

CITIES: Sales tax should be collected on sales of elec-
SALES TAX: trical current and water by a municipally owned
FRANCHISE: light and water plant. In Re: Franchises of
telephone and other public utility companies.

October 29, 1946



Honorable E. F. Bertram
Representative of Scotland County
Memphis, Missouri

Dear Sir:

This is to acknowledge receipt of yours of recent date wherein you requested an official opinion from this department which is as follows:

"I should like to have you render an opinion on the two following questions:

"Is a city required to collect a Sales Tax upon the current and the water from a municipally owned light and water plant?

"If the contract or franchise of a telephone company or other public utility company has expired, can same be renewed or extended by the passage of an ordinance by the City Council, or is the vote of the people required?"

I note from your request that you ask that it reach you by October 24. Due to the fact that we have so many requests, it has been impossible for us to finish this opinion in that time, and I hope you will pardon us for the delay.

Taking up the first part of your request, relating to the application of the Missouri Sales Tax to the sales of current and water sold by a municipally owned light and water plant, we refer to pertinent portions of the Sales Tax Act as re-enacted in House Bill 652 by the 63rd General Assembly. The Missouri Sales Tax Act was originally enacted in 1935, and has been re-enacted biennially thereafter without any material changes in so far as the subject of your inquiry is concerned.

Since the adoption of the new Constitution, a number of political subdivisions have made inquiries as to whether or not they are subject to the Sales Tax Act on account of the provisions of Sub-Section 10 of Section 39 of Article 3 of the Constitution of 1945, which provides as follows:

"The general assembly shall not have power:
'To impose a use or sales tax upon the use,
purchase or acquisition of property paid
for out of the funds of any county or
other political subdivision.'"

This department has written an opinion holding that political subdivisions, referred to in said Sub-Section 10, include cities, towns and villages, and that the sales tax may not be imposed on sales of tangible personal property to such political subdivisions where the price therefor is paid out of funds of such cities, towns or villages. Therefore, if the sales tax is imposed on such political subdivisions, then under the foregoing provisions of the Constitution, it could not be collected. It will be noted, however, that the foregoing provision of the Constitution does not prohibit the general assembly from providing that such political subdivisions shall collect the sales tax when they are engaged in any business required to collect such tax under the Sales Tax Act.

The Sales Tax Act defines certain businesses which are included within its provisions. In Sub-Section (a) of Section 11407 of the Act, the term "person" is defined as follows:

"'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department), estate, trust, business trust, receiver or trustee appointed by the State or Federal Court, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

It will be noted from the aforesaid definition of the term "person" that a municipal corporation is included within the Act.

Sub-Section (c) of said Section 11407 defines the term "business" as follows:

"'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, and the classification of which business is of such character as to be subject to the terms of this article. 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 article."

Sub-Section (e) of said Section 11407 defines the term "purchaser" as follows:

"The word 'purchaser' whenever used in this Act means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under this Act."

Sub-Section (f) of said Section 11407 defines the term "seller" as follows:

"The word 'seller' when used in this article means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed under Section 11408."

Sub-Section (g) of said Section 11407 defines the term "retail sale" as follows:

"'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. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace: * * *

"(2) Sales of electricity, electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

The levying section of the Sales Tax Act is found at Section 11408, and the portion of it which levies a tax on sales of electrical current, water, etc., is found in Sub-Section (c) of said Section 11408. A part of said Section 11408 and said Sub-Section (c) reads as follows:

"Section 11408. From and after the effective date of this Act, there shall be and is hereby levied and imposed and shall be collected and paid: * * *

"(c) A tax equivalent to two (2%) per cent of amounts paid or charged on all sales of electricity or electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

The Sales Tax Act was before the Missouri Supreme Court in the case of School District of Kansas City vs. Smith, State Auditor, et al., 111 S.W. (2d) 167. In that case, the status of the purchaser and the relation of the seller to the state was considered by the court, and at l.c. 168 the court said:

"* * * The purchaser is the taxpayer, and seller, although responsible, is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax. * * *"

Therefore, if the municipality is engaged in the business of selling light and water, it is not the taxpayer, but it is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax from the purchaser of light and water who is the taxpayer.

In your request, referring to franchises of telephone or other public utilities, we find that the statutes applicable to telephone company franchises are different from those applicable to electrical light and water plants and other public utilities. In fact, we find that these statutes are applicable to different cities which have water, light and power plants.

