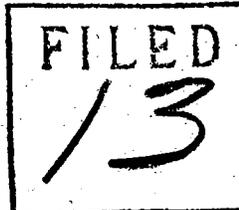


TAXATION - SALES:
SALES TAX:

Persons engaged in business who do not have resale certificates with respect to certain transactions may offer evidence that such sales were not sales at retail.

April 11, 1950

Honorable W. H. Burke
Assistant Supervisor
Department of Revenue
Division of Collection
Jefferson City, Missouri



Dear Mr. Burke:

This department is in receipt of your recent request for an official opinion. Your request reads in part:

"We have an assessment against the Joplin Block and Material Company where their attorney claims that our rules and regulations are not a part of the Missouri Sales Tax Law and particularly objects to the rule stating that they must have resale certificates where they claim that a sale is for resale.

"The attorney states that if the customer advises them that the merchandise is purchased for resale that their client's liability ceases and that if we want to collect sales tax we must go to the purchaser and arrange to get the tax from him. The attorney further states that if they have nothing to show that the transaction was sale for resale at the time an audit is made, that it is only necessary for them to get a statement or a certificate from the purchaser and that it will then be incumbent upon us to exempt this sale from the taxable sales of his client."

As we interpret your opinion request, an audit has been made on a particular person doing business and subject to the Sales Tax Act, and that said person had no resale certificates with respect to certain transactions claimed to be sales for resale. The question

Hon. W. H. Burke

presented is whether or not statements or certificates now obtained from the purchasers will be sufficient to relieve the taxpayer from liability with respect to these transactions.

Section 11421, Laws Missouri 1945, page 1873, provides:

"Every person engaged in the businesses herein described in this State shall keep records and books of his gross daily sales, together with invoices, bills of lading, sales records, copies of bills of sale and other pertinent papers and documents. Such books and records and other papers and documents shall, at all times during business hours of the day, be subject to inspection by the Director of Revenue or his duly authorized agents and employees. Such books and records shall be preserved for a period of at least two (2) years, unless the Director of Revenue, in writing, authorized their destruction or disposal at an earlier date."

(Underscoring ours.)

Section 11413, Laws Missouri 1947, Volume I, page 554, reads in part:

"For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article. * * *"

Pursuant to the authority given the Director of Revenue by Section 11413, Article J of the General Interpretations of Law has been made and promulgated, which article reads in part:

"Section 11416 of the Sales Tax Act, relative to collection and remittance of the tax, requires that you include in your return any and all monies collected from the purchaser as sales tax.

"All sellers making taxable sales of tangible personal property or services, as defined by the Act, must determine when sales are made whether the buyer purchases such goods or services for use, or consumption or for resale. (See Section 11420.)

"All sellers are required to keep ample records of sales and taxable transactions to support reports filed with the Director of Revenue. The Director of Revenue will

Hon. W. H. Burke

not recognize any deductions of any nature on your tax return unless you have ample supporting evidence in your records to explain your deductions. Therefore, all sellers must obtain and keep in their records signed resale certificates supporting deductions taken as sales for resale. Such certificates are to be kept in your files and must be made available for inspection by the Director of Revenue, or his agents, during all business hours of the day. These certificates of resale shall be only prima facie evidence that the property or taxable services described therein was sold for the purpose of resale, and the Director of Revenue has the right to examine all facts relative to the purchase and sale before said certificates will be honored."

(Underscoring ours.)

Therefore, to more efficiently administer the Sales Tax Act and to aid in the collection thereof, it is required that persons engaged in business keep among their records signed certificates of resale where the sales are such. These are required to support the deductions taken as sales for resale and they constitute prima facie evidence in the sellers' records explaining the deductions.

If the regulation requiring the keeping of such retail certificates is a reasonable regulation and in conformity with the Act, it is valid and binding upon the parties subject to the Act, as the Director of Revenue is specifically given the authority to make such regulation. It is our opinion that it is a reasonable regulation to require persons engaged in business to keep among their records, papers and memoranda required by Section 11421, supra, certificates of resale to support the deductions claimed by said persons in their reports to the Director of Revenue. This regulation will more efficiently secure the payment of an accounting for the tax. We are also of the opinion that said regulation conforms to the Act and is a reasonable exercise of the rule-making power afforded the Director of Revenue, as Section 11420, Laws Missouri, 1947, Volume II, page 435, places the burden of proving that a sale is not a sale at retail is upon the person making the sale. Section 11420 reads in part:

"The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale, except with respect to sales, services, or transactions provided for in subsection (b) of Section 11412.* * *"

Hon. W. H. Burke

However, the particular transactions with which we are here concerned were not sales at retail subject to the tax. The fact resale certificates were not obtained at the time of the transactions and were not on file at the time of the audit cannot change the legal nature of these transactions and make them subject to the tax. The Sales Tax Act provides that only sales at retail shall be taxed, and the Director of Revenue cannot by rule or regulation extend liability to sales which are for resale. It was held in the case of *Washington Printing & Binding Co. v. State*, 73 P. (2d) 1326, 1.c. 1328, 192 Wash. 448, that :

"The Tax Commission cannot, by such rule, impose a tax upon property or a transaction that is not mentioned in the statute as taxable. The rule making power is given only for the purpose of empowering the commission to carry out the provisions of the statute.

"The power vested in the commission to prescribe rules and regulations for making returns for ascertaining assessment and collection of the tax imposed by the act does not vest in the commission any discretion whatsoever in the matter of requiring the payment of a sales tax by any other than such as are designated in the act. It is true that an administrative body within prescribed limits, and when authorized by the lawmaking power, may make rules and regulations calculated to carry into effect the expressed legislative intention." *Western Leather & Binding Co. v. State Tax Commission of Utah*, 87, Utah 227, 48 P. 2d 526, 527."

However, Section 11420, supra, does place the burden of proving that the sales in question were not sales at retail upon the seller. Failure to have resale certificates among the records required to be kept by a person engaged in business may constitute prima facie evidence that such sales were subject to the tax, but upon a hearing or an investigation by the Director of Revenue, evidence may be offered by the seller that such transactions were not sales at retail. Statements or certificates from purchasers in such transactions would constitute such evidence. Should proof be made that such sales were for resale, they are then not subject to the tax.

CONCLUSION

It is therefore the opinion of this department that the Department of Revenue may, by regulation, require persons engaged in business under the Sales Tax Act to obtain signed certificates

Hon. W. H. Burke

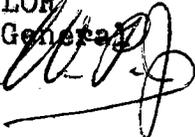
for resale when sales for resale are made. However, failure to have such resale certificates on file can impose no liability for such sales, but can merely constitute prima facie evidence that such sales were sales at retail. Evidence that such sales were for resale may be offered by such persons, and statements or certificates from the purchasers in these transactions would be such evidence. However, the burden of proof that such sales were for resale, and not subject to tax, lies with the persons who allege such.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



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