

INDIRECT - Sales for resale

5-21

May 15, 1934.



Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department acknowledges receipt of your letter requesting an opinion based on the following:

"Are sales of food products to a restaurant or hotel, the latter intending to cook such food products and resell it to customers, within the Missouri Retailers' Occupation Tax Act so as to require the seller of the products to the hotel or restaurant to make return to the Auditor of his gross receipts therefrom?"

In the original opinion rendered by this department we said, in passing on the question of the definition of a sale for resale:

"By the term, 'and not for resale in any form', as used in the Act, is meant that if tangible personal property is purchased for resale in its original form, or substantially in the same form as when purchased, then it is not necessary to make return of the gross receipts from the original sale, but if the original merchandise purchased be utilized and becomes one of the elements of a finished product and becomes tangible personal property, then the selling of the finished product is not a resale within the meaning of the Act, and the gross receipts from the sales of such finished product should be returned."

If there is a question of whether or not sales to restaurants and hotels are sales at retail, the burden is upon those asserting such sales are not sales at retail. Section 8 of the Missouri Retailers' Occupation Tax Act is as follows:

"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. For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed, it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. If the Auditor is not satisfied with the return and payment of the tax made by any person, he is hereby authorized and empowered to make an addition assessment of tax due from such person, based upon the facts contained in the return or upon any information within his possession or that shall come into his possession. The Auditor shall give to the person written notice of such additional or revised assessment, together with written notice of the time and place where the person may be heard on a petition by him for re-assessment. Such notice may be served upon the person personally, or by registered mail addressed to the person at his address as the same appears in the records of the Auditor."

The courts of our state, or of any other state, have never passed directly on this point and until the matter has been adjudicated in the court of proper jurisdiction, we shall continue to adhere to the ruling made in our original opinion.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General