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1. COAL—PURCHASED BY CONSUMER FROM DEALER OR MINING COMPANY—TRANSPORTATION TAX, SECTION 3475 INTERNAL REVENUE CODE, ADDED TO CHARGE MADE TO CONSUMER—PAID BY COMPANY—CHARGE IS PART OF PRICE UPON WHICH SALES TAX IS COMPUTED —SECTION 5546-2, G. C.

2. WHEN CONSUMER PURCHASES COAL AT MINE AND PAYS COST OF TRANSPORTATION TO PLACE OF CONSUMPTION, TRANSPORTATION TAX NOT PART OF PRICE PAID FOR COAL UPON WHICH TAX COMPUTED —SECTIONS 5546-1, 5546-2, G. C.

SYLLABUS:

1. When a consumer purchases coal from a dealer or mining company which has paid the transportation tax imposed by Section 3475 of the Internal Revenue Code and has added the amount of such tax so paid to the charge made to the consumer, such charge is a part of the price upon which the sales tax imposed by Section 5546-2 of the General Code is to be computed.

2. When a consumer purchases coal at the mine and pays the cost of transportation to his place of consumption and the transportation tax levied by Section 3475 of the Internal Revenue Code, the tax so paid is not a part of the price paid for the coal, as defined in Section 5546-1 of the General Code, upon which the tax imposed by Section 5546-2 of the General Code is to be computed.

Columbus, Ohio, January 29, 1943.

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

Dear Sir:

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

> "Section 620 of the Federal 'Revenue Act of 1942,' effective December 1, 1942, imposes upon the amount paid for the transportation of property by rail, motor vehicle, water, or hire from one point in the United States to another, a tax equal to three per centum (3%) of the amount so paid, except that, in the case of coal, the rate of tax shall be four cents (4¢) per short ton. The tax shall apply only to amounts paid to a 'person engaged in the business of transporting property for hire.'
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> Query,—In computing the Ohio Sales Tax on the sale of coal, shall the tax imposed by the Revenue Act of 1942 be included in the selling price?"

Section 3475 of the Internal Revenue Code, referred to in your request as "Section No. 620 of the Federal 'Revenue Act of 1942,'" in so far as is material to your inquiry, reads:

> "(a) Tax.—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation. * * *
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> (c) Returns and Payment.—The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so collected to the collector in the district in

which his principal place of business is located, or if he has no principal place of business in the United States, to the collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. * * *"

You will observe that such section levies a tax of four cents per short ton on the transportation of coal. Such tax is laid against the person who, under the contract for transportation, pays the transportation charges. Bearing such provision in mind, let us refer to the provisions of the Ohio statute levying the sales tax. Section 5546-2 of the General Code provides that:

"* * * an excise tax is hereby levied on each retail sale made in this state * * * as follows:

One cent, if the price is forty cents or less;

Two cents, if the price is more than forty cents and not more than seventy cents;

Three cents, if the price is more than seventy cents and not more than one dollar; * * *"

From such quoted language, it is apparent that the tax is levied on each sale and measured by the "price" at which the article is sold.

The term "price," for the purposes of such levy, is defined in Section 5546-1 of the General Code as follows:

"'Price' means the aggregate value in money of any thing or things paid or delivered, or promised to be paid or delivered by a consumer to a vendor in the consummation and complete performance of a retail sale without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or allowed after the sale is consummated, or any other expense whatsoever. 'Price' shall not include the consideration received for labor or services used in installing, applying, remodeling or repairing the property sold if the consideration for such services is separately stated from the consideration received for the tangible personal property transferred in the retail sale. 'Price' shall be deemed to be the amount received exclusive of the tax hereby imposed provided the vendor shall establish to the satisfaction of the tax commissioner that the tax was added to the price.

. The tax collected by the vendor from the consumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and except for the discount authorized in section 5546-8 of the General Code, no persons other than the state shall derive any benefit from the collection or payment of such tax."

The term "retail sale" is defined in such section and for such purposes 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."

From such statutory provisions, it is apparent that if a coal dealer purchases from a mining company coal for purposes of retailing the same to consumers, no sales tax is levied by Ohio statutes upon such sale or purchase. The vendor in such transaction is not authorized or required by law to collect a sales tax on such transaction. However, by reason of the express provisions of the federal statute, Section 3475, Internal Revenue Code, the transportation tax of four cents per ton is laid against the vendor or vendee, depending upon the question of which of such parties pays the transportation charges. If the transportation charges are paid by the mining company, the tax is levied against it. However, if by reason of the terms of sale, the wholesale purchaser pays to the transportation company the charges for the transportation, the federal tax is laid against him.

Now it may be contended that if the wholesaler is required to pay a tax upon the transportation of the coal from the mine to his warehouse or storage yard, such tax is "passed on" to the consumer. When we talk in loose language, such statement might be considered as true. However, the "passing on" is as a part of the "price" which the consumer pays for the commodity. It is not "passed on" as a tax. A tax is a

forcible exaction made by the sovereign for governmental or public purposes.

Meriwether v. Garrett, 102 U. S., 472, 514
New Jersey v. Anderson, 203 U. S., 483
Pollock v. Farmers' Loan & Tr. Co., 157 U. S., 429
United States v. La Franca, 282 U. S., 568
Cincinnati v. Roettinger, 105 O. S., 145

If then in the sale of coal the purchaser did not pay a sum of money to or for the benefit of the sovereign, he could scarcely be said to pay a tax in making such purchase.

In the case of Lash's Products Company v. United States, 278 U. S., 175, the court had occasion to determine, with reference to a tax laid on the manufacturer of soft drinks in bottles, equal to ten per cent. of the "price" for which they were sold, the meaning of the word "price." The manufacturer in the sale of his products added the ten per cent. of the price to the regular selling price and informed his customers that the amount included the ten per cent. federal tax. He thereupon remitted an amount equal to ten per cent. of the regular price to the federal government. The federal government took the position that the "price for which sold" included the ten per cent. enhancement made to the customer. In the opinion of Mr. Justice Holmes, at page 176, the court said:

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. vs. I. S. Dawes & Son Co. 56 App. D. C. 213, 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. * * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is a part of the price, * * *"

The syllabus of such opinion reads:

> "1. The tax imposed by Section 628 of the Revenue Act of 1918 on soft drinks sold by the manufacturer in bottles, etc., 'equivalent to 10 per centum of the price for which sold,' is a tax on the manufacturer alone which, accurately speaking, cannot be 'passed on' to the purchaser.
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> 2. Where a manufacturer sold such goods at his regular prices plus 10% added to cover the tax and not separately billed, and the purchasers, being notified of the arrangement, paid the whole, the tax payable by the manufacturer was properly computed on the total amount so paid by the purchasers."

The same view was taken in Elmer Candy Company v. Fauntleroy, 19 Fed. (2d), 664. Similarly, in Keilson Cigar Company v. Braden, 59 O. App., 562, the Court of Appeals for Hamilton County passed upon the question as to whether from the "cost" of cigarettes to a cigar dealer should be deducted the amount paid by the manufacturer as a tax on the manufacture thereof. The court, in holding that the dealer paid no tax, observed that "the manufacturer paid this tax and affixed the stamps, and later sold the cigarettes to the appellant, who, undoubtedly, was required to pay an increase in price equivalent to the tax."

From the cases above cited, it would seem that even though the price of the coal paid by the consumer was enhanced by reason of a transportation or other tax paid by a former owner, it can scarcely be held that the "price" paid by him is anything less than the total sum paid by him to secure title to the coal, unless, by reason of the definition contained in Section 5546-1 of the General Code, such sum includes a consideration paid for labor or services used in "installing" or "applying" the coal purchased, which consideration was separate from the consideration paid for the coal.

Thus, in the case of almost every manufactured commodity sold, the producer of the raw material contained therein may have paid a production or storage tax, and the manufacturer or manufacturers who collaborated in the manufacture thereof may have paid a processing tax, all of which may be reflected in the ultimate sale price. If a sale is then made, the consumer pays as the "price" thereof the sum necessary to procure title to the article.

However, it may well be that a consumer of coal purchases his coal at the mine and pays therefor the price demanded by the miner at the tipple and employs a transportation company to convey his coal so purchased to the house or place of business of the consumer. In such case, Section 3475 of the Internal Revenue Code in terms levies a tax against the consumer who has obligated himself to pay for the transportation of the coal, and requires the transportation company to collect the tax from such consumer as a tax and not as a part of the cost of the coal. In such case, the term "price" as defined in Section 5546-1 of the General Code does not in terms include either the transportation charge or the tax levied by Section 3475 of the Internal Revenue Code.

It is elemental that in a taxing statute, if there is doubt as to whether the language imposing a tax includes a levy on a certain item, such doubt must be resolved in favor of the exclusion of the item. As stated by Marshall, C. J., in Caldwell v. State, 115 O. S., 458, 461:

> " * * * where there is ambiguity or doubt as to legislative intent, the doubt should be resolved in favor of the person upon whom the burden of taxation is sought to be imposed, and that language employed in a taxation statute should not be extended by implication beyond its clear import, or to enlarge its operation so as to embrace subjects of taxation not specifically named. This rule is so well settled as not to be longer debatable. It is supported both by authority and reason."

Specifically answering your inquiry, it is my opinion that:

1. When a consumer purchases coal from a dealer or mining company which has paid the transportation tax imposed by Section 3475 of the Internal Revenue Code and has added the amount of such tax so paid to the charge made to the consumer, such charge is a part of the price upon which the sales tax imposed by Section 5546-2 of the General Code is to be computed.

2. When a consumer purchases coal at the mine and pays the cost of transportation to his place of consumption and the transportation tax levied by Section 3475 of the Internal Revenue Code, the tax so paid is not a part of the price paid for the coal, as defined in Section 5546-1 of the General Code, upon which the tax imposed by Section 5546-2 of the General Code is to be computed.

Respectfully,

THOMAS J. HERBERT,
Attorney General.