

this issue was approved by this office in an opinion rendered to the Teachers Retirement System under date of June 18, 1935, being Opinion No. 4343.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

---

3465.

OHIO SALES TAX—RELIGIOUS OR CHARITABLE ORGANIZATION — COUNTY FAIR — SALES —VENDOR—WHERE MEALS ARE SOLD DAY AFTER DAY—CONTINUOUS—NOT EXEMPT AS “CASUAL AND ISOLATED” SALE—SEE SECTION 5546-2 (7) G. C.—OPEN COMPETITION.

*SYLLABUS:*

1. *When a religious or charitable organization engages in the continuous selling of meals day after day, such sales are not exempt as being casual and isolated within the meaning of Ohio Sales Tax, Section 5546-2(7), General Code.*

2. *Even though a “casual and isolated” sale is in open competition with other non-exempt vendors, such sale is nevertheless exempt so long as it is casual and isolated, and regardless of whether or not it is consummated on the premises of the vendor.*

COLUMBUS, OHIO, December 28, 1938.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN: This will acknowledge receipt of your recent communication which reads as follows:

“With the advent of the county fair season the Tax Commission issued orders that all charitable and religious organizations who took concessions at county fairs for the purpose of selling meals during the period of the fair, would be required to collect the Ohio Sales Tax. This was on the basis that as soon as charitable and religious organizations left their premises and entered into open competition with other concessionaires, they would be considered in the business of selling and not entitled to an exemption on the grounds of casual sale.

This ruling was also made in view of the fact that in most cases several hundred meals per day would be sold and we did not feel that this could properly classify them in the casual sale field.

In making arrangements for Noble County Fair, to be held next week, the Commission has experienced some difficulty on the instructions to charitable and religious organizations in that neighborhood to collect tax on meals sold at the Noble County Fair. Some of the charitable and religious organizations who are contemplating making sales at the Fair feel that the rule issued by the Commission is in error and that sales by charitable and religious organizations at county fairs are not properly subject to the tax, such sales being, in their opinion, casual sales.

We are particularly anxious to have this question answered as soon as possible as several county fairs have already been held at which charitable and religious organizations collected the tax. Several are now in progress and charitable and religious organizations are in the process of collecting the tax.

In view of these circumstances, may we have your immediate formal opinion on this subject for our future guidance?"

That part of the Sales Tax Law which is applicable to the solution of your question is set forth in Section 5546-2, General Code, which reads in part as follows:

\* \* \* \* \*

The tax hereby levied does not apply to the following sales:

\* \* \* \* \*

7. Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property.

\* \* \* \* \*

The problem of what constitutes sales which are exempt within the meaning of this provision was considered in Opinions of the Attorney General No. 5726 issued June 18, 1936. For our purpose the pertinent question to which this opinion was responsive reads as follows:

"It is the practice of most churches and religious organizations to conduct sales of various items of tangible personal property for the purpose of raising funds to support the church or religious organization. The number of these sales may vary from year to year and it is impossible to know in advance the number of such sales which will be held during a given

period. Are the sales made at such functions as church suppers, church bazaars and church socials subject to the Ohio Sales Tax?"

After considering the subject of the sale of food in general, the opinion replies to the question as stated in the following manner:

"You state in your communication that it is the practice of many churches and religious organizations to conduct sales of various items of tangible personal property for the purpose of raising funds to support the church or religious organization; that the number of these sales vary from year to year and that it is impossible to know in advance the number of such sales which will be held during a given period. Your question is as to whether sales so made at church suppers, church bazaars and church socials generally are subject to the sales tax. It is obvious that sales so made are subject to the tax unless they are exempted therefrom as casual and isolated sales made by a vendor who is not engaged in the business of selling tangible personal property. As the question is stated in your communication, it is quite difficult to give any categorical answer thereto that will apply with certainty to all sales of the kind referred to. The most that can be said is that as sales of this kind are usually conducted by ladies' aid societies and similar organizations affiliated with churches and church work, they are usually casual and sufficiently isolated as to time and character to satisfy the exemption provisions with respect to casual and isolated sales provided for by Section 5546-2, General Code. Speaking generally, therefore, I am of the opinion that such sales are not taxable."

This response is expressly general in its application. Assuming that the vendor in question was not engaged in the business of selling tangible personal property, the conclusion regarded as being within the terms of the exemption accorded to "casual and isolated" sales only those transactions effected by religious or charitable organizations which are characterized by their sporadic occurrence and short duration. Into this classification of functions generally would fall the ordinary church dinner or supper or a lawn fete. This classification, it will be noted, is generally applicable but in no event is it solely the sponsorship or the label which may be placed on any such function which is indicative of its nature with reference to this exemption. The pertinent question refers to the regularity and the duration of the occurrence of such func-

tions—do they reflect a program providing for continuous and business-like sales effort or are they but incident to occasional functions isolated from such other efforts by the vendor in this direction.

Subsequently reported adjudications of the meaning of Section 5546-2(7), General Code, include first the case of *Carnicom, etc., vs. Tax Commission* (1936), 5 O. O., 348, which resolved the question of whether the sales of three automobiles during a period of six months were exempt within the meaning of this section when the vendor was in the business of selling tires and accessories.

