

MISSOURI OCCUPATION TAX: Water sold by City of Excelsior Springs subject to tax; mineral baths not subject to tax; receipts from operation of swimming pool not subject to tax.

June 28, 1935.



Mr. Robert Moore,  
Special Counsel,  
City of Excelsior Springs,  
Excelsior Springs, Mo.

Dear Sir:

This department is in receipt of your letter of June 25 wherein you present the following statement of facts and request our opinion regarding the same:

"The City of Excelsior Springs, under authority of Sections 6898-A to 6898-D, inclusive, as enacted by the Fifty-seventh General Assembly (extra session) has secured a loan and grant from the Public Works Administration and thereby is proceeding to purchase mineral wells in the city and to construct service buildings for the sale of these waters, giving of mineral water baths, operating a mineral water swimming pool, etc.

"In setting up our accounting system for the operation of this mineral water system, which will not be opened for at least 30 days - we find it necessary to have some determination in relation to the new sales tax law. The provisions of Section 1-A of this Act might be interpreted to subject the City to the payment of such tax.

"Our accountants are very anxious that this question be settled for them as soon as possible. \* \* \* \*"

We note that the activity about to be engaged in by the City of Excelsior Springs will not be in actual operation for at least thirty days. The 1935 Session of the Legislature passed a new sales tax act which goes into effect August 27, 1935.

It has been a mooted question, ever since the original Act was passed by the special session of 1933-34, as to whether or not municipalities were included in the word "person" as contained in the Act. The word "person" as defined in the Act is as follows: (Laws of Mo. 1933-34, Extra Session p.156)

"'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."

In a recent decision of the Circuit Court of Cole County, Missouri in the case of City of Webster Groves v. Forrest Smith it was ruled that municipalities were required to pay the tax under the Act of 1933-34.

In passing the new Occupation Tax Act the Legislature has seen fit to define the word "person" as follows:

"'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, 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."

Thus, it will be noted by the above definition as contained in Sec. 1 of the new Act, that there can be no doubt as to the intention of the Legislature to include municipalities therein. We shall therefore consider your question solely from the standpoint of the Act of 1933-34.

The State of Kentucky in its sales tax act defines the word "person" to include any individual, co-partnership, association, corporation, trust or other form of business organization not therein enumerated, regardless of whether or not similar to those enumerated. This definition is similar to the definition of the word "person" as contained in the Missouri Act of 1933-34.

The Supreme Court of Kentucky in the case of City of Covington v. State Tax Commission, 77 S.W. (2d) 386, in discussing the question of whether or not municipalities were embraced in the act, said (l.c. 390, 391):

"\* \* \*But it is insisted that the language of the statute itself is insufficient to embrace municipalities, or charitable and educational institutions when engaged in the business or activity of merchants or sellers of the commodities taxed. That position is put forward because it is argued that the word 'person' does not embrace municipal corporations, or the other institutions referred to, and therefore none of them may be made to account for the tax, nor are they required to collect it from their purchasers in transactions that they may make as sellers or merchants. As a general rule such contention is sustained by text-writers and opinions, but there are well-recognized exceptions thereto, one of which is that if the entire provisions of the statute being construed indicate that municipalities and other institutions were intended to be embraced, then courts should give the statute that construction, and it is argued that the definition given in the statute is itself broad enough to embrace them. The act under consideration (section 2) defines 'merchant' as 'a person regularly engaged in the vending of tangible personal property'. It then defines the word 'person' as 'including any individual, co-partnership, association, corporation, trust or other form of business organization, regardless of whether or not enumerated here and regardless of whether or not similar to those enumerated.'

\* \* \*

"Summarizing, our conclusions are: (a) That the tax involved here creates a burden upon the purchaser, or buyer, and is not one borne by the seller or merchant;

(b) that as merchant or seller municipalities, as well as charitable and educational institutions, are required to charge it and collect it from all customers who are not exempt from paying it, and to account therefor; (c) that municipalities, as buyers of the taxed commodities, must pay the tax as required by the statute upon all purchases made by them, upon the sale of which the levy is made, except those made exclusively for their educational and charitable institutions; (d) that the merchant or seller is exonerated from paying the tax on sales made to charitable and educational institutions, and other classes of buyers who may be exempt from paying it as purchasers; and (e) that such exempt purchasers are the state and its administrative institutions, and also purely educational, eleemosynary, and charitable institutions, as well as purely federal activities. The judgment appealed from harmonizes with our conclusions, with the single exception that it exonerated charitable, eleemosynary, and educational institutions from collecting or accounting for the tax when engaged in the activity of merchant or seller, but which we have herein determined was and is erroneous."

Other cases bearing on this question, but which we will not burden this opinion with quotations therefrom, are *Orange State Oil Co. v. Amos*, 100 Fla. 884, 130 So. 707; *City of West Palm Beach v. Amos*, 100 Fla. 891, 130 So. 710; *United States v. Perkins*, 163 U.S. 625, 16 S. Ct. 1073, 41 L. Ed. 287; *Texas Company v. Brown*, 258 U.S. 466, 42 S. Ct. 375, 66 L. Ed. 721; *City of Portland v. Kozer*, 108 Or. 375, 217 P. 833; *Standard Oil Co. v. Brodie*, 153 Ark. 114, 239 S.W. 753; and *Pierce Oil Corporation v. Hopkins*, 282 F. 253.

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CONCLUSION

It is the opinion of this department that water, constituting tangible personal property, when sold by the City of Excelsior Springs, a municipality, is subject to a tax of one-half of one per cent on the gross sales thereof. As to the mineral water baths, we are of the opinion that the gross receipts on this item are not subject to the tax for the reason that sales from same constitute sales of services, which is not specifically designated as taxable under Sec. 2-A of the Act. For the same reason we are of the opinion that the receipts from the operation of a mineral water swimming pool are not subject to the tax.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney General.

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