The statute relating to franchises of telephone companies is Section 5326 R. S. Mo. 1939, which reads as follows:

"Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters: Provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

The telephone companies included in this section are set out in Section 5321 R. S. Mo. 1939, and it reads in part as follows:

"Any number of persons, not less than five, being subscribers to the stock of any contemplated telephone or magnetic telegraph company, may be formed into a corporation for the purpose of constructing, owning, operating and maintaining lines of telephone or magnetic telegraph, upon complying with the following requirements: * * *"

The question of whether or not the provisions of what is now Section 5321 R. S. Mo. 1939 included only the persons named in that section was before the Kansas city Court of Appeals in the case of the City of Plattsburg vs. the Peoples' Telephone Company, 88 Mo. App. 307-313, wherein the court said:

"As above observed, the statutes of this State (section 1251, article 6, Revised Statutes 1899) by general provision give the right to corporations organized under that article to erect telephone poles in the streets of the cities of the State. But that statute does not deny the right to individuals, or to corporations organized outside this State. * * *"

From this opinion, it would seem that the provisions of Section 5326, supra, would be applicable to all companies who desired to obtain a franchise from the city. The Missouri Supreme Court, in the case of State ex inf. McKittrick, Attorney General, ex rel. City of Lebanon vs. Missouri Standard Telephone Company, 85 S.W. (2d) 613, in construing what is now Section 5326 R. S. Mo. 1939 said at l. c. 617:

"* * * The statute, by its express terms, is a legislative grant to telegraph and telephone companies organized under the provisions of the Missouri statutes of the right 'to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters.' But the grant of authority conferred by the statute is limited by the terms of the proviso which prescribes that, where a telegraph or telephone company desires 'to place their wires, poles and other fixtures in any city, they shall

first obtain consent from said city through the municipal authorities thereof.' * * *"

At 1. c. 618, the court further said:

" * * * We think it is well settled by the decided weight of authority that, where a city is authorized by statute to give or to withhold its consent to the use of its streets by a public utility, upon giving its consent, the city can impose reasonable conditions upon the exercise of the right or franchise granted, and that among the conditions that it can rightfully impose is one limiting the duration of the franchise. * * *"

This would indicate that the municipal authorities of a city may, by ordinance, grant authority to telephone companies to set their poles, piers, abutments, wires and other fixtures along the streets of the city for the purpose of operating a telephone system.

On the question of franchises for other public utilities such as gas works, electrical works, waterworks, etc., we find that the 63rd General Assembly, by House Bill 461, which was approved on January 25, 1946, enacted a law relating to franchises to such utilities by cities of the fourth class. Section 7178 of this Act provides in part as follows:

" * * * The board of aldermen shall have the right, also, to erect, maintain and operate gas works, electric light works, or light works of any other kind or name, and to erect lamp posts, electric light poles, or any other apparatus of appliances necessary to light the streets, avenues, alleys or other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and to regulate the same, and to prescribe and regulate the rates to be paid by the consumers thereof, and to acquire by purchase, donation or condemnation suitable grounds within or without the city upon which to erect such works, and the right of way to and from such works, and also the right of way for laying gas pipes, electric wires under or above the grounds, and erecting posts and poles and such other apparatus and appliances, as may be necessary for the efficient operation of

such works: Provided, that the board of aldermen may, in its discretion, grant the right to any person, persons or corporation, to erect such works and lay the pipe, wires, and erect the posts, poles and other necessary apparatus and appliances therefor, upon such terms as may be prescribed by ordinance: Provided further, that such rights to any such person, persons or corporation shall not extend for a longer time than twenty years, and shall not be granted nor renewed, unless by consent of a majority of the qualified voters of the city, voting at an election held for such purpose: Provided still further, that nothing herein contained shall be so construed as to prevent the board of aldermen from contracting with any person, persons or corporation for furnishing the city with gas or electric lights in cities where franchises have already been granted, and where gas or electric light plants already exist, without a vote of the people; * * *"

This Act seems to apply especially to authorities of cities of the fourth class to enter into contracts with gas works, electric light or light works.

CONCLUSION

(1) It is therefore the opinion of this department that cities which own and operate municipal water and light plants should collect the Missouri Sales Tax on sales of electrical current of water to their customers.

(2) It is the opinion of this department that telephone franchises may be granted by municipal authorities and such authority does not have to be approved by the voters of the municipality.

(3) It is the opinion of this department that in cities of the fourth class the board of aldermen of such cities may grant franchises to operate gas works, electrical light works or light works, provided such franchises do not extend for a longer time than twenty years and provided that the consent of a majority of the qualified voters of the city vote at an election on such proposition is obtained.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General