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TAX LAW, OHIO SALES — RETAIL SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE OR STORAGE, USE OR OTHER CONSUMPTION OF TANGIBLE PERSONAL PROPERTY IN STATE — NOT WITHIN PROVISIONS, OHIO SALES TAX LAW OR OHIO USE TAX LAW WHEN CONSUMER IS FOREIGN NATION — SUCH TRANSACTIONS NOT SUBJECT TO TAXES PRESCRIBED BY SECTIONS 5546-1 ET SEQ., 5546-25 ET SEQ., G. C.

SYLLABUS:

Retail sales of tangible personal property in this state or the storage, use or other consumption of tangible personal property in this state are not within the provisions of the Ohio Sales Tax Law, Section 5546-1, et seq., General Code, or the Ohio Use Tax Law, Section 5546-25, et seq., General Code, when the consumer is a foreign nation, and therefore, such transactions are not subject to the taxes prescribed therein.

Columbus, Ohio December 30, 1944

Hon. William S. Evatt, Tax Commissioner of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

> "In auditing the transactions of a certain steel company in this state, it has been disclosed that prior to the passage of lend-lease legislation by the Congress of the United States, His Majesty's Government in the United Kingdom, acting by and through the Director General of the British Purchasing Commission, entered into a contract whereby sales to the British government of tangible personal property were consummated in Ohio, which sales are not specifically exempted or excepted from the tax imposed by the Ohio Sales Tax Law, Sections 5546-1, et seq., of the General Code. It further appears that pursuant to such contract, His Majesty's Government in the United Kingdom stored, used or otherwise consumed in this state tangible personal property purchased for storage, use or other consumption in this state and not specifically exempted or excepted from the tax imposed by the Ohio Use Tax Law, Sections 5546-25, et seq., General Code.
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> Your opinion is respectfully requested as to whether or

> not this department has constitutional authority to impose sales or use tax assessments against His Majesty's Government in the United Kingdom on sales, storage, use or other consumption in this state of tangible personal property in the absence of specific exemption or exception provided by statute."

Accompanying your request is a letter addressed to you from counsel for the vendor in the case in question which discloses certain pertinent facts. It appears that under date of April 10, 1941 the vendor entered into a contract with the British Government by which the vendor leased a building owned by it in the City of Massillon, Ohio and installed therein, as agent of the British Government, certain machinery and equipment for the fabrication of armor plate, all of which machinery and equipment was paid for and owned by the British Government. The vendor manufactured at its plant in the City of Canton, Ohio, and there sold to the British Government steel plates for delivery by the vendee to its armor plant in Massillon where it was fabricated into various forms and shapes for use in the construction of military tanks for the British Government by certain other American manufacturing companies. The contract was terminated as of November 30, 1941 and if any sales tax or use tax liability was incurred, it was during that period.

Your inquiry brings up immediate consideration of international law and usages and relationships between sovereign powers. After considerable resarch, I have been unable to find any adjudicated case squarely in point with respect to excise taxes sought to be levied within the exclusive territorial jurisdiction of one sovereign state against another. In the case of State, ex rel. Taggart v. Holcomb, 85 Kan. 178, the court held that:

> "When a state, or any of its municipalities, goes into another state and there acquires and uses property, it does not carry with it any of the attributes of sovereignty nor exercise of governmental power. It has no other or greater right there than any other private owner of property and its property is subject to the taxation which the laws of that state impose."

In that case a municipality of Missouri owned and operated a waterworks in the State of Kansas. The court stated in its opinion (p. 187):

> "And so it may be said here that when a city of the state of Missouri comes into Kansas, it comes as a private party and brings with it none of the prerogatives of sovereignty."

Again in the case of Susquehanna Canal Company v. Pennsylvania, 72 Pa. St. 72, the question arose as to whether the State of Pennsylvania had the power and authority to tax certain monies and credits belonging to the State of Maryland. The court, in rendering its opinion, said (p. 75):

> "* * * We cannot doubt the power of our legislature to tax the property of another state situated within Pennsylvania, or choses in action, bonds or other claims — a lien on property protected by our laws or where they must be invoked to coerce payment of the debt. The only question is, do the laws embrace the bonds due to a sovereign State? It may be conceded that here, as in England, laws which speak in general of inferior persons, cannot properly be applied to superiors. Those which speak of the subject do not embrace the sovereign; or of the people do not include the state. It is well settled, however, that the statute may by express words extend to the state, and where it does so it is binding. The Statute of Limitations in general will not bar the sovereign, yet it may be and often is made so to do, both here and in England; and this either by express words or necessary implication."

Although the court there upheld the validity of the tax, it also recognized the possibility of future reversal in the following language (p. 78):

> "* * * It might possibly be decided, as intimated in the dicta of some very able judges, that the states must have jurisdiction either over the persons or the real or strictly personal property of non-residents before they can tax them, and that taxes assessed on their debts, as is done in Pennsylvania, is in violation of the law of nations; therefore, the Federal courts may exercise the power of declaring our laws a violation of international rights, and thus set them at nought. When they do so, the judiciary of Pennsylvania must conform to that ruling."

Each of the states involved in the above cases is an independent sovereign.

In Opinion No. 1634, Opinions of the Attorney General for the year 1933, Vol. II, page 1790 and in Opinion No. 2265, Opinions of the Attorney General for the year 1940, Vol. I, page 471, it was held by this office that that portion of a bridge owned by the State of Kentucky, but lying within the State of Ohio was taxable as real estate in Ohio and that under the provisions of the Constitution of Ohio this state had

the power and jurisdiction to tax such property at its true value in money. In the latter opinion it was pointed out that when a sovereign state acquires land located within the limits of another sovereign state, it holds the land as a private individual and not as a sovereign power. Dodge v. Briggs, 27 Fed. 160; Burbank v. Fay, 65 N. Y. 57.

These opinions also follow the reasoning set out in U. S. Bank v. Planters' Bank, 22 U. S. 904, wherein the court said (p. 907):

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

This principle was first stated by Chief Justice Marshall in 1829 in The Bank of the United States v. McKenzie, (U. S. C. C.) 2 Fed. Cas. 718.

In the instant case, however, we find Great Britain in the exercise of one of the highest attributes of sovereignty. She is and was at the time in question engaged in war in defense of her people and her life as a free nation — a war in which the United States is now allied with her. What then is the civilized relationship which should obtain?

In the case of The Schooner Exchange v. McFadden & Others, 7 Cranch. 116, decided in 1812, the United States Supreme Court had before it a case in which citizens of the State of Maryland filed a libel against The Schooner Exchange, claiming to be her sole owners and that she was taken from them forcibly by persons acting under the orders of Napoleon, Emperor of the French, while on voyage. The vessel, at the time the action was commenced was in port in Baltimore as an armed cruiser of the French Navy under the command of a French captain holding a commission from the French Government. The libel was dismissed, Chief Justice Marshall delivering the opinion of the court. In that opinion he spoke as follows:

> "In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it neces-

sary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either expressed or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated,

are reserved by implication, and will be extended to him.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

This declaration of principles seems as pertinent today as when it was rendered.

In 1883 the case of Long v. The Tampico was decided by the Federal District Court for the Southern District of New York and reported in 16 Fed. Rep. 491, in which the court held:

> "2. No suit can be maintained against the government *in personam;* and the same immunity is extended by comity to foreign sovereigns with whom this country is at peace, and no attachment or garnishee process can be sustained at common law, whereby the public property of a foreign government can be attached.
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> 3. No suit *in rem* in admiralty can be sustained, or seizure made by the marshal, under process against property of the government devoted to public uses, and in possession of an officer of the government.
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> 4. The same immunity from seizure is by comity extended to the property of a foreign government in the public service and in possession of its officers."

In that case the foreign government was Mexico and the rule of comity was fully recognized.

Again in the case of Mason v. Intercolonial Railway of Canada, reported in 197 Mass. Rep. 349, the Supreme Judicial Court of that state dismissed a tort action filed by a citizen of that state on the ground that the railway was owned and operated by the King of the United Kingdom of Great Britain and Ireland and that the courts of that Commonwealth had no jurisdiction to proceed against the public property of the sovereign of a foreign state. In that case there were assets of the railway within the territorial limits of Massachusetts which the plaintiff sought to reach.

In the case of Royal Italian Government v. National B. & C. Tube Co., 294 Fed. 23, decided in November, 1923, the Italian Government sought to recover money from the defendant paid for material purchased and delivered on the wharf at Baltimore but which was destroyed by fire while stored on the dock and before being loaded aboard ship. It should be noted there that the foreign government was invoking the jurisdiction of the United States court. At page 27 of its opinion the court stated as follows:

> "The plaintiff, being a sovereign power, will not be relieved of the consequences of the acts, stipulations, commissions, or omissions of its agents. It is only where the courts deem it necessary to uphold the sovereign power of the government that it yields to the political situation, and permits the government to be relieved of the consequences of the acts, omissions and agreements of its agents. In doing this, they have chosen the lesser of two evils, in order to strengthen the arm of the sovereign government. No such necessity or propriety exists where a foreign government's agents come to this country and enter into commercial contracts. They are obligated to the terms and conditions of such contracts, as are other persons and private corporations."

