

2501.

TAXES AND TAXATION—MERCHANTS AND MANUFACTURERS—  
WHERE MERCHANDISE OWNED BY CORPORATION IN COLUMBUS AND PURCHASED WITH VIEW TO BEING SOLD OUT AT AN ADVANCED PRICE OR PROFIT BUT WHICH HAS BEEN CONSIGNED TO CLEVELAND MERCHANT FOR SALE IN CLEVELAND AND STORED BY CLEVELAND MERCHANT AT HIS PLACE OF BUSINESS IN CLEVELAND—WHERE LISTED FOR TAXATION AND BY WHOM.

*Merchandise owned by a corporation whose principal place of business is in Columbus, and purchased with a view to being sold at an advanced price or profit, but which has been consigned to a Cleveland merchant for sale in Cleveland and is stored by the Cleveland merchant at his place of business in Cleveland, should be listed for taxation in Cleveland by the Columbus corporation.*

COLUMBUS, OHIO, October 24, 1921.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—The commission requests the opinion of this department as follows:

“When merchandise is owned by a corporation whose principal place of business is in Columbus, Ohio, and same has been consigned to a Cleveland merchant for sale in Cleveland and is stored by the Cleveland merchant at his place of business in Cleveland, should the property be listed,

First: For taxation by the consignor at Columbus,

Second: By the consignor where the property is located (in Cleveland), or

Third: By the consignee in Cleveland?”

The sections to be considered in connection with this question are as follows:

“Sec. 5371. \* \* \* Merchants' and manufacturers' stock \* \* \* shall be listed in the township, city or village in which it is situated. \* \* \*”

“Sec. 5371-4. Property pertaining to a business carried on by a person, firm, partnership, association or unincorporated company shall be listed in the township, city or village in which such business is carried on. \* \* \*”

(This statute does not apply to incorporated companies; it is quoted merely for the purpose of contrast).

“Sec. 5372-1. Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possession or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise on the day preceding the second Monday of April in any year on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the

possession or control thereof and be entered upon the tax lists and duplicate in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not effect the validity of any assessment thereof."

"Sec. 5381. A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

It has always been understood that this section applies to corporations; that is, that the word "person" therein used includes corporations.

"Sec. 5383. A consignee shall not be required to list for taxation the value of property, the product of this state, which has been consigned to him, for sale or otherwise, from a place within this state, nor the value of property consigned to him from another place for the sole purpose of being stored or forwarded, if in either case, he has no interest in such property, or any profit to be derived from its sale.  
\* \* \*

"Sec. 5404. The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money."

"Sec. 5405. Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district."

The commission's questions will be treated in the inverse order of their statement by the commission, the first of them to be considered being whether or not the consignee is under any duty to list the property in question.

On this point sections 5381 and 5383, above quoted, have to be considered. Section 5381, analyzed, applies first to two classes of persons: those who own property which has been purchased with a view to being sold at a profit; and second, persons who have in possession or subject to control property which has been so purchased or which has been consigned to them "from a place *out of this state* for the purpose of being sold at a place within this state." Section 5383 seems to be an attempt to state negatively the omissions from section 5381. It clearly excuses from the duty to list a consignee of property consigned from a place within this state "if \* \* \* he has no interest in such property, or any profit to be derived from its sale."

If in the case you submit the Cleveland merchant has no interest in any profit to be derived from the sale of the goods, section 5383 is of itself an answer to the third question. But it seems likely that the Cleveland merchant does have an interest in the profit to be derived from the sale of the goods. In that event we must inquire whether under section 5381 he is a "merchant." On comparing section 5381, above quoted, with section 5383, also above quoted, we discover that the negative provisions of the latter do not cover the same ground as the omissions from the former. That is to say, a person who does not own but does have in possession or control property which has been consigned to him from a place within this state, for the purpose of being sold within this state, is not a "merchant" as defined in section 5381; nor if he has an interest in any profit to be derived from the sale of the property is he expressly excused from listing its value by the provisions of section 5383. In other words, by adding the phrase "if in either case, he has no interest in such property, or any profit to be derived from its sale" to the first sentence in section 5383, that sentence was made inharmonious with section 5381 in a certain sense, and a case, that may be the case about which the commission inquires, was left unprovided for by the related sections.

The conclusion thus reached assumes that the phrase "which has been purchased either in or out of this state" does not apply to a mere consignee. This is believed to be the case. In the opinion of this department, the phrase connotes a purchase by the person whose character as a merchant is to be tested by his acts. In other words, the section is to be interpreted as if it read:

A person who owns property which has been purchased either in or out of this state, with a view to being sold, etc., or who has in possession or subject to his control property which has been consigned to him, etc.

For the foregoing reasons, it is the opinion of this department that the consignee in Cleveland is, with respect to his possession of the property in question, not a "merchant" in spite of the fact that he may not be within the terms of the condition expressed in the first sentence of section 5383 of the General Code.

