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TAX COMMISSIONER — TAXATION — SALES OF MALT LIQUOR SUBJECT TO EXCISE TAX IMPOSED BY 4305.01 ET SEQ. R. C. AND 4301.42 ET SEQ. R. C.—*NOT* 5739.02(8).

SYLLABUS:

Sales of malt liquor are subject to the excise tax imposed as provided in Sections 4305.01, et seq., and 4301.42, et seq., Revised Code of Ohio, and are not subject to taxation under the provisions of Section 5739.02, Revised Code of Ohio.

Columbus, Ohio, January 2, 1957

Hon. Stanley J. Bowers, Tax Commissioner  
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion is respectfully requested as to the following:

“1. Are sales of malt liquor or malt beverage exempt from the sales tax by virtue of Section 5739.02(8), Revised Code, or any other provision of Ohio law?

“2. If sales of malt beverage are subject to the sales tax, should the amount of tax imposed on malt beverages sold in bulk and in bottles and cans by Section 4305.01, et seq., and Section 4301.42, et seq., respectively, Revised Code, be included in the ‘price’ as defined in Section 5739.01, Revised Code, which is the base upon which the amount of sales tax is computed?”

I am informed that sales of malt liquor have never been taxed under the Ohio retail sales tax since the enactment of the law some twenty years ago and that this request for an opinion relates to the validity of the past interpretation of the Department of Taxation in exempting sales of malt liquor and malt beverages during this period.

It would appear necessary to look to the statutory history to determine the reason for the exemption initially and the validity of the continuance of the exemption.

At the time of the enactment of the Ohio Sales Tax Act in 1934, Section 5546-2 (5), General Code, 115 Ohio Laws, Part 2, page 308, now Section 5739.02 (8), Revised Code, read as follows:

“The tax hereby levied does not apply to the following sales:

“5. Sales of beer as defined by section 6212-63 of the General Code, whether in bulk or in bottles, sales of wine, and sales of spirituous liquors by the department of liquor control.”

At this time Section 6212-63, General Code, 115 Ohio Laws, Part 2, page 161, defined beer thusly:

“For the purposes of sections 6212-44 to 6212-49, both inclusive, of the General Code, sections 6212-49a to 6212-49t, both inclusive, of the General Code, sections 6212-50 to 6212-54, both inclusive, of the General Code, section 6212-54a of the General Code, sections 6212-55 to 6212-62, both inclusive, of the General Code and section 6212-64 of the General Code, the term ‘beer’ as used in any of said sections shall include beer, lager beer, ale, stout and porter, ale, and other brewed or fermented beverages containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight.”

Therefore, at the time of the enactment of the Sales Tax Act the exemption in Section 5546-2 (5), General Code, for beer as defined in Section 6212-63, General Code, is limited to brewed or fermented beverages containing not more than 3.2 per centum of alcohol by weight.

At this time, however, Section 5546-2 (5), General Code, also exempted sales of wine and sales of spirituous liquor by the Department of Liquor Control. For purposes of the sales tax exemption neither of the terms is defined.

It is significant that when Section 5546-2 (5), General Code, was enacted the Liquor Control Act made three classifications of alcoholic beverages, two being classed as intoxicating liquor. Section 6064-1, General Code, 115 Ohio Laws, Part 2, page 118, read as follows:

“As used in and for the purposes of this act:

“The phrase ‘intoxicating liquor’ includes any and all liquids and compounds which contain more than 3.2 per centum of alcohol by weight and are fit for use for beverage purposes, from whatsoever source and by whatsoever process produced, by

whatsoever name called and whether or not the same are medicated, proprietary, or patented; and any and all solids which contain any alcohol.

“‘Beer’ includes all beverages containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight.

“‘Wine’ includes all intoxicating liquors containing not more than seventeen per centum of alcohol by volume.

“The term ‘spirituous liquor’ includes all intoxicating liquors containing more than seventeen per centum of alcohol by volume.”

By Section 6064-15, General Code, 115 Ohio Laws, Part 2, page 130, the holder of a “Permit A-1” was authorized to manufacture beer and other malt liquor containing not more than six per centum of alcohol by weight and to sell such for home use and to retail and wholesale permit holders.

Beer and other malt liquors in excess of 3.2 per centum were taxed as wine as were mixed beverages pursuant to Section 6064-41, General Code, 115 Ohio Laws, Part 2, page 150.

This tax on wine and beer is a sales tax. Cleveland Sandusky Brewing Corp. v. Evatt, 146 Ohio St., 7, 9. While in Ohio there appears to be no constitutional prohibition against double taxation, the general rule in statutory construction is that statutes if at all possible will be construed to avoid double taxation. 51 American Jurisprudence, Taxation, Section 286, page 340. Therefore, the logical assumption was that the legislature had by the use of the word “wine” exempted from the sales tax in Section 5546-2 (5), General Code, malt liquor and mixed beverages, both being subject to a sales tax as wine under Section 6064-41, General Code. This was the interpretation of the department and I believe the correct interpretation.

Having determined that at the time of the enactment of the Sales Tax Act malt liquor was not subject to the application of the retail sales tax, the question narrows down to whether the legislature by some subsequent act has revoked the retail sales tax exemption of malt liquor.

It should be here emphasized that Section 5739.02 (8), Revised Code, Section 5546-2 (5), General Code, has not been changed since its enactment other than to change the reference numbers in the Code in the

definition of beer. The legislature has made some changes in the Liquor Control Act.

Section 6064-1, General Code, 116 Ohio Laws, 515, was amended in 1935 and wine was redefined as intoxicating liquor made from fermentation of grapes and fruits. Section 6064-41a, General Code, 116 Ohio Laws, 539, was enacted and this section taxed beer, ale, stout, porter and other malt liquor in excess of 3.2 per centum sold in bottles at a fixed rate per six ounces.

Section 6212-48, General Code, 116 Ohio Laws, 543, taxed beer, ale, porter, stout and other malt liquor in containers other than sealed bottles. In 1937, Section 6064-1, General Code, 117 Ohio Laws, 628, was again amended and added definitions for malt liquor and mixed beverages. As stated previously, there was no change in Section 5739.02 (8), Revised Code, Section 5546-2 (5), General Code.

If the legislature has revoked the exemption accorded malt liquor, it would have to be by implication by one of the foregoing enactments or amendments. None of the above makes any change which would affect the reason for the exemption that is to avoid multiple taxation of sales of malt liquor.

Amendments and repeals by implication are not favored in the law. In re Estate of Friedman, 154 Ohio St., 1, 10. And in light of this there is justification for the action of the department in the continuation of the exemption of malt liquor from the general sales tax. Due to the long continued administrative practice of exemption from the sales tax imposed by Section 5739.02, Revised Code, section 5546-2, General Code, of sales of malt liquor, coupled with the foregoing history, I am not constrained to change the initial construction given to Section 5739.02 (8), Revised Code, Section 5546-2 (5), General Code.

You have called my attention to the fact that the term "food" as used in Section 5739.02, Revised Code, does not include malt liquor. The exemption for food in Section 5739.02, Revised Code, is the same as the constitutional prohibition against the taxing of purchases of food for human consumption off the premises where sold. Malt liquor of necessity is not food or it could not be taxed with a selective sales tax, the same being true of beer as defined by Section 4305.08, Revised Code. Therefore, I do not believe the inclusion of the term "malt liquor" in the examples

of what is not included in "food" would lend any support to showing an intention for the legislature to tax malt liquor under Section 5739.02, Revised Code, as well as under the selective sales tax section in the Liquor Control Act.

It is my opinion and you are so advised that sales of malt liquor are subject to the excise tax imposed as provided in Sections 4305.01, et seq., and 4301.42, et seq., Revised Code of Ohio, and are not subject to taxation under the provisions of Section 5739.02, Revised Code of Ohio.

Respectfully,  
C. WILLIAM O'NEILL  
Attorney General

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