



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

PRICE DANIEL  
ATTORNEY GENERAL

March 7, 1947

Hon. Alfred M. Clyde  
Criminal District Attorney  
Tarrant County  
Fort Worth, Texas

Opinion No. V-76  
Re: Construction of Art. 1111-d,  
Chapter Eleven, A, Vernon's  
Penal Code.

Dear Mr. Clyde:

Your request for our opinion on the above captioned matter has been received by this Department. We quote from your letter as follows:

"It is the desire of this office to obtain an opinion from your office on the construction of Article 1111-D, Chapter A, of the Penal Code of the State of Texas, as to whether or not this Article applies to the following state of facts:

'A concern, situated here in Fort Worth, known as "Blue Bonnet Discount Stamp Company", sells their stamps to merchants throughout the State of Texas, who, in turn, give the stamps to customers. When the customer completes a book which is given by the Blue Bonnet Discount Stamp Company to place stamps therein, the customer, in turn, can present the book or books of stamps to the Blue Bonnet Company; and they, in turn, will give merchandise to redeem the book or books presented by the customer. This company does not sell merchandise, but is engaged only in the business of redeeming the stamps heretofore mentioned.'

"The question is: Whether or not the conduct of the business as outlined above, comes within the purview of this Statute."

On February 26, 1947, we requested that you furnish this office with additional facts, which you did by letter dated March 1, 1947, from which we quote:

"1. The Blue Bonnet Stamp Company keeps at its location in Fort Worth, the merchandise with which to redeem the stamps, and also has other redemption stations in other cities in Texas. The only way this Company puts out merchandise is by redeeming stamps that have been given away by the merchants.

"2. The holder of these stamps cannot receive merchandise from the merchant who gives the stamps. They must present the stamps to one of the redemption stations.

"3. The merchandise of the Company is displayed at the redemption stations, and each article has a value which is known by the Company as 'book value'. The merchandise runs from one 'book value', and up. Any person may appear in person at the redemption stations and select and receive at that time, any article that the Company has, provided they have a sufficient number of books. Deliveries of merchandise are also made by this Company by mail. Under this system, the customer selects the desired article, orders by number from a pamphlet put out by the Blue Bonnet Company, and mails the required number of books containing stamps to the Company. The Company, in turn, will mail this particular item to the individual, which closes the transaction, unless the item is damaged in shipping. If so, the Company will make it good.

The Texas Chain Store Tax Statute (Chap. 400, page 1589, Acts 1st C.S. 44th Leg.) is codified as Art. 1111d, Vernon's Annotated Penal Code of Texas. The parts of the Act with which we are concerned provide as follows:

"Sec. 1. That from and after the passage of this Act it shall be unlawful for any person, agent, receiver, trustee, firm, corporation, association or copartnership, either foreign or domestic to operate, maintain, open or establish any store or mercantile establishment in this State without first having obtained a license so to do from the Comptroller of Public Accounts as hereinafter provided.

". . . . .

"Sec. 6. The provisions of this Act shall

be construed to apply to every person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"Sec. 7. The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind are sold, at retail or wholesale.

"Sec. 8. Any person who, either for himself or as the agent of any person, receiver trustee, firm, corporation, copartnership or association, shall operate or maintain any store or stores or mercantile establishment or mercantile establishments as defined in this Act without having displayed in a conspicuous place in such store or mercantile establishment the license fee receipt for the current year as required in this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars (\$25); nor more than One Hundred Dollars (\$100), and each day of such violation shall constitute a separate and distinct offense."

Under the facts you outlined, it will be necessary for us to determine whether or not the Bluebonnet Discount Stamp Company is a "store" or "mercantile establishment", as defined in Sec. 7 of the Act quoted above.

