

2583.

DITCHES—TOWNSHIP—COUNTY COMMISSIONERS HAVE CONTROL OF—EXCEPTIONS NOTED—OPINION NO. 1362 APPROVED AND FOLLOWED.

*SYLLABUS:*

*The county commissioners are vested with sole authority in regard to the constructing, cleaning and repair of township ditches, except that the township trustees have authority under the provisions of Section 6603, General Code, to improve a township ditch or drain within the limitations contained in said section.*

COLUMBUS, OHIO, September 17, 1928.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—This will acknowledge your letter dated September 13th, 1928, which reads as follows:

“The County Commissioners have requested me to secure your opinion on the following matter relative to so-called county ditches.

Are all township ditches and drains now under the control and supervision of the County Commissioners, to the extent that they are required by law to clean and to supervise the cleaning of such ditches?”

The question which you present was answered in a recent opinion of this office addressed to Prosecuting Attorney of Brown County, Ohio, which opinion appears in Vol. IV, Opinions, Attorney General for 1927, at pages 2483, the syllabus of which reads as follows:

“1. The county commissioners are vested with sole authority in regard to the constructing, cleaning and repair of township ditches, except that the township trustees have authority under the provisions of Section 6603, General Code, to improve a township ditch or drain within the limitations contained in said section.

2. When a petition is filed under the provisions of Section 6603, General Code, it is the mandatory duty of the township trustees to proceed under said section.”

I am enclosing herewith a copy of this opinion.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2584.

CIGARETTES—LICENSE—DEFINITION OF WHOLESALE AND RETAIL DEALERS—OPINIONS REVIEWED.

*SYLLABUS:*

1. *Opinions of the Attorney General on the wholesale and retail traffic in cigarettes reviewed.*

2. *Where a person, firm or corporation has filed with the county auditor the statement required by Section 5897, General Code, and paid the fifty dollar fee as a retail dealer*

*in cigarettes, and the auditor is later informed that such person, firm, or corporation is in fact selling cigarettes at wholesale, such person, firm or corporation is not liable for the assessment of four times the amount of the license fee as provided in Section 5898, General Code. Such person, firm or corporation may, however, be prosecuted under the provisions of Section 12680, General Code.*

3. *A person, firm or corporation engaged in the wholesale business of trafficking in cigarettes, with a place of business in another state, but no place of business in Ohio, is not liable for the license fee prescribed in Section 5894, General Code, where such person, firm or corporation sells cigarettes at wholesale in the course of interstate commerce to persons, firms or corporations within Ohio.*

COLUMBUS, OHIO, September 17, 1928.

HON. ERNEST M. BOTKIN, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your recent request for my opinion, and which reads as follows:

“I respectfully request your opinion on the following questions:

First: Under the provisions of Section 5894 of the General Code what constitutes “The wholesale business of trafficking in cigarettes?”

Second: Where information is furnished to the County Auditor to the effect that a certain firm is selling cigarettes at wholesale and the records in the Auditor’s office show that such firm made a return under Section 5897 of the General Code as a retail cigarette dealer, and paid the sum of \$50 as such retail dealer, as provided in Section 5894, General Code, is such firm liable for the assessment of four times the amount of the license fee as provided in Section 5898 of the General Code?

Third: Is a person, firm, or corporation in the wholesale cigarette business with a place of business in another state and having no place of business in Ohio, liable for the license fee provided by Section 5894, General Code, and the penalties provided by the chapter of the General Code relating to the trafficking of cigarettes, where such person, firm, or corporation sells cigarettes at wholesale within the State of Ohio?”

Section 5894, General Code, to which you refer, provides:

“A person, firm, company, corporation, or co-partnership, engaged in the wholesale business of trafficking in cigarettes, cigarette wrappers or a substitute for either, shall annually be assessed and pay into the county treasury the sum of two hundred dollars, or, if so engaged in such traffic in the retail business, the sum of fifty dollars for each place where such business is carried on by or for such person, firm, company, corporation or co-partnership.”

In your first question you make inquiry as to what constitutes “the wholesale business of trafficking in cigarettes” under Section 5894, *supra*. Obviously, whether a particular course of conduct constitutes a wholesale or a retail traffic in cigarettes depends upon the particular facts involved and it is impossible to give a categorical answer to your first question. Similar questions have been considered by this department with reference to specific sets of facts, and I desire to refer you to the following opinions which may aid you in determining whether, under a particular set of facts, the person, firm or corporation in a given case is engaged in the wholesale

or the retail business of trafficking in cigarettes: 1915 Opinions, Attorney General, Vol. II, p. 1270; 1927 Opinions, Attorney General, Vol. I, pp. 360, 516 and 637. Opinion No. 300, 1927 Opinions, Attorney General, Vol. I, p. 516, contains a discussion of the various tests applied by the courts in determining what constitutes sales at wholesale or at retail under given sets of facts. I deem it unnecessary to quote at length from the above opinions inasmuch as the same have been published and are readily available for your examination.

The question has also been considered by this department in three later opinions, being Opinion No. 1939, addressed to the Prosecuting Attorney of Ashland County, Ohio, under date of April 5, 1928; Opinion No. 1995, addressed to the Prosecuting Attorney of Montgomery County, Ohio, under date of April 20, 1928, and Opinion No. 2159, addressed to the Bureau of Inspection and Supervision of Public Offices, under date of May 24, 1928. The facts under consideration in Opinion No. 1939, supra, were as follows: One J. T. R., a retail dealer of Ashland, Ohio, purchased of -----store, 5 cartons 1 M Camel Cigarettes for \$5.85 and tendered his check in payment. The check bore Mr. R's advertisement as a retail grocer. In the course of the opinion, after quoting from Opinion No. 300 above referred to, it was said:

"On the meager facts submitted it is impossible for this department to determine, whether or not the store in question was 'engaged in the wholesale business of trafficking in cigarettes;' although it is my opinion that, on the facts stated in your letter, under any of the four tests above discussed it could not be said that the store making the sale described in the report was engaged in the wholesale business of trafficking in cigarettes.

The store making the sale here involved is one of a well known company, which operates a large number of retail grocery stores. Undoubtedly such stores are engaged *primarily* in the retail business, and one or more isolated sales in quantities like that here involved would not in and of itself make such stores wholesalers. However, under the guise of conducting a retail grocery business, such stores can not engage in the wholesale business of trafficking in cigarettes and avoid the tax imposed by law."

Opinion No. 1995, supra, holds that the requirement in Section 5894, supra, of a license for each place where such business is carried on applies equally to the wholesale and the retail business. The syllabus of Opinion No. 1995 reads:

"A person, firm, company, corporation or copartnership engaged in the wholesale business of trafficking in cigarettes, cigarette wrappers, or a substitute for either, shall annually be assessed and pay into the county treasury the sum of two hundred (\$200.00) dollars for each place where such business is carried on by or for such person, firm, company, corporation or copartnership."

The syllabus of Opinion No. 2159, supra, reads:

"1. A corporation located outside the state through its salesmen sells cigarettes to retail dealers in Ohio and ships the same direct. The retail dealers receive no invoices from the corporation, which sends the invoices to an Ohio representative who presents the invoices to the retailers, makes collection and settles with the corporation, deriving a profit from the transactions. Such transactions are in legal effect sales by the corporation direct to the retail dealers and the Ohio representative who makes the collections is not liable for the wholesale cigarette dealer's license under Section 5894, G. C.

2. Where manufacturers of cigarettes make sales through their salesman direct to retail dealers and ship the goods direct to said retail dealers, a jobber who is billed for such cigarettes, who is required to pay the invoices therefor and who in turns collects the amounts of such invoices plus a small profit from the retail dealers, but who must stand any loss through failure of any of the retail dealers to pay, is engaged in the wholesale business of trafficking in cigarettes and is liable for the wholesale cigarette license tax."

