

3849.

SALES TAX—LUNCH ROOM CONDUCTED BY BOARD OF EDUCATION NOT
SUBJECT TO RETAIL SALES TAX—"VENDOR" DISCUSSED.

SYLLABUS:

1. *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.*

2. *Where a teacher or group of teachers or a group of pupils or a parent teachers' organization or any other group of persons, independent of the board of education, conducts a store in connection with a school wherein certain school supplies or candy or other articles are sold, to the pupils and employes of the school, the profits from which transactions accrue to the school or to some school activity, the sellers should be licensed as vendors under the retail Sales Tax Act and all sales made therein are subject to the retail Sales Tax.*

COLUMBUS, OHIO, January 24, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

"Section 4762-1 of the General Code, authorizes boards of education to establish cafeterias in the schools for furnishing meals to pupils and teachers, and in some instances a profit is derived from such establishment, although it is assumed that no greater amount will be charged than the actual cost.

Question 1: Under the provisions of House Bill No. 134, known as the Sales Tax, will a board of education be required to take out a vendor's license and collect a tax on the retail sales made in such cafeteria?

Question 2: Where a school, independent of the board of education, conducts a store wherein certain writing materials, such as paper, pens, ink, and pencils and other such articles are sold, will such school be required to take out a vendor's license and collect a tax on the retail sales made in such store?"

House Bill No. 134 of the Second Special Session of the 90th General Assembly, codified as sections 5546-1 to 5546-23, inclusive, of the General Code of Ohio, and commonly known as the "Retail Sales Tax Act" is an act providing for the levy and collection of a tax upon sales of tangible personal property at retail for certain purposes enumerated in the said act. Section 1 of the act (§5546-1 General Code) provides in part, as follows:

"As used in this act:

'Person' includes individuals, firms, partnerships, associations, joint stock companies, corporations, and combinations of individuals of whatever 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 purposes of this act. * *

'Retail sale' and 'sale at retail' include all sales excepting those in which the purpose of the consumer is (a) to re-sell 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 in manufacturing, retailing, processing or refining or in the rendition of a public utility service; or (c) security for the performance of an obligation by the vendor. * *

'Retail establishment' means any premises in which the business of selling tangible property is conducted or in or from which any retail sales are made." Section 2 of the act (§5646-2, General Code) reads in part, as follows:

"For the purpose of providing revenue * * an excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, with the exception hereinafter mentioned and described, as follows: * * "

(Here follows a statement of the rate of tax and an enumeration of ten exceptions, naming classes of sales to which the tax does not apply, none of which is pertinent to the present inquiry.) The above section further provides that:

"For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

Although it appears from the provisions of Section 2 of the Retail Sales Act, portions of which are quoted above, that the tax thereby levied is levied on "each retail sale in this state of tangible personal property occurring during the period etc.," and that the presumption is that "all sales" are subject to the tax until the contrary is established, it is evident upon consideration of the entire act construed from its four corners, that it is such sales only as are made by a "vendor" as defined by the act that are taxable.

No provision is made in the act for collection of the tax by anyone other than a "vendor" nor is there any provision for the sale by the treasurer of state, his agents or the several county treasurers of prepaid tax receipts to any one other than a "vendor." In fact, the sale of the said receipts to anyone other than a "vendor" is expressly negatived.

It is provided in Section 8 of the act:

"The treasurer of state, his agents and the several county treasurers shall sell prepaid tax receipts only to licensed vendors."

Section 5546-10, General Code, provides for the licensing of persons engaged in making retail sales as a business, or intending to so engage.

One of the penalty sections (5546-14, General Code) provides a penalty for per-

sons engaging in business without a license while the following Section 5546-15, General Code penalizes for failure to collect the tax which can be collected by a licensed vendor only.

It remains to determine therefore, whether or not a board of education in the operation of a school lunch room or cafeteria or when selling merchandise, candy, etc., on school premises, may or should be licensed as a vendor under the terms of the act, and whether or not a board of education in conducting the activities mentioned, is engaged in business within the terms of the act.

By the terms of Section 4762-1, General Code, boards of education are authorized to operate lunch rooms in connection with the schools, for the preparation and serving of lunches to the pupils and teachers and other school employes. It is expressly provided therein that the lunch room shall not be operated for profit and that the accounts of receipts and expenses of such school lunch rooms be kept in a lunch room fund. It is provided by inference in said statute that a board of education may engage in the sale of merchandise, candy and like supplies on the school premises for profit, so long as the profit is used for school purposes or for some activity in connection with the school.

It will be observed that a "vendor" is defined in the Sales Tax Act as "the 'person' by whom taxable sales are made," and "person" is defined as including "individuals, firms, partnerships, associations, joint stock companies, corporations and combinations of individuals of whatever form and character." It is safe to say that a board of education is none of the classes enumerated in the definition of a "person" unless it be a "combination of individuals of whatever form and character." This classification is very broad. In my opinion, a board of education is not a "corporation" as the term is used in the statute. Even though it should be held that the term "corporation" as so used, included municipal corporations generally, it has been held that owing to the very limited number of corporate powers conferred upon boards of education, they rank low in the grade of corporate existence and hence, are properly denominated quasi corporations to distinguish them from municipal corporations such as cities or villages, which are vested with more extended powers and a larger measure of corporate power. See:

Finch vs. Board of Education, 30 O. S., 37

Board of Education vs. Volk, 72 O. S., 469

Board of Education vs. Sawyer, 7 O. N. P. (N. S.) 401.

It would most likely be held that a board of education would come within the classification of a "person" as used in the Sales Tax Act, and would therefore be a "vendor" within the terms of the Act if in fact they made "retail sales" such as are made taxable by the provisions of the Act.

Boards of education are organizations subject to the control of the legislature, and constitute instruments by which the legislature administers the department of the civil administration of the state which relates to education and the schools. In other words, they are agents of the state for the purpose of carrying on the affairs of the state with respect to the public schools, that is, they are arms, agencies or instrumentalities of the state for the promotion of education throughout the state by the establishment of a state wide system of public schools. See:

Finch vs. Board of Education, *supra*

Board of Education vs. Volk, *supra*

Cline vs. Martin, 94 O. S., 420

Wageman vs. Board of Education, 95 O. S., 409

State ex rel. Board of Education vs. Board of Education, 7 O. C. C., 152

Rockwell vs. Blaney, 9 O. N. P. (N. S.) 495.

The fact that boards of education are agencies of the state does not in and of itself serve to make sales that may be made by them exempt from the sales tax. It is a well settled rule of law that the state is not bound by the terms of a general statute unless it is expressly included therein. *State vs. Cappellear*, 39 O. S., 207; *Ohio vs. Board of Public Works*, 36 O. S., 409; *State ex rel. vs. Merrell*, 126 O. S., 239. It is equally well settled that a political subdivision of the state is not a taxpayer so as to permit a taxpayer's suit to be instituted by the political subdivision. *Board of Education vs. Guy, County Auditor*, 64 O. S., 434. It has also been generally held that in the imposition of a tax there is a presumption that the state and its political subdivisions are not subject to the tax. This rule is stated in Cooley on Taxation, 4th Ed., Sec. 621, as follows:

"Some things are always presumptively exempt from the operation of a general tax law because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax and thus the public would be taxing itself in order to raise money to pay over to itself and no one would be benefited.* * It cannot be supposed that the legislature would ever purposely lay such a burden on public property and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute."

The argument against the imposition by the state of a tax on its property is not applicable here and none of the rules referred to above have any application here. The Sales Tax is not levied on the vendor or the consumer but on the transaction—the "retail sale," although it is to be collected by the vendor from the consumer, except in special cases where the means of collection is not practical and where the tax may be prepaid. It would thus appear that a sale made by the state or any of its political subdivisions would not be exempt on account of the rules referred to.

It appears however, by the terms of Section 10 of the Retail Sales Act (§5546-10 G. C.), that it is not the intent of the law to tax retail sales except those that are made by persons engaged in making such sales as a business.

The term "business" is a word of large and somewhat indefinite import, and has been variously defined by the courts. In almost all cases, however, where the courts have undertaken to define the term, it has been said that it imports trade or commercial transactions carried on for profit or at least with a view to profit. In the case of *Trustees of Columbia College vs. Lynch*, 47 How. Prac. 273, 275, it is said:

"The word 'business' is defined by Webster as that which occupies the time, attention or labor of men for the purpose of profit or improvement."
In the case of *Flint vs. Stone*, 220 U. S., 107, it is said:

"'Business' is that which occupies the time, attention and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed."

