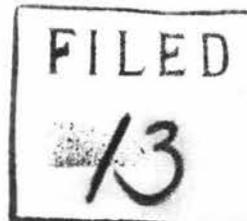


TAXATION SALES

} Sales by wholesaler to purchaser not coded and paying
Sales Tax should be considered sale at retail and
burden is upon seller to show otherwise.

January 13, 1950



Mr. W. H. Burke
Assistant Supervisor
Sales Tax Unit, Department of Revenue
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Our St. Louis Sales Tax Office claim that if a sale is made to a party in the state of Missouri who is not coded and paying sales tax, he must be considered as a user and consumer and pay sales tax on his purchases of merchandise from a wholesaler. With the exception of a wholesaler selling to another wholesaler who makes no sales except to jobbers or retail merchants;-- can we apply this rule generally?

"Also, when the above wholesaler sells merchandise to a customer outside of the state of Missouri, can we demand that he furnish a code number showing that he is paying sales tax in his state, or selling only to sholesalers who in turn sell to jobbers and retailers? If this is legal it will simplify our sales for resale problem considerably."

Section 11408, R. S. Missouri, 1939, (re-enacted Laws of 1947, Volume I, page 546) imposes a two percent tax upon every retail sale in the state of tangible personal property. Section 11407 (g) (amended Laws of 1947, Volume I, page 535) defines sale at retail as follows:

"'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or

Mr. W. H. Burke

title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; * * *"

Section 11420, R. S. Missouri, 1939 (re-enacted Laws of 1947, Volume II, page 431) provides in part that:

"The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale, * * *"

In view of the burden of proof, which is imposed upon the seller by Section 11420, we feel that your office may consider a sale by a wholesaler to a purchaser, who is not coded and paying sales tax, is a sale at retail within the meaning of the statute. (We use the phrase "not coded and paying sales tax," employed by you, to mean that the purchaser does not have an account number assigned by your department and does not make returns to your department of tax collected by him on retail sales.) Of course, the statute does not create a non-rebuttable presumption that such a transaction is a sale at retail, and the seller may show that, as a matter of fact, the sale was not a retail sale within the meaning of the act.

As for your second question, insofar as the transaction in question is not exempt under Section 11409, R. S. Missouri, 1939, (re-enacted Sixty-fifth General Assembly, House Bill No. 303) which exempts sales made in commerce between this state and any other state, the burden of proof of showing that the sale was not a sale at retail would be upon the seller. However, the exemption of sales in commerce would also be involved in such transactions. Where the purchaser accepted delivery of the goods in Missouri, and then transported them to another state, the sale would be subject to tax, if not actually shown to be a sale for resale. If, however, the goods are shipped by the seller to the purchaser in another state, we feel that under the case of American Bridge Company v. Smith, 352 Mo. 616, 179 S.W. (2d) 12, the transaction would be exempt under Section 11409, and the question of whether or not the sale was actually a sale at retail would be immaterial.

Mr. W. H. Burke

CONCLUSION

Therefore, it is the opinion of this department that sales by a wholesaler to a purchaser, who is not coded and paying sales tax, may be considered a sale at retail within the meaning of the sales tax act, and that the burden is upon the seller in such transaction to show that the sale was actually not a retail sale within the meaning of the act. The same rule may be applied insofar as sales to purchasers outside the state are involved, except where sales are exempt under Section 11409 because made in commerce between this state and any other state.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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RRW/feh