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TAX—NATIONAL BANKS GOVERNMENTAL AGENCIES—REVISED STATUTES UNITED STATES SECTION 5219—SALES OF PERSONAL PROPERTY, FURNITURE, EQUIPMENT AND SUPPLIES TO SUCH BANKS FOR USE IN CONDUCT OF BUSINESS—NOT TAXABLE UNDER PROVISIONS OF SECTION 5546-2 G. C.

SYLLABUS:

National banks are governmental agencies and are subject to state taxation only in the manner provided by section 5219, Revised Statutes of the United States (USCA, Tit. 12 §548), and for this reason section 5546-2, General Code, which provides for the levy of excise taxes on retail sales made in this State of tangible personal property, does not apply to sales of furntiure, equipment and supplies to national banks for use in the conduct of their business as banks.

COLUMBUS, OHIO, February 21, 1939.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: As previously acknowledged, you have submitted for my opinion a question which is stated in your communication as follows:

"Are sales to national banks taxable under the Ohio sales tax?"

In this connection, I am advised that the sales in question were of furniture, equipment and supplies purchased by national banks for their use in conducting their business as banks. I am further advised with respect to these sales that these national banks in purchasing personal property of the kind above mentioned assumed that the sales of this property to them were exempt from the incidence of the sales tax and in this view gave to the several vendors of such property certificates indicating that such sales were not legally subject to the tax imposed by the Sales Tax Act, as is provided for in such cases by section 5546-3, General Code; and on giving such sales tax exemption certificates to their vendors, the banks did not, of course, pay to such vendors any sales tax on the property sold to such banks.

It appears, however, that notwithstanding the fact that these national banks gave to the several vendors sales tax exemption certificates on and with respect to these sales, the Tax Commission has made sales tax assessments against a number of these national banks as consumers for and with respect to sales severally made to them of property of the kind above mentioned. And the question here presented is as to the validity of such assessments.

In the consideration of the question here presented, I do not deem it necessary to note at length the provisions of the Ohio Sales Tax Law. That the sales referred to in your communication are retail sales within the meaning of section 5546-2, General Code, is not questioned. And it is sufficient to note that provision is made by this section for the levy of an excise tax on each retail sale made in this State at the graduated rates therein specified, subject to the exceptions and exemptions therein provided for. By section 5546-3, General Code, it is provided, subject to an exception not here material, that the tax imposed by section 5546-2 of the General Code shall be paid by the consumer to the vendor in every instance, and that it shall be the duty of the vendor to collect from the consumer the full and exact amount of the tax payable with respect to each taxable sale, and to evidence the payment of the tax in each case by cancelling prepaid tax receipts, equal in face value to the amount of such tax. It appears, therefore, that the incidence of the tax provided for by the Sales Tax Law is on the "consumer" who is defined by section 5546-1, General Code, as the person to whom the transfer effected by a sale is or is to be made; and the only duty of the vendor with respect to the sale is to collect the proper amount of sales tax thereon and to cancel prepaid tax receipts in an amount equal to such tax. Fox vs. Frank, Treasurer, 52 O. App., 483, 486. And this view as to the proper incidence of the tax is not affected by the fact that upon failure of the vendor to collect such tax and to cancel prepaid tax receipts in the manner prescribed by

the law, he is made personally liable for the amount of the tax applicable to the transaction or transactions as to which he failed to collect sales taxes and to cancel prepaid tax receipts therefor. Section 5546-9a, General Code.

In this view as to the incidence of the particular sales taxes here in question as taxes on these national banks as "consumers" in the purchase of furniture, equipment and supplies for use in the conduct of their business as banks, the question presented in your communication with respect to the validity of such taxes is suggested by the thought that national banks are agencies or instrumentalities of the federal government and that for this reason it is beyond the power and authority of the State to impose an excise tax of this kind upon the transactions by which the banks acquired property of this kind for the purpose above stated. And in this connection it is pertinent to note that section 5546-2, General Code, excepts from the sales taxes therein provided for "sales which are not within the taxing power of this state under the Constitution of the United States." The view that national banks are agencies or instrumentalities of the federal government and are for this reason beyond the taxing power of the State with respect to taxes of this kind goes back for its support to the leading case of McCulloch vs. Maryland, 4 Wheat., 316. In this case, it was held that a Maryland statute which imposed a tax on each bank note issued by "banks or branches thereof in the state of Maryland not chartered by the legislature" or in lieu thereof an annual tax of $15,000.00 upon any such bank or branch, was invalid as applied to a branch bank of the Bank of United States which had theretofore been incorporated under the authority of an Act of Congress. The court in its opinion in this case, speaking through Marshall, C. J., after expressing the unanimous opinion of the court that the act there in question passed by the legislature of the State of Maryland was unconstitutional and void in its application to the Bank of the United States, said:

> "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

Since the decision of the Supreme Court in the case of McCulloch vs. Maryland, supra, there has been an apparent extension of the views indicated in the opinion of the court in this case; and in later cases the

Supreme Court has held that the states have no power to tax national banks, their property or other incidents otherwise than as may be expressly permitted by act of Congress. Thus, it was held in the case of Owensboro National Bank vs. Owensboro, 173 U. S., 664, that "A state is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except when permitted so to do by the legislation of Congress."

In the case of Bank of California vs. Richardson, 248 U. S., 476, the court in its opinion, referring to section 5219 of the Revised Statutes of the United States, which authorizes the states to tax the shares of national banks, said:

> "There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in this section. All possibility of dispute to the contrary is foreclosed by the decisions of this court. People v. Weaver, 100 U. S. 539; Mercantile Bank vs. New York, 121 U. S. 138, 154; Owensboro National Bank vs. Owensboro, 173 U. S. 664; Covington vs. First National Bank, 198 U. S., 100."

In the case of First National Bank vs. Anderson, 269 U. S., 341, 347, the following is said in the opinion of the court delivered by Van Devanter, J.:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent."

Many other decisions both of federal and of state courts might be cited on this point. And in this connection it is pertinent to note that under the provisions of section 5219, Revised Statutes of the United States (U. S. C. ,Tit. 12, §548), as amended by Act of Congress, March 25, 1926, 44 Stat., 223, the states are authorized to provide for the taxation of the real property of national banks to the same extent, according to its value, as other real property is taxed, and, subject to certain conditions, the states are further authorized (1) to tax the shares of national banks to their owners; or (2) to include the dividends therefrom in the taxable income of the owners or holders thereof; or (3) to tax the banks on their net income; or (4) to tax the banks according to or measured by their net income. By this section it is further provided that the im-

position by the State of any one of the four forms of taxation above noted shall be in lieu of the others. In the enactment of the Intangible and Personal Property Tax Law in 1931, 114 O. L., 715, 749, this State, as before the enactment of said law, provided for the taxation of the shares of stock of both national and state banks (secs. 5408, et seq., G. C.). This tax is one against the owners and holders of such shares of stock and is none the less such by reason of the fact that it is made the duty of the bank to collect the taxes upon its shares of stock from the several owners thereof and to pay such taxes to the Treasurer of State (sec. 5672, G. C.)

Since Congress in the enactment of section 5219, Revised Statutes, has prescribed the form of taxes which a state is authorized to levy on or with respect to national banks, it would seem to follow, consistently with the fundamental principles noted in the decisions of the Supreme Court of the United States in the cases above cited, that the states are precluded from levying any other form of taxes on national banks or on their activities or functions. And as to this it is noted that in the case of M. G. West Co. vs. Johnson, 20 Cal. App., 95, decided April 1, 1937, the court, construing the Retail Sales Tax Act of that State as one imposing a direct burden upon the purchaser as well as upon the vendor with respect to the sale of tangible personal property under said Act, held that with respect to banks and other federal governmental instrumentalities established under the Federal Farm Loan Act of 1916 and the Act of 1933 (12 USCA, 1935, Supp., 261), furniture and office equipment are necessary for the efficient conduct of their business and the purchase thereof is a purchase for a governmental function, and that sales taxes imposed upon the sale of such furniture and office equipment to the banks and other federal governmental instrumentalities therein named were invalid as an unauthorized limitation of the privilege of such federal agencies to do business. A petition for a writ of certiorari was thereafter denied by the Supreme Court in this case. 302 U. S., 638. However, in the later case of Western Lithograph Company vs. State Board of Equalization, 11 Cal. (2d), 156, decided April 19, 1938, the Supreme Court of California held that the Retail Sales Tax Act of that State was an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; and that the retail sales tax under said Act being a direct obligation of the retailer, and, so far as the consumer is concerned, a part of the price paid for the goods, it is neither in fact nor in effect laid upon the consumer. And in this view the court held that sales taxes imposed pursuant to said Act upon the sale of tangible personal property to a certain national bank therein referred to were not taxes against such bank and that the same were not invalid as against the contention of the vendor in support of his claim for a refund of sales taxes on the sale of such personal property to the bank. It is to be noted, however, that the court in its opinion in this case expressly recognized that a

national bank is an instrumentality of the United States and as such is not subject to tax by the State except with the consent of and in the manner prescribed by Congress. And more to the point the court in its opinion further recognized that if the tax there in question imposed pursuant to the provisions of the State Retail Sales Tax Act of that State were a tax on the consumer or purchaser of the goods sold, the tax there in question would be invalid.

As before noted herein, it is not doubted that the excise tax imposed by the Ohio Sales Tax Law is a tax upon the purchaser or consumer on the sale of tangible personal property; and in this view the sales taxes here in question represented by assessments made against national banks in this State on the sale of furniture, equipment and supplies purchased by such banks for use in the conduct of their business, are taxes against these banks as consumers under the Sales Tax Law. And consistently with the principles above noted applicable to the question presented in your communication, I am of the opinion that the sales taxes which suggested the question stated in your communication have been illegally assessed, and that the assessments certified by the Tax Commission against these banks under the assumed authority of section 5546-9a, General Code, should be canceled.

Respectfully,
THOMAS J. HERBERT,
Attorney General.