

COMMISSION MERCHANTS:

Cooperative marketing associations  
are not subject to the provisions  
of the statute applicable to com-  
mission merchants.

May 8, 1940

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Honorable Jewell Mayes, Commissioner  
Department of Agriculture  
Jefferson City, Missouri

Dear Mr. Mayes:

This is in reply to yours of recent date wherein  
you request an opinion from this department based on the  
following statement of facts:

"We respectfully request your ruling as to the definition of 'commission merchant', given in Section 12648, Article 21, Chapter 87, R. S.--Mo., 1929 as follows:  
'(a) Every person, firm, exchange, association or corporation who shall receive, sell or offer for sale on commission within this state any kind of farm products, shall be deemed to be a commission merchant and engaged in the commission business.'

"Question 1: Does the definition of 'commission merchant' apply to such cooperative marketing associations as the 'Ozark Fruit Growers' Association', a copy of whose Constitution and By-Laws is attached hereto?

"The 'Ozark Fruit Growers' Association', is a 'parent' marketing association, with which are affiliated a number of local marketing associations dependent upon the parent association as a marketing agency.

"Question 2: Are such several local associations, handling products pro-

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duced by their members, by virtue of their cooperative nature exempt from the requirements of the Missouri Commission Merchant Licensing Law?

"Question 3: Does your opinion on Question 1 apply to all cooperative marketing associations of similar organization?"

Together with your request we have examined the contract of the Ozark Fruit Growers' Association with its cooperative members and the articles of agreement and by-laws of that association.

Under Section 12648, as amended in Laws of Missouri 1939 at page 225, the term "commission merchant" is defined as follows:

"(a) Every person, firm, exchange, association or corporation who shall receive, sell or offer for sale on commission within this state any kind of farm products shall be deemed to be a commission merchant and engaged in the commission business. \* \* \* \*"

If the Ozark Fruit Growers' Association is a commission merchant as is defined under the foregoing definition, then it is subject to the provisions of Article 21 of chapter 87, R. S. Missouri 1929, which requires this association to obtain a license and to give a bond and provides for the punishment for the violation of the provisions of said article. The last section of this article, which is Section 12656, is an expression of the lawmakers to the effect that it was their intention that the General Assembly was providing for the exercise to the full extent of the regulatory and police powers of the state. By this section it is also clearly expressed that the lawmakers only intended that it apply to intra-state transactions.

The contract which you enclosed with your request is one with the Ozark Fruit Growers' Association and the

Aurora Fruit Growers' Association. By this contract it seems that the Ozark Fruit Growers' Association was to receive as compensation for its services three per cent of the gross proceeds of all cars of fruit sold or consigned to it for sale.

An examination of the articles of agreement of the Ozark Fruit Growers' Association shows that originally this association was incorporated under the chapter of the Revised Statutes governing manufacturing and business companies. The original purpose of the organization as is shown by Section 7 of its articles was as follows:

"To provide ways and means for the growers of fruit and other farm products in the State of Missouri, Arkansas and other states and territories, to secure, by co-operation among themselves, and with railroads and express companies and by all other lawful means, the cheapest and best transportation services for their fruits and other farm products, and the proper distribution, marketing and sale of same."

It will be seen that this organization was formed not only for the purpose of serving Missouri growers but those of Arkansas and other states and territories. It will also be seen that it was formed with the idea of cooperation among the members of the organization. This corporation was formed before the non-profit Cooperative Association Act of Missouri was passed, but by Section 26 of the by-laws of this association it seems that since those associations which are affiliated with the Ozark Fruit Growers' Association participate in the surplus funds after the current expenses have been paid, then the Ozark Fruit Growers' Association and the affiliated associations are operating under what would be termed a non-profit cooperative plan. Said Section 26 of the by-laws is as follows:

"If the report of the treasurer of the O. F. G. A. shows that there

is a surplus of funds on hand in excess of the needs for the current expenses, the same shall be pro-rated to the affiliating associations of the past season on the basis of the amount of business done by each Association."

Section 24 of the by-laws of said association provides as follows:

"Each local Association shall have its own local self government, rules and regulations, provided the same does not conflict with the rules and regulations of the O. F. G. A."

So it will be seen from the articles of agreement and the by-laws of the Ozark Fruit Growers' Association that the associations for which it acts as what may be termed the "parent" association go together and make up one and the same organization. In other words, the Ozark Fruit Growers' Association is only an arm through which the affiliated associations act for the purpose of the sale and distribution of their products.

We do not find any Missouri case directly in point on the question here involved, but in a Kentucky case the City of Owensboro et al. v. Dark Tobacco Growers' Association, 300 S. W. 350 at 352, wherein a similar set-up was under discussion and wherein the question of the relationship of the "parent" association to the affiliated associations and growers was discussed, and there the court said:

"In determining whether an agreement between parties is a sale or whether it is a mere contract of agency, isolated expressions in the instrument indicating whether it is one or the other are not necessarily controlling; on the contrary the courts will ignore apparently inconsistent language

used, and look to the real nature of the agreement between the parties, what its real purpose was, and what, from the nature of the transaction, must have been in the minds of the parties.

"In this case the association not only was the creature of the growers, but by its charter it had no right to make a profit out of the handling or sale of their products. The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its members, who were all either growers or landlords.

"A consideration of these facts makes it impossible that the parties could have had in mind any other thing than the creating of a sales agency in the execution of the several contracts. 22 R. C. L. p. 216; 2 C. J. pp. 420, 421; Haarparinne v. Butter Hill Fruit Growers' Association, 122 Me. 138, 119 A. 116."

As stated in that case, the Dark Tobacco Growers' Association was formed not for the benefit of the association but for the benefit of its members. So here the Ozark Fruit Growers' Association is not functioning for the benefit of the Ozark Fruit Growers' Association as an association but for the benefit of its members who are the affiliated associations which go to make up the Ozark Fruit Growers' Association.

The Ozark Fruit Growers' Association is merely a marketing association of the strawberry and fruit growers which is created and organized for the purpose of advantageous marketing of the various fruit growers' associations of that section of the state. As stated

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in your request, you say that the "Ozark Fruit Growers' Association" is a "parent" marketing association with which are affiliated a number of local marketing associations depending upon the "parent" association as a marketing agency.

CONCLUSION.

From the statement contained in your request, and from an examination of the contract enclosed together with suggestions and the by-laws and articles of agreement of the Ozark Fruit Growers' Association, and from the consideration of the statutes hereinbefore referred to, and the Kentucky case cited, it is the opinion of this department that the term "commission merchant" as defined in said statutes does not apply to such a cooperative marketing association as the Ozark Fruit Growers' Association, or to any other cooperative association which operates on the same or similar plan.

Respectfully submitted

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Assistant Attorney General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney General

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