

... ATION OF MERCHANTS: Poultry company buying from farmers, fattening them and shipping in car lots is a merchant within the meaning of Sec. 10099 R.S. 1929; likewise grain elevators operating in same manner.

8-27

August 7, 1935.



Hon. Glen W. Huddleston,  
Prosecuting Attorney,  
Carroll County,  
Carrollton, Mo.

Dear Sir:

This department is in receipt of your letter of August 2 wherein you make the following request for an opinion:

"Please send me an opinion as to whether or not the following firms are subject to assessment on their property for merchant's tax.

"The Stamper Poultry Co. buys poultry from the farmers and poultry dealers here in Carroll County and fattens them, and then ships this poultry, in car load lots, to market. The company contends that as it does not sell any of this poultry at retail here in Carroll County, it is not a merchant within the meaning and definition of the Mo. statutes of 1929, and therefore, should not be assessed for merchant's tax on this poultry.

"I would, also, like to have an opinion as to whether or not grain elevators are subject to assessment for merchant's tax on the grain which they buy in small quantities and ship to market in car load lots. It is their contention that they are wholesalers in regard to this grain that is shipped in car load lots,

and therefore, are not subject to assessment on it for the merchant's tax."

The question of whether or not the Stamper Poultry Co. and the grain merchants of Carroll County are merchants within the meaning of the law may be treated together, as they appear to be in the same position insofar as the merchant's tax may apply.

Sec. 10075, R.S. Mo. 1929 declares certain persons to be merchants, as follows:

"Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

In the case of State of Missouri v. Whittaker, 33 Mo. 457, it was held that one who manufactures and sells is a merchant.

In the case of Kansas City v. Brewing Co., 98 Mo. App. 590, it was held that it is a mixed question of law and fact as to whether or not a manufacturer is a merchant.

Section 10099, R.S. Mo. 1929 construes the term "merchant" as follows:

"The term 'merchant', as used in this article, shall be construed to include all merchants, commission merchants, grocers, manufacturer and dealers in drugs and medicines, except physicians for medicines used in their practice whether trading as wholesale or retail dealers."

In the case of Campbell Baking Co. v. City of Harrisonville, 50 F. (2d) 1.c. 675 Sections 10075 and 10099, supra, and numerous definitions of "merchants" are discussed. The Court said:

"'Merchants of all kinds' is a broad designation. There is a statutory definition of merchant (Rev. St. Mo. 1929, Sec. 10075 and section 10099), which is as follows:

\* \* \*

"This definition is in a taxing statute, but it is part of a statute having to do with an ad valorem property tax on the amount of 'all goods, wares and merchandise which they may have in their possession or under their control' (section 10077), and the license required is purely to aid in procuring the property tax--the fee therefor is nominal, being but 50 cents (section 10086). A necessity for an ad valorem tax of this character would be the location within the state of the goods taxed. This is not necessarily a definition of 'merchants of all kinds', as used in section 7046, which relates only to license or privilege taxes. As applied to privilege taxes, the term is defined as 'one making a business of buying and selling commodities; a trafficker; a trader.' Secondary meaning: 'One who carries on a retail business' (Viquesney v. Kansas City, 305 Mo. 488, 498, 266 S.W. 700, 703), and by this court as 'persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade'. (Union County Nat. Bank v. Ozan Lumber Co. (C.C.A.) 179 F. 710, 715.) Appellant sells bread within the City of Harrisonville and would therefore seem to be a merchant, because it is 'one making a business of \* \* \* selling commodities' (bread) and one 'engaged in the business of \* \* \* selling merchandise or other personal property in the usual course of trade.' Also see City of Kansas v. Vindquest, 36 Mo. App. 584. Appellant contends it is simply a manufacturer. But a manufacturer may, as to the articles made by him become a merchant when he sells them."

Further definitions, and the construction of said sections, are contained in the same decision in a dissenting opinion by Judge Van Valkenburgh in the following language (l.c. 676):

"In the first opinion of this court, the expression 'merchants of all kinds' contained in Section 7046, Rev. St. Mo. 1929, granting power to cities of the fourth class to levy license taxes, was held to be a designation sufficient to include appellant, and to satisfy the requirements of section 7287, Rev. St. Mo. 1919. On rehearing, counsel for appellee, while seeking to sustain this classification on the theory of ejusdem generis (rejected, as the majority opinion correctly holds, by controlling decisions of the Missouri Supreme Court) in brief and argument placed greater dependence upon the contention that appellee was a peddler as specially designated in section 7046, Rev. St. Mo. The majority opinion holds that appellant is a merchant, as named in the statute, and comes within the express terms of the ordinance. In that opinion, which expressly holds that the Campbell Baking Company is not a peddler, appellant is nevertheless apparently viewed as an itinerant vender as defined in Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 34 S. Ct. 493, 58 L. Ed. 974. The decision of the majority depends upon the conception that appellant is a merchant within the statutory designation, and that its sales take place in Harrisonville. The definition of 'merchant' contained in Rev. St. Mo. 1929 (sections 10075 and 10099), which would exclude appellant, is rejected upon the rather fine distinction drawn between different kinds of taxing statutes. The general definition of a merchant contained in the Standard Dictionary is 'a person who buys and sells

commodities as a business and for profit; especially one who has a place of sale and stock of goods; a trader, a buyer, a shopkeeper; a storekeeper.' This does not differ materially from those definitions as applied to privilege taxes, used by the Supreme Court of Missouri (Viquesney v. Kansas City, 305 Mo. 488, 266 S.W. 700), and by this court (Union County National Bank v. Ozan Lumber Co., 179 F. 710, 715). But none of these definitions apply to the business of appellant as disclosed beyond dispute by this record. Appellant is essentially a manufacturer. It does not buy and sell. It maintains no stock of goods. It manufactures upon orders of its regular customers, and delivers those orders by its own vehicles throughout its trade territory."

#### CONCLUSION

We assume, and in fact you state in your letter, that these dealers maintain that they are wholesale merchants due to the fact that they do no local retail business; therefore, in view of the above decision and the plain wording of Section 10099, supra, wherein the statute used the phrase "whether trading as wholesale or retail dealers", we are of the opinion that the firms mentioned in your letter are merchants within the meaning of the law relating to taxation of merchants, Chapter 59, Article 17, R.S. Mo.1029.

You have used the words "merchant's tax"; we assume that you refer to the above mentioned chapter and not to a merchant's license.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney General.