

TAXATION: Ad valorem tax of merchant who ceases doing business before first Monday in June; on merchants who commence doing business after first Monday in June.

October 28, 1943.

Mr. Clyde E. Buzzard,
Assessor of Newton County,
Neosho, Missouri.



Dear Sir:

This will acknowledge receipt of your letter of September 9, 1943, as follows:

"We have recently written the State Tax Commission in regard to Merchants Tax and they referred us to our County Attorney and he in turn referred us to you for your opinion in the following instance:

"A files Merchant Statement in June. In August he sells stock of Merchandise to B.

- "1. Should A pay all of Merchants Tax as shown on statement? Or
- "2. Should B file a new statement when he takes over the business?

"3. If this is to be prorated or divided is B obligated by A's statement?"

Section 11309, R. S. Mo. 1939, provides:

"On the first Monday in June in each year it shall be the duty of each person, corporation or copartnership or persons, as provided by this article to furnish to the assessor of the county * * * a statement of the greatest amount of goods, wares and merchandise, which he or they have had on hand at any one time between the first Monday in March and the first Monday in June next preceding,* *."

While this section uses the words "June next preceding" such language has been held to mean the June next following the month of March, in the same year. State ex rel. Fisher v. Rodecker, 145 Mo. 450, 458.

Based upon this return the assessor places a valuation upon the property and the same is extended upon the tax books, at the same rate as is levied upon real estate. Section 11305, R. S. Mo. 1939. Thereafter, on the first of January next following, the tax must be paid to the collector of the county. Section 11306, R. S. Mo. 1939. Bond must be given to insure payment of this tax, and where not paid the bond is deemed forfeited and judgment may be taken for double the amount due. Section 11315, R. S. Mo. 1939. Likewise a similar provision is made with respect to failure to file the statement except in that case judgment may be taken for three times the amount due. Section 11316, R. S. Mo. 1939.

State ex rel. Fisher v. Rodecker, 145 Mo. 450, was an action on such bond for failure to file the statement. Defendants contended that since they had ceased to do business as merchants before June 1st of said year, they were not amenable to the tax and therefore not required to file the statement. In answer to this contention the court said (l.c.460-1):

"* * * if at any time between the first Monday in March and the first Monday in June of that year, Rodecker and Cohen were engaged in selling goods, wares, and merchandise at Bates county it was their duty on the first Monday in June in that year to file in the office of the clerk of the county court of that county a statement of the greatest amount of goods, wares, and merchandise which they may have had on hand at any time between those dates, whether they were in fact engaged in the mercantile business on the first Monday of June, 1894, or not."

State ex rel. Nunnelee v. Horton Land & Lbr. Co., 161 Mo. 664, was an action on a manufacturer's tax bond, where the provisions as to filing a statement, payment of the tax and giving a bond were substantially the same as on merchants.

The defendant did not file the statement and such failure was the basis of the action. Defendant attempted to inject in the case the point that it had disposed of the property in question prior to June 1st, though it did not raise that point in the pleadings. On this the court said (l.c. 673):

"* * * Issues can not be tendered by the evidence in a case, and if they could the fact that the defendant's property had changed hands before the first of June, 1896, if such was the fact (of which there was slight evidence brought out on a re-cross-examination of one of plaintiff's witnesses), afforded no defense for defendant's neglect to file the statement required by law,* * *."

These two cases clearly hold merely because a merchant ceases to do business, as such, before the expiration of the period during which he is to compute the taxable property, does not relieve the merchant from the duty to file the statement. Neither is he in our opinion relieved from having to pay the tax, for applying the principle of these cases we see that Section 11303, R. S. Mo. 1939, defines a "merchant" as one selling goods at a place occupied for that purpose. And Section 11305, R. S. Mo. 1939, provides:

"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 March and the first Monday in June 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."

Clearly anyone acting as a merchant on any date between the first Mondays in March and June, is subjected to

the tax. It matters not, that he may cease to so act or may dispose of all his goods, before the expiration of that period, because once he becomes subject to the tax, it must be paid, for no law provides he is to be relieved upon the happening of such contingencies as ceasing to be a merchant or disposing of his goods.

Thus, if the law is that a person who acts as a merchant a single day between the periods fixed is liable, we can see no justification at all for a contention that a merchant who sells his goods out in August is relieved from liability or may be permitted to prorate this liability according to the number of months he acted as a merchant.

Moving now to the proposition as applied to the merchant who acquired, in August, the goods of the first merchant, it appears that Section 11329, R. S. Mo. 1939, provides:

"When any person or corporation shall commence the business of merchandising in any county in this state after the first Monday in June, in any year, he shall execute a bond as provided for in section 11306, conditioned that he will, on the first day of January next succeeding, furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay the same rate of tax as other merchants, to be estimated as the time from the day on which he commenced business to the first Monday in June next succeeding shall be to one year."

This section is unambiguous and needs no exposition. It is designed to and does require a merchant commencing business, as such, after the first Monday in June, to file a statement of the greatest amount of goods on hand between the time he commenced business and the end of the year. Upon that statement he must, on the following January 1st, pay an ad valorem

tax, but in this instance the tax is prorated as the time from the day on which he commenced business to the first Monday in June of the next year, is to one year.

C O N C L U S I O N

It, therefore, is our opinion that Merchant "A", having acted as a merchant during the period from the first Monday in March to the first Monday in June, in a year, is liable for the full ad valorem tax on merchants even though he may cease to act as a merchant and sell all his goods during or after said period. Merchant "B" having acquired the goods of "A", after the first Monday in June, upon acting as a merchant, is also liable for an ad valorem tax, but it is to be prorated under the formula set forth in Section 11329. The taxes of each are distinct and what "A" may be liable for and pay, has no bearing upon what "B" may be liable for and pay. And in the converse, what "B" may be liable for and pay, has no bearing upon what "A" may be liable for and pay.

Respectfully submitted,

LAWRENCE L. BRADLEY,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney-General.

LLB/LD