In the case of *Couzner vs. California Club*, 100 Pac. 868, 155 Cal., 303, 20 L. R. A. (N. S.) 1095, it is said:

“The term ‘business’ as used in a law imposing a license tax on business, trades, etc., ordinarily means business in a trade or commercial sense when carried on with a view to profit or livelihood.”

To the same effect are definitions found in the case of *Conhaim Holding Company vs. Willcuts*, 21 Fed., 2nd, 91, 92; *Homer Coal Company vs. Heiner*, 26 Fed., 2nd, 729, 730; *Curley vs. New England Trust Company*, 221 Mass., 384, 109 N. E., 171.

The authority extended to boards of education by Section 4762-1, General Code, to operate lunch rooms, expressly provides that they “shall not be operated for profit.” It clearly appears that the lunch rooms so operated are entirely for the accommodation of the pupils and employes and are a mere incident of school management. It was not the intention that they be maintained in a commercial sense and operated as a business as the term implies. The operation of such lunch rooms if conducted without profit as provided by the statute, are clearly so operated by the board of education in its governmental capacity and do not constitute the doing of business.

However, the legislature amended said Section 4762-1, General Code, in 1933 by inserting after the provision for the operation of lunch rooms not for profit, the following provision:

“No board of education, the principal or teacher of any school room, or class organization of any school district will be permitted to sell or offer for sale, or supervise the sale of merchandise, foods, candies, or like supplies for profit on the school premises except when the profit derived from such sale is to be used for school purposes or for any activity in connection with the school on whose premises such merchandise, food, candies or supplies are sold or offered for sale. No individual student or class of students, acting as an agent for any persons or group of persons directly connected with the school will be permitted to sell or offer for sale the profit outside the school building, any of the above mentioned and described merchandise, except when the profit derived from such sale is to be used for school purposes or for any activity in connection with the school.

The enforcement of this law will be under the jurisdiction of the state department of education.”

The authority extended to boards of education by force of this amendment at least borders on the extension of proprietary powers to a board of education and, in my opinion, the conducting of such activities as the amendment implies, for profit, even though the profit goes to the school or to some school activity, constitutes the doing of business for which the board should be licensed as a vendor under the Sales Tax Act and the tax collected on retail sales made in pursuance thereof.

Sometimes teachers or parent teachers’ organizations or groups of pupils, independent of the board of education, conduct a store in connection with a school, for the sale of school supplies, candy, etc., to pupils and teachers, the profits therefrom going to some school activity. Clearly, such transactions come within the Sales Tax Act and the seller should be licensed as a “vendor” and the tax collected as provided by the act.

I am therefore of the opinion, in specific answer to your questions:

1. 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.

2. Where a teacher or group of teachers, or a group of pupils, or a parent teachers' organization or any other group of persons, independent of the board of education, conducts a store in connection with a school, wherein certain school supplies or candy or other articles are sold to the pupils and employes of the school, the profits from which transactions accrue to the school or some school activity, the sellers should be licensed as vendors under the retail Sales Tax Act and all sales made therein are subject to the retail sales tax.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

3850.

APPROVAL, BONDS OF CITY OF YOUNGSTOWN, MAHONING COUNTY,
 OHIO, \$24,000.00.

COLUMBUS, OHIO, January 24, 1935.

Industrial Commission of Ohio, Columbus, Ohio.

3851.

APPROVAL, BONDS OF JACKSON RURAL SCHOOL DISTRICT, MONROE
 COUNTY, OHIO, \$910.67.

COLUMBUS, OHIO, January 24, 1935.

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

3852.

APPROVAL, BONDS OF PEASE TOWNSHIP RURAL SCHOOL DISTRICT,
 BELMONT COUNTY, OHIO, \$3,629.12.

COLUMBUS, OHIO, January 24, 1935.

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

3853.

APPROVAL, BONDS OF McDONALD VILLAGE SCHOOL DISTRICT, TRUM-
 BULL COUNTY, OHIO, \$22,589.01.

COLUMBUS, OHIO, January 24, 1935.

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