The first branch of the above syllabus is in accord with the holding in the opinion found in 1915 Opinions, Attorney General, Vol. II, p. 1270, and the second branch is in accord with the holding in Opinion No. 372, 1927 Opinions, Attorney General, Vol. I, p. 637, above referred to. The above opinions will, I believe, give you sufficient information to enable you to determine, under any given circumstances, whether a dealer in cigarettes is engaged in such business in a wholesale or a retail way.

Sections 5897 and 5898, General Code, to which you refer in your second question, provides:

Section 5897. "Each person, firm, company, corporation, or co-partnership engaged in such business shall annually, on or before the fourth Monday of May, make out and deliver to the county auditor upon a blank to be furnished by such auditor for that purpose a statement showing the name of the person, firm, company, corporation or co-partnership engaged therein, a brief and accurate description of the premises where it is conducted, and by whom owned. Such statement shall be signed and verified by such person, firm, company, corporation or co-partnership."

Section 5898. "If such person, firm, company, corporation or co-partnership, fails or refuses to furnish the requisite information for such statement, or to sign or verify it, the assessment shall be four times the amount provided in this chapter. The person, firm, company, corporation or co-partnership entering into such business after the fourth Monday of May in any year, before so doing shall make the return herein required to the county auditor, and, failing to do so, such assessment shall be four times the amount provided in this chapter."

Section 5897 requires a person, firm, company, etc., engaged in the business of trafficking in cigarettes annually to make out and deliver to the county auditor a statement showing the name of the person, firm or company, a brief and accurate description of the premises where the business is conducted and by whom owned. Such statement must be signed and verified by such person, firm, company, etc. Section 5898 provides as a penalty for failure or refusal to furnish the requisite information for such statement or to sign or verify it, an assessment of four times the amount of the original assessment. Section 5898 is a penal section and it is well settled that penal sections must be strictly construed. Hence, unless the person, firm or corporation who makes and files the statement required by Section 5897, General Code, is required by law to state therein the character of the business engaged in, that is whether wholesale or retail, no penalty may be imposed under Section 5898, General Code, for failure so to state or for misstatement as to the character of such business. Section 5897 does not require the person, firm or corporation making the statement to state therein the character of the business engaged in. If that information is included in the statement, it is purely voluntary and no penalty attaches under Section 5898, General Code, if such information is incorrect.

However, in this connection, your attention is directed to Section 12680, General Code, which provides:

“Whoever, being engaged in the business of trafficking in cigarettes, cigarette wrappers or a substitute for either, fails to post and keep constantly displayed in a conspicuous place in the building where such business is carried on, a receipt signed by the county treasurer showing that the amount of the assessment required by law has been paid into the treasury of the county where such business is located, or sells or offers to sell cigarettes, cigarette-wrappers or a substitute for either without complying with the provisions of law relating to cigarettes, shall be fined not less than one hundred dollars nor more than three hundred dollars and for each subsequent offense shall be fined not less than three hundred dollars nor more than five hundred dollars.”

You will observe that the above section provides a penalty, by way of a fine, for engaging in the business of trafficking in cigarettes or cigarette-wrappers without posting and keeping constantly displayed in a conspicuous place in the building where such business is carried on, a receipt showing that *the amount of the assessment required by law* has been paid into the county treasury. The words “the amount of the assessment required by law” can, of course, refer only to the tax or assessment prescribed in Section 5894, General Code, supra, to-wit, \$50.00 for engaging in the retail business and \$200.00 for engaging in the wholesale business of selling cigarettes. It follows that even though a person, firm or corporation has paid the \$50.00 assessment and has obtained a receipt therefor and keeps the same displayed as required by Section 12680, General Code, if it is in fact engaging in the wholesale business the amount of the assessment required by law has not been paid, and such person, firm or corporation is liable to prosecution under said Section 12680, General Code.

