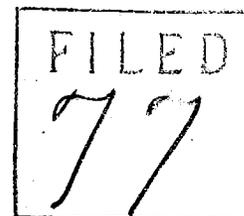


TAXATION AND REVENUE: Owner of pinball machines and music boxes not assessable as a merchant under Section 11303 and Section 11305, R. S. No. 1939.

November 9, 1945



Honorable Max F. Ruler
Assistant Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

Your letter of October 15, 1945, receipt of which we have previously acknowledged, reads as follows:

"There is before me a question that may be propounded by the local board of equalization upon a tax matter, which was levied by them against a client of Mr. Earl E. Roberts a local attorney here.

"He seems inclined to contest this matter and in that regard wrote you on October 4th and your answer to his request for an opinion of October 5th is before me.

"If it is within your province to issue an opinion on such taxation to me as an officer of this county on music boxes commonly known as juke boxes and pin-ball machines, I would be glad to have such for my guidance when called upon for my opinion from the local board of taxation."

Your letter is to be read in connection with that of Mr. Earl E. Roberts, which is referred to in your correspondence. The question involved in a reading of these two letters presents itself as being - Is the owner of pinball machines and music

boxes, commonly known as juke boxes, subject to being assessed as a merchant by the county board of equalization?

Section 11303, R. S. Mo. 1939, states:

"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."

Section 11305, R. S. Mo. 1939, states:

"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."

In the case of State v. West, 34 Mo. 424, l. c. 428, Judge Dryden holds:

"To be a merchant in the sense of the law, the dealer must have on hand goods, wares, and merchandise ready for sale and present delivery, and must also actually deal in the selling of the same. * * *"

This interpretation has been upheld in numerous cases to date and has not been reversed in any.

In the case of Edmonds v. City of St. Louis, 156 S. W. (2d) 619, 1. c. 624, it is said:

"If the business of selling merchandise through slot vending machines were fundamentally the same as that of a merchant, we would agree with appellants. But it is not. For over 80 years the statutory definition of a merchant has been substantially the same, under what is now Sec. 11303, R. S. 1939, Sec. 10075, Mo. Stat. Ann. p. 8062, to wit (*italics ours*): '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.' But automatic vending machines may be located on the premises of another, as in arcades, hotel lobbies, railroad stations, restaurants or other frequented places. They may be operated without personal attention, and the stocks vended are necessarily restricted in character and quantity. In a sense, the space they occupy might be called a 'stand or place,' but not within the meaning of the statute. While a form of merchandising they are not integral parts of a mercantile establishment."

That was a case which was stronger than the present situation since the machines were used for vending cigarettes. In the present situation the owner of the pinball machines and music boxes merely sells service or entertainment through such machines and no tangible goods, wares, or merchandise in the light of these definitions.

Various jurisdictions have defined what the term "goods, wares and merchandise" means.

The case of Dyott v. Letcher and McKee, 29 Ky. (6 J. Marsh) 541, 1. c. 543, states:

"Those articles only, which are sold or kept for sale by a merchant, can be properly denominated goods, wares, and merchandise."

The case of Somorby v. Buntin, 118 Mass. 279, the court was interpreting whether a sale of letters patent for an invention was goods, wares, and merchandise within the statute of frauds. C. J. Gray said (l. c. 285):

"* * * Before letters patent are obtained, the invention exists only in right, and neither that right, nor any evidence of it, has any outward form which is capable of being transferred or delivered in specie, or which, upon any construction, however liberal, can be considered as goods, wares or merchandise. * * *"

So, in the present situation there is no outward form which is capable of being transferred or delivered in specie so as to be considered goods, wares, or merchandise within the meaning of Section 11303, R. S. No. 1939.

The case of Smith v. Wilcox, 24 N. Y. 353, l. c. 358, holds:

"'Goods, wares, and merchandise' include all movable property that is ordinarily bought and sold."

The owner of pinball machines and music boxes does not sell tangible material such as could be transferred or delivered in specie. Therefore, Sections 11303 and 11305, R. S. No. 1939, may not be said to include such owner of pinball machines and music boxes as a merchant.

Conclusion

The owner of pinball machines and music boxes, commonly called juke boxes, is not subject to be assessed as a

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merchant, by the county board of equalization, under Section 11303 and Section 11305, R. S. Mo. 1939, since he merely sells service and entertainment through such machines and not goods, wares and merchandise. Also, he does not occupy any "stand or place" within the meaning of the statute.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG