

ICE CREAM: Proof necessary to require manufacturer for sale at retail to take out supplementary permit

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10-5  
October 2, 1935



Honorable J. C. Breshears  
Commissioner  
Department of Agriculture  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"Under Article 5, Chapter 93, Sections 13068 and 13076, inclusive, as amended 1933 and 1935, would tax returns made to the County Assessor by an ice cream manufacturer, listing one or more retail outlets be sufficient proof of ownership to require such manufacturer to pay supplementary retail ice cream permit fee for the sale of his ice cream at retail in such store or stores?"

Section 13071, Laws of Missouri 1933, page 254, requires every manufacturer of ice cream for sale either at wholesale or retail to obtain a permit and pay the prescribed fee for the privilege of conducting his business. Said Section reads as follows:

"Each manufacturer of ice cream in cities or towns in this state which now have or may hereafter have a population of five thousand or over who manufacture ice cream for sale at wholesale shall pay an annual fee of one hundred dollars for a permit to conduct his business, and each manufacturer of ice cream in cities or towns in this state which now or may hereafter have a

population of five thousand or over who manufacture ice cream for sale at retail shall pay an annual fee of five dollars for a permit to conduct his business. Each manufacturer of ice cream in cities or towns of less than five thousand and more than two thousand population and in any suburban or rural part of the state of Missouri who manufacture ice cream for sale at wholesale shall pay an annual fee of forty dollars and in cities or towns of a population of two thousand and less twenty dollars for a permit to conduct his business and each manufacturer of ice cream in cities or towns of less than five thousand population and in any suburban or rural part of the state of Missouri who manufacture ice cream for sale at retail shall pay an annual fee of three dollars for a permit to conduct his business; such fees shall be paid into the state treasury, to the credit of the general revenue fund of the state. For the purpose of this article, the term 'wholesale manufacture' shall include every manufacturer of ice cream who sells at wholesale for resale, and the term 'retail manufacture' shall include every manufacturer who manufactures and sells ice cream at retail; Provided, that nothing in this article contained shall be so construed as to require a permit to authorize persons or committees not otherwise engaged in the manufacture of ice cream, to manufacture and make ice cream for their own use or for the purpose of sale at picnics, church socials, or other entertainments of like character. All manufacturers of ice cream shall be subject to inspection by the commissioner of agriculture or his inspectors during all reasonable hours, or any other officers under any law now or hereafter in force in this state."

Section 13071a, Laws of Missouri 1935, page 265, provides that a manufacturer of ice cream for sale at retail is only permitted by the permit provided in section 13071 supra, to sell ice cream at retail at the one place described in the application, provided that a manufacturer of ice cream for

October 2, 1935

sale at retail who operates two or more places of business where ice cream is sold at retail shall secure a supplementary permit for each additional place where such ice cream is sold at retail. The fee for said supplementary permit to be at the same schedule and amount as permits for retail manufacturers as specified in section 13071, supra. Section 13071a reads as follows:

"A 'retail manufacturer,' as defined, shall only be authorized and permitted, by the permit heretofore provided, to sell ice cream at retail at the one place only, located at the address designated in the application. Provided, that a manufacturer of ice cream for sale at retail operating two or more places of business where ice cream is retailed of his (its) own manufacture, shall secure a 'supplementary permit' for each and every additional place where such manufactured ice cream is sold at retail, and the fee to be charged for such 'supplementary permit' (permits) to be at the same schedule and amount as permits for 'retail manufacturers' as specified in Section 13071, Laws of Missouri, 1933, page 254."

Your exact question as we understand it is whether the tax returns made to the county assessor by the manufacturer for sale at retail, listing one or more retail outlets, is sufficient proof of ownership to require such manufacturer to pay the supplementary fee required for each additional place where his ice cream is retailed. Section 9756 R. S. Mo. 1929, provides the manner of making assessments and what the tax lists shall contain. Said section reads, in part, as follows:

"He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and

the person listing the property shall enter a true and correct statement of such property in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor."

Section 9746 R. S. Mo. 1929 provides that every person owning or holding property on the first day of June, shall be liable for taxes thereon for the ensuing year.

In the case of Wilcoxson v. Darr 139 Mo. 1. c. 671, the court said:

"I. The admission of the certified copy of the garnishee's tax list given in Jasper county is assigned as error. The ground of the complaint is that our statute nowhere makes an office copy of this assessment list evidence. Section 7534 requires the assessment list to be signed and sworn to. It requires the taxpayer to subscribe to an oath that the list so sworn to contains a true account and statement of . . . . 'notes unsecured by mortgages or deeds of trust and notes secured by mortgages or deeds of trust.' This list is required to be filed in the office of the county clerk. It is an original file in his office. That the original would be evidence, there can be no doubt. Boyer v. Tucker, 70 Mo. 457. It would certainly have been competent for the jury in an investigation in which the very existence of a debt is the issue, to have known that the person who claimed to owe the debt had sworn in a proceeding required by law, that he had no such debt or had evaded the fact by a sworn list, omitting said debt."

In the case of O'Malley v. Construction Company 255 Mo. 1. c. 391, it was said:

"Further, ownership having been found once to exist, the general rule is it is presumed to continue until a change

October 2, 1935

therein is affirmatively shown."

From the foregoing, it is our opinion that the fact a manufacturer of ice cream for sale at retail makes a sworn statement in his tax list that he owns certain retail outlets, would justify you in finding that such manufacturer was the owner of the retail outlets on the first day of June preceding the year for which such property was assessed, and, having established that fact, such ownership would be presumed to continue until a change of ownership is affirmatively shown.

We call your attention, however, to the fact that the supplementary permit or permits required of a manufacturer of ice cream for sale at retail is a permit for the privilege of operating additional places of business where ice cream is retailed by its own manufacturer. To operate a place of business ordinarily means to control and manage such business. It is conceivable that a manufacturer might own retail outlets and yet not operate such places of business. The question of whether or not they do operate additional retail outlets is a question of fact to be determined in each individual case from all the facts and circumstances. Evidence of ownership in our opinion would be evidence tending to show that they did operate such places of business, and, we think, you would be justified in requiring manufacturers of ice cream at retail who own two or more retail outlets, to either take out the required supplementary permits or to furnish you with satisfactory proof that they do not operate such places of business.

Yours very truly,

J. E. TAYLOR  
Assistant Attorney General

APPROVED:

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

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