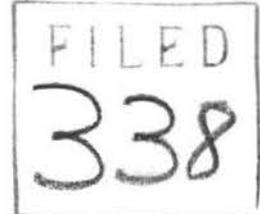


TAXATION:
CONSTITUTIONAL LAW:

The elimination of the discounts presently allowed under the sales tax act, the state income tax act, and the city earnings tax authorization statutes for the collection of such taxes would not affect the constitutionality of those statutes.

OPINION NO. 338



November 14, 1968

Honorable Maurice Schechter
State Senator - 13th District
Missouri Senate
41 Country Fair Lane
Creve Coeur, Missouri 63141

Dear Senator Schechter:

In your recent letter as Chairman of the Missouri State Tax Commission you state that the Commission is considering a recommendation disallowing the discounts presently authorized on Sales Tax Collections paid to the State of Missouri on withholding for State Income Taxes paid to the State of Missouri, on City Earnings Tax paid to the City of St. Louis and on City Earnings Tax paid to Kansas City. You have requested an informal opinion from this office as to whether the disallowance of such discounts could affect the constitutionality of any of the laws in question.

The basic question presented is whether the nominal taxpayer, who is required to collect the tax and transmit it to the State or City is entitled, as a matter of constitutional right, to compensation for the performance of the duty imposed upon him. Inherent in that question is the preliminary one of whether the state may validly impose the obligation of acting, in effect, as a collection agent for the state or city.

Missouri Appellate Courts have not as yet ruled directly on these issues. However, similar questions, in one form or another, have been presented to the Courts of a number of states as well as to the federal courts. With one exception, no longer followed, every case involving a statute which requires a retailer or employer to collect and remit taxes has sustained the constitutionality of such statute. Although

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some of the statutes involved in these cases contain provisions allowing discounts or other compensation for the involuntary burden of collecting and remitting the taxes, such fact is ordinarily considered merely an additional reason rather than a necessary requisite, for the decision.

Among the relevant federal decisions are the following:

Brushaber v. Union Pacific Railroad Co., 240 U.S. 1. This case denied a number of constitutional objections to an early federal income tax statute which provided for collecting the tax at the source, that is, made it the duty of corporations to retain and pay the sum of the tax on interest due on bonds and mortgages. This was a forerunner of the present, much broader, withholding duty. The specific contention here relevant (and which was overruled without elaboration) was stated in this fashion in the opinion l.c. 21:

" * * * This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation * * *."

A headnote to this case in the official report reads as follows:

"The provisions for collecting income at the source do not deny due process of law by reason of duties imposed upon corporations without compensation in connection with the payment of the tax by others."

Wilmette Park District v. Campbell, 7 Cir., 172 F.2d 885. This case involved the validity of penalties assessed against a state instrumentality for failure to collect and pay the federal tax on admissions. The Park District contended that "the duty of collecting federal taxes cannot be imposed by Congress upon elected Commissioners of a local government [sic] body and cannot make the costs of collecting the same a charge upon general tax revenues * * *." On authority of Allen v. Regents of the University System of Georgia, 304 U.S. 439, the Court sustained the assessment of penalties. The Supreme Court affirmed the ruling in 338 U.S.411.

The Allen case, denying the objection that the application of the federal admissions tax to a state instrumentality unconstitutionally burdened a governmental function, held that the instrumentality may constitutionally be required to collect, make return of, and pay the tax to the United States. The Supreme Court said, 304 U.S., l.c. 450, that even though the burden of collecting the tax is placed directly on the state agency, "we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States."

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Abney v. Campbell, 5 Cir., 206 F.2d 836, certiorari denied 346 U.S. 924, involved the validity of the withholding provisions of the Federal Insurance Contributions Act as applied to domestic employees, the contention being that domestic employers may not be burdened l.c. 838:

" * * * as uncompensated tax collectors * * * by being required to withhold and account to the government for portions of wages, withheld for payment of the employees' income taxes."

In the course of the opinion, the Court states, Abney v. Campbell, Supra, l.c. 841:

" * * * withholding provisions have now become a familiar part of our system of taxation and can no longer be successfully challenged."

