

2082

AN APPLICANT FOR A DOG KENNEL LICENSE IS NOT REQUIRED TO OBTAIN A VENDOR'S LICENSE BEFORE SUCH KENNEL LICENSE WILL BE ISSUED; AND WHERE A PROPER APPLICATION FOR A KENNEL LICENSE IS MADE, THE AUDITOR SHOULD ISSUE SAID LICENSE — §§955.05, 5539.17, R.C.

SYLLABUS:

An applicant for a dog kennel license under Section 955.04, Revised Code, is not required to obtain a vendor's license issued under Section 5539.17, Revised Code, before such kennel license will be issued; and where a proper application for a kennel license is made, the auditor should issue said license regardless of the fact that the applicant has not obtained such a vendor's license.

Columbus, Ohio, March 27, 1961

Hon. John S. Ballard, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion asks the question:

“Shall the County Auditor refuse to issue a kennel license on proper application where the applicant does not have and refuses to obtain a vendor's license?”

As to procurement of a kennel license, Section 955.04, Revised Code, provides:

“Every owner of a kennel of dogs bred or kept for sale shall, in like manner as provided in section 955.01 of the Revised Code, make application for the registration of such kennel, and pay to the county auditor a registration fee of ten dollars for each such kennel. The payment of such kennel license fee shall entitle the licensee to not more than five tags, to bear consecutive numbers and to be issued in like manner and have like effect when worn by any dog owned in good faith by such licensee as the tags provided for in section 955.08 of the Revised Code. Upon application to the county auditor, additional tags, in excess of said five tags, may be issued upon payment of an additional fee of one dollar per tag.”

Under this section, therefore, every owner of a kennel of dogs bred or kept *for sale* must get a kennel license.

It would appear from the provisions of Section 955.04, *supra*, that since kennel licenses must be procured by certain kennel owners, the auditor would have the ministerial duty to issue such a license on proper application. This conclusion is strengthened by the language of Section 955.07, Revised Code, reading :

“Upon the filing of the application for registration required by section 955.01 of the Revised Code and upon the payment of the registration fee, the county auditor shall assign a distinctive number to every dog or dog kennel described in such application, and shall deliver a certificate of registration bearing such number to the owner thereof. A permanent record of all certificates of registration issued, together with the applications therefor, shall be kept by such auditor in a dog and kennel register, which shall be open to the inspection of any person during reasonable business hours.”

Also, Section 955.08, Revised Code, provides :

“In addition to the certificate of registration provided for by section 955.07 of the Revised Code, the county auditor shall issue to every person making application for the registration of a dog and paying the required fee therefor a metal tag for each dog so registered. The form, character, and lettering of such tag shall be prescribed by the bureau of inspection and supervision of public offices. If a tag is lost, a duplicate shall be furnished by the auditor upon proper proof of loss and the payment of twenty-five cents for each duplicate tag issued.”

Referring to said Sections 955.07 and 955.08, one of my predecessors in Opinion No. 5953, Opinions of the Attorney General for 1955, page 554, at 558, stated :

“As outlined in the above quoted sections, the duties of the county auditor are limited, to the extent material here, to the registration of dogs and dog kennels and the issuance of dog licenses or tags upon application and payment of the required fees. There is nothing therein which can be construed as placing upon the auditor the duty of determining the correctness of the assertions or representations made in an application. Nor do I feel that such a duty can be implied as one fairly within the scope of the auditor’s office or necessary to the accomplishment of the main purposes thereof.”

