

act is hereby declared to be independent of any other section, subdivision or part hereof, and the finding or holding of any such section, subdivision or part to be unconstitutional, ineffective or void shall not affect any other section, subdivision or part hereof.

Section 10. All provisions of the General Code of Ohio heretofore enacted which are contrary to or in conflict with this act are hereby amended or repealed."

The summary of this proposed law reads as follows:

"The purpose of this act is to safeguard investments in stocks, bonds and other securities by limiting salaries and bonuses to not more than \$10,000.00 per year for any individual employe or official except those engaged as entertainers and in sports.

Also to provide for distribution of net profits in excess of ten per cent, within one year, to those entitled to receive same.

Income from legitimate investments excepted.

The act provides for enforcement and necessary officers to be appointed by the Governor and for salaries of such officers.

Penalty for violation is double amount of excess drawn and not more than two years' imprisonment or both.

Sec. 9 has to do with constitutionality by making each part of the law integral if another part declared unconstitutional.

Sec. 10 amends and repeals conflicting laws."

I am of the opinion that the foregoing is a fair and truthful statement of the proposed law and accordingly submit for uses provided by law the following certification:

"Without passing upon the advisability of the proposed law and without passing upon the constitutionality of the same but pursuant to the duties imposed upon me under the provisions of section 4785-175 of the General Code of Ohio, I, John W. Bricker, Attorney General of the State of Ohio, hereby certify that the foregoing summary is a fair and truthful statement of the proposed law. John W. Bricker, Attorney General."

Respectfully,

JOHN W. BRICKER,

Attorney General.

4114.

SALES TAX—SALES TO SUPERINTENDENT OF BANKS FOR USE IN LIQUIDATION OF BANK EXEMPT.

SYLLABUS:

The State of Ohio is the "consumer" of goods purchased by the Superintendent of Banks of Ohio for use in the liquidation of a particular bank, within the meaning of Section 5546-2, General Code, although the purchase price is paid from the assets of

the particular bank, under Section 710-97, General Code, and therefore such sales are not taxable under the Ohio Sales Tax Act (Sections 5546-1 to 5546-23, General Code.)

COLUMBUS, OHIO, APRIL 4, 1935.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

“In the exercise and discharge of the powers and duties by law vested in and imposed upon me as Superintendent of Banks of the State of Ohio in connection with the liquidation of banks, the business and property of which are in my possession, I am required to purchase articles, which in the ordinary course of business and trade, are subject to tax under the recently enacted sales tax law of Ohio.

The articles referred to are paid for by me from funds derived directly through the liquidation of said banks, or subsidiaries wholly owned by such banks, as convenient agencies for the management and the holding of title to property heretofore belonging to said banks and now vested in me as Superintendent of Banks and constituting a part of the assets of such banks, all of which are being liquidated by me for the benefit of the depositors and creditors of said banks.

All purchases herein referred to are made by me as an officer of the State of Ohio in the performance of the functions imposed upon the Division of Banks in the Department of Commerce.

May I request your opinion as to whether or not articles purchased as herein set forth, are exempt from tax under the provisions of the sales tax law of this state.”

In a letter addressed to you by the Tax Commission of Ohio, the views of the commission are thus stated:

“We are of the opinion that while the sales are made to you as an officer of the State of Ohio in the performance of the functions imposed upon the Division of Banks, they are not sales to the State of Ohio and are, therefore, subject to the tax imposed by Section 2 of Amended House Bill No. 134.”

The act imposing a tax upon retail sales in this State is contained in Sections 5546-1 to 5546-23, inclusive, General Code (115 O. L., Pt. 2, 306, et seq.).

Section 5546-2, General Code, provides, inter alia:

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

1. *When the consumer is the state of Ohio or any of its political subdivisions.*
* * * * *

Section 710-89, General Code, authorizes the Superintendent of Banks to take possession of the business and property of a state bank upon the happening of certain conditions. Upon taking possession, the Superintendent is required by Section 710-90, General Code, to post a notice upon the bank's doors. Section 710-91, General Code, provides that “such posting shall of itself, and without the execution or delivery of any instruments of conveyance, assignment, transfer, or endorsement, vest the title to all such assets and property in the superintendent of banks.”

After reviewing the above sections, together with Section 154-39, General Code, I stated in Opinion No. 4021, rendered March 6, 1935:

"Reading all of these sections together, it is apparent that the Division of Banks takes possession of the business and property for liquidation and that the posting of a notice upon the doors of the bank vest possession and title to all assets and property in the Division of Banks, a division of the Department of Commerce, which is one of the nine departments of state government created by the Administrative Code of 1921. In 1921 these departments, together with the elective state officials and certain independent boards and commissions became the administrative branch of the government of the State of Ohio."