In holding that these sales were within the exemption, the court gave only brief attention to the question relating to the nature of the transactions but was concerned mainly with the qualification of the vendor, namely, whether he as a holder of a vendor's license for the sale of tires and accessories was by the same token engaged in the business of selling tangible personal property, to wit, automobiles. Nevertheless, the court did determine that the sales in question were "casual and isolated" and in doing so utilized the following guiding language at page 349:

"'Casual' has been defined as that which is occasional, irregular or incidental, in contradistinction from stated or regular. See Ballentine's Law Dictionary, page 686. The meaning of the term 'isolated' may be illustrated in such synonyms as detached, separated, solitary, etc."

The court decided that because the sales of these three automobiles during a period of six months were "occasional, irregular or incidental" (the meaning given to "casual"), as well as "detached, separated or solitary" (the meaning ascribed to "isolated"), the three transactions came within the meaning of the phrase "casual and isolated."

The next case to be decided was that of *State, ex rel. City Loan and Savings Company vs. Zellner* (1938), 133 O. S., 263, 10 O. O., 245, which held that a finance company was engaged in the business of selling automobiles when the amount of the sales of automobiles which came into its possession by process of seizure totaled some \$25,000.00 a year. The court held that these sales were not entitled to the exemption under Section 5546-2(7) because the vendor could not demonstrate that it was "not engaged in the business of selling tangible personal property." In reaching this conclusion the court, through Judge Day, stated in connection with the nature of the sales that:

"The activity of selling is not only commenced, but continually and systematically conducted, and as such, constitutes

engaging in the business of selling within the meaning of the provision of Section 5546-1, et seq., General Code.

*Sales made in a more or less continuous succession cannot be said to be casual or isolated, but if the characteristic of systematic recurrence and continuity in respect to such sales is developed, they cease to be occasional, casual or isolated.*" (Italics the writer's).

By the language used in both of these cases it is clear that when sales occur in continuous succession they are not entitled to exemption on the basis of their being "casual and isolated." Thus, an analysis of these two cases, together with the outline drawn in the 1936 opinion leads to the conclusion that whenever the facts of a case are such that they indicate the occasion for effecting a sale is not of sporadic occurrence and of brief duration, the transactions cannot be classed under this exemption.

With these considerations in mind we turn to the facts as you have presented them. You state that the concessions in question are for the purpose of selling meals during the period of various county fairs. I believe it is usual for such fairs to continue for two or more consecutive days. Therefore, I am assuming that the concessions in question contemplated the sale of meals continuously during at least such a period of time. If this be the case, the application of the interpretations adopted in the two opinions hereinbefore discussed impels me to the conclusion that such continuous sales of meals day after day are not sufficiently detached, separated and solitary (speaking in terms of the Carnicom case) to constitute "casual and isolated" sales, nor is the vendor able to qualify according to the test set down in the City Loan and Savings Company case because such sales occur in continuous succession. Therefore, it is my opinion that when a religious or charitable organization engages in the continuous selling of meals day after day, such sales are not exempt as being casual and isolated within the meaning of Section 5546-2(7), General Code.

In holding this opinion, I reach the same conclusion as you do according to your communication, namely, that such sales are subject to the sales tax. However, it should be noted that my conclusion rests upon a different basis than yours. You state as your basis for ruling the sales subject to the tax that "as soon as charitable and religious organizations left their premises and entered into open competition with other concessionaires, they would be considered in the business of selling and not entitled to an exemption on the grounds of a casual sale."

For this reasoning I find no support either in the statute in question or in any judicial interpretation of its content. The exemption under

this sub-section does not depend upon where the sale is made or with whom the vendor competes in making the sale. Therefore, it is my further opinion that the exemption accorded to those sales which are "casual and isolated" is not affected by the fact that such sales are not effected on the premises of the vendor and that the transaction is in open competition with other vendors who are conducting a business enterprise.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

---

3466.

APPROVAL—PROPOSED AGREEMENT, STATE OF OHIO THROUGH DIRECTOR OF HIGHWAYS, WITH THE WHEELING AND LAKE ERIE RAILWAY COMPANY, INSTALLATION OF FLASH LIGHTS, GRADE CROSSING, NEAR OBERLIN, LORAIN COUNTY, OHIO, PROJECT NO. FAGH 293 (3).

COLUMBUS, OHIO, December 28, 1938.

HON. IVAN AULT, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my formal approval as to form a proposed agreement by and between the Wheeling and Lake Erie Railway Company and the State of Ohio, providing for the installation of flashing lights at the grade crossing over the tracks of said company on State Highway No. 866 about one and one-half miles southwest of Oberlin in Lorain County, Ohio, and designated as Project No. FAGH 293 (3).

It is my opinion that said proposed agreement is in proper legal form and when the same is executed by the State of Ohio, it will become a binding contract by and between the parties thereto for the purposes therein mentioned.

I, therefore, hereby approve said contract as to form and am returning the same herewith.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*