

5810.

GRAIN EXCISE TAX LAW—PERSON HAULING GRAIN PURCHASED DIRECTLY FROM FARMER TO MARKET IN OR OUT OF THIS STATE—NOT SUBJECT TO PROVISIONS OF SUCH LAW.

SYLLABUS:

A person owning and operating a truck, without other facility for the receipt and storage of grain, who purchases grain directly from farmers and by means of his truck hauls the grain so purchased by him to markets in or out of the state where such grain is sold by him, is not required to make a return of the grain thus purchased and sold by him under the grain excise tax law provided for by Amended Senate Bill No. 186, 116 O. L., 64; but such grain is subject to taxation as property in the hands of such person as a merchant under the provisions of Sections 5381 and 5382, General Code, and on the average basis of valuation provided for in and by Sections 5382 and 5388, General Code.

COLUMBUS, OHIO, July 7, 1936.

HON. JOHN M. KIRACOFE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication in which you request my opinion upon a question therein stated as follows:

“The question has been raised in this County as to whether, or not, a trucker who purchases and handles grain must make a return of grain handled during the year.

We have several truckers here who purchase grain of the farmers and then haul that grain either to local markets or out of the State. These truckers make no return on this grain purchased and handled.

The Auditor of this County is desirous of knowing whether, or not, under the law they must make a tax return of grains handled in case where these truckers purchase and truck to dealers in this State and also whether they must make a return when purchased and trucked to dealers out of the State.”

The question presented in your communication is whether a person who purchases grain of the farmer who raises the same and trucks or hauls the grain thus purchased to a market in or out of the state where the grain is sold by him, is required to make a return of the grain thus

handled by him for purposes of taxation under Amended Senate Bill No. 186, 116 O. L., 64, which act was enacted by the 91st General Assembly under date of April 5, 1935, and which, by specific provision of the act, went into effect December 31, 1935.

As stated in the title of the act here referred to, which has been carried into the General Code as sections 5545-21 to 5545-30, inclusive, the same is an act "To provide for the levy of a tax on the handling of grain in lieu of all taxes on grain so handled as property of the person handling the same, and for all the purposes for which taxes are authorized to be levied on such grain as property." Section 2 of this act (Sec. 5545-22, G. C.) provides as follows:

"In lieu of all taxes on grain, as property of any person engaged in any such business, an annual excise tax is hereby levied on the handling of grain for all the purposes for which taxes would otherwise be levied on such grain as property in the taxing district in which any such business is carried on, measured as follows, to-wit:

A sum equal to one-half mill per bushel upon all wheat and flax handled at one or more places in this state in the pursuit of any such business in the year hereinafter specified, ascertained as hereinafter provided, plus a sum equal to one-fourth mill per bushel upon all other grain so handled."

By section 3 of the act (Sec. 5545-23, G. C.), it is provided that every person engaged in handling grain shall, at the time when his annual return of taxable personal property is made or is required to be made, file with the assessor a statement on a form prescribed by the Tax Commission setting forth therein the number of bushels of each kind of grain received by him at each place where any such business is or has been carried on in this state during the year immediately preceding the date as of which the taxable personal property of such person is or would be required to be listed, or the part thereof during which he was engaged in such business at such place; and the number of bushels of each kind of grain purchased by him at each such place for shipment from a place in this state during such period. It is further provided in this section that for the purpose of the act, and, of course, for the purpose of the statement or return to be made by such person, grain purchased for shipment from a place in this state shall be deemed to have been purchased at the principal place in this state where the purchaser maintains an elevator, warehouse, or other like facility, and if there be no such place, at the principal office or place of business of such person

in this state, which, in the case of an individual having no other office or place of business in this state, shall be his actual place of residence. This section further provides that there shall be set out in such return the number of bushels of each kind of grain included in this statement which has been transferred "from one such place to another such place."

From the provisions of section 2 of this act, it is seen that the tax under consideration is an excise tax levied on the "handling" of grain for all the purposes for which taxes would otherwise be levied on such grain as property in the taxing district in which the business of the taxpayer is carried on. On the facts stated in your communication, there can be no question but that the "trucker" therein referred to is handling grain as the term "handling" is ordinarily used and understood with respect to transactions relating to the purchase and sale of tangible personal property. However, in order to determine the meaning of this term as the same appears in section 2 of this act, consideration must be given to the provisions of section 1 of the act (Sec. 5545-21, G. C.) wherein this term is defined. In and by this section it is provided that with certain exceptions and exemptions not here material, "handling" includes the receipt of grain and the purchase of grain as herein defined, as or in connection with or as a part of any business." The terms "receipt" and "purchase" are defined in this section of the act as follows:

"'Receipt' and 'received' mean the acquisition of actual custody or possession at or in an elevator, warehouse, store, mill or other facility for the storage, accumulation, sale or processing of grain, for any purpose whatsoever, excepting as otherwise provided in this act; 'purchase' and 'purchased' mean the acquisition of title without custody or possession, excepting as otherwise provided in this act; but none of said terms includes transactions for the purpose only of guaranteeing warehouse receipts to be used as security."

It is thus seen from the definitive provisions of section 1 of this act that the business of "handling" grain, which is the incidence of the excise tax imposed by section 2 of the act, means either the "receipt" of grain or the "purchase" of grain as those terms are likewise defined in section 1 of the act. By the provisions of this section the receipt of grain means the actual custody or possession of this commodity at or in an elevator, warehouse, store, mill or other facility for the storage, accumulation, sale or processing of grain for any purpose whatsoever, excepting as otherwise provided in the act. Although on the facts stated in your communication the trucker therein referred to acquires the custody and possession of the grain which he obtains from the farmer,

he does not acquire the custody or possession of the grain at an elevator, warehouse or other place or facility for the storage, accumulation, sale or processing of the grain, and his acquisition of the grain is not, therefore, a "receipt" of the same within the meaning of the term as used in this act. Again, the "purchase" of grain within the meaning of this term as the same is used in defining the business of handling grain, means the acquisition of title to the grain without custody or possession of the same. The trucker, on the facts stated in your communication, acquires title to the grain when he obtains the same from the farmer but in addition thereto he likewise obtains custody and possession of the grain. It is thus seen that the transaction of the trucker with respect to the grain which he obtains from the farmer is not a "purchase" of the grain as this term is used in defining the business of handling grain which is the thing taxed by this act. It follows, therefore, that on the facts stated in your communication the trucker therein referred to is not engaged in the business of handling grain within the meaning of the act here in question which, as above noted, imposes an excise tax on such business as the same is defined in the act.

A further question suggested on the facts here presented is whether the grain acquired by the trucker by purchase from the farmer is subject to taxes as personal property in the hands of the trucker. In this connection, it is noted that section 8 of the act above referred to (Sec. 5545-28, G. C.) provides:

"All grain included in the statements required to be made by this act and upon the handling of which a tax is hereby imposed, shall be exempt from taxation as personal property, anything in the laws of the state with respect to the taxation of such property to the contrary notwithstanding."

Inasmuch as upon the facts of this case the transaction by which the trucker purchases and sells grain is not a "handling" of the same and is not a taxable transaction under this act, he is not required to include the grain thus bought and sold by him in any statement or return to the assessor, provided for in the act.

It results from this that the grain purchased and sold by the trucker in the course of the business pursued by him is not exempt from taxation as personal property in his hands, and it further appears that this property would be taxable as against the trucker as a "merchant" under the provisions of Section 5381, General Code, which provides:

"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."

Touching this question, it was held in an opinion of this office under date of September 25, 1911, Annual Report of Attorney General, 1911-1912, Vol. II, page 1360, that:

"One who buys and sells cattle with a view to profit is a merchant within the meaning of Section 5381, General Code. Such person shall be taxed for such cattle according to the average amount of his stock during the preceding year regardless of the fact that all stock has been disposed of by him, when the assessor calls to assess his property for taxation."

The requirement with respect to the taxation of the property of a merchant is found first in the terms of Section 5328, General Code, which provide for the taxation of personal property used in business, and the requirement as to the taxation of such property on the basis of the average valuation thereof for the preceding year is found in the provisions of Section 5382, General Code, which reads as follows:

"A merchant in estimating the value of the personal property held for sale in the course of his business, shall take as the criterion the average value of such property, as provided in the next preceding section, which he has had from time to time in his possession or under his control during the year next previous to the time of making such statement, if he has been engaged in business so long, and if not, then during such time as he has been so engaged. Such average shall be ascertained by taking the amount in value on hand, as nearly as possible, in each month of the next preceding year in which he has been engaged in business, adding together such amounts and dividing the aggregate amount thereof by the number of months that he has been in business during such year."

On the facts stated in your communication, I conclude, therefore, by way of specific answer to the question presented in your communication, that the business conducted by the trucker therein referred to is not taxable under the grain excise tax act, but that the grain purchased and sold by him is taxable to him as a merchant under the provisions of

Sections 5381 and 5382, General Code, and on the basis of seventy per cent of the valuation thereof, as provided for by Section 5388, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5811.

EXEMPTED VILLAGE SCHOOL DISTRICT—DISCONTINUATION OF SCHOOLS IN SUCH DISTRICT AND SALE OF BUILDINGS—GOVERNED BY SECTION 7684, G. C.

SYLLABUS:

1. *The provisions of Sections 7730 and 7730-1, General Code, with respect to the suspension and reopening of schools in village and rural school districts and the sale of school buildings and real estate in the territory of a suspended school have no application in exempted village school districts.*

2. *A board of education of an exempted village school district may, under its broad power to manage and control the schools under its jurisdiction and to assign pupils to schools within its district as provided in Section 7684, General Code, suspend or discontinue any school in the district which, in its judgment is not needed for school purposes, and may thereafter dispose of the building which had formerly housed the suspended or discontinued school as well as the real estate upon which said building is located, by sale or otherwise, without limitation as to the time when such property may be disposed of.*

COLUMBUS, OHIO, July 7, 1936.

HON. W. RALPH PENCE, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion concerning the following state of facts:

“On June 8, 1931, Glendale School was suspended as being impractical, and the attendance being less than required for a one-room school. On May 11, 1932, Zink School was suspended as being impractical to operate. On August 5, 1935, the schools known as Hoagland and Russell were suspended pursuant to O. G. C., Section 7595-1c, stating the average daily attendance was less than one hundred eighty (180) pupils.