

APPLICATION OF THE OHIO SALES TAX LAW TO FARM TRANSACTIONS—A REVIEW OF FUNDAMENTALS

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The seemingly instinctive and settled aversion of much of the citizenry to paying taxes is equaled in intensity only by the wholehearted endorsement of exemptions, exceptions and deductions from the tax base. The cynosure of taxpayer attention with respect to the Ohio sales tax law¹ appears to fall on what transactions are not subject to the state's sovereign power of taxation. That this is so in our tax-conscious times is not startling but it should be borne in mind that exemptions are not examples of legislative benevolence that can be interpreted in the abstract. Rather, such exemptions² and exceptions³ in the Ohio sales tax law become susceptible of proper interpretation only when they are viewed as integral parts of a tax law.

Although taxpayers welcome the benefits of exemptions and exceptions from the sales tax, it is also generally recognized that such exemptions make the interpretation of such law exceedingly difficult for both the taxpayer and the tax administrator. That exemptions and exceptions from the tax base complicate the administration of a sales tax law is a veracious, if somewhat prosaic, observation. Those taxpayers whose transactions fall within the scope of the various exemptions or exceptions from the Ohio sales tax law naturally look primarily at the language of the statutory exception. However, these exemptions and exceptions are circumscribed by other statutory provisions in the sales tax law which delineate the legislative intent. To hope for unanimity of view between the taxpayer and tax administrator with respect to the scope of sales tax exemptions and exceptions would, of course, be an ingenuous and impractical approach to the problem. Realism indicates that popularity has not characterized the tax collectors efforts even in Biblical times.⁴ It is submitted, however, that a restatement of basic principles of the sales tax law can be helpful in fostering taxpayer understanding as to the nature of limitations on the exemptions and exceptions from the tax base.

It is the purpose of this paper to consider the sales tax law in relationship to farming transactions. To properly present that subject it is deemed advisable to consider certain other aspects of the sales tax law which are germane to the application of the sales tax to any transaction.

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The views reflected in this article are expressed by the author as an individual and not in any official capacity.

¹ OHIO REVISED CODE, §§5739.01 to 5739.99, inclusive.

² OHIO REVISED CODE, §5739.02.

³ OHIO REVISED CODE, §5739.01.

⁴ Matthew 9:11, Revised Standard Version.

The exemptions and exceptions from the sales tax law accorded to farmers are subject to the same limitations as are the various other exemptions and exceptions.

In order to make the subsequent discussion as to the status of farm transactions under the sales tax law more meaningful, reference will be made to certain fundamental principles of the law. The pivotal and starting point in the Ohio sales tax law is the levying provision of OHIO REV. CODE SECTION 5739.02. It is therein provided that:

. . . an excise tax is hereby levied on each retail sale made in this state of tangible personal property.

Considered alone the above levy would place the sales tax law on a virtually unlimited tax base. Even though the law exempts and excepts various types of purchases from this levy, it should be remembered that initially every transaction involving the sale of tangible personal property in Ohio is subject to taxation unless specifically excluded by other provisions of the law. Undoubtedly, the General Assembly was cognizant of the administrative complications which would arise because of the various exemptions and exceptions in the sales tax law, for it is provided in OHIO REV. CODE SECTION 5739.02, that for the purpose of proper administration and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established. This presumption of taxability has been referred to and relied upon by the Ohio Supreme Court.⁵ In paragraph one of the syllabus of *National Tube Co. v. Glander*⁶, it was held that under the Ohio sales and use tax laws the presumption obtains that every sale or use of tangible personal property in the state is taxable.

Another limitation which surrounds the exemptions and exceptions from the sales tax is found in the rule of law pronounced by the Ohio Supreme Court that statutes relating to such exemptions or exceptions are to be given a strict construction. This rule of strict construction was set forth by the Court in the case of *National Tube Co. v. Glander*,⁷ wherein it was held in paragraph 2 of the syllabus:

Statutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto.

This syllabus rule appears to represent a definite departure from the former view of the Court expressed in the opinion in the case of *The Kroger Grocery and Baking Co. v. Glander*⁸ to the effect that exceptions from the definition of "retail sale" in the sales tax law, as differentiated

⁵ *Ornamental Iron Work Company v. Peck*, 160 Ohio St. 399, 116 N.E. 2d 577 (1953); *National Tube Company v. Glander*, 157 Ohio St. 407, 105 N.E. 2d 648 (1952); *Foster v. Evatt*, 144 Ohio St. 65, 56 N.E. 2d 265 (1944); *The Standard Oil Co. v. Peck*, 163 Ohio St. 63, 125 N.E. 2d 342 (1955).

⁶ 157 Ohio St. 407, 105 N.E. 2d 648 (1952).

⁷ *Ibid.*

⁸ 149 Ohio St. 120, 77 N.E. 2d 921 (1948).

from exemptions from the tax, must be given a liberal construction in favor of the taxpayer.

Having discussed the comprehensive language in which the sales tax law is levied and the statutory presumption of taxability, consideration should now be given to the various exceptions and exemptions from the tax which limit the tax base. Reference has been made to both exemptions and exceptions in the sales tax law. The exemptions from the tax are found in OHIO REV. CODE SECTION 5739.02, wherein it is stated that the tax does not apply to the transactions therein enumerated. These exemptions relate to various retail sales of tangible personal property which the General Assembly felt should not be subject to the sales tax. The law now contains eighteen different exemptions from the tax. It should be pointed out, however, that the sales tax law contained thirteen exemptions when it was originally enacted in 1935.

From the standpoint of tax administration, the exemptions contained in the Ohio sales tax law, OHIO REV. CODE SECTION 5739.02, do not present as complicated problems as do the exceptions in the law where tangible personal property is to be used by the consumer in a certain manner. OHIO REV. CODE SECTION 5739.01 provides that the term "retail sale" includes all sales except those in which the purpose of the consumer is:

- (1) To purchase the item for resale in the form in which it was received by him.
- (2) To incorporate the thing transferred as a material or part into tangible personal property to be produced for sale by manufacturing, assembling, processing or refining.
- (3) To use or consume the thing transferred *directly* in the production of tangible personal property for sale by manufacturing, processing, refining or mining; to use the thing transferred *directly* in *farming, agriculture*, exploration for and production of crude oil and natural gas, directly in making retail sales, directly in the rendition of a public utility service, and directly in certain other specified processes and personal service transactions.

(Emphasis supplied.)

Because the tax is levied on retail sales, the General Assembly has excepted from the tax various intermediate purchases of tangible personal property. The Ohio Supreme Court has held that the purpose of excepting sales of property used and consumed directly in the process of creating other tangible personal property for ultimate sale is to encourage the manufacture and production of more valuable personal property upon the sale of which a greater amount of tax can be collected from the consumer because of the enhanced value of the final product.⁹ The Court has also indicated that the purpose of the exceptions in the Ohio

⁹ *Ibid.*

sales tax law where property is used directly in producing other property for sale is to prevent the pyramiding of the tax.¹⁰

When the Ohio sales tax law went into effect in January 1935, the statute provided that the term "retail sale" did not include those sales in which the purpose of the consumer was to use the property transferred in manufacturing, retailing, processing or refining, or in the rendition of a public utility service. It is thus apparent that the exceptions from taxation were first intended to cover certain industries. However, in December 1935, the General Assembly amended the law whereby these original industry-wide exceptions were restricted to include the sales and use of only those items used or consumed directly in producing tangible personal property for sale by manufacturing, processing, refining, mining, farming and by certain other processes and services. In connection with the insertion of the adverb "directly" in the sales tax law, the Ohio Supreme Court¹¹ has made the following statement:

From the history of such statutory changes, it appears that the exception was first intended to cover certain industries. These industry-wide exceptions were finally restricted to include the sales and use of only those items of tangible personal property, in an industry, used or consumed *directly* in producing tangible personal property for sale.

What was the legislative intent in inserting the word "directly" in the existing statute? In our opinion, it was intended to narrow the field of that which was excepted sales and use, namely, to change an exception from one involving property used or consumed in certain industries to one involving property used or consumed in a certain manner by those industries. The action of the General Assembly in amending the section is presumed to have been made to effect some purpose. *Leader v. Glander*, Tax Commissioner, 149 Ohio St. 1, 77 N. E. 2d 69.

Of course, the adverb "directly"¹² has precipitated much litigation as to whether or not in any given situation property may be said to be so used for one of the excepted purposes. With respect to the various exceptions in the sales tax law to the definition of "retail sale", the Ohio Supreme Court¹³ has characterized the difficulty of interpretation by stating as follows:

It stands to reason that a determination in cases of this kind depends very largely on the peculiar facts of the particular case, and it is difficult, if not impossible, to formulate general rules which may be applied in other cases. Needless to say, some of the cases present close questions on the fact.

¹⁰ *Bailey v. Evatt*, 142 Ohio St. 616, 53 N.E. 2d 812 (1944).

¹¹ *Fyr-Fyter Co. v. Glander*, 150 Ohio St. 118, 80 N.E. 2d 776 (1943).

¹² In *Erie Railroad Co. v. Peck*, 160 Ohio St. 322, 116 N.E. 2d 304 (1953) the court, in deciding whether certain property was excepted from the sales tax said: "The source of the entire difficulty is the adverb "directly".

¹³ *National Tube Company v. Glander*, 157 Ohio St. 407, 105 N.E. 2d 648 (1952).

In the case of *Powhatan Mining Company v. Peck*,¹⁴ the Ohio Supreme Court listed seventeen other cases in which it had been called upon to determine whether there was a direct use in a particular activity of the items whose sale was claimed not to be subject to the sales or use taxes. The innate complexity of questions concerning exceptions in the sales tax law was reflected in the following statement of the Court in the above case:

What may appear to one person to be a direct use in a particular case may appear to another equally intelligent and reasonable person not to be a direct use. This probably explains many of the differences of opinion which have been exhibited by the decisions of this Court in determining whether, in a particular case, a direct use was or was not involved.

Most of the exceptions to the definition of "retail sale" set forth in OHIO REV. CODE SECTION 5739.01 are designed to avoid taxing intermediate sales where ultimately there will be produced for sale tangible personal property, the sale of which would be subject to the retail sales tax. The General Assembly, however, has excepted certain sales from taxation even though the property is not used in producing tangible personal property for sale. For example, OHIO REV. CODE SECTION 5739.01 excepts from the definition of "retail sale" all sales in which the purpose of the consumer is to use or consume the property transferred directly in industrial cleaning of tangible personal property, directly in the rendition of a towel or linen service supply, directly in rendering farming, agricultural, horticultural or floricultural services, directly in rendering services in the exploration for and production of crude oil and natural gas or directly in the rendition of a public utility service.

Against the previous background as to the scope of the exemptions and exceptions in the Ohio sales tax law, attention will now be directed to the specific status of farming transactions under the sales tax law. If a person engaged in farming or agriculture claims that a transaction is exempt from the sales tax under OHIO REV. CODE SECTION 5739.02, or that a given transaction is excepted from the definition of "retail sale" by OHIO REV. CODE SECTION 5739.01, he, like any other taxpayer claiming such exempted status, is faced with the following limitations engrafted on those exemptions and exceptions by other provisions of the sales tax law:

1. OHIO REV. CODE SECTION 5709.02 levies the tax on each retail sale made in this state of tangible personal property.
2. For the purpose of preventing evasion of the tax, OHIO REV. CODE SECTION 5739.02 sets forth the presumption that all sales made in this state are subject to the sales tax until the contrary is established.
3. The Ohio Supreme Court has announced the rule that

¹⁴ 160 Ohio St. 389, 116 N.E. 2d 426 (1953).

statutes relating to the exemptions and exceptions from the sales tax are to be strictly construed and one claiming such exemption or exception must affirmatively establish his right thereto.¹⁵

APPLICATION OF SALES TAX TO FARMER-CONSUMER

Consideration will now be given to the status of the farmer as a consumer under the sales tax law. As a consumer the farmer, like any other purchaser, must pay the sales tax on all of his purchases of tangible personal property unless certain transactions have been exempted from the tax by OHIO REV. CODE SECTION 5739.02, or that such transactions are excepted from the definition of "retail sale" by OHIO REV. CODE SECTION 5739.01. It is well to point out at this time that the Ohio sales tax is levied against the consumer. In this respect OHIO REV. CODE SECTION 5739.03 provides that the tax:

. . . shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer the full and exact amount of the tax payable on each taxable sale, and shall evidence the payment of the tax by cancelling prepaid tax receipts, equal in face value to the amount of the tax . . .

In the case of *Cole Bros. Circus v. Bowers*,¹⁶ the Ohio Supreme Court held that under OHIO REV. CODE SECTION 5739.03, the thrust of the sales tax is upon the vendee or consumer with the exception of where the vendor prepays the tax by virtue of OHIO REV. CODE SECTION 5739.05. That the burden of the sales tax falls upon the consumer was clearly reflected by the following statement of the Ohio Supreme Court in the case of *Winslow-Spacarb, Inc. v. Evatt*¹⁷ wherein it was stated:

It is apparent that while a vendor making taxable sales must supply himself with prepaid tax receipts, thus prepaying the tax into the public treasury, the sales tax is essentially a consumer's tax ultimately paid by the consumer.

As a consumer the farmer is not granted any exemptions under the sales tax law, OHIO REV. CODE SECTION 5739.02, that are applicable only to farming transactions. Section 5739.02 (B)(3) exempts from the tax the sales of feed and seeds. Of course this exemption is availed of by those engaged in farming. Another exemption in Section 5739.02 (B)(2), which is of economic interest to farmers is the exemption for sales of food for human consumption off the premises where sold, which exemption is necessitated by the provisions of Section 12, Article XII, of the Ohio Constitution.¹⁸ The various other exemptions set forth in OHIO

¹⁵ *National Tube Company v. Glander*, 157 Ohio St. 407, 105 N.E. 2d 648 (1952).

¹⁶ 163 Ohio St. 72, 125 N.E. 2d 332 (1955).

¹⁷ 144 Ohio St. 471, 59 N.E. 2d 924 (1945).

¹⁸ Article XII, Section 12, provides: "On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold."

REV. CODE SECTION 5739.02, apply generally to all consumers and not especially to those engaged in farming.¹⁹

Of more concern to farmers are the provisions of OHIO REV. CODE SECTION 5739.01, wherein certain farming transactions are excluded from the definition of "retail sale" and hence, because the sales tax applies to retail sales, such farm transactions are not subject to the tax. The applicable portion of OHIO REV. CODE SECTION 5739.01, provides that the terms "retail sale" and "sales at retail" include all sales except those in which the purpose of the consumer is:

. . . to use or consume the thing transferred directly in the production of tangible personal property for sale by . . . farming, agriculture . . . and persons engaged in rendering farming, agricultural . . . services for others shall be deemed to be engaged directly in farming, agriculture . . .

As in the case of the various other exceptions from the definition of "retail sale" in OHIO REV. CODE SECTION 5739.01, where property is used in a certain manner, the recurring problem is whether the farmer purchases tangible personal property to be used directly in farming. The subject of controversy is the adverb "directly."

Difficulty of interpretation centers on whether the farmer uses a thing transferred directly in the production of tangible personal property for sale by farming or agriculture. Usually it can be readily determined whether a person is engaged in a farming process, but the further question to be resolved under OHIO REV. CODE SECTION 5739.01, is whether the purchased property is used directly in such process.

There is a paucity of judicial interpretation as to what transactions are to be considered as coming within the scope of the farming exception. However, the Ohio Supreme Court has pronounced some rules of guidance to determine whether property is used directly in farming. In the case of *Saunders Mills, Inc. v. Evatt*,²⁰ the Court was presented with the following factual situation:

The taxpayer was engaged in the manufacture and sale of alfalfa hay. It procured alfalfa hay from leased lands, and trucks were used solely in the hauling of such hay from the fields to the taxpayer's dehydrating plants.

Confronting the court was the question of whether such trucks were used directly in the production of tangible personal property for sale by farming or manufacturing. The Tax Commissioner had taken the position that the sales applied to the purchase of such trucks since they were used exclusively in transporting the alfalfa hay from the fields where grown to the dehydrating plants over the public roads and were not used in any actual manufacturing or farming process. The Court concurred

¹⁹ OHIO REVISED CODE, §5739.02 now contains eighteen exemptions from the tax.

²⁰ 139 Ohio St. 229, 39 N.E. 2d 526 (1942).

in the position taken by the Tax Commissioner and the Board of Tax Appeals, and held that such trucks were not used directly in farming since they were not engaged in actually sowing, drilling, cultivating or harvesting the hay, or in converting it into a manufactured product.

The rationale of the court's decision seems to be that the trucks were used merely as transportation devices to carry the hay to the dehydrating plant at which point the processing began. Hence, the trucks were not used directly in farming because the farming process had ended, and such trucks were not used directly in manufacturing or processing since the hay was merely transported to the processing plant.

The ruling of the court in this case was a harbinger of future pronouncements by the court as to the scope of other exceptions in the sales tax law where property is claimed to be used directly in the production of tangible personal property for sale by manufacturing and processing.

That the word "directly" is a definite term of limitation is clearly reflected by decisions of the Ohio Supreme Court which adhere to the ruling of the *Saunders Mills, Inc., v. Evatt*²¹, that transportation devices which carry property to the point where processing begins or which carry completed products to various distribution points, are subject to the sales tax.

In the case of *Asphalt Corporation v. Glander*²², the court interpreted the word "directly" as used in connection with the various use exceptions in OHIO REV. CODE SECTION 5739.01, by stating:

When the General Assembly excepted from taxation the sale of those things which were to be used or consumed directly in the production of tangible personal property for sale by processing, it had in mind only such articles as had a direct part in the processing. Sales of instrumentalities of transportation and other articles or things which are necessary to carry on the business of processing, but which themselves have no part directly in the production, were not excepted.

In this case the court held that certain cranes, the sole function of which was the conveying of ingredients to a place of processing, and which have no part in the actual processing itself, were not used directly in the production of tangible personal property for sale by processing and therefore were not excepted from the sales tax. The court referred to the doctrine announced in the *Saunders Mills case*²³ and analogized by saying that since the functions of the trucks in the *Saunders* case and the cranes in the *Asphalt Corporation* case were solely transportation, there was no difference in the principles involved in both cases.

In reviewing the various cases concerning the scope of the term "directly" the court made the following statement:

The distinction which this court has logically drawn in reference

²¹ *Ibid.*

²² 152 Ohio St. 497, 90 N.E. 2d 366 (1950).

²³ 139 Ohio St. 229, 39 N.E. 2d 526 (1942).

to transportation instrumentalities is that if such instrumentalities are used solely to transport materials to the point of processing, or to transport them from the place of processing after they have been fully completed, they are not used directly in the production of the processed property, whereas if such instrumentalities are used solely to transport partially processed materials to another location where the processing is continued or completed by the same processor, they are used directly in the production of the processed property.

The limitation which the Ohio Supreme Court had placed on the interpretation of whether property was used directly in farming in the *Saunders Mills* case, was later relied upon by the Ohio Board of Tax Appeals²⁴ in a determination that tangible property owned by a person who operated as a contractor in clearing, reclaiming and draining land for cultivation, was not used directly in farming and hence, was subject to the sales tax.²⁵ It was contended by the taxpayer that the clearing, reclaiming, and draining of land for cultivation constituted farming and that property so used for the preparation of land for producing crops was a direct use in production of such crops. The taxpayer further contended that the use of such equipment in clearing and reclaiming land for cultivation was just as necessary and direct a use as was the use of a plow on land already prepared for cultivation.

The Tax Commissioner took the position that the equipment was not used directly in farming since it had no contact with any crops produced and that the taxpayer's activities resulted only in making the land suitable for subsequent cultivation and production of crops. The Board relied upon the conclusions set forth in the *Saunders Mills, Inc. v. Evatt case*²⁶ that the trucks which transported the alfalfa hay from the fields over the public roads to dehydrating plants were not engaged in actually sowing, drilling, cultivating or harvesting the hay. In this connection the Board stated:

The clearing and drainage of land must of necessity precede its cultivation. Its clearing will not produce personal property for sale other than timber cut therefrom. Clearing and draining land but makes it capable of being farmed. If it then lies fallow it will produce no crops save weeds and second growth. It must be ploughed, worked and weeded before it can produce crops . . .

The statutory exception with respect to farming as set forth in OHIO REV. CODE SECTION 5739.01, relates not only to things used directly in the production of tangible personal property for sale by farming and agriculture, but further states that persons engaged in rendering farming

²⁴ OHIO REV. CODE, §5703.02 et seq. provides for a three-member Board of Tax Appeals whose various functions include hearing appeals from final orders issued by the Tax Commissioner. See also Ohio Revised Code, §5717.02.

²⁵ *Replogle v. Glander*, Tax Commissioner, No. 63070, October 9, 1947.

²⁶ 139 Ohio St. 229, 39 N.E. 2d 526 (1942).

and agricultural services for others shall be deemed to be engaged directly in farming and agriculture. The taxpayer contended, therefore, that he stood in the same relation to the farmer as does a thresher or owner of a combine or bailer who performs custom service in a community. The Board of Tax Appeals, however, thought there was a discernible difference since the taxpayer in reclaiming and clearing land did not perform a service which directly contributes to the production of the annual crop for sale or use.

In order to properly administer the sales tax law with respect to excepted farm purchases, the Tax Commissioner has promulgated Rule No. 42. It is important to note that this administrative rule of the Tax Commissioner has the force and effect of law unless it is unreasonable or in conflict with statutory enactment governing the same matter.²⁷ Hence, every effort is made to have such rules clearly and accurately reflect the provisions of the sales tax law. Such rules are necessary to implement the statute by way of covering factual situations which could not practically be inserted in the taxing statute. With regard to the rule making authority of the Tax Commissioner, the Ohio Supreme Court, in the case of *Kroger Grocery and Baking Company v. Glander*,²⁸ stated:

Such rules and regulations are necessary because of the infinite detail essential in the consideration of an application and the interpretation of the law to concrete and specific circumstances and situations, the incorporation of which in the statute itself would be impracticable or impossible.

Rule No. 42 of the Department of Taxation defines the term "farming" as the occupation of tilling the soil for the production of crops as a business as it includes the raising of farm livestock, bees, or poultry where the purpose is to sell such livestock, bees, or poultry or the products thereof as a business. Agriculture is defined by the rule as the cultivation of the soil for the purpose of producing vegetables and fruits and includes gardening or horticulture together with the raising and feeding of cattle or stock for sale as a business.

Rule No. 42 reflects the provisions of OHIO REV. CODE SECTION 5739.01 by providing that the sales tax status of tangible personal property used in farming is determined by the use of such property. It is provided therein that to be excepted from the tax the property sold must be used directly in the production of tangible personal property for sale or in the stimulation of the growth of products which will be sold.²⁹ The

²⁷ *The Ransom & Randolph Company v. Evatt*, 142 Ohio St. 398, 52 N.E. 2d 738 (1944); *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 77 N.E. 2d 921 (1948).

²⁸ *Ibid.*

²⁹ In connection with the "use" exceptions in OHIO REV. CODE §5739.01, a situation may be presented where equipment is used partially for a purpose not subject to taxation. The applicable rule of law was announced as follows by the Ohio Supreme Court in *Mead Corp. v. Glander*, 153 Ohio St. 539, 93 N.E. 2d 19

rule further draws a line of demarcation between a direct use of property which is excepted from taxation and indirect uses of property which are taxable. In this respect the rule provides that articles used in producing or stimulating production must be distinguished from articles used in storing, distributing, or selling products after they have been harvested. By way of further example, the rule states that sales of materials such as lumber, nails, glass and similar items to be used in the construction or repair of buildings shall be subject to the tax.

It is recognized by Rule No. 42 that various items of property will be used directly in the production of tangible personal property for sale³⁰ by farming or agriculture. Hence, the rule provides that all implements and articles used in cultivation or used to stimulate growth of crops which are to be sold are deemed to be used directly in the production of tangible personal property and the sales thereof are not subject to the sales tax. Of course, it is impossible for Rule No. 42 to cover specifically the infinite variety of factual situations that can arise as to whether given property may be said to be used directly in farming.

Judicial interpretation has, however, held that property in order to be excepted from the sales and use³¹ taxes must be used directly in the excepted process. The Ohio Supreme Court has evolved the principle that property which is used in some manner prior to the actual beginning of manufacturing and processing is not used directly and hence is subject to the sales tax. The Court has further marked out the line of taxability by holding that property which is used in some manner after the excepted process has been completed is also not used directly and hence such purchases are taxable. Illustrative of these rules of law are the cases of *National Tube Co. v. Glander*³² and *The Crowell-Collier Publishing Co. v. Glander*.³³

In the *National Tube* case the court was concerned with the taxability of machinery and equipment consisting of ore unloaders and ore bridges. The ore unloaders were especially designed pieces of heavy machinery used in unloading iron ore and limestone from the holds of docked ships arriving over Lake Erie. These machines moved along the length of the docks and were equipped with buckets that scooped the materials out of the holds of ships, placed such material on a conveyor apparatus contained in the unloader and from there the material was deposited in a concrete ore trough which extended almost the entire length of the docks. The ore bridges were also equipped with buckets which

(1950): "Where equipment is employed primarily in a way which excepts its purchase from the sales and use tax, its incidental use otherwise will not destroy its excepted status."

³⁰ The term "sale" is defined in OHIO REV. CODE, §5739.01. See also *Piper v. Glander*, 149 Ohio St. 109, 77 N.E. 2d 714 (1948).

³¹ OHIO REV. CODE §§5741.01 to 5741.99, inclusive.

³² 157 Ohio St. 407, 105 N.E. 2d 648 (1952).

³³ 155 Ohio St. 511, 99 N.E. 2d 649 (1951).

removed the ore from the ore troughs and then scattered such ore over an area called the storage yard. It was claimed by the taxpayer that such scattering was done in such a way as to blend the ore preparatory to its introduction into blast furnaces. The ore bridges also picked up from the storage pile the ore desired and loaded it into cars which transported the ore to a central point known as the stock house from whence it was taken by a skip hoist to the blast furnaces.

The court took the view that in approaching the problem of whether certain property was excepted from the sales tax, it must be borne in mind that under the sales tax law the presumption prevails that every sale or use of tangible personal property in this state is taxable. Moreover, the court said that laws relating to exemption or exception from taxation must be strictly construed and anyone claiming such exemption or exception must affirmatively establish his right thereto. It was held by the court that the ore unloaders and the ore bridges were employed in operations *preliminary* and *preparatory* to manufacturing or processing and were not used directly in producing tangible personal property for sale by manufacturing or processing and hence the purchases of such equipment were subject to the sales tax.

In the Crowell-Collier case the operative facts were as follows:

The taxpayer was engaged in the business of manufacturing, publishing and distributing magazines. It was contended by the taxpayer that a certain conveyor was excepted from taxation by virtue of its claimed use directly in producing tangible personal property for sale by processing. This conveyor operated from a large mailing room on the second floor of the publishing plant where the magazines were assembled, bound, bundled and labeled. The conveyor transported such magazines to railroad cars and other transportation vehicles which were located on the first floor of the plant. The Tax Commissioner took the position that the conveyor was a transportation instrument which conveyed the finished product from the place of processing after processing had been completed. In this respect the Commissioner relied upon the case of *Tri-State Asphalt Corp. v. Glander*,³⁴ previously referred to. With respect to the taxability of such conveyor, the court held:

Here the magazines are completely printed, addressed, bundled and packaged when the conveyor picks them up and delivers them to railroad cars and trucks on the first floor. *The conveyor renders no functional service in the course of processing them. Production is completed when the conveyor picks them up.* Its purchase is clearly subject to the use tax. (Emphasis added).

EXEMPTED AND EXCEPTED FARM SALES—

LEGAL REQUIREMENT OF EXEMPTION CERTIFICATES

Attention will first be focused on those sales of items which are excepted from taxation by virtue of being used directly in the production

³⁴ 152 Ohio St. 497, 90 N.E. 2d 366 (1950).

of tangible personal property for sale by farming or agriculture. Despite the foregoing discussion as to the limitations imposed on the farming exception by the sales tax law, there are, of course, various items of property used directly in farming so as not to be subject to the sales tax. In this respect Rule No. 42 of the Department of Taxation states that any machinery and equipment used directly in the cultivation of the soil is excepted from the tax. However, even as to the sales of property which fall within the direct use exception for farming or agriculture, certain legal requirements must be observed by the farmer-consumer and also by the vendor who supplies such property to the farmer.

As previously adverted to, the Ohio sales tax is imposed on the consumer.³⁵ With respect to those sales to which the tax does not apply, OHIO REV. CODE SECTION 5739.03 provides that the consumer must furnish to the vendor, and the vendor must obtain from the consumer, a certificate indicating that the sale is not legally subject to the tax. OHIO REV. CODE SECTION 5739.03 further establishes a presumption of taxability if such certificate is not furnished or obtained within the period for filing the vendor's return for the semi-annual period in which the sale is consummated. Hence, where a farmer purchases property claimed to be used directly in farming, the farmer must furnish and his vendor must obtain an exemption certificate in the form prescribed by the Tax Commissioner.³⁶

It should be noted that the sales tax law has a dual application in that the law places certain obligations on both the consumer and the vendor. It is important from the standpoint of the vendor that his farmer-customer furnish him with the proper exemption certificate on sales which the farmer claims to be excepted from the tax in order that the vendor may have proper evidence of such excepted sales when the vendor files the semi-annual sales tax return required by OHIO REV. CODE SECTION 5739.12. A complementary provision of the sales tax law, OHIO REV. CODE 5739.10, levies a three per cent excise tax on the receipts of vendors derived from retail sales. This statute, however, does not impose an independent tax but is an enactment designed to insure to the state approximately the receipt of taxes imposed under the bracket taxes levied by OHIO REV. CODE SECTION 5739.02.³⁷ The three per cent tax on the receipts of vendors is subject to the same exemptions and exceptions as the bracket taxes levied by OHIO REV. CODE SECTION 5739.02. Such tax is determined by deducting from the sum representing three per cent of the receipts from "retail sales", as defined in OHIO REV. CODE SECTION 5739.01, the amount of tax paid to the state by the means of can-

³⁵ OHIO REV. CODE, §5739.03.

³⁶ Rule No. 135 of the Department of Taxation provides for unit and blanket exemption certificates. Rule No. 93 prescribes the forms for such unit and blanket exemption certificates. Rule No. 93 further provides that the purchaser must state statutory reason for claiming exemption or exception.

celing prepaid tax receipts. The vendor, in filing his semiannual sales tax return, must report gross sales minus the exempted or excepted sales and sales under forty-one cents to obtain net taxable sales. In order to substantiate the exempted or excepted sales, the vendor is required to obtain and preserve the exemption certificates properly executed by his customer.³⁸ If the exemption certificate is not obtained by the vendor within the period for filing the vendor's return for the semiannual period in which a sale is consummated, it is provided in OHIO REV. CODE SECTION 5739.03³⁹ that it shall be presumed that the tax applies. However, it is further provided that the failure to have obtained such exemption certificate shall not prevent a vendor from establishing that the sale is not subject to the tax and in such event the tax shall not apply.

It is provided in OHIO REV. CODE SECTION 5739.13, that if any vendor fails to collect the tax⁴⁰ or any consumer fails to pay the tax imposed by OHIO REV. CODE SECTION 5739.02, such vendor or consumer shall be personally liable for the amount of tax applicable to the transaction. The Tax Commissioner is authorized to make an assessment against either the vendor or the consumer provided, however, that no assessment shall be made against a vendor where such vendor can establish that he charged a purchaser or consumer the tax which the purchaser or consumer did not pay. Hence, if it is determined that a farmer-consumer should have paid the sales tax on a given transaction, the Tax Commissioner may formally assess such a tax against the consumer by virtue of OHIO REV. CODE SECTION 5739.13. It, of course, should be noted that the mere furnishing of an exemption certificate by the consumer to the vendor does not cloak the transaction with tax immunity if the tax actually applied to such sale. The consumer who issues an exemption certificate to his vendor involving a transaction determined by the Tax Commissioner to be subject to the sales tax may be assessed for such tax by virtue of OHIO REV. CODE SECTION 5739.13. With respect to the consumer, OHIO REV. CODE SECTION 5739.03, also provides that failure to furnish an exemption certificate shall not prevent a consumer from establishing that the sale is not subject to the tax and in such event the tax shall not apply.

In certain instances exemption certificates need not be obtained by the vendor or furnished by the consumer. In this respect OHIO REV. CODE

³⁷ Winslow-Spacarb, Inc. v. Evatt, 144 Ohio St. 471, 59 N.E. 2d 924 (1945).

³⁸ Rule No. 71, Ohio Department of Taxation.

³⁹ OHIO REV. CODE, §5739.03 was amended effective August 6, 1955, by Amended House Bill No. 256. The former statute applied a more rigid requirement by providing that if the exemption certificate was not obtained within the period for filing the vendor's return for the semiannual period in which the sale is consummated, the tax shall apply. See Bellows Co. v. Bowers, 165 Ohio St. 9 (1956).

⁴⁰ OHIO REV. CODE §5739.13, further states that if any vendor collects the tax imposed by OHIO REV. CODE §5739.02, and fails to cancel the prepaid tax receipts required by the sales tax law, he shall be personally liable for the amount of such tax.

SECTION 5739.03, provides that no such certificate need be obtained or furnished where:

1. The identity of the consumer is such that the transaction is never subject to the tax imposed.
2. Where the item of tangible property sold is never subject to the tax imposed, regardless of use.
3. When the sale is in interstate commerce.

Examples of the first exception are sales to the state of Ohio or its political subdivisions, sales to the federal government or its agencies which are not subject to the taxing power of this state under the United States Constitution, and sales of tangible personal property to charitable and religious organizations.⁴¹ An example of the second exception where the property is never taxable regardless of use, is the sale of feed and seeds,⁴² or the sales of ice which are specifically exempted by OHIO REV. CODE SECTION 5739.02. By way of contrast, however, exemption certificates are required when a consumer claims that a sale is excepted from the tax by virtue of the thing transferred being used directly in producing tangible personal property for sale by farming, and the other processes or services referred to in OHIO REV. CODE SECTION 5739.01.

Brief reference will be made to certain procedural requirements of the sales tax law when the Tax Commissioner makes an assessment against a consumer or vendor as authorized by OHIO REV. CODE SECTION 5739.13. SECTION 5739.13, provides that when the Commissioner makes an assessment he shall serve written notice on the person assessed and such notice may be served upon such person either personally or by registered or certified mail. Under the procedural requisites provided in OHIO REV. CODE SECTION 5739.13 the person assessed may file a petition for reassessment with the Tax Commissioner within thirty days after service of the notice of assessment. Provision is made for an administrative hearing and review of such assessment by the Tax Commissioner. The Commissioner's decision with respect to such petition for reassessment may be appealed to the Board of Tax Appeals in the manner provided in OHIO REV. CODE SECTION 5717.02. A further appeal to an appropriate court of appeals or to the Ohio Supreme Court is authorized from the decision of the Board of Tax Appeals by virtue of OHIO REV. CODE SECTION 5717.04.

It is beyond the scope of this paper to consider the status of the farmer who is making retail sales of tangible personal property as a business so as to require such farmer to act as a vendor and to collect the sales tax from his customers. In this respect it will only be noted that OHIO REV. CODE SECTION 5739.17 provides that no person shall engage in making retail sales as a business without having a vendor's license.

⁴¹ All of such sales are exempted from the sales tax by Ohio Revised Code §5739.02.

⁴² *White Truck Sales, Inc. v. Peck*, 162 Ohio St. 251, 122 N.E. 2d 790 (1954).

OHIO REV. CODE SECTION 5739.02 exempts from the tax casual and isolated sales⁴³ by a vendor not engaged in the business of selling tangible personal property except as to such sales of motor vehicles and house trailers.

Because of the inherent complexity of tax laws it is to be expected that various factual situations will arise wherein abstruse problems of interpretation will be presented. Thus it is in the Ohio sales tax law with respect to the provisions of OHIO REV. CODE SECTION 5739.01, which except from the tax sales of property used directly in the production of tangible personal property for sale by farming, agriculture and various other processes and services. Man's quest for certitude cannot be completely fulfilled by way of general rules which can be readily applied to resolve all problems as to whether property is excepted or exempted from the sales tax. Difficulty of interpretation with respect to tax laws is not a unique characteristic of the Ohio sales tax law since intricacy seems to be a trait indigenous to all taxation statutes. Although the Ohio sales tax law contains many exceptions and exemptions from the tax, it has been a prolific revenue producer for the state of Ohio and the local government fund. In the year of its inception, 1935, the sales tax law yielded \$21,668,857.00. The revenue derived therefrom has steadily increased throughout the years to a total yield from sales and use taxes exceeding 206 million dollars for the fiscal year ending June 30, 1955. This yield of the sales and use tax laws constituted nearly 26% of total tax revenue accruing to the state of Ohio. This fact has an assuaging effect upon Ohio's tax officials when they are beset by the problems pertaining to exemptions and exceptions from the tax.

⁴³ Rule No. 137 of the Ohio Department of Taxation provides, in part, with respect to casual and isolated sales:

"Where a person sells his household furniture; where a farmer sells his farm machinery, implements or farm equipment other than motor vehicles or house trailers; or where a grocer sells his cash register, counters or other store fixtures at auction or otherwise, such persons are not 'engaged in business' of selling tangible personal property at retail with respect to this property but are making casual or isolated sales."