



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-1873

Re: (a) When an application is made to the Comptroller of Public Accounts to transfer to an assignee or purchaser a chain store tax license, should such application be accompanied by a filing fee of 50¢ provided by Sec. 2, Article 111d, Penal Code of Texas? (b) Where one such transfer or assignment of the chain store license has been made, may a second transfer or assignment of such license, during the life of said license, be authorized; or should such second purchaser or assignee be required to make application for a new chain store tax license for the remainder of the year?

By your letter of November 10, 1939, you request of this department an opinion upon the two following questions, which we quote from your letter:

"When an application is made to this department to transfer a chain store tax license to an assignee or purchaser, should such application be accompanied by the 50¢ filing fee provided for in Section 2 of the Chain Store Tax Act, which is Article 111d of the Penal Code?"

"Where a store has been transferred more than one time during the life of the license, should the Comptroller authorize a transfer of the license to the second purchaser, or is the second purchaser required to make application for a new license for the remainder of the year? In this connection I refer you to Articles 7055 and 7056, R.C.S."

Section 2 of Article 1111d, Penal Code of Texas, commonly known and cited as the "Chain Store Tax Law," provides generally that any person, firm or corporation desiring to operate, maintain, open or establish a store or mercantile establishment in this State shall make application for a license so to do in the form and manner provided, and further requires that "each application shall be accompanied by a filing fee of fifty cents (50¢) for each store or mercantile establishment operated or to be operated for the purpose of defraying the costs of administration of this Act."

Section 3 of the above cited Act provides that if, upon examination, "an application is found to be satisfactory, and if the filing and license fees as herein prescribed, shall have been paid, the Comptroller of Public Accounts shall issue to the applicant a license for each store or mercantile establishment for which an application for a license shall have been made." (Emphasis ours).

Section 4 of the Act provides that all licenses shall be issued for a period of the calendar year so as to expire on the 31st day of December of each year, and on or before this date a renewal license for the succeeding year shall be issued by the Comptroller of Public Accounts, upon application therefor, accompanied by the filing fee of fifty cents for each store.

Section 5 of the Chain Store Act provides for the payment, in addition to the above described filing fee required by Sections 2 and 4 of the Act, of a license fee, graduated according to the number of stores owned and operated by the licensee.

In discussing the nature of this so-called license fee, the Supreme Court of Texas, in the case of *Hurt et al vs. Cooper et al*, reported at 110 S.W. (2d) 896, spoke as follows:

"Applying this principle to the act in question, we experience no difficulty in reaching the conclusion that the so-called license fees levied thereby are primarily occupation taxes. The act makes two separate levies. One is a levy of a filing fee of 50 cents for each store, and as to this levy it is provided that its purpose is to defray the cost of the administration of the act, and that the expenses incurred in its administration shall not

exceed the amount realized therefrom. The other is a levy of a license fee for each store from which much revenue will be realized. The act apportions the revenue between the available school fund and the general fund, and the only fact stated for the existence of an emergency is that the state is badly in need of additional revenue. The tentative opinion of the Court of Civil Appeals accompanying this certificate correctly answers this question in the following language: "We think the primary purpose of the Act was to raise revenues, although the levy is mentioned as a "license fee." The emergency clause reciting the need of additional revenue; the amounts levied being far in excess of regulatory needs, and the distribution made after collection, indicate clearly that the Act was intended, primarily at least, as a revenue measure. We do not think it a matter of significance that the levy is called a "license fee," as its payment gives the right to carry on the business without the performance of any other condition."

This decision has a direct bearing upon the determination of the instant question because, in holding the chain store license fee levied by Section 5, Article 1111b, Penal Code of Texas, to be an occupation tax, the chain store tax license issued by the Comptroller of Public Accounts, upon payment of such license fee or occupation tax, would be governed squarely by the terms and provisions of Article 7055 and 7056, Vernon's Annotated Civil Statutes, insofar as such statutes are applicable to the attempted transfers or assignments of the license involved here. Such statutes provide as follows:

"Art. 7055. Any person, firm, corporation, or association of persons, who shall be the legal owners or holders of any unexpired occupation license issued in accordance with the laws of this State, may transfer the same on the books of the officer by whom the same was issued."

"Art. 7056. The assignee or purchaser of such unexpired occupation license shall be authorized to pursue such occupation under such unexpired license for and during the unexpired term thereof, provided that such assignee or purchaser shall, before following such occupation, comply in all other respects with the requirements of the law provided

Hon. George H. Sheppard, Page 4.

for in the original applications for such licenses. Nothing in this law shall be so construed as to authorize two or more persons, firms, corporations or associations of persons to follow the same occupation under one license at the same time. Whenever any person, firm, corporation or association of persons following an occupation shall be closed out by legal process, the occupation license shall be deemed an asset of said person, firm, corporation or association of persons, and sold as other property belonging to said person, firm, corporation, or association; and the purchaser thereof shall have the right to pursue the occupation named in said license, or transfer it to any other person; provided, such occupation license shall under no circumstances be transferred more than one time." (Underlining ours.)

The underlined portion of Article 7056, Vernon's Annotated Civil Statutes, next above quoted, furnishes a specific answer to your second question. By the letter of the statute an unexpired occupation tax license such as the one involved here is transferable or assignable only one time during the calendar year for which such license is effective, and consequently you would not be authorized to recognize the validity of such second transfer or assignment. Such second transferee or assignee would be required to procure a new license for the balance of the calendar year upon formal application accompanied by the filing fee of fifty cents, in accordance with Section 2 of the Chain Store Tax Act.

Recurring now to your first question, it is our opinion that the filing fee of fifty cents would not be required to accompany an application or request for a certificate recognizing the first transfer or assignment of the chain store tax license. This so-called application is not the application contemplated or required by Section 2 of Article 1111d, Penal Code of Texas, for the issuance of a new license or licenses originally issued to the person, firm or corporation desiring to operate, maintain, open or establish stores or mercantile establishments in Texas, and we are not authorized to enlarge the scope of Section 2 of this Act so as to make it comprehend a request or application growing out of an assignment or transfer of a chain store tax license, in connection with which the filing fee of fifty cents has already been paid. Under the holding of the Supreme Court in the case of Hurt et al vs. Cooper et al, supra, this

Hon. George H. Sheppard, Page 5.

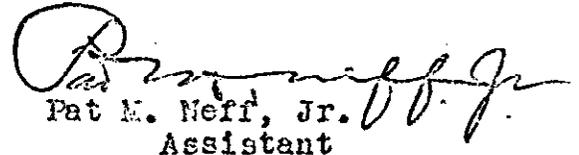
filing fee of fifty cents was held to be a regulatory fee for the purpose of defraying expenses incident to applications for chain store tax licenses, rather than a fee under the powers of taxation. The chain store tax license, for which such filing fee was originally paid, is, under the facts given in connection with your first question, outstanding, and will remain so until the end of the calendar year. Consequently, any expense incident to the transfer or assignment of such chain store tax license is not taken care of by the filing fee of fifty cents originally paid, nor is any additional fee required for such purposes by any language which can be pointed to in the Chain Store Tax Act.

Trusting this fully answers your inquiry, we are

Yours very truly

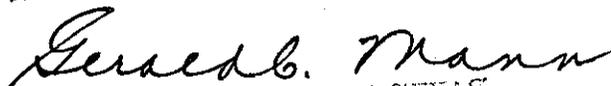
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APPROVED DEC 5, 1959


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