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OUT-OF-STATE WHOLESALERS—MUST PROCURE YEARLY LICENSES—FEES CHARGED FOR REGISTRATION OF BOTH WHOLESALE AND RETAIL AGENTS SET FORTH IN SECTION 907.10, R.C.

SYLLABUS:

1. Under the provisions of Section 907.10, Revised Code, a wholesaler for his first calendar year or portion thereof during which he is in business shall pay the license fee provided in paragraph (F) (1) of such section.
2. Out-of-state wholesalers must procure yearly licenses under Section 907.10, Revised Code, if they make sales within the State of Ohio.
3. The fees to be charged for the registration of both wholesale and retail agents are those set forth in paragraphs (A), (B), and (C) of Section 907.10, Revised Code.

Columbus, Ohio, December 11, 1959

Hon. Robert H. Terhune, Director
Department of Agriculture, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads in part as follows:

"I request a formal written opinion on Amended Section 907.10 of the Revised Code. Principally our problems center around R.C. Sec. 907.10 (E) and (F), * * *

* * *

"One problem with which we are concerned is that Sec. 907.10 (F) fails to state what this Department should use as a standard for determining the license fee for a wholesaler who is in his first year of business. As it would be impossible to use the standard provided, will it be permissible for this department to charge the minimum license fee as provided for in R.C. 907.10 (F) (1).

"We have also been troubled as to whether or not it will be necessary for an out-of-state wholesaler who sells seeds to a wholesaler and/or retailer in this state to make application for a license?

"Our next line of inquiry is in regard to agents' registration fees. Section 907.10 (E) states that they '. . . shall be in accordance with the schedule provided by this section.' Now, does this mean that a wholesaler's agent's registration fee will be the same as the license fee of his domestic or his out-of-state wholesaler principal; or does this section mean that the agent's registration fee will be computed on his (the agent's) total sales volume in Ohio within the calendar year immediately preceding the calendar year for which registration is made? If the latter question be answered in the affirmative, then, in the case of a *new* wholesaler agent, can the Department charge the minimum registration fee meaning that provided in R.C. Sec. 907.10 (F) (1).

"One last question which disturbs us is in regard to a wholesaler who has two types of agents. One selling wholesale and one selling retail. Since a wholesaler principal would not be required to also obtain a retail license because of R.C. 907.10 (6), can the Department require from this retail agent a registration fee under R.C. Sec. 907.10 (A); 907.10 (B); 907.10 (C) ?

* * *

The sale of agricultural or vegetable seeds within the State of Ohio by unlicensed persons is prohibited by the provisions of Section 907.06,

Revised Code. Many of the terms used in Chapter 907., Revised Code, dealing with agricultural seeds, have been defined in Section 907.01, Revised Code. In this section the words "person," "agricultural seeds," "vegetable seeds" and "sell" are defined as follows:

"As used in sections 907.01 to 907.14, inclusive of the Revised Code:

"(A) 'Person' includes any individual, partnership, corporation, company, society, association, receiver, trustee, or any agent engaged in the handling of agricultural or vegetable seeds on a commission or consignment basis, either for present or future delivery.

"(B) 'Agricultural seeds' includes the seeds of grass, forage, cereal, and fiber crops, any other kinds of seeds commonly recognized within this state as agricultural or field seeds, and mixtures of such seeds.

"(C) 'Vegetable seeds' includes the seeds of crops which are grown in gardens or on truck farms and are generally known and sold under the name of vegetable seeds in this state.

"* * *

"(Z) 'Sell,' when applying to agricultural seed, vegetable seed, or screenings, includes the act of transferring ownership, the offering or exposing for sale, exchange, using, distribution, giving away, or transportation in this state, the storing, carrying, or handling in aid or traffic therein, whether done in person or through an agent, employee, or others, and receiving, accepting, or holding on consignment for sale.

"* * *

Provisions for the securing of a license are found in Section 907.10, Revised Code, which, as effective on November 2, 1959, reads as follows:

"All persons shall procure yearly, a license for each separate place of business where seeds are sold, except as provided in sections 907.01 to 907.14, inclusive, of the Revised Code, and all agents shall be registered and shall receive from the director of agriculture a registration certificate, which shall be valid until the first day of January next following. License fees shall be as follows:

"(B) When seed is sold or offered or exposed for sale at retail in quantities not exceeding eight ounces for any container, except packets and cartons in lot containers included in division (D) of this section, a fee of fifty cents;

"(B) When seed is sold or offered or exposed for sale at retail in quantities not exceeding ten pounds for any container, a fee of three dollars;

“(C) When seed is sold or offered or exposed for sale at retail in quantities exceeding ten pounds for any container, a fee of six dollars;

“(D) When seeds are sold at wholesale or on consignment or on commission in packets of eight ounces or less, each lot containers shall carry an inspection tax stamp. Such stamp shall cost fifty cents, and shall be attached, in one or more numbers at the rate of one stamp for each twenty-five dollars wholesale value, or fraction thereof, of the packets contained therein, to each lot container, offered for sale to retailers in Ohio. Such stamp shall be attached in such a manner that it will not be destroyed upon the opening of the lot container. Such stamp shall be purchased by the packet seed packer from the director each year. A refund shall be made for all stamps purchased and not used each year. Sellers required to purchase tax stamps by this section shall not be subject to, or eligible for, any license required in division (F) of this section.

“(E) Agents’ registration fees shall be in accordance with the schedule provided by this section.

