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1. CIGARETTES — OHIO COMPANY — MANUFACTURES AND SELLS PACKAGED CIGARETTES TO BUYERS OTHER THAN RETAIL DEALERS — NOT REQUIRED TO BE LICENSED AS “WHOLESALE DEALER” AS TERM DEFINED IN SECTION 5894-5 G. C.
2. NO PROVISION IN LAW TO REQUIRE COMPANY MANUFACTURING PACKAGED CIGARETTES TO PAY SO-CALLED MANUFACTURER’S TAX OR LICENSE TO ENGAGE IN THAT PARTICULAR TYPE OF BUSINESS.

## SYLLABUS

1. An Ohio company which manufactures packaged cigarettes and sells the same to other than retail dealers is not required to be licensed as a “wholesale dealer” as that term is defined by the provisions of Section 5894-5, General Code.

2. There is no provision of law requiring a company manufacturing packaged cigarettes to pay a so-called manufacturer’s tax or license for engaging in that particular type of business.

Columbus, Ohio, April 5, 1944

Hon. Joel S. Rhinefort, Prosecuting Attorney  
Toledo, Ohio

Dear Sir:

Your request for my opinion reads:

“The County Auditor first made verbal inquiry about the necessity of a manufacturer of cigarettes obtaining a wholesaler’s license under General Code 5894 or some other license as a manufacturer.

We felt that in view of the fact that this was a state wide question and the State Tax Commission would want guidance from the Attorney General, an opinion ought to be written on the matter by the Attorney General for the guidance of the local auditor in pursuance to the inquiry appearing in a letter of the local auditor to our office which is enclosed herewith.”

An examination of the contents of the letter referred to therein discloses that a company contemplates the manufacture of packaged cigarettes in this state. Your county auditor, therefore, asks two questions in connection therewith:

“First: Assuming that no sales were to be made to retailers, would this company be required under the Ohio Law to purchase a wholesale cigarette dealers license?

Second: Would this company be subject to a manufacturer’s tax or license?”

For the purpose of keeping in force and effect the legislation in this state dealing with the imposition of an excise tax on the sale of cigarettes, the 95th General Assembly heretofore reenacted Sections 5894-2 and 5894-2a, General Code, which respectively provide:

Section 5894-2:

“For the purpose of providing revenues for the general revenue fund of the state, and excise tax on *sales* of cigarettes is hereby levied and imposed until March 31, 1945, at the rate of one cent on each ten or fractional part thereof.

*Only one sale of the same article shall be used in computing the amount of tax due hereunder.”*

Section 5894-2a:

“The intent and purpose of this act is to continue the excise tax on *sales* of cigarettes, the levy and collection of which is provided for by sections 5894-1 to 5894-21, both inclusive, of the General Code, until March 31, 1945. All the provisions of law relating to the levy and collection of said existing excise tax, including all the penal provisions thereof, are hereby made applicable to the levy, collection, and distribution of said excise tax until March 31, 1945.”

(Emphasis added.)

Section 5894-5, General Code, which prescribes who shall be licensed to engage in the business of trafficking in cigarettes, reads in part as follows:

“No person shall engage in the wholesale or retail business of *trafficking* in cigarettes within this state without having a license therefor, excepting that in case of the dissolution of a partnership by death, the surviving partner, or partners, may operate under the license of the partnership until the time of its ex-

piration, and the heirs or legal representatives of deceased persons, and receivers and trustees in bankruptcy appointed by any competent authority, may operate under the license of the person so succeeded in possession by such heir, representative, receiver or trustee in bankruptcy. Each applicant for such license shall, within thirty days after this act shall take effect, and, thereafter annually, on or before the fourth Monday of May, make out and deliver to the auditor of the county wherein he desires to engage in such business upon a blank to be furnished by such auditor for that purpose, a statement under oath showing the name of the applicant, each place in the county where the applicant's business is to be conducted, the kind or nature of such business, and such other information as the commission may require in the form of statement prescribed by it. At the time of making such application, each such person desiring to engage in the wholesale business of *trafficking* in cigarettes shall pay into the county treasury a license tax in the sum of one hundred dollars, or if desiring to engage in such retail business, such tax in the sum of twenty-five dollars, for each place where he proposes to carry on such business. For the purposes of this act each place of business shall be deemed to be such space, under the supervision of the applicant, as may be contained under one roof and connected by doors, halls, stairways, or elevators, which space may contain any number of points at which cigarettes may be offered for sale, provided that each additional point at which cigarettes are intended to be offered for sale shall be listed in the application. Upon receipt of such application and exhibition of the county treasurer's receipt showing the payment of such tax, the county auditor shall issue to the applicant a license for each place of business designated in the application authorizing the applicant to engage in such business at such place for and during the year commencing on the fourth Monday of May. Licenses are valid only for the county in which they are issued except as hereinafter provided. Companies operating club or dining cars or other cars upon which cigarettes are sold shall obtain licenses at railroad terminals within the state under such rules and regulations as may be prescribed by the tax commission. \* \* \*

(Emphasis added.)

By virtue of Section 5894-1, General Code, the General Assembly has seen fit to define certain words and terms that are used in the legislation here under consideration and I therefore quote the same, to-wit:

“ ‘Person’ includes firms and corporations;

‘Wholesale dealer’ includes only those persons who sell cigarettes to licensed retail dealers or for the purposes of resale only;

‘Retail dealer’ includes every person other than a wholesale dealer engaged in the business of selling cigarettes in this state, irrespective of quantity or amount or number of sales thereof;

'Sale' includes exchange, barter, gift, offer for sale and distribution, and excludes transactions in interstate or foreign commerce;

'Cigarettes' includes any roll for smoking made wholly or in part of tobacco irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other material excepting tobacco;

'Package' means the individual package, box or other container in or from which retail sales of cigarettes are normally made or intended to be made;

'Commission' means the tax commission of Ohio and where the meaning of the context requires (,) all deputies and employes duly authorized by it."

