TAXATION AND REVENUE: Basis to be used for computation of merchants ad valorem tax.

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July 15, 1946

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Reference is made to your letter of recent date requesting an official opinion of this office, and reading as follows:

> "The assessor and the county board of equalization raised the question as to what was assessable for taxes with a local produce and feed merchant.
>
> "This local produce and feed dealer buys wool, and says he merely buys same on commission, and the truck of the wholesale wool dealer comes often and collects the wool. This wool bill runs into big money, yet this produce dealer says that he is not assessed for this wool, because, he does not own it, it is not in his possession, and not really under his control. He does not want to be charged as that business for taxation. Is that wool buying the largest amount he has on hand between the first Monday in March and the first Monday in June?
>
> "Then this same merchant buys in and ships out every day large quantities of chickens and eggs, and he refuses to consider this as taxable goods on hand.
>
> "He has also a contract with a large hatchery to buy hatching eggs for this hatchery, and he buys eggs and twice a

> week during the hatchery season these hatching eggs are gathered up, and taken out. This produce dealer says that the eggs belong to the other fellow and are not goods on his hands for taxation. Is this amount, the largest amount on hand, any one day, taxable under the taxing of merchants?
>
> "This local dealer holds in storage soy beans, lespedeza seed, clover seed, that belongs to his customers, and the same are held in his warehouses for better prices. If the local produce dealer can sell same for a profit, that is up and above the price the same are held for, he does. Is this taxable as actual goods on hand?"

The complete scheme for the taxation of merchants is found as Article 18, Chapter 74, R. S. Mo. 1939. By virtue of the passage and approval, with an emergency clause, of H.C.S.H.B. 536 of the 63rd General Assembly, the entire article has been retained with changes necessary to conform with the provisions of the Constitution of 1945. The bill became effective March 26, 1946. The particular matters about which you inquire are determined by the provisions of Section 11305, R. S. Mo. 1939, found as a part of H.C.S.H.B. 536. Said section reads as follows:

> "Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission." (Emphasis ours.)

You will note from the underscored portion of the statute quoted supra that commission merchants are not required to in-

clude in their total stock of merchandise any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which such merchant has no ownership or interest other than his commission. Reference to your letter indicates that the various items mentioned therein are claimed to be exempted from the provisions of the taxing portion of this statute under the proviso mentioned. It is, of course, impossible for this office to determine factual matters. However, we might say that in view of the broad powers granted the Merchants Board of Equalization to subpoena witnesses, such factual matters may be readily determined by that body. We can but render our opinion upon the construction to be given the statute, enunciating general principles, which may be applied in specific cases by the Merchants Board of Equalization based upon the facts determined by them in each instance.

In the first place, the proviso applies only to commission merchants. It, therefore, becomes pertinent at the outset to determine whether or not the business transactions of a particular individual come within the designated category of those to whom the proviso applies. The Supreme Court of Missouri, in State ex rel. Parker v. Thompson, et al., 120 Mo. 12, l. c. 20, has defined the term "commission merchant." The definition found therein is as follows:

> "A factor or commission merchant is generally defined to be 'an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission.' Story on Agency (9 Ed.), sec. 33."

Further, the words "growth" and "produce" appear in the proviso. The term "growth" has been defined as being that which has grown or which is growing; anything produced, a product. Words and Phrases, Perm. Ed., Vol. 18, p. 786.

The term "produce" has been defined as that which is produced or grown in, or is the yield of, the state, including crops, timber, coal and iron, and everything produced from or found in the soil of the state. Words and Phrases, Perm. Ed., Vol. 34, p. 184.

In view of the fact that the term "commission merchant" had acquired an appropriate and peculiar meaning in law prior to having been incorporated in the statute under consideration,

we believe the provisions of Section 655, R. S. Mo. 1939, to be germane in construing such statute. Section 655, R. S. Mo. 1939, reads, in part, as follows:

> "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * "

Applying this rule to the term "commission merchant," it is seen that the proviso applies to only a very limited class of merchants, and we may not extend its meaning to encompass others whose business transactions are not such as to bring them clearly within the purview of the definition. That the General Assembly contemplated that the technical import of the term should be used in the construction of the statute is further indicated by the phraseology employed. In this respect, your attention is directed to the phrases "consigned to them for sale" and "which may have been consigned for sale." To us, both of these plainly indicate that the term "commission merchant" was used in the proviso in its technical legal sense, that is to say, as meaning one who has in his possession or under his control the goods, wares and merchandise of another for the purpose of sale.