One of the contentions of the employer, that the Act imposed an involuntary servitude in violation of the Thirteenth Amendment, was denied as "frivolous." In discussing this contention, the Court said, l.c. 841:

"There is no suggestion, in the law, of the imposition of a servitude, there is merely a requirement that as to the tax due by domestic employees on account of the wages paid them by their employer, the employer must withhold the amount fixed by law and account it to the United States. The enforcement of the act is not the imposition of a servitude. It is the collection of a tax and the enforcement of an obligation which under settled federal law appellants may be and are lawfully subjected to. From our holding that the taxes and burdens imposed are valid, it must follow that the enforcement of the law imposing them is not, it cannot be, a violation of the Thirteenth Amendment."

Rainier National Park Company v. Martin, D.C. Washington 18 F. Supp. 481, affirmed without opinion 302 U.S. 661, ruled the validity of a state retail sales tax as applied to a business carried on in a national park, the state having reserved the right to tax. The law imposed a retail sales tax to be collected and transmitted to the state by the seller. In holding the law valid the Court said, l.c. 488:

"When the state reserved the right to tax, it also reserved the right to collect or enforce the tax. The former without the latter would be an empty gesture, which is not the purpose of the reservation. If the collection or enforcement incidentally constituted a regulation

of plaintiff's business, it was valid, nevertheless, if the means adopted for the collection or enforcement are reasonable. It has long been held that the imposition of the duty to collect the tax upon a person, and thus constitute such person an agent of the state, is a reasonable means for collection of the tax."

In sustaining the validity of a Kentucky statute requiring national banks as agents of their shareholders to pay the tax laid on the shares of their shareholders, the United States Supreme Court, in *National Bank v. Commonwealth*, 76 U.S. 353, commented l.c. 363:

"The mode under consideration [for collection of the tax] is the one which Congress itself has adopted in collecting its tax on dividends and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares * * *."

To the same effect are *Aberdeen Bank v. Chehalis County*, 166 U.S. 440; *Des Monies Bank v. Fairweather*, 263 U.S. 103, 111; and *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232. In *Bell's Gap Railroad Co. v. Pennsylvania* the Court stated, l.c. 239.

"The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection."

The Missouri Supreme Court has expressed a similar view of such statutes. *State ex rel Bay v. Citizens State Bank*, 274 Mo. 60, 202 S.W. 382, 385.

Pierce Oil Corporation v. Hopkins, 264 U.S. 137, is an oft-cited case. The plaintiff sought to enjoin the enforcement of an Arkansas statute requiring retailers of gasoline to collect a tax of one cent per gallon. Dealers were required to register and file monthly reports and to pay over each month the amount of the taxes accruing on the sales made. One of the constitutional objections was that l.c. 139:

" * * * the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense."

The Court ruled, l.c. 139:

"A short answer to this argument is * * * that a State which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden."

Monamotor Oil Co. v. Johnson, 292 U.S. 86, involved an Iowa statute which imposed a tax on motor vehicle fuel used or otherwise disposed of in the state. Quoting from the opinion, l.c. 93:

"Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement."

Again, l.c. 95:

"The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the XIV Amendment."

McGoldrick v. Berwind-White Co., 309 U.S. 33, held the New York City sales tax imposed on purchasers and which was required to be collected by the seller does not infringe the commerce clause of the United States Constitution. The companion case of McGoldrick v. Felt & Tarrant Co., 309 U.S. 70, decided on authority of McGoldrick v. Berwind-White Co., Supra, did not discuss, but necessarily denied, the following contention (as set forth in McGoldrick v. Felt & Tarrant Co., Supra, l.c. 74):

"When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, and to incur substantial additional costs and expenses, the City is attempting to exercise its sovereign powers beyond its jurisdiction. That it cannot do without burdening commerce."

Colorado National Bank of Denver v. Bedford, 310 U.S. 41, involved a Colorado statute imposing a percentage tax on the value of services rendered by banks and requiring the banks to collect and remit the tax, less three per cent to cover the cost of the service. (This appears to be the only federal case in which the statute in question provided for compensation, at least so far as the opinions disclose.) In upholding the tax as applied to a national bank, the Court stated, l.c. 53:

"The tax being a permissible tax on customers of the bank, it is settled by our prior decisions

that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality."

To this ruling, the Court added the comment, l.c. 53:

"Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect."

Other United States Supreme Court decisions at least peripherally in point are *Felt & Tarrant Co. v. Gallaher*, 306 U.S. 62 (involving the California Use Tax Act); *Citizens National Bank v. Kentucky*, 217 U.S. 443; and *Helvering v. Davis*, 301 U.S. 619. The *Helvering v. Davis* case involved the Social Security Act, which includes a provision for withholding the employee's tax (although the validity of that provision was not in terms questioned by the distinguished counsel attacking the Act).

Another case indicative of the reasoning of the United States Supreme Court is *Leonard & Leonard v. Earle*, 279 U.S. 392, which is not however, a withholding case. There, a Maryland statute imposing a license tax on the oyster business and requiring that 10% of the empty oyster shells be turned over to the state also required that the quota of empty shells be retained by the licensee for a reasonable time until removed by the State. In holding the statute valid over the objection that, l.c. 396:

"* * * to compel storage of the shells until taking by the State would unlawfully deprive them of the use of their premises, * * *"

the Court stated (citing *Pierce Oil Corp. v. Hopkins* 264 U.S. 137), l.c. 398:

"The requirement concerning storage for a limited time of 10% of the empty shells imposes no serious burden, is but part of the general scheme for taxing the privilege, and is no heavier than demands to which taxpayers are often subjected. It is neither oppressive nor arbitrary."

As the foregoing authorities make clear, the federal courts have in every instance sustained the validity of withholding provisions of both state and federal laws. And as you are aware, the withholding tax is a major part of the federal income tax but no compensation to the employer is provided for.

As indicated above, the state courts are also in accord in holding valid, as against constitutional objections (usually due process

or involuntary servitude), requirements that a person collect and transmit to the state, without compensation, a tax imposed on another.

Among these cases are the following:

Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068. Held, provision of sales tax law requiring the seller of commodities upon which the tax is exacted from the purchaser to collect it (against his will), report the collections and to pay the amount of the tax, all without compensation (whether or not he collects the tax) is not violative of due process.

Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016. Held, the sales tax act is not objectionable because it imposes an uncompensated burden on the seller of collecting and remitting the tax. The Court stated that it was simply an administrative detail, since the consumer ultimately pays the tax, and it is within the power of the Legislature to impose such a duty as a reasonable regulation of the seller's business.

Wiseman v. Phillips, 191 Ark. 63, 84 S.W.2d 91. Held, the requirement of the sales tax act that the retailer collect and remit the tax is not an unreasonable regulation, since it does not involve the payment of any fee nor the performance of any unreasonable task.

State ex rel Rice v. Allen, 180 Miss. 659, 177 So. 763. Held, the sales tax law requiring sellers of property to collect the taxes from their customers without remuneration is valid.

State ex rel Arn v. State Tax Commission, 163 Kan. 240, 181 P.2d 532, certiorari denied 358 U.S. 907. Held, statute requiring vendors of motor fuel to collect the tax thereon without compensation does not impose an involuntary servitude.

Akers v. Handley, 238 Ind. 288, 149 N.E.2d 692. Held, withholding provisions of the Indiana Gross Income Tax Act are not violative of the Thirteenth Amendment as imposing an involuntary servitude.

Blauner's Inc. v. City of Philadelphia, 330 Pa. 342, 198 A. 889. Held, "If the imposition of the burden of tax collection without reimbursement does not violate the Fourteenth Amendment, then a fortiori, the allowance of compensation [1% for collection] constitutes an additional reason in support of the constitutionality of the sales tax ordinance.

Rinn v. Bedford, 102 Colo. 475, 84 P.2d 827. Commenting on the argument that the party rendering the service is "unlawfully constituted a collector of taxes against his will and that the compensation provided for collection [of the service tax] is inadequate and confiscatory," the Court stated that the method of collection of the tax "seems the only practical method," but in any event was a matter left to the discretion of the legislative branch of the government.

Tanner v. State, 28 Ala. App. 568, 190 So. 292, also sustained the collection and remission requirements of a sales tax act.

The only case which holds that adequate compensation must be paid a retailer for collecting and remitting a sales tax upon the consumer is In re Opinion of the Justices, 88 N.H. 500, 190 A. 801, giving this advisory opinion on a proposed sales tax law I.c. 804.

"By the bill the tax is placed upon the purchaser. Although the seller is required to guarantee, collect, account for, and pay it, he is also required to add it to the price of the article sold and may not assume or absorb or refund it. The duty thus devolved upon him to act as the collector of the tax without adequate compensation for the service a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. It would not be a service incidental to the ascertainment of his own taxes.

"The situation is not parallel with that of distributors of gasoline and other motor fuels who are required to pay the tax thereon although it is in finality a tax against the ultimate consumer. Such distributors must be licensed (Pub. Laws c.104, §1), and their duty to pay the tax is therefore a term of the license."

Parenthetically, we note that under the present Missouri sales tax act, retailers must be licensed and must pay the tax on their gross receipts as a term of the license.

In two subsequent advisory opinions, the New Hampshire Supreme Court has departed from the view expressed in 190 A. 801. In Opinion of the Justices, 95 N.H. 546, 64 A.2d 314, the Court stated:

"This provision [allowing breakage to be retained by the retailer as compensation for collecting the tax] was apparently inserted to meet the objection stated in In re Opinion of the Justices, 88 N.H. 500, 503, 190 A.801, that a retailer cannot be called upon to act as a collector of the tax without adequate compensation, * * *. With this statement we do not agree. But the above provision may be considered by the Legislature to be a proper aid in the administration of the law."
(Emphasis added.)

Then, in Opinion of the Justices, 97 N.H. 533, 81 A.2d 845, 850, the Court amplified its changed views as follows:

"In Opinion of the Justices, 95 N.H. 546, 64 A.2d 314, the view was expressed that the provision that breakage be retained by the retailer as compensation for collecting a sales tax was a proper aid in the administration of the law, but not constitutionally required. This duty of collection is similar to that of withholding taxes under the Federal Income Tax provisions. It is a public duty that need not be compensation." (Emphasis added.)

See also 16A C.J.S., Constitutional Law, §650b, pp. 978-980, and 16 C.J.S., Constitutional Law, §203(5), pp. 1002-1003.

As we have noted, your question has not been directly considered in any Missouri case (with the possible exception of the Citizens State Bank case, 202 S.W. 382, 385). There is, however, one case which considered one aspect of the question in reverse, that is, the validity of allowing a discount for collection. That case, Ex parte Asotsky, 319 Mo. 810, 5 S.W.2d 22, concerned a city ordinance imposing an occupation tax upon cigarette dealers. The tax was in an amount equivalent to 20% of the retail sales price of the cigarettes, to be paid by purchase of stamps to be affixed to the packages. A 10% discount in the sale of the stamps to the dealer was allowed. One of the constitutional objections urged was that since the consumer was required to pay the entire 20 per cent, the allowance to the dealers of a 10 per cent "profit" for themselves on such stamps "out of the public funds authorized to be collected from and paid to the consumer" was violative of Article X, Section 3, of the Constitution of 1875 "because the tax thereby attempted to be levied is not wholly and exclusively for public purposes." (Article X, Section 3, of the 1945 Constitution contains a similar requirement that taxes may be levied and collected only for public purposes.) The Court rejected the foregoing contention as follows:

"The ordinance is not reasonably subject to this objection. The provision for the purchase by the dealer of stamps representing 20 per cent. of the retail price at a discount of 10 per cent. is in effect a tax of 18 per cent. instead of 20 per cent. No stamps are sold at 100 per cent. of their face value to any one. There is nothing requiring the dealer to sell cigarettes at any stated price. All of the 18 per cent. tax is paid to the city and finds its way into its treasury where it is used for public purposes, as distinguished from private purposes. The requirement that stamps, representing 20 per cent. of the retail price less 10 per cent. be purchased, is nothing more or less than an unnecessarily round-about way of imposing an 18 per cent. tax on sales of cigarettes.

* * * * *

"If the ordinance required the dealer to collect 20 per cent. of the retail price from the purchaser of the cigarettes in packages and then gave the dealer 10 per cent. of the money so collected or required the purchaser of a package of cigarettes to buy from the dealer, attach to the package and cancel a stamp and to pay therefor the full face of the stamp, a different situation would arise. But since the dealer is not required to collect the tax from the purchaser and the rate he pays for the stamps is 18 per cent. of the retail price, whether the purchaser ultimately pays it or the dealer absorbs it no public money is paid to or retained by the dealer."

In citing Asotsky, we do not mean to imply that the Court would have ruled otherwise had the "different situation," adverted to by the Court, been present. It is a matter of common knowledge that the discount is seldom "profit" in view of the additional expense and burden involved. We note, however, that the present Missouri cigarette tax act, Chapter 149 RSMo., as amended (which allows a discount of 3 per cent to the wholesaler on the total amount of stamps purchased,) "as compensation for affixing the stamps and making such reports", (Section 149.030 RSMo Supp., 1967) requires the full amount of the tax to be added to the sales price, the expressed intent being to impose the tax on the consumer, "with the person first selling the cigarettes acting merely as an agent of the state for the payment and collection of the tax to the state." (Section 149.020 RSMo Supp., 1967)

The present Sales Tax Act authorizes the seller to deduct and retain an amount equal to two per cent from every remittance made on or before the date when the same becomes due. Section 144.140, RSMo Supp., 1967. Formerly, the authorized deduction was three per cent. By reason of the 1965 amendments, the tax is now levied upon sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state, and they are required to obtain a retail sales license without cost and to report and pay the tax on their gross receipts. Sections 144.020, 144.021, 144.080, 144.083, 144.100. In this respect the law is now comparable to the Motor Vehicle Fuel Tax Act, that is, the tax is directly placed on the seller, although he is required to collect it from the purchaser to the extent possible. The requirement that the tax be paid to the seller by the purchaser and the prohibition against advertising or holding out that the tax will be absorbed by the seller is a common provision adopted quite generally for the protection of small merchants.

In view of the fact the sales tax is now a gross receipts tax on the seller for the privilege of engaging in the retail business, it would appear that the primary purpose of the present two per cent

Honorable Maurice Schechter

deduction is simply to assure prompt remission of the tax (it being allowed only if the remittance is timely made). We are aware of no constitutional necessity for the allowance of a discount for prompt payment of a tax directly imposed on the taxpayer. In our opinion, the elimination of the discount would in no wise affect the validity of the sales tax act. Significantly, the Trailer Camp Tax Law, which imposes a privilege tax on the lessor but requires him to collect the tax from the lessee and remit the same to the state, contains no provision authorizing the lessor to retain any portion of the tax so collected. See to this effect Opinion No. 16, dated October 30, 1953, addressed to Hon. L. M. Chiswell.

The Compensating Use Tax Law (Sections 144.600 et seq.), although complementary to the sales tax act, places the primary obligation for the use tax on the person who stores, uses or consumes the tangible personal property, making the vendor responsible for collecting, reporting and remitting the tax. Although a privilege tax, the taxable privilege is not that of the vendor. The vendor is authorized to deduct and retain an amount equal to three per cent of the amount remitted (Section 144.710), but only for prompt remittance. The other taxes to which you refer, the State Income Tax and the City Earnings Taxes of St. Louis and Kansas City are likewise taxes which are not imposed on the person required to collect and remit the same. In each instance the employer is required to withhold the amount of the tax from the wages paid the employee taxpayer, to make reports and to pay over the tax withheld.

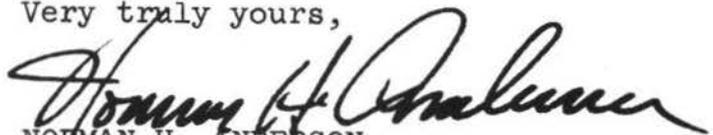
In our opinion, the state (or city as the case may be) may lawfully impose the incidental burden on the employer (or vendor, in the case of the compensating use tax) of collecting and remitting the tax without compensation for the performance of the duty, just as the federal government imposes a similar duty of withholding federal income taxes without compensation. The imposition of such an uncompensated burden does not, under the authorities cited herein, constitute either a taking of property without due process or an involuntary servitude.

CONCLUSION

The elimination of the discounts presently allowed under the sales tax act, the state income tax act, and the city earnings tax authorization statutes for the collection of such taxes would not affect the constitutionality of those statutes.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. Thomas J. Downey.

Very truly yours,


NORMAN H. ANDERSON
Attorney General