Before proceeding further, however, with the discussion of the question as to the consignee's duty to list we must take account of the apparent conflict between section 5372-1, above quoted, and sections 5404 and 5405 of the General Code. The one makes it the duty of an agent of a corporation to list personal property in his possession or control in that capacity, and the other requires the president, secretary and principal accounting officer of every in-

corporated company to list all the property of the corporation in the state. It is strange that this question has never been judicially discussed. This department has never had occasion to consider it. A corporation can act only by its agents; it can have possession and exercise dominion only through natural persons. All the personal property of a corporation, therefore, must necessarily be in possession of some of its agents. It is believed that the way out of the difficulty is to hold that the word "agent" in section 5372-1 does not apply to corporations and that the same conclusion applies to the word "factor" in the same context. In other words, section 5372-1 is a general section, while sections 5404 and 5405 are particular, intended to provide for the making of corporate returns. Therefore, in case of conflict section 5404 should govern. Accordingly, if the property in question is to be regarded as property of the corporation, whose principal place of business is in Columbus, then section 5372-1 has no application and the consignee is not required by that section to list it at all.

It is therefore apparent that the final disposition of the commission's third question cannot be made until the first and second questions, which relate to the duty of the consignor, are answered.

Now the property in question belongs to the corporation, though it is not in the possession of the corporation, and possibly though the Cleveland merchant be not regarded as an agent of the corporation. It is therefore within the comprehensive terms of section 5404, and indeed within the scope of section 5381 as above analyzed. It is "property of the corporation" for the purpose of the one section and the Columbus corporation "owns" (the property) "which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit." The fact that the corporation has not the property in possession is immaterial, because section 5381 does not so define a merchant as to require both ownership and possession but these conditions are stated in the alternative. *It is assumed that the Columbus corporation acquired the property by purchase and did not itself manufacture the property or produce it.* If the fact is otherwise the basis for a part of this opinion is destroyed.

It is the opinion of this department, therefore, that the consignor corporation should list the property in question and that the property is a merchant's stock belonging to it. That being the case, its municipal situs for the purpose of taxation is fixed by section 5371, above quoted. Within the meaning of section 5405 such property is "situated" in Cleveland because of the requirement of section 5371, and has there a "fixed" situs within the meaning of section 5405.

On the foregoing reasoning, the conclusion is that the consignor corporation should list the property in question on the average basis as merchant's stock belonging to it, and that such property should be so listed in Cleveland and not in Columbus.

The only difficulty encountered in arriving at this result is the fact that section 5383, which apparently was intended to excuse consignees in certain cases from listing as merchants property consigned to them for sale, may not expressly excuse the consignee corporation from making a listing. It might, therefore, be argued that section 5383 should be so construed with section 5381 as to require such a consignee of property the product of this state to list such property as a merchant, in spite of the failure of section 5381 to include such a situation within its terms. However, it is the opinion of this department that section 5381 is not to be molded so as to conform to section 5383, but rather that the contrary method of interpretation of the two should be followed. The evident purpose of excluding from the definition in section

5381 cases in which the property had been consigned to a person from a place within this state was that in that event the owner would be within this state and subject to the taxing power of the state. In other words, section 5381 is so broad as that if the consignor and the consignee are both in this state it is not necessary to require the consignee to list the property, as the consignor, being the "owner," would have to list it. This is the controlling idea of the sections, and it is consistent with everything in section 5383 except the words "any profit to be derived from its sale." The fact that a consignee might have an interest in any profit derived from the sale of the property does not make him its owner, and unless there is some statute requiring such consignee to list such property, the mere fact that no statute says that he shall not list it is not sufficient from which to construct a duty to list.

Accordingly, the conclusions first above expressed are adhered to and it is the opinion of this department that the consignee in Cleveland is under no duty to list the property, either on his own behalf or on behalf of the consignor, but that it is the duty of the officers of the consignor corporation to make return of the property in Cleveland.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

2502.

**TAXES AND TAXATION—COUNTY BOARD OF REVISION—UPON GENERAL COMPLAINT FILED BY PUBLIC OFFICER BOARD MAY NOT MAKE HORIZONTAL INCREASE OR REDUCTION IN ASSESSED VALUATION OF ALL PROPERTY IN TAXING SUBDIVISION—COMPLAINTS MUST BE SPECIFIC.**

*A county board of revision, acting upon general complaint filed by a public officer under section 5609 G. C. may not make a horizontal increase or reduction in the assessed valuation of all the property in the taxing subdivision. If complaints are so filed covering specifically each tract of real property or article or kind of personal property, and proper action is taken upon each specific complaint, the board of revision may lawfully conclude that the increase or reduction as to each shall be made by a uniform rate, but such complaints must be specific and must be supported or followed by notice under section 5599 G. C. in case of increase, or affidavit of facts made by the owner in case of reduction as required by section 5601 G. C.*

COLUMBUS, OHIO, October 24, 1921.

*Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—The commission recently requested the opinion of this department as follows:

"May a county board of revision, acting upon complaints filed under the provisions of section 5609 G. C. by any officers named in said section, make a horizontal increase or reduction in the assessed valuation of all of the property in any taxing subdivision in any year after the year in which a reappraisal was made under the provisions of section 5548?"

Section 5609 of the General Code provides as follows: