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WHISKEY OR OTHER SPIRITUOUS LIQUORS — WHEN LICENSED RETAILER HAS IN ESTABLISHMENT, QUANTUM ON HAND, TO BE SOLD AT RETAIL, STOCKED IN STOREROOM, OR IN AN ADJUNCT THERETO, INVENTORY OF LIQUORS SHOULD BE LISTED AND ASSESSED FOR TAXATION, AT SEVENTY PER CENTUM OF AVERAGE VALUE DURING TWELVE MONTHS OF PRECEDING CALENDAR YEAR — SECTIONS 5382, 5388, 5388-1, 5389 G.C.

SYLLABUS:

When a duly licensed retailer has on hand a quantum of whiskey or other spirituous liquors in his establishment to be sold by the drink, whether such liquors are held in his storeroom or in an adjunct thereto from which he from time to time draws for stock to be sold at retail to his customers in the usual course of business, such inventory of liquors should be listed for taxation and assessed under authority of Sections 5382, 5388 and 5389, General Code, at seventy per centum of its average value during the twelve months of the preceding calendar year and not pursuant to authority of Section 5388-1, General Code.

Columbus, Ohio, November 21, 1942.

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

Dear Sir:

I am in receipt of your request for my opinion reading:

"Question has been raised with respect to your opinion, appearing in Opinions of the Attorney General for 1939, Page 610, as to whether or not whiskey in the hands of duly licensed retailers to be sold by the drink, whether on shelves exposed for sale or stored in the same or adjacent room or building, shall be taxed on the basis of 100% of taxable value under Section 5388-1, General Code, or as inventory under Section 5382, General Code, on an average basis and at 70% of such average as provided by Section 5388, General Code. While this specific question appears to have been asked by the then Tax Commission, as set forth on Page 612, some doubt has arisen as to whether or not the opinion answers such question. On Page 626 the following language is used:

'In this connection, I am of the view, however, that the provisions of section 5388-1, General Code, should be given effect to the exclusion of those of section 5388, General Code, with respect to the taxation of whiskey or of other alcoholic liquors as finished

> products whether the same be kept or stored for sale at the manufacturer's place of business or in a warehouse at some point removed from such manufacturerer's plant, whether the same be in the county where such plant is located or in another county in this State.'
>
> In the syllabus of such opinion it is held that 'whiskey or other alcoholic liquors stored or kept as provided in Section 5388-1, General Code, are required to be assessed for taxation at their true value in money.' The question, of course, is whether or not whiskey held by a permittee as above noted is 'stored or kept as provided in Section 5388-1, General Code.' "

Since the rendition of my opinion referred to in your inquiry, the General Assembly has amended Section 5388-1, General Code, and supplemented its language as hereinafter set forth. Original Section 5388-1, General Code, considered in my earlier opinion, was enacted in an act found in 109 O.L., 63, which act included Sections 5388-1 to 5388-4, both inclusive, General Code, and was entitled:

> "An act to provide for the assessment and collection of state and local taxes on whiskey stored in bonded warehouses, ownership of which can be determined only upon its removal therefrom and to declare an emergency."

Section 5388-1, General Code, as enacted in 109 O.L., 63, was amended in 118 O.L., 631, by the substitution of the word "spirituous" for the word "alcoholic" at each place where it appeared in such section as it was originally enacted and was supplemented by the addition of the following language at the end of the section, namely:

> "No tax, whether imposed by this section or any other section of the General Code, shall be levied, assessed or collected upon spirituous liquor stored in bonded warehouses or other places or buildings, as bailment stock, which is subject to withdrawal by the department of liquor control for its use, distribution or sale."

Section 5388-1, General Code, as it now exists, reads as follows:

> "Upon all whiskey or other spirituous liquor *stored* in bonded warehouses or other places or buildings shall be collected taxes at the rate current in the taxing districts in which such warehouse or warehouses or other places or buildings shall be situated for the year in which such state and local tax is to be paid and shall be assessed upon its true value in money. In determining the true value in money for taxation purposes of

> such whiskey or other spirituous liquors so stored, the value placed thereon by the owner or his agent when declaring its value for shipment by express shall be prima facie evidence of its true value in money; and in cases where whiskey or other spirituous liquor is not shipped by express and its value for such purpose not so declared, then the true value in money for taxation purposes shall prima facie be the value last declared by an owner who has shipped similar whiskey or other spirituous liquor by express from the same warehouse or other places or buildings. In case of removal from one bonded warehouse to another bonded warehouse either within or without the state, the value of such whiskey so removed shall be determined in the same way and shall be subjected to the tax as provided in this act. Delinquent taxes shall be assessable against such whiskey or other spirituous liquor for the same period and in the same manner as provided for taxes against other property. No tax, whether imposed by this section or any other section of the General Code, shall be levied, assessed or collected upon spirituous liquor stored in bonded warehouses or other places or buildings, as bailment stock, which is subject to withdrawal by the department of liquor control for its use, distribution or sale."

From the language contained in the first sentence of the statute above quoted, it is evident that the legislature only intended to impose a tax upon whiskey and other spirituous liquors when they are *stored* as distinguished from being in use. I find no language in Section 5388-1, General Code, purporting to levy a tax upon whiskey or other spirituous liquors other than when they are stored in bonded warehouses or other buildings or places. It is therefore necessary in the interpretation of such section, in order to answer your inquiry, to determine the meaning of the word "stored."

As was stated by Hough, J., in Kiefer v. State, 106 O.S., 285, 289:

> "The legislature must be presumed to have used the term it used in its clear, unambiguous, and generally accepted meaning, unless there appears something in the context or surrounding circumstances clearly justifying a different use or meaning."

A similar statement is contained in the fifth paragraph of the syllabus of Eastman v. State, 131 O.S., 1, thus:

> "Words in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them."

In reading Section 5388-1, General Code, I find no part of the con-

text which would indicate that any technical meaning was intended by the legislature for the word "stored." What then is the ordinary meaning of such term?

In the case of Rafferty v. New Brunswick Fire Insurance Company, 18 N.Y., 480, the court construed the term "storing" with reference to a provision in an insurance policy against storing of liquors on the insured premises, and in the second paragraph of the headnotes held:

> "The keeping of spirituous liquors in the building insured, for the purpose of consumption, or for sale by retailers to boarders and others, is not a *storing* within the meaning of the policy."

Similarly, in New York Equitable Insurance Company v. Langdon, 6 Wendell's New York Reports, 623, the court construed the same word with reference to similar provisions in an insurance policy with respect to the keeping of rum, Jamaica spirits and gin in the cellar of a grocery from which the grocery's merchandising stock was replenished from time to time as its needs required, and held in the second paragraph of the headnotes that:

> "The keeping of such articles in quantities in the cellar of the building, purchased for purposes of selling out at retail, and from which the stock in the store is from time to time replenished, is not a *storing* within the meaning of the policy."

On page 628 of such report, Judge Sutherland said:

> "It appears to me that the word *storing* was used by the parties in this case in the sense contended for by the plaintiff, viz., a keeping for safe custody, to be delivered out in the same condition, substantially, as when received; and applies only where the storing or safekeeping is the sole or principal object of the deposit, and not where it is merely incidental, and the keeping is only for the purpose of consumption. If I send a cask of wine to a ware-house to be kept for me, that is a *storing* of it; but if I put it into my cellar or my garret to be drawn off and drunk, I apprehend the term would not be considered as applying."

See also Langdon v. New York Equitable Insurance Company, 1 Hall's Superior Court Reports (N.Y.), 226.

From an examination of the reported cases, it would appear that

the courts have on many occasions considered the meaning of the word "storing" as used in insurance policies containing conditions with reference to the storing of certain articles on the insured premises. In Renshaw v. Missouri State Mutual Fire and Marine Insurance Company, 103 Mo., 595, the court held that a provision in a fire insurance policy against storing gasoline did not prohibit the keeping of gasoline therein for the purposes of sale. Such court reasoned on page 605 as follows:

> "We think, also, that there is an intended distinction between storing an article and keeping it for sale. The meaning of the word 'store' itself sufficiently indicates the distinction. Webster gives this definition to the word when used in this connection: 'to deposit in a storehouse or other building for preservation.' * * * When it is intended to prohibit the keeping for sale any articles, the word 'keep' is usually, if not uniformly, connected with the word store, making the condition of the policy, read 'keep or store.' The word 'keep' having been omitted from this policy, it must have been the intention of the parties to permit the keeping for sale such hazardous articles as are ordinarily kept in such a business."

