

2253.

COSMETICS—SALE OF OHIO WHOLESALE DEALER TO CUSTOMER IN ANOTHER STATE NOT SUBJECT TO EXCISE TAX ON COSMETICS WHEN—INTERSTATE COMMERCE.

SYLLABUS:

Where a wholesale dealer in cosmetics and toilet preparations in this state sells such articles on an order received by him from a customer in another state, and the goods so sold are transported to the customer in such other state by rail or truck, the transaction is one in interstate commerce; and the sale in such case is not subject to the excise tax on the sale of cosmetics and toilet preparations provided for by Section 5443-2, General Code.

COLUMBUS, OHIO, February 2, 1934.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your recent communication requesting my views with respect to the incidence, if any, of the cosmetics tax provided for in section 5443-2, General Code, as to such cosmetic articles owned and held by a wholesale dealer in the state which are sold and transported to a retail dealer in another state. A concrete case illustrating the question presented in said communication is stated therein as follows:

"A, a wholesale dealer in cosmetics and toilet preparations, with his place of business in Columbus, Ohio, received orders from time to time from B, his customer in Pittsburgh, Pa., and fills these orders, received by mail, wire or telephone from his stock of merchandise in Columbus. Deliveries are made thru common carriers via rail or truck; sometimes deliveries are made by trucks individually owned by A to B in Pittsburgh and occasionally the same are made to B at his trucks sent to Columbus to receive the merchandise used in filling such orders so taken as aforesaid."

The tax here in question is one levied upon sales of cosmetics or toilet preparations. As to this, section 5443-2, General Code, as amended in House Bill No. 7, enacted by the 90th General Assembly at its first special session under date of August 23, 1933, provides that for the purpose of affording emergency poor relief and for the purpose of carrying out the further purposes stated in said section, "an excise tax on sales of cosmetics or toilet preparations is hereby levied and imposed, at the rate of ten percentum of the retail selling price thereof." Although this tax is one measured by the retail selling price of cosmetics and other toilet preparations, it is not a tax on the receipts derived from the sale of such articles on the one hand, nor is it a property tax upon such articles on the other. The tax is, as stated, a tax upon the transaction itself, that is, upon the sale of such articles.

In the definitory provisions of section 5443-1, General Code, as amended in the act of the 90th General Assembly, above referred to, transactions in interstate or foreign commerce are excluded from the meaning of the term "sale" as

that term is used in section 5443-2, General Code, providing for the tax and in other provisions of the act relating to such tax.

In the case referred to in your communication, the sales made by the wholesale dealer located in this state are made by him on orders received from his customer in another state; and the contract for the sale of cosmetics and other toilet articles called for in an order of the customer therefor, if one can be said to exist, is doubtless made in Ohio, while the order is accepted by the wholesale dealer, either expressly or by implication in filling the order. However, except as to specific or identified goods, a contract for the sale of goods does not ordinarily constitute a sale of such goods. As I have advised you previously in other communications, it must again be said that ordinarily and in the usual course of business in the sale of manufactured articles or other products on purchase orders, a sale of the goods ordered is not effected until such goods have been segregated from the mass or stock of goods in the hands of the dealer and are delivered to the customer or to a carrier for shipment to such customer. 55 Corpus Juris, page 542; *Woods vs. McGee*, 7 Ohio, Part II, page 127; *Village of Bellefontaine vs. Vassaux*, 55 O. S. 323.

In this view, it is obvious with respect to the question stated in your communication that if the sale is not made until the goods have been delivered to the customer in the other state, this state does not have the power, consistent with the requirement as to due process of law, to levy a tax upon such sale. On the other hand, if it can be said with respect to the question submitted that the sale is made when the goods are loaded in the truck in this state for transportation to the customer in the other state, it must be observed that the sale of the goods in such case is co-incident in point of time with the beginning of the interstate transportation of the goods, and the sale in such case is therefore a transaction in interstate commerce which is excluded from the provisions of the act providing for the levy of the tax here in question. The rule with respect to the question as to when interstate commerce or transportation begins and ends, has been thus stated:

"The preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation, such as carrying the articles in vehicles or floating them to the depot where the interstate journey is to commence, is no part of that journey. But the movement of interstate or foreign commerce begins when the articles have been delivered or tendered to a common carrier for transportation from the state, or for transportation to another carrier for export, though on a local bill of lading, and while in transit from one state to another the goods are exempt from state regulation or taxation." 5 R. C. L. p. 706, §18; *Coev. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Hughes Bros. Timber Co. vs. Minnesota*, 272 U. S. 469, 71 L. ed. 359, 47 Sup. Ct. Rep. 170.

And, in this connection, it is to be further noted that the loading of the goods on the truck for the purpose of transporting the same by trucks generally to the other state is a part of such interstate transportation. *Seay vs. Commonwealth*, 152 Va. 990, 61 A. L. R. 997, 1001.

Upon the considerations above noted, I am inclined to the view, therefore, that the sale and delivery of cosmetics and other toilet preparations by a wholesale

dealer in this state to a customer in another state in the manner indicated in your communication are not subject to the excise tax provided with respect to the sale of such articles in this state.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2254.

APPROVAL, CONTRACT FOR HIGHWAY IMPROVEMENT IN THE CITY OF LANCASTER, FAIRFIELD COUNTY, OHIO.

COLUMBUS, OHIO, February 5, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

2255.

VILLAGE—BOARD OF PUBLIC AFFAIRS MAY EMPLOY EX-MARSHAL AS GAS METER READER WITHIN ONE YEAR AFTER EXPIRATION OF HIS TERM.

SYLLABUS:

The board of public affairs of a village may legally hire at a definite salary an ex-marshall of said village, in the capacity of a gas meter reader, within one year after such ex-marshall's term has expired.

COLUMBUS, OHIO, February 5, 1934.

HON. RAY W. DAVIS, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

"I would like very much to have an opinion upon the following question:

May the Board of Public Affairs of a Municipal Corporation hire at a definite salary within one year after his term has expired, an ex-marshall of that corporation to read Gas Meters for it without violating section 12912 of the Ohio General Code, or any other pertinent section?"

Section 12912, General Code, reads as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year there-