

College District must specify in their nomination petitions the term of office they seek.

4. The legislature in providing for nomination petitions under Section 5a (4) of the statute, supra, made unnecessary the holding of any primary election. The two candidates receiving the highest number of votes for the office of member of the board of trustees for terms expiring 2 years, 4 years and 6 years respectively, shall be declared elected to the respective offices in accordance with Section 5a (14) of the act, supra.

Therefore, it is my opinion that candidates for the office of member of the board of trustees of the Macomb County Community College District are to be nominated by petition only.

5. In order for candidates to be nominated by petitions to qualify as members of the board of trustees of a community college district at the biennial spring election held in April, 1963, the statute requires, in accordance with Section 5a (4), supra, that candidates be nominated by petitions signed by not less than 50 nor more than 200 qualified and registered electors residing within the county forming the Macomb County Community College District.

6. Section 5a (5) of the act, supra, requires that nomination petitions be filed with the county clerk not later than 30 days prior to the date specified for holding an election for members of the board of trustees of the community college district. Since the biennial spring election to be held in April 1963, is set for April 1, 1963, nomination petitions must be filed at least 30 days prior to April 1, 1963.

FRANK J. KELLEY,  
*Attorney General.*

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**TAXATION:** Sales Tax.

**OPTOMETRY:** Furnishing of lenses by optometrist.

**PHYSICIANS AND SURGEONS:** Professional services by ophthalmologist.

A licensed optometrist or ophthalmologist who examines the eyes of a patient, prescribes lenses for and furnishes the lenses as part of his contract for professional services is not subject to the provisions of the Michigan Sales Tax Act, the furnishing of lenses not being a sale of tangible personal property.

No. 3632

March 1, 1963.

Hon. Adam Sumeracki  
State Representative  
Lansing, Michigan

You have requested my opinion in answer to the following question:

Are the lenses or prisms or other mechanical devices furnished to a patient by a licensed ophthalmologist or optometrist subject to taxation under the Michigan Sales Tax Act, as amended?

Act 167, P.A. 1933, and amendatory acts, being M.S.A. 1961 Cum. Supp. § 7.521 et seq., which is known as the Sales Tax Act, provides for certain specific taxes, fees and charges to be paid to the state for the privilege of engaging in certain business activities.

Section 1 of the act defines "sales at retail" as any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale, or for lease under certain circumstances.

The Department of Revenue is entrusted with the administration and collection of the sales tax. See Sections 3, 7 and 9 of the Sales Tax Act. The law is well settled that the Department of Revenue, under its rule making power, is without authority to extend the scope of the sales tax act. Liability for payment of sales tax is controlled by statute and cannot be imposed by rule of the Department of Revenue. *Acorn Iron Works, Inc. v. State Board of Tax Administration*, 295 Mich. 143, 139 A.L.R. 368 (1940).

The Department of Revenue has promulgated Rule 54, effective December 31, 1943, to provide as follows:

"Oculists and optometrists are engaged primarily in rendering non-taxable services. Sales of equipment and materials to them are taxable.

"An optician makes and sells eye glasses, usually upon prescriptions from oculists and optometrists. Sales by opticians to optometrists and oculists are taxable on the entire amount of such sales. Sales of machinery and apparatus used directly in the manufacture of glasses are not taxable. Sales of all other equipment and materials to opticians are taxable.

"Sales at retail by a person regularly engaged in any of the businesses mentioned above of stock accessories such as sun glasses, barometers, thermometers, telescopes, opera glasses, solutions for cleaning glasses, lorgnettes, chains, ribbons, etc., are taxable.

"Sales, not for resale, by optical supply houses are taxable without deduction for commissions or other expenses.

"If an optician is also engaged as an optometrist or oculist and sells glasses directly to the ultimate consumer, the tax will be 50% of the total charge, unless services are billed separately, in which case the tax will apply to the amount charged for the glasses alone.

"Physicians acting in the capacity of oculists or optometrists are subject to the above rule." (R. 205.104, Administrative Code for 1954, page 930.)

An "oculist" is a duly licensed physician specializing in the diseases of the eyes. The correct title of an "oculist" is that of an "ophthalmologist." The law recognizes that the ophthalmologist examines the eyes for the purpose of determining whether glasses are needed and prescribes lenses when necessary for the correction of vision. *Stern v. Flynn*, 278 N.Y.S. 598 (1935).

On the other hand, an "optometrist" determines the need of lenses for the correction of defects of eyesight and the increase of the power and range of vision, forming a judgment as to the need, and provides the corrective lenses. *New Jersey State Board of Optometrists v. S. S. Kresge Co.* (1934), 113 N.J. Law, 287, 294; 174 A. 353, 357. *Dickson v. Flynn*, 286 N.Y.S. 225 (1936).

"Ophthalmologists" are licensed pursuant to the provisions of Act 237, P.A. 1899, as amended, being C.L. 1948, § 338.51 et seq.; M.S.A. 1956 Rev. Vol. § 14.531, et seq.

"Optometrists" are licensed under Act 71, P.A. 1909, as amended, being C.L. 1948, § 338.251 et seq.; M.S.A. 1956 Rev. Vol. § 14.641, et seq.

Rule 54 was criticized, but not declared invalid, by the Attorney General in his opinion No. 870, dated January 7, 1949, O.A.G. 1949-50, page 83, where the attorney general suggested that the legislature considered Rule 54 and act appropriately. The legislature has taken no action on Rule 54, nor has it enacted any appropriate change in the sales tax act concerning optometrists or oculists. Thus, for some 20 years the Department of Revenue has interpreted the provisions of Act 167, P.A. 1933, supra, to mean that the oculist or the optometrist is rendering a service to his patient so that the furnishing of eyeglasses as a part of such service was not the sale of tangible personal property subject to the sales tax act.

The legislature has amended the provisions of Act 167, P.A. 1933, supra, on numerous occasions since Rule 54 was promulgated in 1943. By Act 76, P.A. 1955, the legislature amended Section 4a of the sales tax act to expressly exempt from the sales tax act sales of artificial eyes, individually designed and constructed for a particular person. This amendment is noted but is not particularly significant to your inquiry, since it relates to artificial eyes rather than to lenses, prisms or other mechanical devices furnished by licensed ophthalmologists or optometrists.

The construction given to the sales tax act by those charged with the duty of executing it is always entitled to the most respectful consideration by the court and ought not to be overruled without sufficient reasons. *Boyer-Campbell Co. v. Fry*, 271 Mich. 282 (1935).

The Attorney General has ruled in opinion No. 2937, dated April 22, 1957, O.A.G. 1957-58, Vol. I, page 193, that in the proper administration of the sales tax act it is necessary to distinguish between those businesses engaged in making sales at retail and those businesses engaged in performing services. The latter are not subject to the sales tax act.

The Michigan Supreme Court has been without opportunity to pass upon the taxability of lenses furnished by licensed ophthalmologists or optometrists to a patient under the sales tax act.

An examination of precedents in other jurisdictions reveals two lines of authority. The view that the furnishing of lenses by a licensed optometrist is not a sale of tangible personal property taxable under a comparable sales tax act is set forth in *Babcock v. Nudelman* (Ill.), 12 N.E. 2d 635 (1937). The court held that the main object and purpose of optometry is to furnish skilled professional service to a patient requiring a correction of vision. The delivery of visual objects represented by frames and lenses

is incidental to the main object sought to be accomplished. The opposing view is represented by *Rice v. Evatt* (Ohio) 59 N.E. 2d 927 (1945), where the court held that the professional services of an optometrist cease with the preparation of the prescription and when the patient receives not only his prescription from the optometrist but lenses as well, the sale of the lenses was taxable as not incidental to the professional services rendered. See 139 A.L.R. 372 and 157 A.L.R. 578 for a thorough discussion of the problem of the optometrist and taxability under state sales tax statutes.

It is conceded that the legislature could, by proper amendment to the sales tax act, make the transaction of furnishing eyeglasses by an ophthalmologist or optometrist taxable as a sale by express definition. This the legislature has not done even after the attorney general advised by opinion that the legislature should consider a clarification of the problem.

In light of this history, I am persuaded that a person who engages the professional services of a licensed ophthalmologist or optometrist is seeking the professional services necessary to his physical well-being. The contract for professional services is indivisible where the ophthalmologist or optometrist not only examines the eyes and prescribes corrective lenses but also furnishes the lenses to the patient. In *Perlmutter v. Beth David Hospital*, 123 N.E. 2d 792 (1954), the New York Court of Appeals held that furnishing of blood in a hospital was not a sale within the sales act, being an indivisible part of a medical contract for professional services necessary for the proper care and treatment of the patient. In its opinion the Court said:

“The essence of the contractual relationship between hospital and patient is readily apparent; the patient bargains for, and the hospital agrees to make available, the human skill and physical materiel of medical science to the end that the patient’s health be restored.”

This authority is persuasive of the conclusion that the act of furnishing corrective lenses by licensed ophthalmologists or optometrists after due examination and prescription is an indivisible part of a contract for professional services rendered for the physical well-being of the patient.

Therefore, it is the opinion of the Attorney General that a licensed ophthalmologist or optometrist who examines the eyes of a patient, prescribes lenses for and furnishes lenses as a part of his contract for professional services, is not subject to the provisions of the sales tax act, supra.

FRANK J. KELLEY,  
*Attorney General.*