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TAX SALES — BOARD OF EDUCATION IN ANY CITY, EXEMPTED VILLAGE OR LOCAL SCHOOL DISTRICT, OR A PRIVATE, PUBLIC, PAROCHIAL SCHOOL, COLLEGE OR UNIVERSITY — SALES OF LUNCHES, MEALS OR REFRESHMENTS TO TEACHERS, STUDENTS, PUPILS — LUNCH ROOM OR CAFETERIA CONDUCTED NOT FOR PROFIT — NOT TRANSACTIONS SUBJECT TO A SALES TAX — SECTIONS 4839-6, 5546-2 G. C.

SYLLABUS:

The sales of lunches, meals or refreshments to teachers that take place in a lunch room or cafeteria conducted not for profit by a Board of Education of any city, exempted village or local school district in conformity with the provisions of Section 4839-6, General Code, are not transactions that are subject to a sales tax. (Opinions of Attorney General for 1935, Vol. I, page 56, approved and followed.) Section 5546-2, General Code, which, among other things, provides that sales of food sold to students only in a cafeteria or other place maintained in a private, public or parochial school, college or university are exempt from a sales tax has no application with respect to lunch rooms operated in accordance with Section 4839-6, supra.

Columbus, Ohio, April 7, 1944

Hon. William S. Evatt, Tax Commissioner
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"The Bureau of Inspection and Supervision of Public Offices has raised the question as to whether or not sales of food to teachers in a lunch room conducted by a board of education without profit are subject to the incidence of the sales tax in view of an opinion of your office appearing in Opinions of the Attorney General for 1935, Vol I, page 56, the first branch of the syllabus reading as follows:

'A board of education conducting a school lunch room under the provisions of Section 4762-1, General Code, without profit, need not be licensed as a "vendor" as provided by the retail Sales Tax Act, and sales of food in such lunch rooms are not subject to the tax provided for by the retail Sales Tax Act.'

Your attention is directed to the fact that following the rendition of this opinion, the General Assembly amended Section 5546-2, General Code, in and by House Bill No. 694, passed December 22, 1936, effective January 1, 1937, 116 O. L., Part 2, page 325, so as to expressly exempt 'sales of food sold to students only in cafeteria, dormitory, fraternity or sorority maintained in a private, public or parochial school, college or university'.

Your opinion is respectfully requested as to whether or not the 1935 opinion, supra, is declarative of the law in view of the foregoing amendment of Section 5546-2, General Code."

Subsequent to the rendition of the 1935 opinion, above referred to, Section 4762-1, General Code, was amended and then later repealed. There is, however, now in force and effect Section 4839-6, General Code, which was enacted in its place and which provides in part as follows:

"The board of education of any *city, exempted village or local* school district may provide facilities in the schools under its control for the preparation and serving of lunches, *and other meals or refreshments* to the pupils, the teachers, and to other employees therein, *and to other persons taking part in or patronizing any activity in connection with the schools,* and may

provide the management of such lunch rooms, which facilities shall not be operated for profit; provided that the privileges and facilities granted hereunder by any board of education shall apply to all pupils and teachers and no restrictions or limitations shall operate against any such pupil or teacher in the use of such facilities except for reasons applicable to all alike. * * *"

The changes made in that portion thereof above quoted consisted of the insertion of words above emphasized. The inclusion of these words, however, has merely served to broaden the scope and effect of the statute and has not brought about any material change in its general purport. But as was the situation when the former section was under review in 1935 it is to be noted particularly that the conducting of the facilities maintained for the preparation of lunches and meals "shall not be operated for profit".

Your request quotes correctly the first paragraph of the syllabus of the 1935 opinion, found in Opinions of the Attorney General for that year in Vol. I, page 56. It appears that the conclusion therein reached was predicated on the fact that before a person could be regarded as a "vendor" within the meaning of then Section 5546-1, General Code, there had to be the making of a retail sale in the conducting of a business, and that if the Board of Education was not operating a lunch room for profit but was proceeding under Section 4762-1, General Code, then there was no engaging in business as the word "business" is customarily understood.

I am in full accord with the conclusion reached in this opinion as noted in the first paragraph of the syllabus. Your inquiry, therefore, necessitates an examination of the present statutory enactments to determine whether that same conclusion must follow in the light of the changes that were made in the legislation heretofore considered.

Section 5546-1, General Code, as now in effect, provides in part that:

" 'Person' includes individuals, firms, partnerships, associations, joint stock companies, corporations, and combinations of individuals of whatsoever form and character.

'Sale' and 'selling' include all transactions whereby title or

possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange or barter, and by any means whatsoever; * * *

'Vendor' means the person by whom the transfer effected or license given by a sale is or is to be made or given; and in case two or more persons shall be engaged in business in the same retail establishment under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor for the purpose of this act. * * *

'Retail sale' and 'sales at retail' include all sales excepting those in which the purpose of the consumer is (a) to resell the thing transferred in the form in which the same is, or is to be, received by him; or (b) to incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing or refining, or to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural or floricultural services for others shall be deemed to be engaged directly in farming, agriculture, horticulture, or floriculture; or diectly in making retail sales or directly in the rendition of a public utility service; except that the sales tax levied herein shall be collected upon all meals, drinks and food for human consumption sold upon Pullman and railroad coaches; or (c) security for the performance of an obligation by the vendor; (d) or to use or consume the thing directly in industrial cleaning of tangible personal property; or (e) to resell, hold, use or consume the thing transferred as evidence of a contract of insurance.