It may be seen, therefore, from all of the foregoing citations that the treatment of this question has not been uniform nor has it been fully clarified.

In the case of The French Republic v. Board of Supervisors, 200 Ky. 18, also decided in 1923, the Court of Appeals of Kentucky ruled that the French Government could not be taxed on tobacco owned by it and stored in that state. The following paragraphs from the syllabus in that case are quoted as follows:

> "3. Taxation — Tax on Property of Foreign Country Could Not be Collected. — Since the French Republic is not suable in the state courts without its consent, and tobacco owned by it within the state cannot be subjected to the payment of the tax thereon, the state has no method whereby it can enforce the collection of any tax it might assess on such property.
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> 4. Taxation — Theory Supporting Taxes Does not Apply to Property of Foreign Government. — Taxes are imposed on the theory that the taxpayer should pay a portion of the expense incurred in the protection of his person or property, and that theory does not support the levy of a tax on property of a foreign government situated within the jurisdiction, since every

nation should protect the personal property of all other nations within its jurisdiction without levying a tribute for that purpose.

5. Taxation — Sovereign Nation Entering Another for Purpose of Trade should Not be Taxed. — The absolute sovereignty of every nation within its own territory is subject to certain limitations sanctioned by the law of nations and imposed by its own consent, where foreign governments enter the territory with its consent, in which case there is an implied understanding it does not intend to place its sovereign rights within the jurisdiction of the other nation and therefore does not intend to subject them to taxation.

6. Taxation — Constitutional Exemption of Public Property, Construed in the light of History, Does Not Authorize Taxation of Private Property of Foreign Government. — Constitution, section 170, exempting from taxation public property used for public purposes, should be construed in the light of history and uniform dealing of one power with another, which does not sustain the right to tax the personal property of a foreign power temporarily within the jurisdiction, and, so construed, the Constitution does not authorize or require the taxation of tobacco within the state, owned by the French Republic for the purpose of trade therein."

An examination of the Constitution of the United States does not disclose any clear prohibition to the respective states against levying a tax such as contemplated here. However, there is a clear implication running throughout that all matters with foreign nations are solely within the functions of the Federal Government.

Article I, Section 8, gives to the Congress the power to regulate commerce with foreign nations. Section 10 of the same article provides that no state shall enter into any treaty, alliance or confederation. It also provides that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports. In Article III, Section 2, the judicial department is vested with exclusive jurisdiction in cases arising between a state or its citizens and foreign states, citizens or subjects. Article IV, Section 4 provides that the United States shall guarantee to every state a Republican form of government and shall protect each of them against invasion.

While the sovereignty of every state in the Union is beyond question, nevertheless, there seems a clear implication that no one of them,

as such, will be having any direct relations of any kind with a foreign nation.

One further reference is made, namely to Wheaton's International Law, Fifth Edition, wherein the following statement appears on page 37:

> "The external Sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete. So long, indeed, as the new State confines its action to its own citizens, and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfill, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of the society. Every other State is at liberty to grant, or refuse, this recognition, subject to the consequences of its own conduct in this respect; and until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those States only by whom that sovereignty has been recognized."

I come then to a consideration of the provisions of our statutes covering sales taxes and use taxes.

The term "retail sale" is defined in Section 5546-1, General Code, as follows:

> " 'Retail sale' and 'sales at retail' include all sales excepting those in which the purpose of the consumer is (a) to resell the thing transferred in the form in which the same is, or is to be, received by him; or (b) to incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing or refining, or to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural or floricultural services for others shall be deemed to be engaged directly in farming, agriculture, horticulture, or floriculture; or directly in making retail sales or directly in the rendition of a public utility service; except that the sales tax levied herein shall be collected upon all meals, drinks and food for human consumption sold upon Pullman and railroad coaches;

> or (c) security for the performance of an obligation by the vendor; (d) or to use or consume the thing directly in industrial cleaning of tangible personal property; or (e) to resell, hold, use or consume the thing transferred as evidence of a contract of insurance."

The term "consumer", as used in such definition, is defined earlier in such section as follows:

> " 'Consumer' means the person to whom the transfer effected or license given by a sale is or is to be made or given, or to whom the admission is granted."