“(F) When seeds are sold or offered or exposed for sale on a wholesale basis in any quantity, the fee shall be based on the seller’s total dollar sales volume in Ohio within the calendar year immediately preceding the calendar year for which license application is made, in accordance with the following schedule:

“(1) One dollar up to twenty thousand dollars, volume, the license fee shall be ten dollars;

“(2) Twenty thousand one dollars up to fifty thousand dollars volume, the license fee shall be twenty-five dollars;

“(3) Fifty thousand one dollars up to one hundred thousand dollars volume, the license fee shall be one hundred dollars;

“(4) One hundred thousand one dollars and over volume, the license shall be two hundred dollars.

“(G) Any person licensed to sell seed at wholesale shall not be required to procure in addition a retail license to engage in the selling of seeds on a retail basis.”

Although the General Assembly has failed to make specific provisions for the license fees of a person for his first year of business, it is patently apparent that even a beginner must be licensed. Section 907.06, Revised Code, says in part:

“(A) No person shall sell any agricultural or vegetable seed within this state:

“* * *

“(10) Without first obtaining from the director of the Ohio department of agriculture a seed license to engage in the business of selling seeds.

“* * *

Again in Section 907.10, Revised Code, it is said that “All persons shall procure yearly, a license for each separate place of business where seeds are sold, * * *”. It must therefore be concluded that all vendors of seeds, including wholesalers, must be licensed. It is equally apparent that a fee is to be charged for each license. Accompanying sections of the Revised Code provide for the inspection, analysis of seeds and enforcement of the act. A graduated basis for determining license fees was probably selected in order to offset the proportionate costs of inspection, analysis and enforcement, which costs of necessity increase as the volume of the wholesaler’s business increases. A convenient and reasonably accurate method of estimating the business which a licensee will do in the ensuing calendar year is to use the business done during the preceding year as an estimate. A beginner in the wholesale seed business who has done no business during the preceding calendar year must therefore be placed in the same category as a wholesaler who has done only a nominal amount of business during the preceding calendar year. Each will be obliged to pay the minimum ten dollar license fee under Section 907.10 (F) (1).

The statutes mentioned above make no distinction between wholesale seed dealers located within the state and those located in other states. Neither do they make any distinction as to purchasers. The latter may be wholesalers, retailers or consumers. The line of demarcation under Section 901.06 (A) is the place where the sales are made. This section provides that no person *shall sell* any agricultural or vegetable seed *within this state* without first obtaining a license. Therefore, in answer to your second question, I must conclude that an out-of-state wholesaler must obtain an Ohio license before making any sales of seed within this state.

Section 907.10, Revised Code, says that “all agents shall be registered and shall receive from the director of agriculture a registration certificate, which shall be valid until the first day of January next following.” This obviously requires agents to register annually. Paragraph (E) of this section says:

“(E) Agents’ registration fees shall be in accordance with the schedule provided by this section.”

Referring to "this section," that is Section 907.10, Revised Code, which in its present form is quoted in full above, it will be seen that there are two schedules of license fees. The first deals primarily with sales at retail; the second with sale on a wholesale basis. The provisions for the licensing of persons selling on a wholesale basis, being paragraphs (F) (1), (2), (3), (4), and (G) were added by the 103rd General Assembly and became effective November 2, 1959. Prior thereto, except for minor changes including slightly lower license fees and the additions noted above, Section 907.10 was in substantially its present form. The reference in paragraph E to agents' registration fees were of necessity to the fees set out in paragraphs (A), (B) and (C).

In the case of *In re Allen*, 91 Ohio St., 315, the first branch of the syllabus reads:

"Where there is reenacted in an amendatory act provisions of the original statute in the same or substantially the same language and the original statute is repealed in compliance with Section 16, Article II of the Constitution, such provisions will not be considered as repealed and again reenacted, but will be regarded as having been continuous and undisturbed by the amendatory act."

This principle may well be applied to the otherwise ambiguous provisions of paragraph (E) of Section 907.10, Revised Code, thereby leading to the conclusion that the registration fees for agents of both wholesalers and retailers are to be determined in accordance with the schedule provided in paragraphs (A), (B), and (C) of Section 907.10, Revised Code. Under former Section 907.10, Revised Code, no problem was presented respecting the amount of the registration fee of a new agent. It was the agent's duty to decide what maximum weight containers of seed he wanted authority to sell. His registration fee and his rights were fixed by such determination. The same procedure is appropriate under the present section. The agent may sell in containers of up to the maximum weight permitted under the registration selected.

In your last question reference is made to Section 907.10 (6), Revised Code. It is assumed that this is a typographical error and that the reference is to Section 907.10 (G), Revised Code, which permits any licensed wholesaler also to sell at retail without an additional license. No problem is presented as far as agents are concerned, for as has been previously shown, an agent's registration fee is to be determined by the quantity of seed by weight in any container to be sold by him.

In conclusion and in specific answer to your questions, it is my opinion that :

1. Under the provisions of Section 907.10, Revised Code, a wholesaler for his first calendar year or portion thereof during which he is in business shall pay the license fee provided in paragraph (F) (1) of such section.

2. Out-of-state wholesalers must procure yearly licenses under Section 907.10, Revised Code, if they make sales within the State of Ohio.

3. The fees to be charged for the registration of both wholesale and retail agents are those set forth in paragraphs (A), (B), and (C) of Section 907.10, Revised Code.

Respectfully,

MARK McELROY
Attorney General