LICENSE: The ten dollar fee required for the issuance of a permit to engage in the pharmacy business by Section
PHARMACY: 338.220 RSMo, Cumulative Supp. 1953, is not a tax and must be paid by a purely charitable organization
TAXATION: engaging in the pharmacy business.

May 12, 1954

FILED
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Honorable Charles W. Riley, Secretary
State Board of Pharmacy
245 Wilhoit Building
Springfield, Missouri

Dear Sir:

By letter dated April 27, 1954, you requested an official opinion as follows:

> "We have encountered some difficulty in collecting the annual $10.00 permit fee from the Barnes Hospital Pharmacy. As you know, this fee is required of all pharmacies according to Section 338.220, R. S. Mo., 1949.
>
> "Barnes Hospital contends that it does not have to pay the annual $10.00 permit fee for the reason that it is a non-profit institution and therefore not subject to the tax. It does not pay the annual tax to the City of St. Louis and feels that this is sufficient justification for refusal to pay the permit fee to the State of Missouri. It should be noted, however, that Sales Tax is paid on sales from the pharmacy.
>
> "For your information, the Board has in effect and on file with the Secretary of State the following Regulation:
>
> "'Regulation 13. Hospital pharmacies, physician-owned clinic-pharmacies, and chemist shops shall come under the act as drug stores.'
>
> "We would appreciate your opinion as to this hospital is subject to the annual permit fee as prescribed by the statute."

Section 338.220 RSMo, Cumulative Supp. 1953, requires the payment of a fee of $10.00 for the issuance of a permit to operate a pharmacy within the state. Said Section reads as follows:

> "1. On and after sixty days from and after the taking effect of sections 338.210 to 338.300, it shall be unlawful for any person, copartnership, association or corporation to open, establish, operate or maintain any pharmacy, as defined by statute, within the state of Missouri, without first obtaining a permit to do so from the Missouri board of pharmacy.
>
> "2. Application for such permit shall be made upon a form to be prescribed and furnished by said board: such application shall be accompanied by a fee of ten dollars. The permit issued shall be for one year only, but may be renewable annually upon payment of a like fee. Separate applications shall be made and separate permits required for each pharmacy opened, established, operated or maintained by the same owner.
>
> "3. All permits or renewal fees collected under the provisions of sections 338.210 to 338.300 shall be deposited in the state treasury to the credit of the Missouri board of pharmacy fund, to be used by the Missouri board of pharmacy in the enforcement of the provisions of sections 338.210 to 338.300, when appropriated for that purpose by the general assembly."

"Pharmacy" is defined by Section 338.210 RSMo Cumulative Supp. 1953, as follows:

> "As used in sections 338.210 to 338.300 'pharmacy' shall mean any pharmacy, drug, chemical store, or apothecary shop, conducted for the purpose of compounding, and dispensing or retailing of any drug, medicine, chemical or poison when used in the compounding of a physician's prescription."

The Constitution of Missouri, 1945, by Article X, Section 6, gives the Legislature authority to exempt from taxation certain types of property. That Section reads as follows:

> "All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

By authority of said Article X, Section 6, the Legislature enacted Section 137.100 RSMo 1949, which reads as follows:

> "The following subjects shall be exempt from taxation for state, county or local purposes:
>
> "(1) Lands and other property belonging to this state;
>
> "(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;
>
> "(3) Lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease;
>
> "(4) Nonprofit cemeteries;
>
> "(5) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this state;

> "(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes. (L. 1945 p. 1799 Sec. 5)"

We assume that Barnes Hospital denies their liability for the license fee on the ground that said pharmacy is used "for purposes purely charitable, and not held for private or corporate profit."

Assuming for the purpose of this opinion only that said property is used only for purely charitable purposes and not for private and corporate profit, we conclude that the Barnes Hospital is liable for the payment of the fee mentioned in Section 338.220, if said hospital is engaged in the "pharmacy" business as defined by Section 338.210 supra. This conclusion is based upon the holding of the Supreme Court of Missouri in State vs. Parker Distilling Company, 236 Mo. 219, 139 S.W. 453, wherein the defendant objected to the payment of a fee for a license to engage in the manufacture and sale of intoxicating liquor. The Court made a distinction between the assessment of a license fee and taxation saying (l.c. 258, 259):

> "The authorities clearly show what the difference is between taxation and the licensing of a business or occupation; and that there is no necessary connection between the two. 'A business may be taxed and yet not licensed, or it may be licensed and yet not taxed.' (Youngblood v. Sexton, 32 Mich. l.c. 425, (Cooley)).
>
> "This difference is stated by Mr. Black in his work on Intoxicating Liquors, section 108, in the following language: 'If the business is under no legal condemnation, but is open to all persons to engage in, then the imposition

> of a tax upon it cannot be regarded as a license, because, by universal consent, a license is defined as a permit to do some or engage in some occupation which, without such permission, would be unlawful. A license law, therefore, assumes the illegality of the business, and denounces penalties upon those who pursue it without previously protecting themselves by procuring a license.'
>
> "And in the same section he defines taxation as follows: 'Taxation, on the other hand, assumes the legality of the business for any one who may choose to pursue it, but imposes a burden for the public benefit upon those engaging in it. The case is not altered by the fact that payment of the tax is made a condition precedent to the right to engage in the business.'
>
> "It should also be observed in this connection that the Act of 1909 does not purport to impose a direct tax upon the property mentioned therein. The most that counsel contend for, in that regard, is that the act imposes an indirect tax upon the property of respondent, by requiring it to pay the fees upon all sales mentioned in section 5 of the act.
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> *
>
> "Having thus determined that the burden imposed by said section five is that of a license fee, required to be paid for the privilege of conducting business of respondent and not a tax upon its property, we will return to the original proposition presented: * * * * * * * * * * * *"

It being illegal to operate a pharmacy without being properly licensed, as it was illegal in the Parker case to manufacture and sell liquor without license, the fee required by Section 338.220 must be declared not to be a tax. Section 137.100 supra exempts property used for purely charitable purposes from taxation, and not from the payment of license fees. There being no other applicable exemption statute, we must conclude upon the facts assumed in this opinion that Barnes Hospital should be required to pay the ten dollar fee required by Section 338.220.

Honorable Charles W. Riley

CONCLUSION

It is, therefore, the opinion of this office that the ten dollar fee required for the issuance of a permit to engage in the pharmacy business by Section 338.220 RSMo, Cumulative Supp. 1953, is not a tax and, therefore, upon the facts presented in your letter, must be paid by Barnes Hospital.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd