

4616.

APPROVAL, BONDS OF CITY OF AKRON, SUMMIT COUNTY,
OHIO, \$25,000.00.

COLUMBUS, OHIO, September 5, 1935.

Industrial Commission of Ohio, Columbus, Ohio.

4617.

SALES TAX—APPLICABLE TO SALE OF BOOKS AND SUPPLIES BY BOARD OF EDUCATION AND SCHOOL ORGANIZATIONS WHEN.

SYLLABUS:

1. *Where a board of education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils at no increase in price, the board of education is not required to be licensed as a vendor, collect the sales tax and cancel the prepaid tax receipts under the provisions of the Retail Sales Tax Act.*

2. *Where a board of education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils, at a price not to exceed the cost price plus a ten percent mark-up, the board of education is not required to be licensed as a vendor, collect the sales tax and cancel the prepaid tax receipts if in fact the purpose of the board in marking up the price is not to make a profit from the sale of such books.*

3. *Where a board of education engages a third party at a stipulated salary to sell text-books,—said party to receive no profit to himself from such sales—neither the employe nor the board of education is required to be licensed as a vendor, collect the sales tax and cancel the prepaid tax receipts.*

4. *Where the sales made by a third party, engaged by a board of education at a stipulated salary (no profit to himself) are of supplementary reading books, or any other books except text-books, neither the employe nor the board of education is required to procure a vendor's license, collect the sales tax and cancel the prepaid tax receipts.*

COLUMBUS, OHIO, September 5, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your recent request for my opinion reads as follows:

"We respectfully request your informal opinion immediately to the question that has arisen as to whether or not in the following situations, it will be necessary for either a Board of Education, an employee of any Board of Education, or a person under contract with a Board of Education, to be licensed as a vendor, collect the sales tax and cancel prepaid tax receipts under the provisions of Amended House Bill No. 134?

1. Where a Board of Education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils at no increase in price.
2. Where a Board of Education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils, at a price not to exceed the cost price plus a ten per cent mark-up.
3. Where a Board of Education engages a third party, at a stipulated salary to sell text-books—said party to receive no profit to himself from such sales.
4. Where the sales made by a third party, engaged by a Board of Education at a stipulated salary (no profit to himself), are of supplementary reading books, or any other books except text-books.
5. Where a Board of Education contracts with a third party to sell text-books, at a marked up price, or at a profit to such party.
6. Where the contract is to allow the third party to sell supplementary reading books, or any other books except text-books, at a marked up price, or at a profit to such party."

Sections 5546-1 to 5546-23, inclusive, of the General Code of Ohio comprise what is commonly known as the "Retail Sales Tax Act" providing for the levy and collection of a tax upon retail sales of tangible personal property for certain purposes enumerated in the Act.

By the terms of Section 5546-2, General Code, " * * * an excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, * * *." The same section then contains a list of exemptions but concludes with the statement that " * * * it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established."

These provisions standing alone tend to indicate that *all* retail sales of tangible personal property, except those specifically exempted, are taxable. Such, however, is not the case, for upon consideration of the entire Act it is

evident that only such sales as are made by a "vendor" are taxable. Only the "vendor" may collect the tax. Section 5546-3, General Code, states that:

"The tax hereby imposed shall be paid by the consumer to the vendor in every instance, and it shall be the duty of each vendor to collect from the consumer the full and exact amount of the tax payable in respect of each taxable sale, and to evidence the payment of the tax in each case by cancelling prepaid tax receipts * * *."

Section 5546-10, General Code, states that:

"No person shall engage in making retail sales as herein defined, as a business without having a license therefor * * *."

Then follows in the same section an outline of the procedure in obtaining a license from the County Auditor. Section 5546-8, General Code, provides that the Treasurer of State, his agents, and the several county treasurers, shall sell prepaid tax receipts *only to licensed vendors*.

Thus it may be seen that the statute provides no other method (except as provided in Section 5546-5, hereinafter noted) of collecting the sales tax except by the sale of prepaid tax receipts to licensed vendors who in turn collect the tax from the consumer. One of the penalty sections (5546-14, General Code) provides a penalty for persons engaging in business without a license while the following Section 5546-15, General Code, penalizes for failure to collect the tax which as previously stated may be collected only by a licensed vendor.

It is therefore necessary to determine if a board of education when engaged in selling text-books or any other books must procure a vendor's license, collect the sales tax, and cancel the prepaid tax receipts under the provisions of the Retail Sales Tax Act. Obviously, unless the board of education under the circumstances which you have stated, is a vendor within the meaning of the Act, sales made by it are not taxable.

To argue that a board of education could not be a "vendor" because it is an agency of the state is, in my opinion, untenable. It is true as a general proposition, and there are many cases in support thereof, that the state is not bound by the terms of a general statute unless it is expressly included therein; that a political subdivision of the state is not a taxpayer so as to permit a taxpayer's suit to be instituted by the political subdivision; that in the imposition of a tax there is a presumption that the state and its political subdivisions are not subject to the tax. Nevertheless, these principles are not applicable with respect to the Sales Tax because it is not levied on the vendor or the consumer. The sales tax is levied on the transaction. The transaction is the "retail sale" and the vendor is to collect the tax from the consumer

at the time the "retail sale" is made, except in special cases where the means of collection is not practical and the tax may be prepaid. (Section 5546-5, General Code.) For the reasons just stated it may not be contended with force that a board of education need not procure a vendor's license for the sole and only reason that it is an agency of the state government.

Assuming that a board of education made such "retail sales" as are contemplated by the Act it may be safely presumed that such board of education would come within the classification of a "person" as defined in the Sales Tax Act.

But the mere fact that a board of education qualifies as a "vendor" within the meaning of the Retail Sales Act is not alone sufficient to require a license and collect the tax. An additional fact must be present, namely, the sales must be such as are contemplated by the Act. This is evidenced by Section 5546-2(7), General Code, wherein it is stated that the tax does not apply to "casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property."

A careful study of the Retail Sales Tax Law will reveal that it was not the intent of the law to tax retail sales except those that are made by persons engaged in making such sales as a business. Ample evidence to support this conclusion exists in the Act. Note the following examples:

Section 5546-2, General Code:

"The tax hereby levied does not apply to the following sales:
* * * Casual and isolated sales by a vendor who is not engaged in the *business* of selling tangible personal property."

Section 5546-5, General Code:

"* * * the commission may * * * authorize a vendor to prepay the tax * * * if the * * * conditions of the *applicant's business* are such as to render impracticable the collection of the tax in the manner otherwise provided by this Act." (Italics the writer's.)

Section 5546-9, General Code:

"* * * it shall be the duty of each licensed vendor to purchase * * * prepaid tax receipts * * * to supply the normal requirements of his *business*." (Italics the writer's.)

Section 5546-9a, General Code:

"The Commission by its deputy or deputies * * * shall forthwith call at the *place of business* of such person * * *." (Italics the writer's.)

This section refers to the failure of the vendor to pay an assessment made by the Tax Commission as a result of the vendor's refusal to collect the tax imposed by the Act.

Section 5546-10, General Code:

"No person shall engage in making retail sales as herein defined, *as a business*, without having a license therefor, * * *. Two or more persons * * * may operate a single retail establishment under one license * * * the retirement of one or more persons *from business* * * * shall (not) affect the license or require the issuance of a new license. * * * Each applicant for such license shall, * * * make out and deliver to the auditor of each county, wherein he desires to engage *in such business* * * * a statement showing * * * where the applicant's *business* is to be conducted, the kind or nature of such *business* and such other information as the commission may reasonably prescribe * * *." (Italics the writer's.)

Section 5546-14, General Code:

"Whoever engages *in the business* of selling tangible personal property at retail, or sells tangible personal property at retail incidental to any other regularly conducted *business* * * * without having a license * * * shall be deemed guilty of a misdemeanor * * *." (Italics the writer's.)

The term "business" has been variously defined by the Courts. In almost all cases, however, where the Courts have undertaken to define the term, it has been said that it imports trade or commercial transactions carried on for profit or at least with a view to profit. In the case of *Trustees of Columbia College vs. Lynch*, 47 How. Prac. 273, 275, it is said:

"The word 'business' is defined by Webster as that which occupies the time, attention or labor of men for the purpose of profit or improvement."

In *Flint vs. Stone*, 220 U. S. 107, it is said:

"'Business' is that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person may be employed."

In the case of *Couzner vs. California Club*, 100 Pac. 868, 135 Cal., 303, 20 L. R. A. (N. S.) 1095, it is said:

“The term ‘business’ as used in the law imposing a license tax on business, trades, etc., ordinarily means business in a trade or commercial sense when carried on with a view to profit or livelihood.”

Other cases defining “business” in the same manner are: *Conheim Holding Company vs. Willcuts*, 21 Fed. 2nd. 91, 92; *Homer Coal Co. vs. Heiner*, 26 Fed. 2nd. 729, 730; *Curley vs. New England Trust Co.*, 221 Mass., 384, 109 N. E., 171.

Questions very similar to those which you have presented were asked by the Bureau of Inspection and Supervision of Public Offices and were answered in my opinion No. 3849, rendered January 24, 1935. The questions presented were:

(1) Are boards of education, operating cafeterias for students as authorized by Section 4762-1, required to procure a vendor’s license and collect the Retail Sales Tax?

(2) Where independent of the board of education, a school conducts a store wherein student supplies are sold, must the school be required to take out a vendor’s license and collect a tax on the retail sales made in such store?

The syllabus of Opinion No. 3849, supra, reads as follows:

“1. A board of education conducting a school lunch room under the provisions of Section 4762-1, General Code, without profit, need not be licensed as a ‘vendor’ as provided by the Retail Sales Tax Act, and sales of food in such lunch rooms are not subject to the tax provided for by the Retail Sales Tax Act.

2. Where a teacher or group of teachers or a group of pupils or a parent teachers’ organization or any other group of persons, independent of the board of education, conducts a store in connection with a school wherein certain school supplies or candy or other articles are sold, to the pupils and employes of the school, the profits from which transactions accrue to the school or to some school activity the sellers should be licensed as vendors under the Retail Sales Tax Act and all sales made therein are subject to the Retail Sales Tax.”

In the opinion it is stated:

“The authority extended to boards of education by Section 4762-1, General Code, to operate lunch rooms, expressly provides that they ‘shall not be operated for profit.’ It clearly appears that the lunch rooms so operated are entirely for the accommodation of the pupils and employes and are a mere incident of school management. It was not the intention that they be maintained in a commercial sense and operate as a business as the term implies. The operation of such lunch rooms if conducted without profit as provided by the statute, are clearly so operated by the board of education in its governmental capacity and do not constitute the doing of business.”

In 1933, the legislature amended Section 4762-1, General Code, to authorize boards of education to sell merchandise, food, candies and other school supplies for profit only when the profit derived from such sale is used for school purposes. As to the application of the Retail Sales Tax Act to such sales it is stated in Opinion No. 3849, supra :

“The authority extended to boards of education by force of this amendment at least borders on the extension of proprietary powers to a board of education and, in my opinion, the conducting of such activities as the amendment implies for profit even though the profit goes to the school or to some school activity, constitutes the doing of business for which the board should be licensed as a vendor under the Sales Tax Act and the tax collected on retail sales made in pursuance thereof.”

The reasoning and conclusions of Opinion No. 3849, supra, are applicable to your questions and it is my opinion that the distinctions there made with respect to boards of education engaging in “business” are controlling in answering your inquiry.

Notwithstanding the recent amendment of Section 7715, General Code, by the enactment of House Bill No. 41, (relating to free text-books), during the regular session of the 91st General Assembly, boards of education are authorized to purchase text-books from publishers and sell them to students. Section 7713-1, General Code, provides for the purchase of supplementary reading books, library books, reference books or any other books, required by boards of education.

You ask if it will be necessary for either a board of education or an employe of a board of education, or a person under contract with a board of education to be licensed as a vendor, collect the sales tax and cancel prepaid tax receipts under the Retail Sales Tax Act in the following instances :

"1. Where a board of education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils at no increase in price."

Applying the principles previously stated herein it is apparent that under these facts the board of education is not engaged in "business" within the meaning of the Retail Sales Tax Act and is therefore not amenable to its provisions.

"2. Where a board of education makes direct sales of text-books, supplementary reading books, or any other books, to the pupils, at a price not to exceed the cost price plus a ten percent mark-up."

I am assuming that the marked up price does not exceed the actual expense incurred by the board of education in handling the books and school supplies.