'Business' includes any activity engaged in by any person or caused to be engaged in by him *with the object of gain,* benefit, or advantage, either direct or indirect.

'Engaging in business' means commencing, conducting or continuing in business, as well as liquidating a business when the liquidator thereof holds himself out to the public as conducting such business. However, making a casual or isolated sale is not 'engaging in business'. * * *

Section 5546-2, General Code, provides in part that:

"For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on each retail sale made in this state of tangible personal property on and after the first day of January, 1935, with the exceptions hereinafter mentioned and described, as follows: * * *

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

11a. Sales of food sold *to students only* in a cafeteria, dormitory, fraternity or sorority maintained in a private, *public* or parochial school, college or university. * * *"

(Emphasis added.)

A comparison of the language of present Section 5546-1, with that of the section as it existed in 1935 discloses that the definition of "Person" and "Vendor" are exactly the same. The meaning of the words "Sale" and "Selling" has been amplified but I have not deemed it of sufficient importance to quote the language that was added since it relates to transactions of a special nature. However, I might also note that the definition of these two terms, except for the added language, is exactly the same as in 1935. The meaning of "retail sale" and "sales at retail" has also been amplified but I can find nothing in the current definition that is at such variance with the former definition as to make it necessary that I comment thereon.

As heretofore pointed out, it is to be noted that the words "business" and "engaging in business" have been given a legislative definition. While the word "profit" appears nowhere therein, I believe it is manifest that when it is said "business includes any activity engaged in * * * with the object of gain, benefit, or advantage, either direct or indirect", this language contemplates that the activity in question is conducted with a view to profit. As used above, I believe that it may be said that the words "gain" and "profit" are synonymous. One of the definitions of the first mentioned word, as stated in Webster's New International Dictionary, is as follows:

> "Increase or addition to what one has of that which is of profit, advantage, or benefit; resources or advantage acquired; profit— opposed to loss."

In the light of this definition it seems to me it can hardly be argued that there is any essential difference in the meaning of the words. I am therefore of the view that the changes made in Section 5546-1, supra, after it was considered in connection with the 1935 opinion, are not of particular consequence in so far as this question is concerned.

This brings me now to the significance of the insertion in Section 5546-2 of paragraph 11a, above quoted, which provision first made its appearance in the law in late 1936 (116 O. L. Pt. 2, p. 327). At that time former Section 4762-1 was in effect. It is manifest that the effect of paragraph 11a is to exempt from sales tax certain kinds of transactions theretofore subject to such tax. To say that the General Assembly when it created this exemption, thereby intended at the same time to provide inferentially that a teacher being furnished food in a lunch room operated not for profit pursuant to the provisions of Section 4762-1, supra, can not, in my opinion, be reasonably urged. To conclude otherwise would bring about the anomalous situation of a tax exemption being created and at the same time a transaction being made subject to tax which, prior to the enactment of the section, was free from a tax.

I find no difficulty in giving full force and effect to the wording of paragraph 11a and at the same time holding that a teacher is not required to pay a sales tax when served a meal in a lunch room conducted not for profit pursuant to the provisions of Section 4839-6, supra.

While it is true that the paragraph contains the word "public" and could, of course, apply to sales of food made on the premises of a public school, it does not necessarily mean that all sales of food made at such public school should be exempt from the sales tax. It is possible that under certain circumstances sales could be made with a view to profit. It was pointed out in the aforementioned 1935 opinion that where a teacher or a group of teachers sold candy or other articles for profit on the school premises, the transaction was one that was subject to tax and that the seller should be licensed as a vendor (see para-

graph 2 of syllabus). I can see no reason why this would not be true in the case of the sale of food which, however, if sold in a lunch room conducted by the Board of Education, under section 4839-6, supra, would otherwise be exempt from the tax.

Apparently in the light of the provisions of paragraph 11a, aforementioned, food may be sold to *students only* and the sale is exempt from taxation. Presumably it is immaterial whether the person making the sale is engaged in an enterprise for profit or not. However, if the sale is to a person other than a student, for example a teacher, then under such circumstances the transactions would be subject to a tax unless the sale takes place in a lunch room operated not for profit as provided by the provisions of Section 4839-6, supra. But as your inquiry deals solely with the question of whether a sales tax should be charged for lunches, meals or refreshments that are served to teachers in a school whose lunch room is conducted without a view to profit in the manner provided for by Section 4839-6, supra, I find it unnecessary to express an opinion as to any collateral matter.

Before answering your inquiry specifically, it might be well to again emphasize that the 1935 opinion, while referring to then Section 5546-2, General Code, was not predicated thereon but instead on the language of then Section 5546-1, General Code. I am convinced, after making a careful study of said opinion that the same conclusion would have been arrived at had the last mentioned section then read as it does at this time. This furnishes added support for the view that the insertion in Section 5546-2 of the language hereinbefore noted can not compel a conclusion at variance with that which was reached in 1935.

In specific answer to your inquiry, it is therefore my opinion that: The sales of lunches, meals or refreshments to teachers that take place in a lunch room or cafeteria conducted not for profit by a Board of Education of any city, exempted village or local school district in conformity with the provisions of Section 4839-6, General Code, are not transactions that are subject to a sales tax. (Opinions of Attorney General for 1935, Vol. I, page 56, approved and followed.) Section 5546-2, General Code, which, among other things, provides that sales of food sold to students only in a cafeteria or other place maintained in a private, public or parochial school, college or university are exempt

from a sales tax has no application with respect to lunch rooms operated in accordance with Section 4839-6, supra.

Respectfully,

THOMAS J. HERBERT

Attorney General