1939.

CIGARETTES—DISCUSSION OF WHOLESALE—LICENSE FEE.

SYLLABUS:

Discussion of tests applied by the courts in determining who is "engaged in the wholesale business of trafficking in cigarettes," so as to be liable to license fee prescribed by Section 5894, General Code.

COLUMBUS, OHIO, April 5, 1928.

HON. H. E. CULBERTSON, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

> "Am writing you as to your opinion as to what constitutes a 'Wholesaler of Cigarettes.'
>
> The county auditor has been furnished with three reports of practically the same content. I will give you one.
>
> 'Mr. J. T. R., a retail dealer of Ashland purchased of ---------- store, 5 cartons 1 M. Camel Cigarettes for $5.85 and tendered in payment his check for $7.00. Said check carried Mr. R.'s advertisement that he was a retail grocer.'
>
> Mr. R. paid the same amount as any consumer would pay. Outside of the check there would probably be no knowledge on the seller's part that they were purchased for re-sale except the quantity purchased.
>
> The informant demands his per centum under the statute."

Sections 5894 to 5902 of the General Code, both inclusive, cover the annual tax on the sale of cigarettes. Section 5894 of the General Code, provides:

> "A person, firm, company, corporation, or co-partnership, engaged in the wholesale business of trafficking in cigarettes, cigarette wrappers or a substitute for either, shall annually be assessed and pay into the county treasury the sum of two hundred dollars, or, if so engaged in such traffic in the retail business, the sum of fifty dollars for each place where such business is carried on by or for such person, firm, company, corporation or co-partnership."

In Opinion No. 300, dated April 8, 1927, to the Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio, I stated that:

> "The question as to what constitutes a wholesale dealer, or a retail dealer has often been before the courts of the various states particularly in connection with taxes on wholesale and retail sales of intoxicating liquors. No hard and fast rule has been evolved which can be used to determine whether a dealer engaged in the sale of goods can be classified as a wholesaler or a retailer. In some states the terms 'wholesaler' and 'retailer' as applied to persons engaged in the sale of intoxicating liquor have been defined by statute. The cases seem to lay down four distinct rules

for determining what constitutes a wholesale sale as distinct from a retail sale of liquor. Perhaps the most generally accepted rule is that the distinction depends upon the quantity sold, that is, sales in large quantities are sales at wholesale, while sales in small quantities are sales at retail. Massachusetts seems to adhere to this rule although it was said in the case of *Commonwealth* vs. *Greenwood,* 205 Mass. 124:

'We do not mean to say that the apparent purpose with which purchases are made would not be an important circumstance in this connection. It might be the case that one who bought for the purpose of selling again would desire to buy a larger quantity than one who was purchasing for his own consumption; and the attention of the jury properly might be called to this, as well as to all the other circumstances of whatever sales might be in evidence; but the decisive point is the quantity sold rather than the purpose of the purchaser.'

Other courts have based the distinction upon the 'usual course of trade' doctrine. In other words, the distinction between wholesale and retail sales depends upon whether the particular sale in question was considered by the trade itself as a wholesale transaction or a retail transaction. Other courts have accepted the original package theory; it being held that a wholesale transaction implies sale in unbroken pieces and that a retail sale implies the breaking up or dividing of goods held in larger packages into smaller quantities and the selling of the same in such smaller quantities. The fourth rule laid down by some of the courts is that of the 'purpose of the purchase,' that is, whether the purchase of the goods is for the purpose of consumption or for resale. Thus in *State* vs. *Tarver,* 11 Les. 658; 72 Tenn. 658, it was held:

'The distinction between a wholesale and retail dealer did not depend upon the quantity sold by either, but that sales to purchasers of packages or quantities for the purposes of trade or being resold constituted a wholesale dealer; and sales to persons or customers for purposes of consumption constituted a retail dealer.'

The above case was followed in the case of *J. H. Leidy* vs. *Matz Brothers Brewing Company,* 129 N. W. (Neb.) 443; 32 L. R. A. (N. S.) 622. The first branch of the syllabus reads:

'A manufacturer of beer who sells his product to unlicensed consumers for their use "sells at retail", within the meaning of chapter 82, Neb. Laws, 1907.'

Webster's Standard Dictionary defines wholesale and retail as follows:

'"Wholesale": 1. Selling in quantity, not at retail; as a wholesale druggist; 2. Done in buying and selling in quantities as the wholesale trade * * *. Sale of goods by the piece, bulk or quantity; opposed to retail.'

'"Retail": To sell in small quantities *such as are immediately called for by the consumer;* * * * the selling of goods in small quantities especially *by those who have bought in larger quantities to resell at a profit.*'

In Words and Phrases (Second Series) I find the following definition:

'The primary and usual meaning of the word "wholesale" is the selling of goods in gross to retailers who sell to customers.' *State* vs. *Spence*, 53 So. 595, 597; 127 La. 336.

