

MISSOURI OCCUPATION TAX ACT: Dairymen who engage in the business as their principal work are subject to pay the tax on their gross receipts if they sell their products to the ultimate consumer direct.

5-18
May 15, 1935.



Hon. R.W. Starling,
Prosecuting Attorney,
Miller County,
Eldon, Missouri.

Dear Sir:

This department is in receipt of your letter of May 12 wherein you request an opinion regarding the retailers' occupation tax of Missouri as it affects dairymen. Your letter is as follows:

"Several dairymen of this county have been to see me about paying sales tax on the milk and other dairy products which they sell. They have the idea that since they own their own cows, raise most of their feed and do not buy any milk, they are exempt from paying the tax. * * * * "

Since the passage of the retailers' occupation tax act, it has been generally accepted by the public that farmers were exempt from the provisions of the Act. This is an erroneous impression insofar as the Act itself is concerned. The Act contains no provision specifically exempting farmers; however, this department has consistently ruled that a person engaged in tilling the soil and producing certain commodities as a result of his own toil does not come under the tax. The reasons therefor will follow.

Section 2 of the Retail Occupation Tax Act, Laws of Mo., Extra Session 1933-34, p. 157, is as follows:

"For the privilege of a person engaging in the business of selling tangible personal property at retail a tax is hereby imposed upon such person at the rate of one-half of one per cent of the gross receipts of any such person from the sale of all tangible personal property sold in this state on and after the effective date of this act to and including December 31, 1935."

The expression "a person engaging in the business of selling tangible personal property at retail" is construed to mean that such person is regularly engaged in the business and that the same is his principal business.

Section 1-A of the Act (Laws of Mo. 1933-34, Extra Session, page 156) provides:

"The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business within the meaning of this act."

Because farmers are not engaged in the business of selling tangible personal property, the products of the farm, such as butter, eggs, etc. should be classed as "occasional sales" when same are not regularly sold as a business, there being no specific exemption in the Act, and it is the opinion of this department that those so engaged are exempt from the payment of the tax.

The question of dairymen being subject to the tax presents a different matter. We will not argue the question of whether or not a dairyman is a farmer, as the same is not essential to the determination of the inquiry before us. The test appears to be as to whether or not a person is engaged in the business of farming in the ordinary conception of the occupation, or whether said person is engaged in selling tangible personal property in such a manner that it constitutes his vocation and in such a way that it would take him out of the "occasional sale" class. The fact that the dairyman produces his own feed and does not buy any milk would not remove him from the category of those engaged in the business of selling tangible personal property.

This matter is discussed at length in the case of *Winter v. Barrett*, 352 Ill., l.c. 461-463, wherein the Court said:

"It is argued as to the seller of farm products or produce, that his sales at retail of such property are not a part of the business in which he is engaged but are an incident thereto, namely: that his business is producing, and that he does not conduct the business of selling 'to the consumer for use and not for the purposes of resale in any form' as sales at retail are defined in the act; that this places him in a different class from the grocer or the clothier, whose business is to sell to the consumer, and he may be exempted from the class to which the act applies, and that such exemption is founded on fact, and therefore has a reasonable basis. It will be observed that the exemption of farm products or farm produce, when sold by the producer, from the category of tangible personal property exempts those selling those commodities from the operation of the act whether sales at retail by them are but an incident to their business of producing or are a part of the business of selling such property at retail in which they may be engaged.

"Counsel for the People cite in support of their argument that there is a valid reason for holding that farm products or produce and motor fuel and the sellers thereof at retail belong to a different class from that created by the language of the act, the case of American Sugar Refining Co. v. Louisiana, 179 U.S. 89. In that case the court had before it the question whether an act of the State of Louisiana requiring the payment of an annual license tax on all persons engaged in refining sugar and molasses denied equal protection of the laws because it provided that it should not apply to planters and farmers grinding and refining their own sugar and molasses nor to those planters who granulated syrup for other planters during the rolling season.

"It was held that while the act discriminated in favor of a certain class, the discrimination was founded upon a distinction in principle, in that its effect was to exempt producers from the taxation of the methods employed by them to put their produce upon the market, and that it lay within the power of the legislature to determine whether anything done to prepare a product more perfectly for the needs of the market should not be treated as an incident to its growth or production, and that the act did not deny to others engaged in a general refining business the equal protection of the laws.

"It may be conceded that the right to sell is an incident to the right to manufacture or produce, and where the producer of farm products or produce engages in the business of selling at retail but so sells only as an incident to his business of producing, it cannot be said that he is within the class to which this act applies, and therefore the uniformity provisions of the constitution do not require that he be taxed for such sales. This act has declared, in effect, that such producer does not belong to that class no matter how he sells such products or produce. The sales of farm products generally are not to the consumer, and therefore do not come into competition with those engaged in the business of selling such commodities at retail. The occasional sale of farm products or produce at retail by the producer to the consumer, or such sales of the surplus of his produce raised for his own use, cannot be said to put such producer into the business of selling such property at retail to the consumer. Many such producers do not engage in the business of selling to the consumer but sell generally to grain or produce merchants and cannot be classed with those in the business of selling tangible personal property at retail, for such is not their business. It is different, however, with the producer of farm products and produce, such as vegetables and the like, who not only conducts the business of producing

such produce, of which sales generally may be an incident, but who also conducts the business of selling his produce only to consumers at retail. It is a matter of common knowledge that there are many so engaged. He thus conducts the separate business of selling at retail in competition with other retail dealers in such commodities. He is in the business of selling tangible personal property at retail in addition to the business of producing, and the exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as the druggist who compounds and produces the proprietary remedies which he sells at retail is in that class, and so far as the act attempts to exclude him from its provisions it is not uniform in its application to the class on which it operates and cannot be sustained."

CONCLUSION

It is the opinion of this department that where a person is engaged in the dairy business wherein the same is carried on as his principal business and not incidental to general farming, the gross receipts are subject to the tax, provided the person sells his products direct to the ultimate consumer or user. If the dairyman sells his products to stores and they are in turn to be sold to the ultimate consumer, then, in that event the receipts from such sales should not be included as part of the gross receipts for the reason that the same would constitute sales for resale, and such sales are specifically exempted in Sec. 1 of the Act (Laws of Mo. 1933-34, Extra Session, p. 156).

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED: