

OPINION NO. 74-052

Syllabus:

1. If a uniform supply bookstore or other activity is operated as a business with a view toward profit by the board of education, the board of education is subject to the requirements of the Ohio Sales Tax Act (R.C. Chapter 5739).
2. When a student activity group, a parent-teachers organization, or any other group of persons sell tangible personal property, the profits from which accrue to the school or some school activity, the sellers are subject to the requirements of the Ohio Sales Tax Act (R.C. Chapter 5739).
3. Sales of tickets for admissions to school functions are not subject to the Ohio Sales Tax Act, but sales of programs are subject to the tax if a profit is made.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, June 20, 1974

Your request for my opinion poses the following questions:

"When a Board of Education operates a uniform supply bookstore selling notebooks, pencils, paper, pens, workbooks, etc., is it necessary for the school district to obtain a vendor's license and charge State sales tax to pupils of the district who are their customers?"

"When a student activity group, such as the Future Farmers of America or the Honor Society, sponsors a uniform school supply bookstore, or sponsors a vending machine which dispenses notebooks, pencils, pens, tablets, workbooks, etc., is it necessary for the student activity group to obtain a State vendor's license and charge a State sales tax when the students in the school are its customers?"

"When a group of interested parents, such as those belonging to a P.T.A. or P.T.O. Unit, along with a sponsoring body, such as a band group, sponsor a sale of items with the proceeds to be used for the purchase of band uniforms, is it necessary for these co-sponsoring groups to have a vendor's license and charge a State sales tax?"

"When an activity group, such as the athletic body, sells programs at a game or sells tickets for admission to games, is it necessary that such body have a vendor's license and charge a State sales tax?"

The answer to your questions will depend on the language of Chapter 5739 of the Revised Code, and particularly R.C.

5739.01, R.C. 5739.02, and R.C. 5739.17. The first of these three Sections provides in part as follows:

"As used in sections 5739.01 to 5739.31, inclusive, of the Revised Code:

"(A) 'Person' includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, corporations, the state and its political subdivisions, and combinations of any form.

"(B) 'Sale' and 'selling' include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or tangible personal property is or is to be granted; and include all transactions by which lodging by a hotel is or is to be furnished to transient guests; and include all transactions by which printed, imprinted, overprinted, lithographic, multilithic, blue-printed, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred; for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever; and include the production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. * * *

"(C) 'Vendor' means the person by whom the transfer effected or license given by a sale is or is to be made or given; if two or more persons are 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.

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"(F) 'Business' includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect.

"(G) 'Engaging in business' means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds himself out to the public as conducting such business. Making a casual sale is not engaging in business.

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"(M) 'Casual sale' means a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, for his own use in this state.

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 (Emphasis added.)

The second of these Sections, R.C. 5739.02 provides in part as follows:

"For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crises, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering sections 5739.01 to 5739.31, inclusive, of the Revised Code, an excise tax is hereby levied on each retail sale made in this state.

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"(B) The tax does not apply to the following:

- "(1) Sales to the state, or any of its political subdivisions;
- "(2) Sales of food for human consumption off the premises where sold;
- "(3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

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"(8) Casual sales by a person not engaged in the business of selling tangible personal property except as to such sales of motor vehicles and house trailers;

"(9) Sales of tangible personal property, other than motor vehicles and house trailers, by churches or by organizations not for profit operated exclusively for charitable purposes as defined in division (B) (12) of this section, provided that the number of days on which such tangible personal property, other than items never subject to the tax, is sold does not exceed six in any calendar year or one in any calendar month. If the number of days on which such sales are made exceeds six in any calendar year or one in any calendar month, the church

or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of such church or organization.

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"(12) Sales of tangible personal property to churches and to organizations not for profit operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which consist of carrying on propaganda or otherwise attempting to influence legislation.

"Charitable purposes means the relief of poverty, the improvement of health through the alleviation of illness, disease, or injury, the operation of a home for the aged, as defined in section 5701.13 of the Revised Code, the promotion of education by an organization engaged in carrying on research in, or the dissemination of scientific and technological knowledge and information primarily for the public.