I have been able to find but two Ohio cases which are at all helpful in this discussion. The case of *Markle* vs. *Town Council of Akron*, 14 Ohio 567, seems to adhere to the rule first announced above, that is, that the distinction depends on the quantity sold, namely, sales in large quantities are sales at wholesale, while sales in small quantities are sales at retail. On page 792 it is said:

'But to retail, is to dispose of in small quantities, and may be either for or without a consideration. It may be the distribution of a whole into parcels.'

In the later case of *Kaufman* vs. *Village of Hillsboro*, 45 O. S. 700, however, our Supreme Court follows the fourth test above referred to, namely that the *purpose of the purchase* is the criterion, that is, whether the purchase is for consumption or for resale. In that case the proof was that Kaufmann sold twenty-five quarts of beer at one time to one Rhoades in quart bottles and that said beer was sold to Rhoades to be consumed by him as a beverage. The opinion of the court is as follows:

'A sale, by one who is not a manufacturer, of twenty-five quarts of beer, put up in bottles of one quart each, not upon the prescription of a physician, nor for any known mechanical, pharmaceutical or sacramental purpose, but to be drank by the person to whom sold, is a sale at retail within the meaning of the eleventh section of the act known as the Dow Law; and the keeping of such place where such sales are made is a violation of the ordinance of a village prohibiting ale, beer and porter houses and other places where intoxicating liquors are sold at retail for any purpose or in any quantity, other than as permitted by the eighth section of said act.'"

You will observe that Section 5894, supra, provides that one *"engaged in the wholesale business* of trafficking in cigarettes" shall pay the license fee prescribed in such section. This language seems clearly to contemplate something other than a single sale in a large quantity, or a single sale for the purpose of re-sale. That is, before the license fee prescribed in the section under consideration may be assessed the person or firm sought to be charged with such fee must be "engaged in the wholesale business of trafficking in cigarettes".

In your letter you state that a retail dealer purchased from a retail store operated by a well-known chain grocery store company five cartons of cigarettes and tendered his check containing the advertisement that he was a retail grocer. You further state that the county auditor was furnished "with three reports of practically the same content," but you do not say whether or not such reports related to the same store or to other stores.

On the meager facts submitted it is impossible for this department to determine, whether or not the store in question was "engaged in the wholesale business of trafficking in cigarettes"; although it is my opinion that, on the facts stated in your letter, under any of the four tests above discussed it could not be said that

the store making the sale described in the report was engaged in the wholesale business of trafficking in cigarettes.

The store making the sale here involved is one of a well-known company, which operates a large number of retail grocery stores. Undoubtedly such stores are engaged *primarily* in the retail business, and one or more isolated sales in quantities like that here involved would not in and of itself make such stores wholesalers. However, under the guise of conducting a retail grocery business, such stores cannot engage in the wholesale business of trafficking in cigarettes and avoid the tax imposed by law.

For the reasons above indicated, a specific answer to your question, other than that above set forth, is not given. It is believed, however, that the above discussion of the law will enable you properly to determine the question involved, when all the facts shall have been ascertained.

I am herewith enclosing copy of Opinion No. 300, above referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1940.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF JACOB Y. DYKE AND E. B. HATFIELD, IN FRANKLIN TOWNSHIP, ROSS COUNTY, OHIO.

COLUMBUS, OHIO, April 6, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—You have submitted for my opinion, under recent date, two abstracts of title, encumbrance estimate, a copy of the certificate of the action of the Controlling Board and a deed conveying certain property in Franklin Township, Ross County, Ohio, and more particularly described as follows:

FIRST TRACT—Part of the Virginia Military Survey No. 13.441, being bounded and described as follows: Beginning at a White Oak, corner to Survey No. 14.849 and Number 13.516 and running thence north Fifty (50) degrees West one hundred and fifteen (115) poles to a stake on Britton's corner to Survey No. 13.523, thence South with said Britton's line fifty-one (51) degrees West one hundred and thirty-four (134) poles to a stake, thence forty-three (43) degrees West fifteen (15) poles, thence South sixty-four (64) degrees East twenty-six (26) poles to a hickory, thence South eighteen (18) degrees East thirty-eight (38) poles to two (2) chestnut oaks, thence South forty-four (44) degrees East forty (40) poles to three (3) chestnut oaks corner to Survey No. 14.891 and No. 14.849, thence North fifty-eight (58) degrees East one hundred and sixty-six (166) poles to the place of beginning, containing ninety-nine and one-fourth (99¼) acres, be the same more or less.

SECOND TRACT—Being part of Survey No. 14.523, beginning at a large white oak near the top of the ridge, thence South (41½) degrees East