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SALES — FOOD — TELEPHONE COMPANY'S EMPLOYEE'S CAFETERIA—SUBJECT TO OHIO SALES TAX—NO EXEMPTION UNDER SECTION 5739.02 (B) (9) R. C.

**SYLLABUS:**

Sales of food to employes in a cafeteria operated by a telephone company are subject to the application of the Ohio sales tax and are not exempted by the provisions of Section 5739.02 (B) (9), Revised Code.

Columbus, Ohio, December 1, 1956

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

Dear Sir :

Your request for my opinion reads as follows :

"I respectfully direct your attention to Section 5739.02, Revised Code, which provides in part as follows :

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

"(9) \* \* \* and all sales by any other public utility as defined in section 5727.01 of the Revised Code.'

"The pertinent portion of Section 5727.01, Revised Code, referred to above, reads as follows :

"(A) "Public utility" includes each corporation, firm, individual, and association, its lessees, trustees, or receivers elected or appointed by any authority, and referred to as an express company, telephone company, \* \* \*.'

"(E) Any person, firm, partnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated :

"(2) Is a telephone company when engaged in the business of transmitting telephonic messages to, from, through, or in this state;'

"My question concerns the application of the sales tax to sales of food to employees in a cafeteria operated by a telephone company. The administrative policy of the Department of Taxation during the past years has been to consider such sales exempt under Paragraph (B) (9) of Section 5739.02 of the Revised Code. I question the legality of such policy especially since it is doubtful if a telephone company is deemed to be a public utility while engaged in such activity. The opinion of the Supreme Court, in *Haefner v. Youngstown*, 147 O. S. 58, tends to create further doubt relative to this matter.

"Kindly give me your advice and opinion with regard to the status of the subject transactions."

Section 5739.02, Revised Code, levies a tax on retail sales of tangible personal property and also exempts certain transactions from the application of the tax. The pertinent exemption reads as follows :

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

“(9) Sales of artificial gas by a gas company as defined in section 5727.01 of the Revised Code, of natural gas by a natural gas company as defined in said section, of electricity by an electric light company, as defined in said section, of water by a water works company, as defined in said section, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits; *and all sales by any other public utility as defined in section 5727.01 of the Revised Code; \* \* \*.*”

(Emphasis added.)

An excise tax is levied on certain public utilities by Section 5727.38, Revised Code, which reads as follows:

“(A) ‘Public utility’ includes each corporation, firm, individual, and association, its lessees, trustees, or receivers elected or appointed by any authority, and referred to as an express company, telephone company, \* \* \*

“(E)

“(2) Is a telephone company when engaged in the business of transmitting telephonic messages to, from, through, or in this state; \* \* \*.”

It appears that the sales referred to in Section 5739.02 (B) (9) are those sales made in connection with the business within the scope of the utility operation as defined in Section 5727.01, Revised Code. This is borne out by the fact that the specific examples of exemption set out in Section 5739.02 (B) (9) prior to the general words involved herein are sales within the scope of the utility operation described in Section 5727.01, Revised Code. This being a sales tax exemption the general words should have no broader application than the specific examples, as exemptions from sales tax are strictly construed due to the presumption contained in Section 5739.02, Revised Code. *Goodrich v. Peck*, 161 Ohio St., 202, 208; *National Tube Company v. Glander*, 157 Ohio St., 407.

In the case of *Haefner v. Youngstown*, 147 Ohio St., 58, the Supreme Court was concerned with the pre-emption doctrine of taxation. After an examination of Section 5546-2 (6), General Code, Section 5739.02 (B) (9), Revised Code, and Section 5483, General Code, Section

5728.38, Revised Code, Judge Williams made the following observation at page 64 of his opinion:

“\* \* \* The receipts from local telephone service and from equipment furnished for that service are not in a strict sense receipts from sales but are receipts within the meaning of the term ‘gross receipts’ as used in Section 5483. Merchandise and electrical appliances sold by a utility company of any kind are subject to the sales tax and not the gross receipts tax. Accordingly receipts from telephone subscribers commonly known as telephone rentals are taxed as part of the gross receipts of the telephone companies whereas sales of merchandise and electrical appliances by such a telephone company, if any take place, are sales within the meaning of the sales tax law.

“Inferentially the whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the ‘gross receipts’ of utilities that are subject to the excise tax under Section 5483. \* \* \*.”

Judge Williams evidently considered the whole field covered by taxes for he did not discuss, other than mention, the problem of whether a declaration of exemption by the state is a limitation on the municipal taxing power. Part of the tax involved in the Haefner case was a tax on local service and equipment furnished to telephone subscribers.

When the exemption in Section 5739.02, Revised Code, is read in connection with Section 5727.38, Revised Code, the reasoning of Judge Williams is clear in that the two sections mutually exclude items subject to a tax in the other section.

Therefore, it is my opinion and you are so advised that sales of food to employees in a cafeteria operated by a telephone company are subject to the sales tax and are not exempted by the provisions of Section 5739.02 (B) (9), Revised Code.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General