OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Hon. Gilbert Smith
County Attorney
Jones County
Anson, Texas

Dear Sir:

Opinion No. O-2190
Re: Application of Subd. 2 of Art. 7047, R.C.S., to the individual described below.

Receipt is acknowledged of your letter of recent date requesting the opinion of this department touching the above matter. The first paragraph of your letter reads:

"There is some difference of opinion as to whether Subdivision 2, of Article 7047, Revised Civil Statutes of Texas, applies to Watkins and Rawleigh agent, who travels about a county selling, soaps, fly sprays, extracts, pans and utensils, patent medicines and etc."

You state that the factual background to your inquiry corresponds to the facts in the case of COLLINS v. STATE, 182 S.W., 327.

Subdivision 2 of Article 7047, provides:

"2. TRAVELING VENDORS OF PATENT MEDICINES. From every traveling person selling patent or other medicines, fifty dollars, and no traveling person shall so sell until said tax is so paid. This tax shall not apply to commercial travelers, drummers, or salesmen making sales or soliciting trade for merchants engaged in the sale of drugs or medicines by wholesale."

Under the Collins' case, as well as the case of

NO COMMUNICATION IS TO BE CONSTRUED AS A DEPARTMENTAL OPINION UNLESS APPROVED BY THE ATTORNEY GENERAL OR FIRST ASSISTANT

NEEDHAM v. STATE, 103 S.W., 857, there would seem to be no doubt of the application of this statute to such situation insofar as the contract between the traveling vendor and his company, and the method of sales by the peddler, is concerned.

Presumably, you are concerned about the question of whether the fact that the traveling person sells not only patent medicines, but also soaps, fly sprays, extracts, pans, utensils, etc., would relieve the application of the statute.

Our research reveals no case in Texas directly resolving this question. The case of SHED v. STATE, 155 S.W. 524, however, involved facts described as follows in the court's statement of the case at pp. 524, 525:

> "Appellant was convicted of the offense of being a traveling person pursuing the occupation of selling patent and other medicines.
>
> "The evidence unquestionably shows that appellant had a two-horse hack on which was painted 'Watkins' Remedies'; that he traversed Coryell County, selling these remedies and Watkins' spices, etc.; that this was his regular occupation. Appellant himself testified and stated: 'My name is A. T. Shed. I am the defendant in this case. I understand what I am being tried for. I am principally engaged in selling extracts, spices, flavorings, soaps, perfumes and other toilet articles. I am in the employment of J. R. Watkins Medical Company, Winona, Minn., U. S. A. * * *
>
> "Cross-examination of the witness A. T. Shed: 'I sell medicines, but I sell only conditionally. I spend more time talking up soaps, spices, etc.; but at the same time I talk up the medicines too and offer them for sale in the way I have told you."

In affirming the judgment of conviction, the court took no cognizance of the facts as shown pertaining to the sale of products other than patent medicines, and said at page 526 of the opinion:

> "In so far as appellant is concerned he

had established and was carrying on a certain line of business wholly within the state, and such a class of business and occupation can be regulated by the state, for the great weight of authority supports the right to tax peddlers where the law does not discriminate between products of residents and non-residents * * * .

"Appellant was being prosecuted for pursuing a given occupation - that of peddling patent and other medicines. And each sale would have a tendency to prove that he was so engaged, and the court did not err in permitting evidence to be adduced of individual sales."

There is the same implication in the case of PEOPLES v. STATE, 152 S.W. 168, from which we quote as follows:

" * * * . After the expiration of his license the testimony would show that in traveling he only sold peppers, spices, soaps, and flavorings, at the same time advertising the remedies, but would not sell the same from the wagon. Without some evidence that he sold these remedies while acting as a traveling salesman, the judgment cannot be sustained. It is evident that after the expiration of his license he continued to drive about the country in the Watkins wagon, but there is no evidence that he made a sale of any character of medicine, and under these circumstances the verdict of the jury was unauthorized. * * * "

The proposition is entirely sound, in our opinion, that a person who is a traveling vendor of patent medicines is liable for the occupation tax imposed by Article 7047, Subdivision 2, supra, notwithstanding he may also sell other products in connection therewith. Such is consonant with the statute itself, and with the cases cited.

Accordingly, you are respectfully advised that in our opinion the individual described in your inquiry, is subject to the occupation tax imposed by Subdivision 2 of Article 7047, supra.

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Trusting that we have satisfactorily answered your inquiry, we remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Zollie C. Steakley
Zollie C. Steakley
Assistant

ZCS:ob

APPROVED APR 16, 1940
Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY BWB