The term "person", as used in such definition of consumer, is defined in such section as follows:

> " 'Person' includes individuals, firms, partnerships, associations, joint stock companies, corporations and combinations of individuals of whatsoever form and character."

Certainly the transactions under consideration were retail sales within the statutory definition.

The question then arises as to whether Great Britain is a "person" within the meaning of this statutory definition. It is, of course, obvious that a foreign nation is not an individual, firm, partnership, association, joint stock company or corporation. Is it then a "combination of individuals of whatsoever form and character".

It is a well established rule of interpretation of statutes that when in the enactment of a law the Legislature has defined terms as therein used, such definitions are controlling in the interpretation of such defined words as used in such statutes, even though such defined words may have an ordinary meaning which is broader or narrower than that set forth in the definition. Columbus Street Railway Co. v. Pace, 68 O. S. 200; Conrad v. State, 75 O. S. 52; Sears v. Sears, 77 O. S. 104; Inglis v. Pontius, 102 O. S. 140; Tax Commission v. Parker, 117 O. S. 215.

In defining the word "person", the General Assembly has defined it by enumerating the things which are included within the term. Under the rule "expressio unium exclusio alterius" all other things are excluded from the term; even though they might be similar to those things

mentioned. Cincinnati v. Roettinger, 105 O. S. 145.

The ordinary meaning of the term "individual", especially when used in a series of words designating groups of persons such as "firm, partnership, association, joint stock company, corporation, etc." is one human being as distinguished from a group of two or more human beings acting as a single business group. The context in which the word "individual" appears in Section 5546-1, General Code, clearly indicates that it was used in its ordinary connotation which does not include entities other than business associations of human beings. The so-called ejusdem generis rule of interpretation of statute is that where in a statute there is an enumeration of certain things or matters followed by words such as "any other", "or other" or "or otherwise", such words are restricted to matters and things similar to those specifically enumerated. Lane v. State, 39 O. S. 312; Myers v. Seabarger, 45 O. S. 232; John W. Rutherford & Co. v. Cincinnati & P. R. Co., 35 O. S. 559; State v. Johnson, 64 O. S. 270.

In applying such rule, it would appear that unless a foreign country is an association of individuals similar to a partnership, firm, association, joint stock company or corporation, it would not be a "combination of individuals" as used in the act.

I am brought to this conclusion as I am then enabled to harmonize these enactments of the Ohio General Assembly with the great weight of authorities cited herein committed to the principle of international comity and reciprocal recognition of sovereign rights between civilized nations at peace with each other.

When invoking the ejusdem generis rule and concluding that thereunder the statutory definition of the word "person" should not be construed to include a foreign country, I am not overlooking certain exemptions specified in Section 5546-2, General Code. This section provides in part as follows:

> "The tax hereby levied does not apply to the following sales:
>
> 1. When the consumer is the state of Ohio, or any of its political subdivisions. * * *
>
> 3. Sales which are not within the taxing power of this state under the constitution of the United States."

It might with some plausibility be argued that if the definition of the word "person" was not intended to include a state or country, why then was it necessary for the General Assembly to specifically exclude the State of Ohio and the Federal Government? The answer, however, seems to be obvious. Certainly there was no need whatever of the state exempting itself or its political subdivisions. As already stated herein, it is a well recognized principle of law that the sovereign does not pass laws for itself, but rather for its people. This principle is particularly applicable with respect to tax laws.

By the same token, the exemption specified under paragraph 8 would have been necessarily implied under the Constitution of the United States itself had it not been specifically written in. It seems clear to state at this point that the Legislature, at the time of the enactment of these acts, did not contemplate even the possibility of intra-territorial retail sales to another sovereign power.

Incidentally, all that has been said here with reference to the sales tax provisions is equally applicable to the provisions of the use tax law inasmuch as the definitions in each act are identical.

In view of all the foregoing and in keeping with the great principle of international comity so clearly delineated in the authorities cited above, I am constrained to the conclusion and it is my opinion that retail sales of tangible personal property in this state or the storage, use or other consumption of tangible personal property in this state are not within the provisions of the Ohio Sales Tax Law, Section 5546-1, et seq., General Code, or the Ohio Use Tax Law, Section 5546-25, et seq., General Code, when the consumer is a foreign nation, and therefore, such transactions are not subject to the taxes prescribed therein.

Respectfully,

THOMAS J. HERBERT

Attorney General