In your third question you inquire whether or not a person, firm or corporation in the wholesale cigarette business with a place of business in another state and with no place of business in Ohio, which sells cigarettes at wholesale within this state, is liable for the license fee provided by Section 5894, General Code, and the penalties provided by related Sections. Obviously, the legislation providing for a tax on the business of trafficking in cigarettes was enacted in the exercise of the police power of the state, which cannot operate extra-territorially, and unless the sales in question can be said to have been made in the State of Ohio, such person, firm or corporation can not be compelled to pay the tax imposed by Section 5894, General Code.

In one of the opinions above referred to, to-wit: Opinion No. 624, 1915 Opinions, Attorney General, Vol. II, p. 1270, a similar question was considered. It appeared that a corporation with headquarters in St. Louis, Missouri, was selling cigarettes at wholesale to retail dealers in Piqua, Ohio, through its salesmen, the cigarettes being shipped direct to said retail dealers. It further appeared that there was another dealer in said city who represented the wholesaler, to whom the wholesaler sent the invoices covering the cigarettes shipped to the other dealers, and who collected the amounts of the invoices, plus a small profit, from the retail dealers, and remitted the amounts of the invoices to the wholesaler, retaining the profit added for himself. It was held that the sales in question constituted interstate commerce and were not subject to the Ohio tax on the business of trafficking in cigarettes.

In a later opinion, being Opinion No. 372, found in 1927 Opinions, Attorney General, Vol. I, p. 637, under similar circumstances, which, however, differed in so far that the invoices were sent to a jobber, who paid said invoices and collected the amount of the same, plus a small profit from the retailer, but who must bear any loss resulting from failure of any of said retailers to pay, it was said:

“\* \* \* The jobber is billed for the cigarettes and is responsible for the payment of the invoices. He in turn bills the retailers for the amounts of

the invoices plus a small profit, but if he is unable to make collection he has no recourse against the manufacturer and must personally stand the loss.

Under such circumstances it is clear that the jobber is more than merely the agent of the wholesaler for the purpose of making collection of the wholesaler's accounts. It is further clear that under such circumstances, as between the manufacturer and the jobber, there is a sale of the cigarettes to the jobber and that the title to such cigarettes passes to the jobber even though they are delivered to persons other than the jobber and never come into his actual physical possession. The salesmen who sell the cigarettes to the retailers are as a matter of law the agents of the jobber for the purpose of making such sales. It is not necessary for the purposes of this opinion to determine the exact time when title does pass to the jobber."

In view of the holdings of the opinions above referred to, your third question must be answered in the negative. You do not state whether the wholesaler in question transmits the invoices direct to the retail dealers to whom the sales are made or sends the same to some jobber or representative to make collection. I am therefore unable to render an opinion as to whether or not such jobber or representative would be liable for the cigarette tax.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2585.

FINES—SECURITY TO MAGISTRATE FOR PAYMENT OF FINE AND COSTS—REGISTERED LIBERTY BOND—AUTHORITY OF MAGISTRATE TO INSTITUTE CIVIL ACTION FOR ITS ENDORSEMENT.

*SYLLABUS:*

1. *Magistrate is authorized to take either chattels or choses in action, including a mortgage, as security for the payment of a fine and costs. In case of default of payment of fine, mayor has right to sell chattels and foreclose mortgage.*

2. *Where security for fine and costs fails, execution may be levied upon the property of the defendant, or, in default thereof, upon the body of the defendant.*

3. *Where a registered Liberty Bond was given by a defendant in a criminal action as security for the fine and costs imposed upon such defendant, which bond was not endorsed or assigned to such mayor, and the defendant now refuses to endorse such bond, a civil action may be commenced by the mayor in a court of competent jurisdiction to require the defendant to endorse the bond and take such other steps as may be necessary to enable the mayor to sell the bond and apply the proceeds in satisfaction of the fine and costs.*

COLUMBUS, OHIO, September 17, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge your letter dated August 17, 1928, which reads:

"The Mayor of an Ohio Village accepted a registered liberty bond for \$100.00 as security for an unpaid fine of \$100.00, assessed for violation of a statute. The Mayor failed to have the bond endorsed or assigned to himself, or the State, and the defendant refuses to endorse same at this time.