It will be observed that under the provisions of Section 5894-5, supra, "No person shall engage in the wholesale or retail business of *trafficking* in cigarettes". The word "trafficking" has not been given a legislative definition. I therefore call your attention to a definition appearing in Webster's New International Dictionary wherein it is said that it means:

"To pass goods and commodities from one person to another for an equivalent in goods or money;"

This same definition was adopted by the Court in *Kroger Grocery and Baking Company v. Schwer, Auditor*, 36 O. App. 512, wherein then Section 5894, General Code, was under review.

It is significant that at no place in any of the above quoted Sections, nor in any other enactment dealing with the taxing of the sale of cigarettes, has the General Assembly made any reference to a manufacturer. I might note at this point that a company manufacturing cigarettes is subject to various federal regulations but this State has seemingly found it unnecessary to pass any legislation which would be particularly applicable to a company engaged in such business. That a manufacturer must be able to sell his product in order to do business is manifest and that in so doing in this State he would be "trafficking" in cigarettes seems likewise to be evident. But may it be argued because of that fact alone it was the legislative intent that he be required to obtain a license? And if so, then

a license of what kind — as a wholesale dealer or a retail dealer?

It seems apparent that the General Assembly had in mind that a wholesale dealer would be a *purchaser* of cigarettes and not a manufacturer, this conclusion being based to a very great extent upon the language of Section 5894-4, General Code, which reads:

“At the time of delivering cigarettes to any person each wholesale dealer in this state shall make a true duplicate invoice showing the date of delivery, the amount and value of each shipment of cigarettes delivered and the name of the purchaser to whom delivery is made, and shall retain the same for a period of two years, subject to the use and inspection of the commission.

*Each wholesale and retail dealer in this state shall procure and retain invoices showing the amount and value of each shipment of cigarettes received by him, the date thereof and the name of the shipper and shall retain the same for a period of two years subject to the use and inspection of the commission.*

In each case in which cigarettes are shipped into the state of Ohio, the railroad company, express company or any other public carrier transporting any shipment thereof shall file with the commission a copy of the freight bill within ten days after the delivery in this state of each shipment.”

(Emphasis added.)

When it is said that each wholesale dealer “shall procure and retain invoices” this clearly anticipates the *purchase* of the completed product, viz., packaged cigarettes. Clearly a wholesale dealer could not purchase cigarettes from himself. It is therefore apparent that purchases must be made from some other source. While one wholesaler may, of course, purchase from another wholesale dealer, the time must necessarily arrive when the dealer would be required to buy from the manufacturer. However, as hereinafter pointed out a manufacturer may — whether intentionally or otherwise — bring himself within the statutory definition of wholesale dealer and as such be required to be licensed.

There is, of course, a distinction between the meaning of the words “wholesale dealer” and “manufacturer”. For the purpose of determining who is a manufacturer some assistance may be gained from an examination of the provisions of Section 5385, General Code, which reads:

“A person who purchases, receives or holds personal prop-

erty, of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, is a manufacturer, and, when he is required to return a statement of the amount of his personal property used in business, he shall include therein the average value estimated, as hereinafter provided, of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto, (separately listing finished products not kept or stored at the place of manufacture or at a warehouse in the same county therewith), which, from time to time, he has had on hand during the year next previous to listing day annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged."

I think such definition can be adopted for the purposes of this opinion. However, I deem it appropriate to point out that the Section in question is a legislative definition of a manufacturer for the purpose of specifying who shall list personal property for taxation.

I indicated above that under certain circumstances a manufacturer of cigarettes might be required to be licensed as a wholesale dealer. This conclusion is predicated upon the fact that Section 5894-1, supra, holds that a wholesale dealer includes only those persons who sell cigarettes to licensed *retail dealers*. While it is not necessary that I here specifically decide the question, I am of the view that if a manufacturer sells direct to a retail dealer, then he must be licensed as a wholesale dealer. Your county auditor seemingly recognized this to be so in the light of the fact that in seeking an opinion he specifically mentioned that no sales are to be made to retailers.

I am unable to find an opinion by any of my predecessors bearing directly on the matter nor do I seem to have had the precise question under consideration. Nor do I find any reported court decision that is of any assistance. I have examined various opinions of former Attorneys General from which it appears that some difficulty has been experienced in determining whether a person is a wholesale or a retail dealer but the question as to the necessity for a manufacturer to be licensed is not discussed.

The second question that is asked by your county auditor concerns

the necessity of such a company to pay a manufacturer's tax or license. I find no statutory enactment that has particular application to a company engaged in the manufacture of cigarettes. Hence I conclude that for the purpose of engaging in business its status is no different than that of any other company.

In specific answer to the several inquiries that have been presented, it is my opinion that:

1. An Ohio company which manufactures packaged cigarettes and sells the same to other than retail dealers is not required to be licensed as a "wholesale dealer" as that term is defined by the provisions of Section 5894-5, General Code.

2. There is no provision of law requiring a company manufacturing packaged cigarettes to pay a so-called manufacturer's tax or license for engaging in that particular type of business.

Respectfully,

THOMAS J. HERBERT

Attorney General