

TAXATION:
SALES TAX:
CONDITIONAL SALES AND
CHATTEL MORTGAGES:
TAX: WHEN COLLECTED

Sales tax due and collectible at time title to tangible personal property passes unless the sale is a charge or time sale. If chattel mortgage and note are given for balance of purchase price, tax is to be collected.

March 1, 1938 3/10



Mr. J. W. Thurman,
Sales Tax Department,
Jefferson City, Missouri.

Dear Sir:

This is to acknowledge receipt of yours of February 21, 1938, requesting an official opinion from this department, which is as follows:

"Under date of February 18, a conference was held in our Saint Louis office with the operators of the above mentioned Saint Louis credit furniture house. * * * * *

The business of the furniture house is conducted altogether on credit. It is their custom to require a down payment, the balance of the purchase price to be paid in installments and the Company is protected by requiring the purchaser to give a promissory note for the balance due and also to sign a chattle mortgage as additional security for the fulfillment of their contract. A considerable portion of the furniture of necessity must be repossessed as the purchaser fails to make the installment payments in accordance with the stipulated agreement. The records of the furniture house indicate that the tax is collected at the time the sale is completed and the furniture delivered to the purchaser. * * * *

The point in issue is whether or not sales should be treated as final when a note and chattle mortgage are given, or whether or not the balance on the note should be treated as a time sale and the furniture house liable for tax only when payment is received

on the notes representing the sale price of the furniture. * * * * *

Your request particularly relates to the time when the sales tax is to be collected in case of the entire purchase price is not paid at the time of the transaction and in case such transaction is not a charge and time sale.

Sub-section b of Section 1 of the Sales Tax Act, Laws of Missouri, 1937, page 553, provides as follows:

"(b) The term "Sale" or "Sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration" * * * * *

Sub-section g of Section 1 defines the term "retail sale" as follows:

"(g) "Sale at retail" means any transfer made by any person engaged in business as defined herein of the ownership of, or 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." * * * * *

Sub-section 5 of the Act provides as follows:

"Every person receiving any payment or consideration upon the sale of property or rendering of service subject to the tax imposed by the provisions of this Act, or required to make collection of the tax imposed by the provisions of this Act, shall be responsible not only for the collection of the amount of the tax imposed on said sale or service but shall, on or before the 15th day of each

month, make a return to the State Auditor of all taxes collected for the preceding month or required to be collected for the preceding month, and shall remit the taxes so collected or required to be collected to the State Auditor. The seller of any property or person rendering any service, subject to the tax imposed by this Act is directed to collect the tax from the purchaser of such property or the recipient of the service as the case may be. The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. " * * * * *

And sub-section 10 of said Act provides as follows:

"Every person making or rendering any sale, service or transaction taxable under this Act shall on or before the fifteenth day of the month after this Act becomes effective, and on or before the fifteenth day of every calendar month thereafter, individually or by duly authorized officer or agent make and file with the Auditor a written return, in the manner and form designated or prescribed by said Auditor, and upon blanks furnished by him showing the amount of gross receipts from sales, services and taxable transactions by such person and the amount of tax due thereon during and for the preceding calendar month, or that portion thereof subsequent to the effective date of this Act, and with such written return such person shall remit to the Auditor the amount of said tax due. In case of charge and time sales the amount thereof shall be included as sales in said returns as and when payments are received by the person, without any deduction therefrom whatsoever." * * * * *

Your request indicates that the furniture house collects the sales tax at the time the sale is completed and the furniture is delivered to the purchaser. Section 5 plainly sets out that it is the duty of the seller to remit all taxes collect-

ed to the State Auditor. The seller is merely acting as an agent for the state in the collection and remitting of the sales tax.

Sub-section b of Section 1 of the Act provides that the term "sale" shall include conditional sales or sales in any other manner. When the ownership or title to the property is transferred, then by the terms of sub-section g of Section 1 of the Act the "Sale at Retail" is consummated and if such transaction is not a charge or time sale, it is the duty of the seller at that time to collect the amount of the sales tax and remit the same as provided by Section 10 of the Act.

