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1. DAIRY, PRODUCING AND PROCESSING MILK—LABORATORY FOR STUDENTS TO STUDY DAIRY TECHNOLOGY —STATE UNIVERSITY NOT ENGAGED IN BUSINESS AS "HANDLER" OF MILK—FEDERAL ORDER REGULATING SUCH BUSINESS—SURPLUS SOLD TO GENERAL PUBLIC FROM STORE MAINTAINED ON UNIVERSITY CAMPUS.

2. UNIVERSITY NOT LIABLE FOR PAYMENT OF ASSESSMENT LEVIED UNDER TERMS OF FEDERAL ORDER TO MEET ADMINISTRATION EXPENSES.

SYLLABUS:

1. A State University, operating a dairy and producing and processing milk in order to provide a laboratory for the study by students of Dairy Technology, is not engaged in business as a "handler" of milk within the scope of a Federal order regulating such business, although the surplus of the milk processed over the needs of University institutions, is sold to members of the general public through a store maintained on the University campus.

2. Such State University is not liable for the payment of an assessment levied under the terms of such Federal order to meet the expenses of administration thereof.

Columbus, Ohio, March 16, 1946

Mr. John F. Cunningham, Dean, College of Agriculture
Ohio State University, Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion which reads, in part, as follows:

> "A question has arisen as to the compliance of the Dairy Technology Department of the Ohio State University with War Food Order No. 79, a copy of which I enclose herewith.
>
> The question is concerned particularly with the paragraph No. 4 on the second page, providing that each handler shall pay the market agent certain assessments.
>
> Our Dairy Technology Department questions whether or not the Federal government can collect such assessment from a state institution especially since none of the products are sold or delivered off the University campus. Neither is the Dairy Laboratory located within the city limits."

Attached to your request is a copy of Food Distribution Order No. 79 of the War Food Administration, Part 1401—Dairy Products, as amended effective October 1, 1943. Since receiving your request I have learned that this order has been supplanted by an order of the United States Secretary of Agriculture following the return to the United States Department of Agriculture on June 30, 1945, of responsibility for regulation of milk production. Said subsequent order of the Secretary of Agriculture was issued to become effective on February 1, 1946, and provides for the regulation of the price to be paid to producers for milk produced by "handlers" of fluid milk within the Columbus marketing area, and for an assessment to meet expenses in the administration of the order, not to exceed two cents per hundredweight of milk received by such "handlers".

In addition to the facts contained in your request, I understand that the Department of Dairy Technology of the Ohio State University has for a number of years maintained a plant for the processing of milk, the principal purpose of which is to serve as a laboratory for students engaged in the study of dairy technology. About one-third of the milk so processed is produced by the University on the university farms. The other two-thirds is purchased from farms in the central Ohio area. About ninety per cent of such milk, after being processed in the plant of the Department of Dairy Technology, is sold and delivered on the University campus by the Department to other Departments of the University for use on the campus by such other departments in the various campus institutions. The surplus, constituting about ten per cent of the total milk processed, is sold through a dairy store maintained by the Department of Dairy Technology on the campus, where members of the general public may go and purchase milk and other dairy products. None of the milk produced or processed is sold or delivered off the campus.

The order of the Secretary of Agriculture, which the marketing agent of the Department of Agriculture seeks to invoke, is published in the Federal Register for Wednesday, January 30, 1946, and those portions thereof pertinent to your question are as follows:

> "§974.1 Definitions. The following terms shall have the following meanings: * * *
>
> (d) 'Person' means any individual, partnership, corporation, association, or any other business unit. * * *

(f) 'Handler' means (1) any *person* who receives producer milk at a fluid milk plant and (2) any association of producers with respect to any producer milk constituting a part of the producer milk supply of a fluid milk plant which such association diverts on its account to a plant other than a fluid milk plant. Producer milk so diverted shall be deemed to have been received by such association.

§974.8. Expense of administration. As his prorata share of the expense which necessarily will be incurred in the maintenance and functioning of the office of the market administrator, and in the performance of the duties of the market administrator, each handler, with respect to all receipts, during each delivery period, of skim milk and butterfat (except receipts from other handlers) in (1) producer milk and (2) other source milk at a fluid milk plant, shall pay to the market administrator, on or before the 12th day after the end of such delivery period, that amount per hundredweight of such receipts not to exceed 2 cents, which is determined (subject to review by the Secretary) and announced by the market administrator on or before the 10th day after the end of such delivery period." (Emphasis added.)

The matter of whether the University is liable for the payment of an assessment such as that levied under the Federal order in question depends upon (1) whether a State University comes within the definition of the term "handler" as set forth in the order, and (2) whether, in any event, the United States Department of Agriculture can validly regulate a State University in the performance of its functions in providing a laboratory for students, and levy an assessment upon the performance of such functions to defray the expenses of such regulation. These questions are necessarily commingled and interdependent.

The Supreme Court of the United States in the recent case of New York v. United States, ——U. S.——, 90 L. Ed. 265, decided January 14, 1946, has held that a state, which in the disposition of its natural resources, sold bottled mineral water on the general market in competition with private business of the same nature, was not immune to taxation by the Federal Government in a levy made generally, without discrimination, upon the activity in which the state was thus engaged. Likewise, in the earlier case of Ohio v. Helvering, 292 U. S. 360, 78 L. Ed. 1307, and South Carolina v. United States, 199 U. S. 437, 50 L. Ed. 261, it was held that where, in pursuing its governmental function of controlling traffic in intoxicating liquor, a state engages in the liquor business, it is removed from immunity from Federal taxation.

However, in all of the cases cited above, the state involved was definitely and obviously engaged in a business which partook of the nature of private enterprise, and which, as an activity in and of itself, had no direct bearing on the governmental function of such state. No case of the Supreme Court of the United States has yet held that the disposition of surplus material produced, not for a general market, but for the sake of the act of production itself, and the incidental supplying of the needs of a state institution, constitutes an invasion of the field of business and renders a state which makes such disposition subject to Federal levy thereon. And although Mr. Justice Frankfurter, who announced the decision of the Court in New York v. United States (supra), uses language in his opinion which tends to discard any distinction, for purposes of dealing with taxing statutes, between the traditional governmental functions of states and proprietary functions thereof, he is joined in his opinion only by Mr. Justice Rutledge and not by the other members of the Court.

That the immunity of state activity from Federal taxation or regulation is strictly limited, I cannot deny, in view of the decision just discussed in New York v. United States (supra), and in view of the two recent cases of Case v. Bowles, ——U. S.——, 90 L. Ed. 398, and Hulbert v. Twin Falls County, ——U. S.—— 90 L. Ed. 404, both decided February 4, 1946, and both of which held that a state, or subdivision thereof, was subject to a Federal price regulation which by its terms had application to "an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." However, the difference between the language quoted and "* * * any individual, partnership, corporation, association, or any other business unit" is apparent. The language in the price regulation was construed by the Supreme Court to have application to a state or subdivision thereof in view of the words "or any other government or any of its political subdivisions * * *".

It is my opinion that a State University operating a laboratory for students in dairy technology, and incidentally disposing of some milk thus processed, is not a "business unit" within the meaning of the order of the Secretary of Agriculture, and thus not a "handler" within the definition contained therein. From the facts which have come into my

possession, it does not appear that the operation of the University in the Department of Dairy Technology furnishes any substantial competition with established commercial enterprises engaged in producing and marketing milk in the Columbus area, and it is likewise apparent that the purpose of such operations is not to enter the field of business with a view to profit, either for the support of the state in the exercise of its governmental function of education, or otherwise.

A widely used definition of the term "business" is "that which occupies the time, attention and labor of man for the purpose of livelihood or profit." (See Bouvier Law Dictionary, Vol. I, page 408 (1914), Flint v. Stone, Tracy Co., 220 U. S. 107, 55 L. Ed. 589, Black's Law Dictionary, page 260 (1944), citing cases.) It is clear that the activities as regards milk at the Ohio State University do not come within this definition. It is likewise clear that the Ohio State University is not an individual, partnership, corporation or association. (See Neil v. Board of Trustees, 31 O. S. 15; Section 4861, General Code of Ohio.)

Therefore, it is my conclusion, in answer to your question that:

1. A State University, operating a dairy and producing and processing milk in order to provide a laboratory for the study by students of Dairy Technology, is not engaged in business as a "handler" of milk within the scope of a Federal order regulating such business, although the surplus of the milk processed over the needs of University institutions, is sold to members of the general public through a store maintained on the University campus.

2. Such State University is not liable for the payment of an assessment levied under the terms of such Federal order to meet the expenses of administration thereof.

Respectfully,

HUGH S. JENKINS,
Attorney General.