Section 7715, General Code, authorizes a mark-up of not to exceed ten percent. If the mark-up is made for the purpose of making a profit, then I am of the opinion that the board of education is engaging in "business" and is amenable to the provisions of the Retail Sales Tax Act. If the sale is for profit then Opinion No. 3849, supra, is directly applicable and as stated therein the board of education would be engaged in a proprietary function and although the profit went to the school or to some school activity, such sales for profit constitute the doing of business for which the board should be licensed as a vendor under the Sales Tax Act and the tax collected on retail sales made in pursuance thereof. If the marked up price does not exceed the actual cost of the books and supplies and the expenses of handling the same, then I am of the opinion that the board is not amenable to the Sales Tax Act.

"3. Where a board of education engages a third party, at a stipulated salary to sell text-books said party to receive no profit to himself from such sales."

I am of the opinion that under the facts just stated a license need not be procured and the sales tax need not be collected for the reason that the third party is merely the employe of the board and as long as such status exists without profit or a view to profit by the board it is not doing "business" and hence not amenable to the Retail Sales Tax Act.

"4. Where the sales made by a third party engaged by a board of education at a stipulated salary (no profit to himself) are of supplementary reading books, or any other books except text-books."

For the purposes of the Retail Sales Tax Act I find no distinction between questions 4 and 3. The determining factor in my opinion is not what is sold but rather what is the purpose in selling it. If the purpose is solely that of offering the supplies for sale to the students without profit, then I am of the opinion that the provisions of the Retail Sales Tax Law are not applicable whether the sale is of text-books—or other books.

With respect to your fifth and sixth questions there is considerable doubt as to whether or not the board of education may contract with a third party to sell text-books, supplementary reading books, or any other books, either with or without profit to the third party under the present law as amended by the 91st General Assembly. For the purposes of this opinion, however, it is not necessary to pass upon that question. Assuming that such authority does exist, it follows, in my opinion, that the third party with whom such contract would be made would be engaged in "business" within the provisions of the Retail Sales Tax Act if he should sell such books at a profit.

Specifically answering your inquiry as to the application of the Retail Sales Tax Act to certain sales of text-books, and other books, made by boards of education, employes of boards of education, or by persons under contract with a board of education, I am of the opinion that:

1. Where a board of education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils at no increase in price, the board of education is not required to be licensed as a vendor, collect the sales tax and cancel the prepaid tax receipts under the provisions of the Retail Sales Tax Act.

2. Where a board of education makes direct sales of text-books, supplementary reading books, or any other books, to its pupils, at a price not to exceed the cost price plus a ten percent mark-up, the board of education is not required to be licensed as a vendor, collect the sales tax and cancel the prepaid tax receipts if in fact the purpose of the board in marking up the price is not to make a profit from the sale of such books.

3. Where a board of education engages a third party at a stipulated salary to sell text-books—said party to receive no profit to himself from such sales—neither the employe nor the board of education is required to be licensed as a vendor, collect the sales tax and cancel the prepaid tax receipts.

4. Where the sales made by a third party, engaged by a board of education at a stipulated salary (no profit to himself), are of supplementary reading books, or any other books except text-books, neither the employe nor the board of education is required to procure a vendor's license, collect the sales tax and cancel the prepaid tax receipts.

5. Where a board of education contracts with a third party to sell text-books at a marked up price, or at a profit to such party the latter must procure a vendor's license, collect the sales tax and cancel the prepaid tax receipts.

6. Where the contract between a board of education and a third party allows the third party to sell supplementary reading books, or any other books except text-books, at a marked up price, or at a profit to such party, it is necessary for such third party to procure a vendor's license, collect the sales tax and cancel the prepaid tax receipts.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4618.

APPROVAL, BONDS OF CUYAHOGA COUNTY, OHIO, \$8,000.00.

COLUMBUS, OHIO, September 6, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4619.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY,
OHIO, \$11,000.00.

COLUMBUS, OHIO, September 6, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4620.

APPROVAL, BONDS OF CITY OF GARFIELD HEIGHTS, CUYA-
HOGA COUNTY, OHIO, \$3,000.00.

COLUMBUS, OHIO, September 6, 1935.

Industrial Commission of Ohio, Columbus, Ohio.