In the case of Hurt, et al, vs. Cooper, et al, decided by our Supreme Court on December 1, 1937, reported in 110 S.W. (2d) 896, 130 Tex. 433, Judge Hickman, Commissioner, in speaking of "store" said:

"The statute having defined the word, we are not concerned with its usual meaning. Under that definition, a mercantile establishment, at which goods, wares, or merchandise of any kind, except those exempted, are sold is a store and is

taxable as such, and this even though it may also be a distributing point . . . . conversely, a mercantile establishment at which no sales are made is not a store, and therefore not taxable. The test is whether sales of goods, wares, or merchandise are made at the place . . . ."

In *Continental Paper Bag Company, et al, vs. Bosworth*, Com. App., Sec. B, 276 S.W. 170, Justice Short said:

"In American usage, the word 'store' when employed to designate a place of business, is a broad one. It signifies not merely a warehouse, or storeroom, but may include in its meaning a business establishment where personalty is kept and sold, and incidentally gotten in salable condition."

In *Veasey Drug Company, et al, vs. Bruza, et al*, 37 *Pacific Reporter*, 2d, 294, the Court said:

". . . . .

"The claimant presents no authority defining the specified term 'wholesale mercantile establishment' as used in our statute, and we have found none, however, when the separate words composing that expression are considered in their usual, ordinary and natural use and meaning, no difficulty is encountered in arriving at the meaning of the statutory term. Thus from all of the definitions the word 'establishment' means an institution, place, building, or location. Its meaning, of course, may vary and does vary with the use of the word. The word 'mercantile' in its ordinary acceptance means pertaining to the business of merchants, and is concerned with trade or buying and selling of merchandise. *People vs. Federal Security Company*, 255 Ill. 561, 99 N.E. 668, 88, H. H. *Kohlsaat and Company vs. O'Connell*, 255 Ill. 271, 99 N. E. 689. In *Carr vs. Riley*, 198 Mass. 70, 84 N. E. 426, 428, 'mercantile' is defined thus: 'Of or pertaining to merchants or the traffic carried on by merchants; having to do with trade or commerce, trading, commercial'. Thus while the word 'establishment' may mean almost any kind or character of institution, location, building, or place, yet its meaning is greatly restricted when used following the

word 'mercantile'. And the expression 'mercantile establishment' must mean and refer to an institution of mercantile business, or place, building, or location where the mercantile business or the buying or selling of merchandise is conducted or engaged in. One mercantile business or establishment may differ from another just as one merchant may differ from another merchant as to the character of business engaged in. So we have retail merchants or retail mercantile establishments on the one hand, and wholesale merchants or wholesale mercantile establishments on the other hand.

"A mercantile establishment is a place where the buying and selling of articles of merchandise is conducted. Hotchkiss vs. District of Columbia, 44 App. D.C. 73.

"The term 'mercantile business' is defined to mean 'the buying and selling' of articles of merchandise as an employment' in Grayham v. Hendricks, 22 L. Ann. 523."

In your related facts, the subject company redeems the book or books of stamps in merchandise; consequently, it is not necessary for us to define goods, wares or merchandise as set forth in the statute.

We come now to the word "sale". In 37 Tex. Juris., page 69, under Sec. 2 of the subject "sales" the following definition is given:

"A 'sale' may be defined as a transfer of personal property from one person to another for a price in money or for property of an agreed money value. The Uniform Sales Act defines 'a sale of goods' as 'an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.' The definition implies that there must be not only an 'agreement', but also a present 'transfer' of property, or 'passage of title', from seller to buyer, either absolutely or conditionally, (but not necessarily a delivery), and the payment of a price, or a promise - given or implied - to pay."

In Johnson vs. State, Tex. Ct. Crim. App., 55 S. W. 968, decided February 21, 1900, Brooks, Judge said:

"The Court defined a sale as follows:  
'In law, a sale is the agreed transfer of property having some other value to another for a valuable consideration. A sale may be shown by facts and circumstances, as well as by direct proof. The valuable consideration above mentioned may not be in money, but may be any article of value.' We think this definition is correct."

In *L. H. Woods and Company vs. Half, Weiss Company*,  
44 Texas, 633, the Court said:

"A sale imports and necessarily carries with it a change of ownership, (*Pars. Merc. Law*, 46)

". . . . Whatever rule be adopted, it may be sometimes difficult to apply it, but we cannot doubt that the true principle is this: every sale transfers the property, and that is not a sale which does not transfer the property in the thing sold; but this property cannot pass, and therefore the thing is not sold unless, first, it is completed and wholly finished, so as to be in fact and in reality the thing purporting to be sold; and in the second place, it must be so distinguished and discriminated from all other things that it is certain, or can be made certain, what is the specific thing the property in which is changed by the sale. If the transaction be deficient in either of these points, it is not a sale, although it may be a valid contract for a future sale of certain articles when they shall be completed, or when separated from others."

In *Gay vs. Hardeman*, 31 Tex. 245, the Court said:

"What constitutes an actual sale of personal property? It is an agreement between the seller and the buyer upon the consideration or price, either in cash or upon a stipulated credit, and a delivery of the property. When so delivered, the sale is consummated and the right of property becomes absolute in the buyer, and the seller has no longer any more control over it than the rest of mankind. But it is pretended that at the time of the sale a lien was reserved or retained by the seller. This was impossible by the common law in regard to personal property, because an actual or constructive delivery was necessary to effectuate a sale of personal property. And when this

delivery took place the right of property was absolute in the buyer, and subject to any future alienations he might choose to make of it."

With reference to the definition of "retail" and "wholesale", Holmes, Circuit Judge, in *White Motor Company vs. Littleton, et al*, C. C. A., 5th Circuit, decided December 12, 1941, 124 Fed. (2d) 92, in speaking of the Fair Labor Standards Act, said:

"The word 'retail' is not defined by the Act. Given its common and ordinary acceptance when used in sales parlance, it means a sale in small quantity or direct to the consumer, as distinguished from the word 'wholesale', meaning a sale in large quantity to one who intends to resell. The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were preponderantly retail although the products sold were used subsequently for commercial purposes."

In *Veazey Drug Company, et al, vs. Brunza, et al*, supra, the following was said:

"The term 'wholesale' or the selling in or by unbroken parcels is distinguished from 'retail' or dividing into smaller quantities and selling direct to consumers" in *Gorsuth v. Butterfield*, 2 Wis. 237, and also in *Kentucky Consumers Oil Company vs. Commonwealth*, 192 Ky. 437, 233 S.W. 892, and in *Great Atlantic & Pacific Tea Company vs. Cream of Wheat Co.*, (C.C.A.) 227 F. 46.

"A wholesale dealer is one whose business is the selling of goods in gross to retail dealers, and not by the small quantity or parcel to consumers thereof." *State vs. Lowenhaught*, 79 Tenn. (11 Lea) 13; *Webb v. State*, 79 Tenn. (11 Lea) 662.

In *Sperry & Hutchinson Co. vs. Mechanics' Clothing Co.*, 135 Fed. Rep. 833, the Court said:

"Upon consideration of the allegations of the bill as to the nature of the trading stamps, it is apparent that the only purpose for which they are issued to collectors is for redemption; that the only promise made by the

Sperry & Hutchinson Company to the public in relation to these stamps is that it will redeem them if procured from authorized merchants; and that the collector acquired only such rights as are expressly or by fair implication promised him by the company.

"A trading stamp is not ordinary property. It is sui generis. It represents a somewhat complicated transaction, and, from its nature, I think there are necessary limitations upon the modes in which it may be transferred . . . By contract between the complainant and the merchant, the title to the stamp does not vest in the merchant who issues it but remains in the company until it has been issued in regular course to a customer of the merchant. The customer is expressly offered only the right to redeem the stamp, and impliedly the right to transfer it for redemption. A stamp is not merely a token of the company's obligation to redeem it, and of the right of the holder to redemption, but it is also a token or an instrument of another transaction in which the trading stamp company has an interest, and from which it derives its entire profit and its recompense for its outlay in establishing the business . . . . .