If such courts have correctly set forth the ordinary conception of the term "store," then it would appear that the past tense of the word "store" or the word "stored," when used by the legislature in the enactment of Section 5388-1, General Code, indicated a legislative intent to tax whiskey or other spirituous liquors only when they were deposited in a warehouse or other building or place for the purpose of safekeeping during a period of time until it shall have been determined as to their subsequent disposition, as distinguished from being *kept* in custody as a reservoir of stock incidental to their use in some other business, and not to levy a tax on whiskey or other spirituous liquors kept by a merchant to be withdrawn from time to time for use in his merchandising business when, as and if required for the purpose of being vended to his customers.

Such view is given support by the fact that the legislature has provided a specific method or system for the taxation of the inventory of a merchant. In providing such method, the legislature has in Section 5381, General Code, defined a "merchant" as follows:

> "A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or

> which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

Under the facts outlined in your request, it is apparent that the licensed vendors therein mentioned are persons who either own or have in their possession or subject to their control personal property (namely, whiskey or spirituous liquors) within this state, with authority to sell it, purchased by them either in or out of the state, with a view to being sold at an advanced price or profit. Such being true, such duly licensed retailers are merchants within the meaning of that term as defined in Section 5381, General Code. If I understand correctly the meaning of the term used in your inquiry "duly licensed retailers," it would seem to me that their merchandise would necessarily include whiskey, other spirituous liquors, vinous liquors and malt beverages, which they intend to sell at an advanced price over that for which they were purchased or with a view to profit. If such be true, then it would appear that the legislature has specifically provided in Sections 5382 and 5389, General Code, the method of listing such property for purposes of taxation and the valuation at which such inventory shall be listed, to wit, at seventy per centum of the average true value thereof which the merchant had on hand during the twelve calendar months or part thereof prior to the commencement of the first day of January of the year in which the listing is made.

After receipt of your request, I have reexamined my former opinion appearing in Opinions of the Attorney General for 1939, Vol. I, page 610, and the reasoning therein contained, in the light of the subsequent amendments of Section 5388-1, General Code, which amendments I have hereinabove set forth. While in such opinion some of the reasoning is predicated upon the fact that Section 5388-1, General Code, as then existing, was enacted prior to the enactment of those provisions of law with reference to the taxation of the inventory of a merchant or a manufacturer, such portion of the reasoning, even if omitted from such opinion, would not necessarily affect the conclusion therein expressed. It does not appear to me that the substitution of the word "spirituous" for "alcoholic" would indicate a different intent on the part of the legislature, nor does it seem to me that the addition of the last sentence now appearing in Section 5388-1, General Code, which exempts bailment stock stored in a warehouse for the benefit of the State Liquor Department, would indicate a change of legislative purpose other than with respect to liquors stored for such specified purpose. It therefore does not seem to me that the

subsequent amendment of the statute by the General Assembly requires any modification of such opinion, at least with respect to liquors kept by a merchant as a part of his stock of merchandise which he has on hand with a view to being resold to his customers at an advanced price or with a view to profit.

Specifically answering your inquiry, it is my opinion that when a duly licensed retailer has on hand a quantum of whiskey or other spirituous liquors in his establishment to be sold by the drink, whether such liquors are held in his storeroom or in an adjunct thereto from which he from time to time draws for stock to be sold at retail to his customers in the usual course of business, such inventory of liquors should be listed for taxation and assessed under authority of Sections 5382, 5388 and 5389, General Code, at seventy per centum of its average value during the twelve months of the preceding calendar year and not pursuant to authority of Section 5388-1, General Code.

Respectfully,

THOMAS J. HERBERT
Attorney General.