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R.C. 5739.17 provides in part as follows:

"No person shall engage in making retail sales subject to a tax imposed by or pursuant to section 5739.02 or 5739.021 *5739.02.11 of the Revised Code as a business without having a license therefor, * * *."

(Emphasis added.)

My predecessors have considered questions similar to those you have presented. See, Opinion No. 6812, p. 195, Opinions of the Attorney General for 1944; Opinion No. 5726, p. 873, Opinions of the Attorney General for 1936; Opinion No. 4617, p. 1155, Opinions of the Attorney General for 1935; Opinion No. 3849, p. 56, Opinions of the Attorney General for 1935. The conclusion of my predecessors was that the Sales Tax Chapter of the Revised Code is only applicable in those situations in which a "business" is being operated. But they defined that term as any trade or series of commercial transactions carried on for profit. Thus in Opinion No. 3849, supra, the then Attorney General said (at p. 59):

"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 (Sec. 5546-10 G.C.), °R.C. 5739.171, 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." (Emphasis added.)

Not long after the date of that opinion, the General Assembly amended the definitional section of the Sales Tax Chapter to include a definition of "business" similar to that employed by my predecessor. R.C. 5739.01 (F)(G); 116 Ohio Laws (Part 2), 323-324 (1936). See also, Opinion No. 71-068, Opinions of the Attorney General for 1971; Opinion No. 6812, *supra*, and Opinion No. 4617, *supra*; Rules of the Tax Commissioner, TX-11-01 (1969).

In the light of the above, I think it clear that if a bookstore operated by a board of education sells to its pupils at cost, or at such a markup as is only sufficient to cover the board's actual cost, no sales tax need be charged. On the other hand, if the operation shows a profit, a vendor's license must be obtained and the sales tax must be collected. There is a specific exemption for school lunch rooms serving students only, regardless of whether operated at a profit. R.C. 5739.02 (B) (3); Opinion No. 6812, *supra*. But the statutory exemptions of R.C. 5739.02 are to be strictly construed, Ohio Children's Society v. Porterfield, 26 Ohio St. 2d 30, 32-33 (1971), and I see none of the provisions of that Section which would exempt a bookstore operating at a profit. Its operations clearly could not be deemed "casual sales" under R.C. 5739.02 (B)(8), for the meaning of that term is strictly limited by its definition in R.C. 5739.01 (M). Nor could it come within the exception for sales exclusively for charitable purposes by non-profit organizations for the time allowed for such sales is limited to no more than six days in a year or one day in a month. There will, of course, be exemptions for articles sold at fifteen cents or less, R.C. 5739.02 (A)(1), and for articles of food to be consumed off the premises, R.C. 5739.02 (B)(1). I conclude, therefore, that if the board of education operates its bookstore at a profit it is subject to the sales tax provisions of the Revised Code.

Your second and third questions pertain to sales of tangible personal property made by students or school-related organizations. Since the purpose of the sales is apparently to obtain a profit, the sellers are engaged in a business and are required to be licensed as vendors under the Ohio Sales Tax Act. Opinion No. 3849, *supra*. I should say, however, that I see no reason why all sales by organizations within a school cannot be handled on one vendor's license held by the school. All sales can be reported, and all taxes remitted, on the school's return.

Your fourth question concerns the applicability of the sales tax to admissions to a school function and to the sale of programs. My answer to your first three questions applies to the sale of programs. Admission tickets, however, are not subject to the Ohio Sales Tax. See Estelle Realty, Inc. v. Mayfield Heights, 176 Ohio St. 367 (1964); Opinion No. 70-148, Opinions of the Attorney General for 1970.

In specific answer to your questions, it is my opinion and you are so advised that:

1. If a uniform supply bookstore or other activity is operated as a business with a view toward profit by the board of education, the board of education is subject to the requirements of the Ohio Sales Tax Act (R.C. Chapter 5739).

2. When a student activity group, a parent-teachers organization, or any other group of persons sell tangible personal property, the profits from which accrue to the school or some school activity, the sellers are subject to the requirements of the Ohio Sales Tax Act (R.C. Chapter 5739.).

3. Sales of tickets for admission to school functions are not subject to the Ohio Sales Tax Act, but sales of programs are subject to the tax if a profit is made.