"The trading stamp, when issued, represents a closed transaction between the merchant and the company, as well as an outstanding obligation to redeem the stamp. As a token or voucher of the sale and use of so much advertising, the trading stamp is necessarily a consumable article - an article designed for a single use in an advertising scheme. . . . .

"The trading stamp is an artificial creation. The company, having created it and having created a value for it, may dispose of it on such terms as it sees fit. It may in the first instance restrict the right to issue it for advertising purposes to such persons as it may select, and to such persons as are willing to pay for it. The public is entitled to receive it upon the terms offered, namely, that it is exchangeable for goods. But, it is asked, why, if the right of a customer to transfer it is conceded, may he not transfer it in any mode he pleases, and give it as an advertisement if he sees fit?



A sensible answer to this question, I think, is this: Because he thereby appropriates to himself the trading stamp company's legitimate share of the transaction. In the trading stamp scheme or plan, as explained in the books, there are designed to be three parties - the customer, the merchant, and the trading stamp company. The customer is to acquire, at his benefit, a redeemable stamp; the merchant is to acquire, as his benefit, a trade advantage resulting from issuing the stamps at his shop; the trading stamp company's benefit is the money paid to it by merchants for the privilege of issuing the stamps

.....

"While a transfer of ordinary property by the owner upon any terms usually deprives other persons of no rights, this is not always the case with the trading stamp. While it may be transferred in any way which confines its use within the purpose for which it was issued, it may not be transferred in such a way as to destroy its value as an instrument of special trade advantage or advertising company, or advertising, or as to deprive the company which created the value of the stamp, and which has assumed the obligation to redeem it, of its right to compensation for expenditures and for redeeming the stamp."

In *Sperry & Hutchinson Co. vs. Fenster, et al*, District Court, Eastern District, New York, decided January 16, 1915, 219, Fed. Rep. 755, the Court said:

"The right to redeem the stamps is a property right transferable by possession while the license to use them for advertising purposes is not transferable without compensation to the person granting that right, viz: the plaintiff herein."

In 10 *Tex. Juris.* p. 111, Sec. 64, consideration is defined as follows:

"A consideration may be defined to be something which is given in exchange, something which is mutual, or something which is the inducement to the contract. It must be a thing which is lawful and competent in value. It is that which induces the promise or the price paid for the promisor's undertaking."

In 10 Tex. Juris., page 122, Sec. 71, appears the following:

"A valuable consideration may be either a benefit to the promisor or a detriment to the promisee, - or stated in another way, it may consist of some right, interest, profit, or benefit accruing to one party, or some forbearance, loss or responsibility given, suffered or undertaken by the other. Again, to constitute a consideration, either some benefit must flow to, or some injury must be received by, one or the other of the parties."

In the light of the decisions and laws set forth above, and inasmuch as a transfer of merchandise for a valuable consideration (the right to redeem the stamps for merchandise) occurs, it is our opinion that the trading stamp company you named comes within the definition of "store" or "mercantile establishment" at which goods, wares or merchandise of any kind are sold, at retail or wholesale, and is, therefore, subject to the provisions of Article 1111d, Penal Code of Texas.

SUMMARY

A trading stamp company which redeems trading stamps, with merchandise it keeps in stock for that purpose, is a "store" or "mercantile establishment" within the meaning of Article 1111d, Vernon's Penal Code, and is subject to the provisions of that Article.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

By s/J. A. Amis, Jr.  
J. A. Amis, Jr.  
Assistant

JAA:rt:mj:wc

APPROVED MAR. 7, 1947  
s/Price Daniel  
ATTORNEY GENERAL

APPROVED OPINION COMMITTEE BY BWB, CHAIRMAN