone Company v. United States, 54 Fed. (2d), 168; Foss-Hughes Company v. Lederer, 287 Fed. 150; Thurman v. Swisshelm, 36 Fed. (2d), 350. In view of such holdings of the courts construing similar language in other sections of law, it would appear settled that Section 3406, supra, lays a tax upon the manufacturer, producer or importer and not on the purchaser. Such being the case, the next question for determination is whether or not such tax should be included within the price as such term is defined in the Ohio Sales Tax Law.

It will be noted that Section 5546-1, supra, defines "price" as "the aggregate value in money * * * paid or delivered by a consumer to a vendor in the consummation and complete performance of a retail sale." It consequently follows that the total amount paid by the vendee to the manufacturer, producer or importer for the article purchased is the price upon which the Ohio sales tax should be computed, if such vendee be the consumer.

Whether or not the Congress in the enactment of section 3406, supra, and similar manufacturers' excise taxes, contemplated only sales at wholesale rather than retail is beside the point and cannot alter the conclusion reached herein. Keeping in mind that these taxes are laid upon the manufacturer-vendor rather than the vendee, your attention is called to the fact that ever since the effective date of the first sales tax law on January 1, 1935, the so-called manufacturers' excise taxes levied on the sales of automobiles, refrigerators, phonograph records, cameras, sporting goods, etc., in precisely the same manner as those here under consideration have consistently been considered by the Tax Commission of Ohio and its administrative successor, the Department of Taxation, as a part of the selling price upon which the Ohio sales tax was computed when sold at retail whether separately billed or not.

The rule with respect to the conclusiveness of adminstrative interpretation is stated in 37 O. Jur., page 698 as follows:

> "The construction placed upon a statute by executive departments or bureaus is not only persuasive but is entitled to great respect and should, perhaps, be regarded as decisive in a case of doubt or when the obligation imposed or the duty enjoined is not plain and specific."

See also Vindicator Ptg. Co. v. State, 68 O.S. 362; State, ex rel. Gallinger,

et al., v. Smith, County Auditor, 71 O.S. 13.

Moreover, the Sales Tax Law of this state has been reenacted three times and amended in some respects several times, but at no time has the Legislature seen fit to change the law in this respect. We therefore have in effect a legislative sanction of its administrative interpertation.

Your second question is whether or not the taxes imposed on articles sold at retail, under the provisions of Chapter 19 of the Revenue Act of 1941, are to be included in the tax base upon which the Ohio sales tax is computed.

Sections 2400, 2401 and 2402 of such chapter each contain the following language:

> "There is hereby imposed upon the following articles sold at retail a tax equivalent to 10 per centum of the price for which so sold: * * * "

The Commissioner of Internal Revenue has, under date of September 29, 1941, promulgated "Regulations 51 (1941 Edition)," Section 320.7 of which reads:

> "(a) The tax imposed by Chapter 19 of the Internal Revenue Code on the retailer's sale of an article is by statute not a part of the taxable price of the article. Where the Federal tax is billed as a separate item, the amount thereof should be excluded in determining the sale price upon which the tax is to be computed. Where the Federal tax is not billed as a separate item, it will be presumed that the amount of the tax is included in the price charged for the article, and such amount will be excluded by an appropriate computation in determining the taxable sale price.
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> Thus, where an article is sold for $100 and an additional sum of $10 is billed as tax, it is clear that $100 is the taxable sale price and $10 the amount of tax due thereon at the prescribed rate of 10 per cent. Where the article is sold for $100 with no separate billing or indication of the amount of the tax, it will be presumed that the tax is included in the $100, and the tax computed accordingly on the basis of a sales price exclusive of the tax. Since the rate of tax is 10 per cent, the billed price of $100 represents the taxable sales price (100 per cent) plus the tax due thereon (10 per cent), or 110 per cent. Since 10 per cent is 1/11 of 110 per cent, the tax may be computed on the basis of a sales price exclusive of the tax by taking 1/11 of the billed price.

(b) A retail sales tax imposed by a State, or Territory, or political subdivision of the foregoing, or by the District of Columbia, may be excluded from the taxable price of an article only when billed as a separate item; if not so billed, the amount of such tax must be included in the taxable sales price.