While it is undoubtedly true that the various items mentioned in your letter of inquiry, that is, wool, chickens and eggs, hatching eggs, soy beans, lespedeza seed, and clover seed, are included in the terms "growth" or "produce," yet such fact does not relieve the merchant of including them in determining the maximum amount of goods, wares and merchandise on hand at any one time during the period specified, to be used in determining the maximum value thereof, unless his dealings are those of a "commission merchant."

With the above principles in mind, we have reexamined your letter of inquiry. The claim of exclusion with respect to the transactions in wool is based upon the claimed fact that the dealer merely purchases such wool upon a commission basis and does not at any time have title thereto nor have such produce under his control or in his possession. This,

of course, squarely presents a question of fact based upon the contract of the dealer and his claimed principal, and one which this office is unable to determine. However, as mentioned supra, the Merchants Board of Equalization is in a position to obtain all necessary information relative to the true nature of the transaction. The final determination will involve questions of contract, sale, bailment, and principal and agent, and can be resolved only when all of the pertinent facts are presented. We might say, though, that if the dealer acquires such wool in his own name, actually taking title thereto, and thereafter simply sells the entire lot, made up of numerous purchases, to some other person, the mere fact that his compensation therefor would be determined upon a percentage or commission basis would not serve to permit the exclusion of the value of the wool in determining the highest value of goods, wares and merchandise on hand during the prescribed period.

With respect to the purchases of chickens and eggs, we think that such produce must necessarily be included in the aggregate valuation, as no statement appears in the letter of inquiry to indicate that the transaction, so far as the dealer is concerned, is anything but one of outright purchase and sale. Under these circumstances, the chickens and eggs do constitute a part of his stock of goods, wares and merchandise.

With respect to the hatching eggs purchased under an alleged contract with a hatchery, under which title, possession or control of the eggs is never vested in the dealer, the same factual questions are present as are necessary for the determination of the matter with respect to the dealings in wool, mentioned supra. Again, we can but say that the mere fact that the purchases are made under an agreement by which the compensation is determined upon a commission basis does not constitute the dealer a "commission merchant" with respect thereto, and if title, possession or control does vest in such dealer, he necessarily must include the value of such hatching eggs in arriving at his total valuation for tax purposes.

As to the soy beans, lespedeza seed, clover seed, etc., that are held by the dealer in storage for his customers, a somewhat different situation presents itself. If he is, under his contract, required to return to the respective owners of the various items mentioned their identical produce, merely receiving from them a stipulated storage charge for his services in connection therewith, the items do not

constitute any part of his stock of goods, wares and merchandise. On the other hand, if the dealer has the right to dispose of such items in ordinary commerce, or to commingle such items with his own stock of similar items and use the entire lot for the purpose of filling his ordinary orders, so that such items in storage with him are actually in his possession and under his control, it will be necessary for him to take into consideration the value of such items. Again, it may be possible that the terms of the contract of the merchant with the respective owners of the various items are such as to permit the disposal of their respective holdings when in his judgment such disposal by sale is proper. If the various items be consigned to the merchant for sale under these conditions, and under an agreement to reimburse the merchant for his services in connection therewith on a commission basis, such contract possibly would constitute the merchant a "commission merchant" with respect to such items. Such being the case, the items would then be excluded from his inventory under the quoted proviso. Here, again, are questions of fact which will necessarily have to be determined by the Merchants Board of Equalization.

CONCLUSION

In the premises, we are of the opinion that, in the absence of contractual relations with the owners of the various items of growth and produce mentioned in your letter of inquiry, which constitute the merchant a "commission merchant" within the meaning of that term as defined in legal phraseology, such merchant must give due regard to the total value of such items in arriving at the highest amount of all goods, wares and merchandise which he has on hand at any time between the first Monday in January and the first Monday in April, in any year, for the purpose of determining the ad valorem tax due and owing by such merchant.

Respectfully submitted,

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APPROVED:

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