

It is plain that the former township trustee in suggesting the arrangement above described, is assuming that such arrangement is unobjectionable, except to the extent that it may be made objectionable in his case by section 12912 G. C. In other words, it is being assumed by the former township trustee that a person who does not come within the description of section 12912 G. C. might lawfully enter into the arrangement. No provision of statute has been found which gives ground for such an assumption. Highway construction work, as distinguished from current maintenance and repair, may be carried on by township trustees only upon competitive bids as provided by section 3298-15f,—there is no authority in the trustees to proceed by force account as they may in the case of maintenance and repair (see section 3373).

The suggested arrangement, if entered into, would have all the elements of a contract.

Since, in view of what has been said, the arrangement suggested is not in itself permissible, and may not be legally entered into in any event, the question whether the township trustee if he entered into the arrangement would be violating section 12912 becomes immaterial, and is not herein passed upon.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1297.

TAXES AND TAXATION—HOW PROPERTY IS TO BE LISTED FOR TAXATION WHEN MERCHANT OR MANUFACTURER INCORPORATES HIS BUSINESS BETWEEN FIRST DAY OF JANUARY AND SECOND MONDAY OF APRIL.

If a merchant or manufacturer who has been in business for several years between the first day of January and the second Monday in April incorporates his business in good faith, the corporation is not required to list such property for taxation on the average or any other basis for the year 1920; and the individual is not obliged to list such property, unless he has received in lieu thereof and holds on tax listing day the stock of the company or other non-taxable securities, in which event under section 5376 G. C. he will be obliged to list the monthly average value for the time he held or controlled them of the effects converted into stock or other securities to the extent that he holds such non-taxable securities on tax listing day.

COLUMBUS, OHIO, May 28, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your letter requesting the opinion of this department upon the following question:

“If a merchant or manufacturer who has been in business for several years between the first day of January and the second Monday in April incorporates his business, will the return for taxation for the year 1920 be made by the individual or the corporation? If by the individual, as of what date should the property be listed? If by the corporation, as of what date should it be listed?”

In answering this question it will be assumed that the reorganization of the business has been made in good faith. The general rule is that a corporation is

regarded as a distinct legal entity, so that, unless the transaction is intended as a cover for actual fraud or the rights of creditors have intervened, what the commission refers to as the "incorporation of his business" by the merchant or manufacturer will be looked upon exactly as if the individual had sold his stock of goods and business to a corporation in which he is not interested at all.

See *Bank vs. Trebein Co.*, 59 O. S. 316;

Andres vs. Morgan, 62 O. S. 236.

In this case, of course, the state had acquired no right against the manufacturer as an individual prior to the day preceding the second Monday of April, so that the doctrine of these cases could not be applied without a showing of an attempt to defraud the law, which would require more facts than are stated in the commission's communication, though no ruling is intended to be made upon the question whether a conclusion contrary to that reached herein could be predicated upon such an intent if shown.

The case is therefore to be discussed upon the same footing as the question upon which Opinion No. 1020 of this department addressed to the commission under date of February 26, 1920, was discussed. That opinion, however, does not exactly cover the present case. The facts then submitted did not require this department to go further than to hold that where a partnership engaged in manufacturing or merchandising sold a stock of goods to a corporation between the first day of January and the day preceding the second Monday of April, without going out of business, the stock of goods which it had sold would have to be accounted for in its partnership return made as of the day preceding the second Monday of April on the average basis for the year preceding that date. That opinion did not pass on the question as to what would be the result if the partnership had actually gone out of business—as in this case it appears from the statement that the individual has gone out of business as a merchant or manufacturer.

The former opinion referred to is, however, authority for the statement that the corporation is not required to list the property for the current year. This narrows the question down to that respecting the duty, if any, of the individual to list such property.

The following quotations from sections 5381, 5382 and 5385 of the General Code may be made:

"Section 5381. A person who owns * * * property within this state, with authority to sell it, which has been purchased * * * with a view to being sold at an advanced price or profit, * * * is a merchant."

"Section 5382. When a person is required by this chapter to make out and deliver to the assessor a statement of his other personal property, he shall state the value of such property appertaining to his business as a merchant. In estimating the value thereof, he 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."

"Section 5385. A person who purchases, receives or holds personal

property, 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, as a manufacturer, and, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, he shall include therein the average value estimated, as hereafter 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 which, from time to time, he has had on hand during the year next previous to the first day of April annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged."

It might be strongly argued that these sections require a person, who has been at any time during the year preceding the second Monday of April engaged in one of the businesses therein described, to list the average value of the goods or the materials, etc., on hand during the year, though he may have gone out of business prior to that day. Such argument would be based upon such expressions as the following:

"Such average shall be ascertained by taking the amount in value on hand, * * * in each month of the next preceding year in which he has been engaged in business, * * * and dividing the aggregate amount thereof by the number of months that he has been in business during such year."

(Section 5382)

"the average value estimated * * * of all articles * * * which from time to time he has had on hand during the year next previous to the first day of April annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged."

(Section 5385)

On the other hand, however, the general principle is that the status of persons and things for property taxation is to be determined as of the day to which the duty to list relates. Thus, the duty of a person to list as an agent or an administrator or a trustee depends upon whether he holds property in any of these capacities on the day when such duty arises. So also, the sections under consideration after defining the terms "merchant" and "manufacturer" go on to prescribe what shall be done by such a merchant or manufacturer "when (such) a person is required by this chapter to make out and deliver to the assessor a statement of his other personal property." From this it seems clear that the character of the person on whom these sections devolve duties is to be determined by whether or not he satisfies the definition of a "merchant" or a "manufacturer" at the time when he is required by law to list his property for taxation.

Upon careful consideration it is believed that the points last mentioned outweigh the inferences to the contrary and that where an individual or partnership engaged in the manufacturing or mercantile business has gone out of business prior to the day preceding the second Monday of April in any year, after having been engaged in such business during a part of such year, such individual or partnership

is not required to list any property on the average basis as such merchant or manufacturer on listing day.

It is obvious, of course, that the result of this conclusion is that the property formerly belonging to the individual or partnership will escape taxation for the year 1920. This would be inevitable had the individual or partnership not been engaged in manufacturing or mercantile business. In that event the transfer of any personal property of an individual to a corporation at the time named in your inquiry would clearly have the effect of avoiding taxation for the year. The conclusion is that sections 5381, 5382 and 5385 G. C. are not strong enough to change the result when the business of the individual is that of a merchant or manufacturer.

The conclusion therefore is that the property in question is not subject to be listed for taxation in the year 1920; unless perchance the individual who has incorporated his business has converted what formerly was his ownership of the property and assets pertaining to the business into shares of stock in the corporation, which are non-taxable, or having received cash has converted the cash into other non-taxable securities, in either of which events, of course, under the statute it will be his duty to list on the average basis the effects by him so converted into non-taxables for the period of time which he held them in taxable form. Inasmuch as one would naturally expect to find the individual in the situation of a stockholder after incorporating his business on tax listing day, 1920, section 5376 G. C. (107 O. L. 32) would probably apply and produce the above described result by requiring him to list

“the monthly average amount or value, for the time he held or controlled them within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities not taxed, to the extent he may hold or control such bonds or securities on tax listing day.”

No direct opinion is expressed on this point because it rests in inference rather than on the statement of facts submitted by you.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1298.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN
WAYNE COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 29, 1920.

1299.

APPROVAL, BONDS OF TRUMBULL COUNTY, OHIO, IN AMOUNT OF
\$12,000 FOR COUNTY BUILDINGS.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 29, 1920.