This exclusion relates to State or local taxes imposed with respect to the sale of the article, regardless of whether the vendor or vendee is liable for payment of the tax. However, it does not include other levies, as for example, a State income tax payable by a retailer upon the net profits derived from his operations.

Where the amount of any State or local retail sales tax is excluded from the taxable sales price of an article, the taxpayer must retain a copy of the invoice, bill, or other memorandum of sale rendered the purchaser or other evidence satisfactory to the Commisioner to show that the amount of the retail sales tax so excluded was stated as a separate charge."

The above regulation, declaring that "the tax imposed by Chapter 19 of the Internal Revenue Code on the retailer's sale of an article is by statute not a part of the taxable price of the article," clearly places such tax directly upon the purchaser and not upon the retail vendor. The method of calculating the tax and the examples set forth in the regulation itself show beyond any doubt that the 10 per centum fixed by the Federal law is to be calculated upon the price of the article to the vendee.

The Federal statute imposing the tax in question became effective October 1, 1941. None of the provisions contained therein have as yet been submitted for judicial interpretation. In such case the rule of administrative interpretation above quoted is applicable, and I therefore feel that the construction placed thereon by the Commissioner of Internal Revenue and approved by the acting Secretary of the Treasury, should be regarded as controlling and followed until reversed or modified by a court of competent jurisdiction. In other words, the taxable price of an article as fixed by this regulation should be considered to be the "price" of such article within the meaning of the Ohio Sales Tax Law.

In connection with this point, reference may again be made to the case of Lash's Products Co. v. United States, supra. It was contended therein by the petitioner that the beverage sales tax, which was under consideration, accrued upon ten-elevenths of the amount received from the purchaser rather than on the total amount thereof which included such tax. This contention was supported by a regulation of the Commissioner

of Internal Revenue that when the tax was billed as a separate item it was not to be considered as an increase in the sales price. In said case, however, the invoice did not separately indicate the amount of such tax. In regard thereto, it was stated in the opinion of Mr. Justice Holmes:

> " * * * But if, in view of the history in the solicitor general's brief, we assume with him that the practice of the commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered. It did not bill its tax as a separate item, and the commissioner's regulations notified it that 'if the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price,' although they purported to make a different rule 'when the tax is billed as a separate item.' "

The second branch of the headnotes of said case reads:

> "Where a manufacturer sold such goods at his regular prices plus 10% added to cover the tax and not separately billed, and the purchasers, being notified of the arrangement, paid the whole, the tax payable by the manufacturer was properly computed on the total amount so paid by the purchasers."

Thus the court indicated that, had the facts in the case before it been within the regulation of the Commissioner, its conclusion might have been different. In the instant case, the regulation quoted in full above expressly states that the tax imposed is not a part of the taxable price of the article purchased, whether billed as a separate item or not, and provides that when the tax is not separately billed it "may be computed on the basis of a sales price exclusive of the tax by taking one-eleventh of the billed price."

In light of the foregoing, I am therefore constrained to the view that the tax imposed by Chapter 19 of the Internal Revenue Code is a tax laid upon the purchaser rather than on the retailer.

Therefore, in specific answer to your inquiries, it is my opinion that:

1. The tax laid under Section 3406 of the Internal Revenue Code upon certain articles sold by the manufacturer, producer, or importer, is an excise tax upon the manufacturer, producer, or importer, for the privilege of selling the articles therein specified, and as such becomes a part of the purchase price of such articles when sold to consumers and

should be included in the "price," as defined by section 5546-1 of the General Code, of such articles, when computing the Ohio sales tax.

2. The tax laid by Chapter 19 of the Internal Revenue Code upon the sale at retail of jewelry, furs and toilet preparations, as interpreted by the Commissioner of Internal Revenue (Internal Revenue Regulation 51, Section 320.7) is in effect a tax upon the purchaser of such articles, even though collected through the retailer and as such should be excluded from the "price" as defined by Section 5546-1, General Code, of such articles when computing the Ohio sales tax.

Respectfully,

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Attorney General.