The State of Michigan has a sales tax act which is somewhat similar to the Missouri law and the Supreme Court of that state in passing on that act as it applies to conditional sales. In the case of *Montgomery Ward and Company v. Frye, et al.*, 269 N.W. 166, 170, said:

"Count 4 seeks refund of the sales tax upon the unpaid balance on canceled conditional sales contracts, where there had been recapture of the merchandise. Plaintiff appeals from an adverse holding.

The act of 1933 included conditional sales and other title retaining contracts and levied the sales tax upon the gross proceeds and defined the gross proceeds as 'the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, without any deduction * * for losses' (section 1), but an allowance of refunds for returned goods.

Plaintiff's former district supervisor for Michigan, during the period here involved, and now an assistant retail manager, testified relative to such conditional sales:

'Count IV, Class D, relates to the sale of items of merchandise upon which we take a title retaining contract. We collect the sales tax from the customer when the sale is made. At the time of repossession, we

make no refund of sales tax to the customer. When this merchandise is repossessed, we re-sell it through the regular channels of our business as second-hand merchandise. * * *

'During the period of time in question we paid the tax as we collected the money. Our procedure has been changed since that time. In other words, at that time we did not pay the sales tax when the sale was made but we paid the sales tax as the money was collected. I know that was the fact although I don't know what the law required.'

Under this testimony there can be no refund. Under the statute credits or refunds for returned goods may be deducted, but such does not apply to repossession of merchandise under conditional sales contracts.

Denial of judgment for this item is affirmed."

And in the case of Rudolph Wurlitzer Co. v. State Board of Tax Administration, 275 N.W. 248, l.c. 249, the Supreme Court of the State of Michigan said:

"Plaintiff sold merchandise at retail under conditional sales contracts, paid the tax upon the full contract price, but upon recapture of the merchandise took credit for the amount of the tax so paid above the amount of the money received.

This amounted to quite a sum and coming to the attention of the tax authorities led to a demand that the amount of such taken credits be paid, and thereupon plaintiff paid the same under protest and upon being refused refund thereof brought this action to have recovery.

The court below awarded plaintiff judgment, and defendants review by appeal presenting the following question: 'May a licensee in making its monthly returns pursuant to the Michigan 'General Sales Tax Act (Act

No. 167 of 1933)' lawfully deduct from gross proceeds of retail sales any unpaid balances on canceled conditional sales contracts, 'where there has been recapture of the merchandise?'"

The General Sales Tax Statute, Act No. 167, Public Acts 1933, provides, section 1 (b.1): 'The term 'sale at retail' includes conditional sales, installment lease sales and any other transfer of such property when the title is retained as security for the purchase price but is intended to be transferred later,'

It also provides: 'Credits or refunds for returned goods may be deducted.' Section 1 (c).

Upon conditional sales the tax is computed on the full sale price, and upon recapture of the property for nonpayment of installments there is no refund or right to credit.

We had occasion in *Montgomery Ward & Co. v. Fry*, 277 Mich. 260, 269 N.W. 166, 170, to consider the question here presented. In that case count 4 of the declaration sought refund of the sales tax upon the unpaid balance on canceled conditional sales contracts where there had been recapture of the merchandise. Upon this point we held: 'Under the statute credits or refunds for returned goods may be deducted, but such does not apply to repossession of merchandise under conditional sales contracts.'

Counsel for plaintiff in the case at bar state:

'That decision seemed to be based wholly on the fact that the General Sales Tax, Section 3663-1, subsection (b.1) (Comp. Laws Supp. 1935), states:

'The term sale at retail includes condi-

tional sales, installment lease sales, and any other transfer of such property when the title is retained as security for the purchase price but is intended to be transferred later.'

'We agree with that decision and with the attorney general that goods sold on conditional sales contracts are subject to this tax and the record shows that plaintiff in this case, when making a sale on conditional sales contract, paid the full amount of the tax to the state of Michigan in its next monthly return. Our contention is, however, and it was apparently not strongly argued in the Montgomery Ward Case, that under the clause 'credits or refunds for returned goods may be deducted,' that we are entitled to such credits or refunds when goods are necessarily repossessed by the seller.'

We again hold that the statutory provision permitting the seller to deduct credits or refunds for returned goods relates to transactions wholly apart from conditional sales. Merchandise is sometimes returned by a purchaser and refund of the purchase price made or credited. Such is not the case under conditional sales."* * * * *

Upon the question of when should the transaction be treated as final for the purpose of computing the tax; that is, when the note and chattel are given or when they are paid off. In other words, if the giving of the note and chattel mortgage make the transaction a charge and time sale; then by the provisions of said section 10 of the Act, the sales tax is to be collected and remitted as and when the payments are made; but if the giving of the note and chattel mortgage does not make the transaction a charge and time sale, then the tax is due at the time of the giving of such note and mortgage and of the delivery of the title and possession of the property.

Your request indicates that it is the custom of the furniture house to require a down payment of the purchase price and to take the balance in installment notes secured by a chattel mortgage on the articles sold. In the Montgomery Ward case, supra, the plaintiff stated that it collected the tax at the

time the sale was made and that if it repossessed the property it would not refund any of the tax.

Your letter also indicates that the tax is collected at the time the sale is made but it does not reveal whether or not, in case the furniture is repossessed, the company refunds any of the tax. If the dealer collects the tax at the time the sale is made and remits it to the auditor within the time provided by law then and thereafter he could not refund any of the tax to the person from whom the furniture is repossessed. The terms of the contract entered into at the time of the sale of the furniture would be controlling on this point. Volume 55 Corpus Juris, page 1197, Section 1174 on the construction of such instruments the rule is stated as follows:

"* * * and whether or not a contract is one of conditional sale, or a contract of a different character, is a question of the intent of the parties as shown by the language of the whole contract without regard to its form or the name which the parties may have given it." * * * *

If for the balance of the purchase price of the property the purchaser gives the seller a note secured by a chattel mortgage on the articles sold, then the transaction would be considered final at that time because the title of the chattel is then delivered by the seller and the relationship of creditor and debtor exists between the parties. If this were not the case, the mortgagor who is giving the chattel mortgage on the articles he has purchased could not deliver the title of the chattels to the mortgagee as required by Section 3097 R.S. Mo. 1929 which is as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust," * * * * *

Then by the provisions of sub-section g of Section 1 of the Act the title and ownership of the chattels having been transferred to the purchaser, the sale at retail has been completed and the tax is then due and collectible.

If the seller of the tangible personal property retains the title to such property until it is paid for, then all the elements of a retail sale as defined by said subsection g of Section 1 are not present, for the purchaser does not own and have title to the chattel until it is paid for and the creditor and debtor relationship does not exist between the parties.

So in case a conditional sales contract is entered into when the furniture is sold, the sales tax would only be due and payable as the collections for the balance of the purchase price are made. In distinguishing between chattel mortgages and conditional sales contracts in the case of *Branham et al. v. Peltzer et al.*, 177 S.W. 373, 374, the Supreme Court said:

"* * * the test by which to determine whether a transaction is a mortgage or a conditional sale is this: If, after the execution and delivery of the instrument evidencing the transfer, the debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases within a given time, thereby entitling him to a reconveyance, it is a conditional sale." * * * * *

Apparently the contract with the furniture house has been treated by the parties as a final sale when the note and chattel mortgage were given for at that time the furniture house delivered title and possession of the furniture to the purchaser and took the note and chattel mortgage back thereby creating the relationship of creditor and debtor between the parties.

CONCLUSION

From the foregoing, this office is of the opinion that the sale in which a note and chattel mortgage are given for the balance of the purchase price for tangible personal property is final at the time of the delivery of title of such property to the purchaser and of the giving of the note and chattel mortgage and that it is the duty of a seller of such property to collect from the purchaser the two per cent sales tax as provided by law.

March 1, 1938

And we are further of the opinion that if in the act of such a transaction, the relation of creditor and debtor exists between the seller of the property and the purchaser of the property, then the instrument given evidencing the transfer is a chattel mortgage, and the sales tax is due at the time of giving of such instrument, but if at the time of the transaction no debt subsists and the seller of the goods has the privilege of refunding as he pleases within a given time thereby entitling him to a reconveyance or retaking of the property, then the instrument is a conditional sales contract and a sales tax is due and payable as the installment payments are made.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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