Further to be noted is the fact that Section 955.04, *supra*, is enforced by the county dog warden and his deputies under Section 955.12, Revised Code, reading in part :

“* * *

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“* * * They shall patrol their respective counties and seize and impound on sight all dogs more than three months of age found not wearing a valid registration tag, *except dogs kept constantly confined in a registered dog kennel*, and except dogs acquired by, and confined on the premises of, an institution or organization of the type described in section 955.16 of the Revised Code. * * *

(Emphasis added)

Coming to your specific question as to whether the auditor should refuse to issue a kennel license where the applicant does not have a vendor’s license, Section 5739.17, Revised Code, dealing with vendors’ licenses, provides :

“No person shall engage in making retail sales subject to the tax imposed by section 5739.02 of the Revised Code as a business without having a license therefor, * * * Each applicant for such license shall make out and deliver to the county auditor of each county, in which he desires to engage in business, upon a blank to be furnished by such auditor for that purpose, a statement showing the name of the applicant, each retail establishment in the county where the applicant’s business is to be conducted, the nature of such business, and such other information as the tax commissioner reasonably prescribes in the form of statement prescribed by him.

“At the time of making such application, the applicant shall pay into the county treasury a license fee in the sum of one dollar for each retail establishment in the county where he proposes to carry on business. Upon receipt of such application and exhibition of the county treasurer’s receipt, showing the payment of such fee, the county auditor shall issue to the applicant a license for each retail establishment designated in the application, authorizing the applicant to engage in business at such retail establishment. * * *

“* * * * * * * *”

Defining “sale,” “business,” and “engaging in business” as used in Section 5739.17, *supra*, Section 5739.01, Revised Code, provides :

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

“* * * * * * * *”

“(B) ‘Sale’ and ‘selling’ include all transactions by which title or possession, or both, of *tangible personal property*, is or is to be transferred, * * *

“* * * * * * * *”

“(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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* * *”

(Emphasis added)

I might note at this time that there appears to be some question as to whether *all* sales of dogs are subject to sales tax (Section 5739.02, Revised Code) and, thus, whether a vendor’s license is required in all cases. I say this because of the decided uncertainty as to whether *all* dogs should be considered as personal property; such uncertainty being raised as a result of Section 955.03, Revised Code, reading :

“Any dog which has been registered under sections 955.01 and 955.04 of the Revised Code and any dog not required to be registered under such sections shall be considered as personal property and have all the rights and privileges and be subject to like restraints as other livestock.”

Since the section clearly states that dogs which are registered, or are not required to be registered, are personal property, under the doctrine of *expressio unius est exclusio alterius* it would appear to follow that all other dogs are not personal property. I do not, however, deem it necessary for the purposes of this opinion to further consider this aspect, as the question of whether a person is selling tangible personal property without a license comes within the purview of specific sections of the sales tax law and the determination of each case would depend on the particular fact situation involved.

As to selling without a license, Section 5739.31, Revised Code, reads :

“No person shall engage in the business of selling at retail or sell at retail incidental to any other regularly conducted business without having a license therefor, as required by sections 5739.01 to 5739.31, inclusive, of the Revised Code.”

As to the penalty for selling without a license, division (E) of Section 5739.99, Revised Code, reads :

“(E) Whoever violates section 5739.31 of the Revised Code shall be fined not less than twenty-five nor more than one hundred dollars.”

In summary, it would appear that upon proper application, the auditor should issue a kennel license to the applicant. Although such a license is issued only to owners of dogs bred or kept *for sale*, there is no requirement that an applicant have a vendor's license before the kennel license will be issued. Nor do I feel that such may be applied as necessary to the accomplishment of either the dog registration statutes or the sales tax law. As noted earlier, said dog registration statutes are enforced by the county dog warden; and a penalty is provided for anyone selling personal property as a business without having obtained a vendor's license under Section 5739.17, Revised Code.

Answering your specific question, therefore, it is my opinion and you are advised that an applicant for a dog kennel license under Section 955.04, Revised Code, is not required to obtain a vendor's license issued under Section 5539.17, Revised Code, before such kennel license will be issued; and where a proper application for a kennel license is made, the auditor should issue said license regardless of the fact that the applicant has not obtained such a vendor's license.

Respectfully,
MARK MCELROY
Attorney General