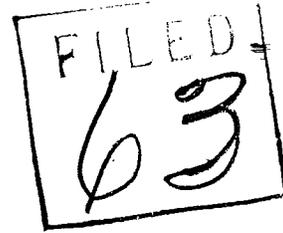


TAXATION:  
MERCHANTS TAX:  
COUNTY:

Liability for merchants tax of merchant selling  
business, and liability of purchaser of said  
business.

JOHN M. DALTON  
XXXXXXXXXXXX

February 6, 1953



Opinion No. 63

Honorable Garner L. Moody  
Prosecuting Attorney  
Wright County  
Hartville, Missouri

John C. Johnson  
XXXXXXXXXXXX

Dear Sir:

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

"The question has come up in our county  
concerning merchant's tax as follows:

"Is a merchant who was in business on  
January 1, 1952, who had a stock of goods  
and filed a statement for tax assessment  
as required by law, and who later in 1952  
sells his business, liable for the full  
amount of 1952 taxes on such merchandise  
as assessed?

"What are the liabilities of the second  
or purchasing merchant as to 1952 taxes?"

The general principle of law is that taxes lawfully  
assessed when paid cannot be refunded in the absence of  
statutory authority to refund such taxes. This rule even  
seems to prevail in cases of taxes illegally exacted. In  
State ex rel. S. S. Kresge Co. v. Howard, 208 S.W. (2d) 247,  
l.c. 249, 250, 357 Mo. 302, the Court said:

"We now consider the validity of the claim  
and the appropriation for its payment. The  
refund of taxes illegally exacted is ordi-  
narily a matter of governmental grace. On  
grounds of public policy, the law discour-  
ages suits for the refund of taxes illegally  
levied and collected, and has imposed many  
restrictions on their recovery. It is  
generally held that taxes voluntarily paid

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without compulsion, although levied under an unconstitutional statute, cannot be refunded without the aid of a statutory remedy. 51 Am. Jur. Taxation Sec. 1167."

See also State ex rel. Rice v. Powell, 44 Mo. 436; Couch v. Kansas City, 30 S.W. 117, 127 Mo. 436; and Kansas City ex rel. Elliott v. Holmes, 106 S.W. 559, 127 Mo. App. 620.

The assessment of merchants tax is for the calendar year January 1 to December 31, or in case one shall commence business after January 1, then from the date he commences business until December 31 of the same year. Section 150.040, V.A.M.S., reads:

"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."

Merchandise in this State is not listed for taxation as other personal property, but the merchant must apply for a license, and without it, he cannot operate his business. The merchants tax amounts to and is equivalent to an ad valorem tax levied on real estate, but in this instance, on the highest amount of goods, wares and merchandise in possession at a specified time.

In State ex rel. v. Alt, 224 Mo. 493, l.c. 507, 508, the Court said:

" \* \* \* In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a

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forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied."

One of the primary rules of statutory construction is to ascertain and give effect to expressed legislative intent. See *State ex Inf. Rice ex rel. Allman v. Hawk*, 228 S. W. (2d) 785, 360 Mo. 490; also *Riley v. Hollard*, 243 S.W. (2d) 79.

Section 150.100, V.A.M.S., provides that no person shall deal as a merchant without first obtaining a license, and reads:

"No person, corporation, copartnership or association of persons shall deal as a merchant without a license first obtained according to law; and every applicant for a license shall affirmatively state in a written application whether goods, wares and merchandise are to be sold by applicant at wholesale, at retail, or at both wholesale and retail. Every person or corporation so offending shall upon conviction thereof be deemed guilty of a misdemeanor."

Section 150.160, V.A.M.S., further provides that before any person shall obtain a license to vend merchandise, he shall execute a bond conditioned that he will, before the 31st day of December following, pay all the merchants tax due. Said section reads:

"Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to the state, with good and sufficient surety,

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conditioned that he will on or before the thirty-first day of December following, pay to the collector of the proper county all merchants tax due, which bond shall be approved by the collector and his approval endorsed thereon; provided, that said bond shall not be required where any person, corporation or copartnership of persons has obtained and paid a license as required by law for a period of five continuous years immediately preceding an application for a license for the current year, but the actions authorized in sections 150.010 to 150.290 for default of said bonds shall be prosecuted against such person, corporation or copartnership of persons, notwithstanding the fact that no such bond has been given."

In State ex rel. v. Rodecker, 145 Mo. 450, the defendant ceased doing business between the first Monday in March and the first Monday in June and the court held that his bond was forfeited for failing to file a statement of goods on hand between these dates and pay the taxes thereon.

Section 150.180, RSMo 1949, further provides that when any merchant shall commence business after the first Monday in January, he is required to execute a bond that he will furnish the required statement of the largest amount of goods on hand between the first day of the month he commences business and the first day of the next January, upon which statement he shall pay a tax, and reads:

"When any merchant shall commence the business of merchandising in any county in this state after the first Monday in January, in any year, he shall execute a bond as provided for in section 150.160, conditioned that he will 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 a tax based upon the

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same rate as other merchants, to be determined by the number of months in business in any calendar year."

Since this is in the nature of a license tax issued in the name of and to the individual merchant, under the foregoing statutes and in the absence of a statute authorizing a transfer of said license or tax to the purchaser, we believe that it was the legislative intent in enacting said statutes that the purchaser of any such business cannot operate said business upon the license issued to the seller of said business, notwithstanding the fact that the purchase is consummated during the calendar year in which the former owner was duly licensed and prior to the expiration of the license issued to him.

#### CONCLUSION

Therefore, it is the opinion of this department that the merchant, who was in business on January 1, 1952, and who filed a statement for tax assessment purposes later during the year's business, is liable for the full amount of tax assessed in accordance with the statement filed by said merchant. Furthermore, the purchaser of said business during 1952 is required to make application for a license and is liable for taxes based upon a statement to be filed by him in 1952 as provided by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON  
Attorney General

ARR:VLB