

STATE AUDITOR- SALES TAX - Tax to be paid by receivers,
executors, etc., when.

5.21

May 17, 1934



Honorable Forrest Smith
State Auditor
Jefferson City
Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated May 11, 1934 concerning the Missouri Occupation Tax Law, which letter is as follows:

"We would be pleased to have your opinion upon the question of whether or not a receiver, executor, administrator or assignee for the benefit of creditors is required to make return and pay tax where such officer continues the business taken over by him or is engaged in liquidating the same.

We note that several other states having a tax of this nature require such persons to make return but in opposition to this view we note also the following cases:

Howe v. Atlantic, Pacific & Gulf Oil Company et al (State of Missouri et al, Interveners) District Court, W. D. Missouri, W. D. May 4th, 1933, 4 Fed. Sup. 162

In the matter of Flatbush Gum Company, Inc., Bankrupt (U.S. District Court, Eastern Dist. of N. Y., March 29, 1934. (See copy attached hereto, case not being yet reported). "

Subdivision (a) of Section 1, Laws Missouri 1933, in Extra Session, page 156, being the Missouri Occupation Tax Act, defines the word "person" in the following language:

" 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

By subdivision (c) of the same section, the word "business" is defined as,

" 'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect."

The case of *Howe v. Atlantic, Pacific and Gulf Oil Company, et al*, reported in 4 Fed. Supp. 162, was reversed by the United States Circuit Court of Appeals by an opinion filed March 30, 1934, the Circuit Court of Appeals directing that the receiver pay the taxes upon gasoline already sold and to make reports as to future sales. The Circuit Court of Appeals in the course of its opinion said:

"Federal receivers authorized to conduct and carry on the business of a corporation as a going concern as such are not exempt from the payment of taxes legally assessed and levied against them by city ordinance or state Laws."

And again,

"The ordinance here involved is all comprehensive. It says: 'Every person, firm or corporation' shall pay the tax. The fair intendment of the ordinance was to include all persons. That term is broad enough to include this receiver. A construction of this ordinance which would permit the receiver to avoid the payment of the one cent city and two cents state tax would give him such an

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unconscionable and inequitable advantage over his competitors as to render such a construction unreasonable. The ordinance is broad enough to include this receiver. Liberty Central Trust Company et al., v. Gilliland Oil Company, 279 Fed. 432; Michigan v. Michigan Trust Company, receiver, supra; Coy v. Title Guarantee & Trust Company, 212 Fed. 520."

It appears that the receiver in the case quoted from was operating the business as a going concern and was not undertaking to liquidate its affairs.

We are of the opinion that where a receiver, executor, administrator, assignee or trustee is put in charge of a then going business and if such person continues to operate such business as a going business concern, then the amount of the sales made in the course of the conduct of such business should be returned to the State Auditor, but, on the other hand, if such person, upon taking over and in charge such business, proceeds in good faith to liquidate and close out such business, then the sales made in the course of such liquidation and closing out would not be made in the conduct of a business as that term is defined by the Missouri Occupation Tax Law.

No hard and fast rule can be laid down in determining the question you present but each case should be disposed of according to the facts peculiar to each case.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC