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1. AUTOMOBILE DEALERS' AND SALESMENS' LICENSING ACT —PLACARDS, SECTION 6301-2 GENERAL CODE, MAY BE USED ON MOTOR VEHICLES HELD EXCLUSIVELY FOR SALE, BEING TRANSPORTED, OR USED TO TEST OR DEMONSTRATE FOR PURPOSE OF SALE OR LEASE, IF SALE IS CASUAL OR ISOLATED.
2. MOTOR VEHICLES REBUILT OR REPAIRED SOLD IN CONNECTION WITH BUSINESS OF DISMANTLING, SALVAGING OR REBUILDING, WHERE SALE IS RECURRENT AND MADE IN CONTINUOUS SUCCESSION, VIOLATION SECTIONS 6302-2, 6302-18 GENERAL CODE.
3. PARTNERSHIP, CLASSIFIED AS DEALERS TO SELL MOTOR VEHICLES OR AS SALVAGERS MAKING CASUAL OR ISOLATED SALES, NOT REQUIRED TO BE LICENSED AS SALESMEN, SECTION 6302-4 GENERAL CODE.
4. REQUIREMENTS TO QUALIFY AS DEALERS TO SELL, DISPLAY, OFFER FOR SALE OR DEAL IN MOTOR VEHICLES.
5. SALES TAX LEVY—CASUAL OR ISOLATED SALES—VENDOR ENGAGED IN BUSINESS OF SELLING — QUESTION OF FACT —DEPENDENCE ON ELEMENT OF CONTINUITY AND SYSTEMATIC RECURRENCE OF SALES.

**SYLLABUS:**

1. *Persons engaged in the business of dismantling, salvaging and rebuilding motor vehicles may use placards, issued pursuant to Section 6301-2, General Code, on motor vehicles owned or being held exclusively for sale and being transported or being used in testing or being demonstrated for the purpose of sale or lease, if, so far as the sale is concerned, such sale is casual or isolated.*

2. *Where the activity of selling rebuilt or repaired motor vehicles is continually and systematically conducted in connection with the business of dismantling, salvaging or rebuilding motor vehicles, such sales,*

*if recurrent and if made in continuous succession, constitute a violation of Sections 6302-2 and 6302-18, General Code.*

3. *The members of a partnership, whether classified as dealers engaged in the business of selling motor vehicles at retail or as motor vehicle salvagers making casual or isolated sales, are not required to be licensed as salesmen in accordance with the terms of Section 6302-4, General Code.*

4. *Persons having places of business for the purpose of dismantling, salvaging or rebuilding motor vehicles may not qualify as dealers under the Automobile Dealers' and Salesmen's Licensing Act unless there is maintained a separate established place of business which is used solely and exclusively for the purpose of selling, displaying, offering for sale or dealing in motor vehicles.*

5. *The retail sales of salvaged automobiles by persons engaged in the business of dismantling, salvaging and rebuilding motor vehicles are not subject to the sales tax levy if such sales are casual or isolated. Whether such sales are casual or isolated and whether the person is or is not a vendor engaged in the business of selling is a question of fact depending on the element of continuity and systematic recurrence with respect to such sales.*

Columbus, Ohio, November 28, 1941.

Hon. Edward W. Kuns, Prosecuting Attorney,  
Paulding, Ohio.

Dear Sir:

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

"The following facts and questions are submitted in order that your determination may clarify a situation in regard to the 'Automobile Dealers' and Salesmen's Licensing Act'.

A. and B. doing business as X Brothers, engage in the business of dismantling and salvaging motor vehicles. They have secured special registration card by virtue of Section 6301-2, General Code.

Wrecked motor vehicles which are acquired by them are sent to automobile repair shops for rebuilding and repairing and upon their return are placed with other salvaged automobiles

which are not so repaired in their yard or parked on the street in front of or near their salvage yard. The cars are not marked with price tags nor is there any other merchandising signs or advertising designed to further the sale of said motor vehicles.

No car salesmen are employed and the sales are made by either A. or B., partners doing business as X Brothers, on a cash basis to persons coming to their place of business for the purpose of buying a motor vehicle or parts thereof. Their special registration number was issued April 1, 1941 and since said date of April 1, 1941, they have sold at retail the following cars:

- On April 8, 1941, 1935 Oldsmobile;
- On July 7, 1941, 1936 International Truck;
- On July 14, 1941, 1936 Dodge;
- On July 14, 1941, 1937 Terraplane.

On the back of the said special registration card is a note which is a duplicate of the note on the application form for said special registration which note reads as follows on said card:

'NOTE: The special license plates issued with this registration may be used only on motor vehicles owned or being held exclusively for sale, and being transported or being used in testing or being demonstrated for purposes of sale or lease and shall be used on no other motor vehicle.

Cylon W. Wallace,

Registrar of Motor Vehicles'

1. By virtue of a special registration card, as provided by Section 6301-2, of the General Code, what rights and privileges do persons engaged in dismantling, salvaging and rebuilding motor vehicles have in regard to the transportation, testing or demonstration of motor vehicles for sale at retail.

2. Does the selling of motor vehicles at retail by persons engaged in dismantling, salvaging and rebuilding motor vehicles in the manner set forth above violate the provisions of Sections 6302-2, 6302-4 and 6302-18, General Code.

3. The last sentence of the paragraph defining a dealer of Section 6302-1, of the General Code, reads as follows:

'Places of business or departments in a place of business used to dismantle, salvage or rebuild motor vehicles by means of using used parts are not considered as being maintained for the purpose of assisting or furthering the selling, displaying, offering for sale or dealing in motor vehicles.'

Does the foregoing provision which excludes places of business engaging in dismantling, salvaging and rebuilding motor vehicles from the definitions of a dealer, exempt such business places from the provisions of Section 6302-18 of the General Code.

4. When is the retailing of salvaged automobiles by persons engaged in the business of dismantling, salvaging and rebuilding motor vehicles to be considered 'casual' sales and not taxable as such."

Section 6301-2, General Code, referred to in the first question presented in your inquiry permits persons other than manufacturers or dealers to register annually with the Registrar of Motor Vehicles for the purpose of obtaining placards to be used only on motor vehicles owned or being held exclusively for sale and being transported or being used in testing or being demonstrated for purposes of sale or lease.

The privileges conferred under the foregoing section of the General Code, while permitting persons other than manufacturers or dealers to register and obtain placards for use on motor vehicles held exclusively for sale, are limited by the provisions of the Automobile Dealers' and Salesmen's Licensing Act which provides, among other things, that no person, other than a salesman or dealer licensed in accordance with the provisions of the Act, shall engage in the business of selling motor vehicles at retail within the state.

To hold a motor vehicle exclusively for sale and to engage in the business of selling motor vehicles at retail are entirely different types of activity. While persons other than manufacturers or dealers may engage in the former type of activity, the latter activity is confined to those persons properly licensed as dealers or salesmen.

The term "engaging in business" is statutorily defined in the Automobile Dealers' and Salesmen's Licensing Act under Section 6302-1, General Code, as follows:

"'Engaging in business' means commencing, conducting or continuing in business as well as liquidating a business when the liquidator thereof holds himself out to be conducting such business. However, making a casual or isolated sale is not engaging in business."

By reason of the foregoing definition it seems apparent that the privileges conferred under Section 6301-2, General Code, upon persons other

than manufacturers or dealers, that is, in the instant case, persons engaged in dismantling, salvaging and rebuilding motor vehicles, include the right to use placards, issued pursuant to the section, on motor vehicles owned or being held exclusively for sale and being transported or being used in testing or being demonstrated for purposes of sale or lease if, in so far as the sale is concerned, such sale is casual or isolated.

In considering the second question set forth in your inquiry concerning the sales made during the months of April and July, I am of the opinion that such activity constituted a violation of Sections 6302-2 and 6302-18, General Code. Section 6302-2, General Code, provides in part that no person, other than a dealer licensed according to the provisions of the Automobile Dealers' and Salesmen's Licensing Act, shall engage in the business of selling motor vehicles at retail within the state. Section 6302-18, General Code, provides as follows:

“Whoever engages in the business of selling, displaying, offering for sale or dealing in motor vehicles at retail without having a license therefor as required by this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars or more than five hundred dollars and upon conviction for a second or subsequent offense shall be fined not less than five hundred dollars or more than one thousand dollars.”

The language employed in the Automobile Dealers' and Salesmen's Licensing Act in defining the phrase “engaging in business” is identical with the wording used in defining the same phrase as it appears in the Sales Tax Act under Section 5546-1, General Code.

The definition set forth in Section 5546-1, General Code, was construed in the case of *State, ex rel. v. Zellner*, 133 O.S. 263, wherein it was stated:

“These sales are not occasional but are so abundantly recurrent and continuous as to yield in excess of \$25,000 annually. The activity of selling is not only commenced, but continually and systematically conducted, and as such, constitutes engaging in the business of selling within the meaning of the provisions of Section 5546-1 et seq., General Code.

Sales made in a more or less continuous succession cannot be said to be casual or isolated. Occasional sales, made by one not engaged in the business of selling, may be casual and isolated, but if the characteristic of systematic recurrence and continuity in respect to such sales is developed, they cease to be occasional, casual or isolated.”

Applying this same reasoning to the factual situation presented in your inquiry, it is my opinion that the activity of selling mentioned therein is continually and systematically conducted and that the sales consummated are sufficiently recurrent and in such continuous succession so as to take them out of the classification of casual or isolated sales. Such activity, therefore, constitutes "engaging in business" and since no dealers' license has been issued, Sections 6302-2 and 6302-18, General Code, have been violated.

Sections 6302-4, General Code, also referred to in your second question, provides in part as follows:

"No salesman, as herein defined, shall \* \* \* engage in the business of selling at retail motor vehicles in this state or advertise or assume to engage in such business without first having a license therefor. \* \* \* "

The term "salesman" is defined in Section 6302-1, General Code, as including "any person as hereinbefore defined who for a commission, compensation or other valuable consideration is employed by a dealer to sell, display and offer for sale or deal in motor vehicles." From the foregoing it is clear that the members of a partnership, whether engaged in business as dealers or in the making of casual or isolated sales, would not have to be licensed as salesmen.

If engaged in the business of selling, a dealer's license issued to the partnership would permit the members thereof to sell cars as dealers but if only casual or isolated sales are made, then the Automobile Dealers' and Salesmen's Licensing Act has no application. In neither case, therefore, could there be a violation of Section 6302-4, supra.

By the third question presented in your inquiry, information is sought with respect to the interpretation of the last sentence in the paragraph in Section 6302-1, General Code, in which the term "dealer" is defined and whether said sentence exempts places of business engaged in dismantling, salvaging or rebuilding motor vehicles from the provisions of Section 6302-18 supra. The paragraph containing the sentence in question, set forth in Section 6302-1, General Code, provides as follows:

"Dealer" includes all persons as hereinbefore defined,

regularly engaged in the business of selling, displaying, offering for sale or dealing in motor vehicles at an established place of business which is used solely and exclusively for the purpose of selling, displaying, offering for sale or dealing in motor vehicles, which place of business in the case of a dealer in new motor vehicles shall have space, under roof, for the display of not less than one new motor vehicle and facilities and space therewith for the inspection, servicing and repair of not less than one motor vehicle. For the purpose of this definition, a place of business which is used for selling, displaying, offering for sale or dealing in motor vehicles shall be deemed to be used solely and exclusively for those purposes even though farm machinery is sold or displayed for sale thereat, or if repair, accessory, gasoline and oil, storage, parts, service or paint departments are maintained thereat if such departments are operated for the purpose of furthering and assisting in the business of selling, displaying, offering for sale or dealing in motor vehicles. Places of business or departments in a place of business used to dismantle, salvage or rebuild motor vehicles by means of using used parts are not considered as being maintained for the purpose of assisting or furthering the selling, displaying, offering for sale or dealing in motor vehicles."

It is apparent that this definition in no manner exempts those persons engaged in the business of dismantling, salvaging or rebuilding motor vehicles from the penal provisions of Section 6302-18, *supra*, in case said persons attempt to engage in business as dealers. To the contrary, the sentence to which you refer prevents said persons from qualifying as dealers in that such places of business or departments may not be considered as being operated for the purpose of furthering and assisting in the business of selling.

The whole tenor of the Automobile Dealers' and Salesmen's Licensing Act is directed against the so-called marginal competitor by preventing said persons from qualifying as dealers. This purpose is well stated in an article entitled "Legislative Succor for the Motor Car Dealer" appearing in the Ohio State University Law Journal, Vol. V at page 377, wherein it is stated that:

"The Ohio statutory provision is directed at the rough counterpart to these 'alien' competitors in the automobile business—the fly-by-night seller of an occasional car, the small-town dealer, who must sell other articles to carry his overhead, the junk dealer who offers to the market a rebuilt car, and the finance company which employs the market to absorb the cars it has repossessed. The statute carries, however, no outright prohibition against any of these marginal dealers; the requirement is only that they have an "established place of business" "used solely and exclusively" for the merchandising of motor cars."

Your fourth question inquiring as to when the retailing of salvaged automobiles by persons engaged in the business of dismantling and rebuilding is to be considered as casual and isolated and not taxable as such depends on a question of fact. The sales tax exemption, to which you refer, appears in Section 5546-2, General Code, subsection 7, and reads as follows:

“Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property.”

In the case of *Carnicon v. Tax Commissioner*, 5 O.O. 348, it was held that the language of subsection 7 of Section 5546-2, supra, exempting “casual and isolated sales” from the operation of the sales tax when made by “a vendor who is not engaged in the business of selling tangible personal property” excepts casual and isolated sales when made by a vendor engaged in the business of selling tangible personal property where the sale or sales so made are unrelated to the vendor’s business as then conducted.

Hence, a person engaged in the business of motor vehicle salvaging and the sale of used automobile parts may be a person not engaged in the business of selling rebuilt or repaired motor vehicles and in such case sales thereof made by him may be casual and isolated within the meaning of the statute.

Whether or not a person admittedly engaged in the business of selling used automobile parts is also a vendor engaged in the business of selling repaired motor vehicles depends on the definition of the term “vendor engaged in business” as that phrase is used in the Sales Tax Act. In the case of *State, ex rel. v. Zellner*, 133 O.S. 263, at page 270, the term is defined as follows:

“ \* \* \* a vendor, engaged in the business of selling tangible personal property, is one who commences, conducts or continues in the activity of selling tangible personal property, with the object of gain, benefit, or advantage, either direct or indirect.”

Of course, the question as to whether a person is or is not a vendor engaged in the business of selling, depending as it does upon the element of continuity of activity is closely associated with the question of whether a sale is casual or isolated.

From the foregoing it is concluded that the sales of salvaged automobiles by persons engaged in the business of dismantling, salvaging and rebuilding motor vehicles are not subject to the incidence of the Ohio sales



tax if such sales are casual or isolated. Whether such sales are casual or isolated and whether the person is or is not a vendor engaged in the business of selling is a question of fact depending on the element of continuity and systematic recurrence with respect to such sales.

In specific answer to your inquiry, it is my opinion that:

1. Persons engaged in the business of dismantling, salvaging and rebuilding motor vehicles may use placards, issued pursuant to Section 6301-2, General Code, on motor vehicles owned or being held exclusively for sale and being transported or being used in testing or being demonstrated for the purpose of sale or lease, if, so far as the sale is concerned, such sale is casual or isolated.

2. Where the activity of selling rebuilt or repaired motor vehicles is continually and systematically conducted in connection with the business of dismantling, salvaging or rebuilding motor vehicles, such sales, if recurrent and if made in continuous succession, constitute a violation of Sections 6302-2 and 6302-18, General Code.

3. The members of a partnership, whether classified as dealers engaged in the business of selling motor vehicles at retail or as motor vehicle salvagers making casual or isolated sales, are not required to be licensed as salesmen in accordance with the terms of Section 6302-4, General Code.

4. Persons having places of business for the purpose of dismantling, salvaging or rebuilding motor vehicles may not qualify as dealers under the Automobile Dealers' and Salesmen's Licensing Act unless there is maintained a separate established place of business which is used solely and exclusively for the purpose of selling, displaying, offering for sale or dealing in motor vehicles.

5. The retail sales of salvaged automobiles by persons engaged in the business of dismantling, salvaging and rebuilding motor vehicles are not subject to the sales tax levy if such sales are casual or isolated. Whether such sales are casual or isolated and whether the person is or is not a vendor engaged in the business of selling is a question of fact depending on the element of continuity and systematic recurrence with respect to such sales.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.