In the course of the same opinion, I said:

"Banks have long been recognized as quasi-public corporations and the several states have enacted statutes for their incorporation and regulation. The State of Ohio under the Banking Act (Sections 710-1, et seq., General Code) is engaged in regulating going institutions and liquidating those found to be unsafe and unsound. Because of the nature of the business and its relation to the economic welfare of the citizens of Ohio these activities are purely governmental functions. See *Metcalf & Eddy vs. Mitchell*, 269 U. S. 514."

There is no question but that when the state of Ohio, through the Division of Banks of the Department of Commerce undertakes to liquidate banks, it is engaged in a governmental function which has long been recognized as essential.

Section 710-97, General Code, provides that the expenses of liquidation shall be paid "out of the property of such bank in the possession of the superintendent of banks * * *." It might be argued that because articles are purchased for use in a single liquidation from assets of the particular bank, the state of Ohio is not the consumer. In Opinion No. 4021, supra, I held that the Federal Government could not constitutionally tax income paid to officers or employees of the Division of Banks, although they were engaged in liquidating particular banks and were paid from the assets of those banks. In the course of that opinion, I said:

"It is true that such assets are held in a fiduciary capacity for the benefit of the bank's creditors. However, when the State of Ohio in the proper exercise of its governmental functions has thus undertaken to liquidate and distribute to hundreds of thousands of its citizens their proportionate shares in the assets of these quasi-public institutions the Federal Government cannot, by taxation or otherwise, impose direct burdens upon such process.

As above noted the salaries are actually paid by the State from money owned by one of its Divisions. Contributions to the fund of any particular bank come from all of its depositors. Where state funds are derived by taxation all of the citizens do not contribute. Furthermore the expenses of certain departments, boards and commissions of state government, are paid from license fees collected from those who benefit from the functions of the particular governmental agency. For example under Section 710-17, General Code, fees and expenses collected by the Superintendent of Banks for examination and inspection of banks together with penalties "shall be paid by him into the state treasury to the credit of a fund for the use of the Department of Banks, and shall be used upon the order of the Superintendent of Banks, but shall not be used or paid out or appropriated for any other purpose." Under the provisions of Section 606, General Code, the public utilities are assessed for main-

taining the public utilities commission. The expenses of the Bureau of Motor Vehicles are paid from the annual license tax levied upon the operation of motor vehicles. Section 6291, General Code. Other statutory provisions of a similar nature exist in this and other states."

Upon similar reasoning, I conclude that when the state of Ohio through one of its administrative divisions is engaged in the proper exercise of a governmental function, such as the liquidation of a bank, the state is the "consumer" of articles purchased for use in performing such function, although the purchase price is paid from assets of a particular bank, the Division of Banks having title to such assets.

The above conclusion is supported by the decision in *Farkas vs. Fulton*, 18 Abs. 277 (Court of Appeals, Lucas County), motion to certify overruled by the Supreme Court March 27, 1935. In this case, it was held that the Superintendent of Banks is not liable for a tort committed by one of his employes while performing duties in connection with the liquidation of a bank in the possession of the superintendent. The court quoted with approval the following language from *Bennett vs. Green*, 156 Ga. 572, 579, 119 S. E. 620:

"The Superintendent of Banks, in taking charge of the affairs of an insolvent bank for liquidation, is the agent of the State. He acts for and in behalf of the commonwealth. His possession is that of the State, who is his principal."

The court in the *Farkas* case said further:

"We hold that the Superintendent of Banks is a state official, an arm of the state government, vested with such authority and powers and duties as are expressly granted to him by the statutes of Ohio * * *."

The court pointed out that the State had not consented to be sued on the tort.

In view of the foregoing and specifically answering your inquiry, it is my opinion that the State of Ohio is the "consumer" of goods purchased by the Superintendent of Banks of Ohio for use in the liquidation of a particular bank, within the meaning of Section 5546-2, General Code, although the purchase price is paid from the assets of the particular bank, under Section 710-97, General Code, and therefore such sales are not taxable under the Ohio Sales Tax Act (Sections 5546-1 to 5546-23, General Code).

Respectfully,
JOHN W. BRICKER,
Attorney General.

4:15.

APPROVAL, BONDS OF VILLAGE OF WILLOUGHBY, LAKE COUNTY, OHIO,
\$2600.00.

COLUMBUS, OHIO, APRIL 4, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.