TAXATION : Construction of proposed amendment to the
SALES TAX : exemption section of House Bill 125, by
EXEMPTION : Mr. Andrae.

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Hon. Henry Andrae
Representative of Cole County
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the construction of two proposed amendments to the Exemption Section of the Sales Tax Act now before the House of Representatives in House Bill No. 125.

The proposed amendments are as follows:

> "Amend House Bill No. 125; Page 7; Section 11409; Lines 4, 5 and 6; by inserting a comma after the word 'sales' in line 4, and by striking out all of line 4 after the word 'sales', all of line 5, and all that part of line 6 preceding the comma in said line, and by inserting the following in lieu thereof:
>
> "the tax upon which would be construed as a direct burden upon interstate commerce or as a tax levied upon sales made outside this state of articles for use within this state.
>
> "Amend House Bill No. 125; Page 5; Section 11407; by adding a subsection immediately after subsection (L) on page 5 to be known as subsection (m) and to read as follows:
>
> "(m) Nothing in this act shall be construed as imposing a use tax."

The Missouri Supreme Court in the case of Mississippi River Fuel Corporation v. Smith, 164 S. W. (2d) 370 l.c. 377, in construing the language of the Exemption Section where it

contained the words:

> "as may be made in commerce in this state and any other state of the United States, or between this state and any foreign country.* *"

said; l.c. 377:

> "* * * Of course, this language means sales between citizens of this state and citizens of any other state, and to this we agree. Sec. 11408, R.S. 1939, amended in 1941, Laws 1941, p. 701, Mo. R.S.A. 11408, but not as to the language here quoted, provides that the sales tax shall be levied upon every retail sale in this State of tangible personal property', and Sec. 11409 does no more than to exempt from the sales tax sales made in interstate commerce.* * * *"

The proposed amendment proposes to exempt from the act retail sale transactions, upon which the imposition of the taxes would be construed as a direct burden on interstate commerce. In the case of McGaldwick vs. Berwind White Coal and Mining Company, 309 U. S. 33, 60 S. Ct. 388, the court in speaking of the authority of states to enact legislation affecting interstate commerce, said, at l.c. 391:

> "Section 8, clause 3, article 1, of the Constitution declares that 'Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *.' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See Gibbons v. Ogden, 9 Wheat. 1, 187, 6 L.Ed. 23; South Carolina State Highway Dept. v. Barnwell Bros., 303

> U.S. 177, 185, 58 S.Ct. 510, 513, 82 L.Ed. 734. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

and at l.c. 392, in speaking of taxes which states may impose without burdening commerce, the court said:

> "* * * A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. * * *"

and in speaking of taxes which the states may not impose because they would impede or destroy interstate commerce, the court further said at l. c. 393:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power

> to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Referring to the last two statements quoted from the Berwind White case, there will be seen that there are instances where states may levy excise taxes on transactions which involve interstate commerce, and there are instances in which the states are prohibited from levying taxes on such transactions.

The entire first sentence in Section 11409 of House Bill 125 could be left out and still the state would be prohibited from imposing a tax upon interstate commerce which it would be prohibited from taxing under the Constitution or laws of the United States. We also think that the amendment which you proposed would not add anything to the prohibition to tax commerce, in other words, under the holding of the Supreme Court of the United States in the Berwind White case and cases cited therein, if the proposed tax burdend commerce more than it does intra-state commerce or if it impedes the flow of commerce, then it would be in violation of the Constitution and laws of the United States.

In regard to the portion of the proposed amendment reading as follows;

> "or as a tax levied upon sales made outside this state or articles for use within this state."

Apparently the purpose of this amendment is to clarify the question of whether or not retail sales made outside of the state for purchases of property to be used in this state are taxable.

The Act imposes a tax on "retail sales" of certain articles, services, etc. The term "sale at retail" is defined as: subsection (g) of Section 11407:

> "(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. * * *"

The elements, of 'sale at retail' as defined by the Act, necessary to impose the tax are:

1. The seller must be engaged in business.

2. There must be a transfer of title or ownership of the property sold.

3. There must be a valuable consideration.

4. The property sold must be for use or consumption and not for resale in any form as tangible personal property.

Your amendment relates to the second and fourth elements, of the sale, which are; transfer of the title and the use or consumption of the article. In the Berwind White case quoted above, the Supreme Court of the United States ruled that if either of the elements which constitute a 'retail sale' takes place within the state in which the tax is imposed, then the state is authorized to collect the tax.

Following this reasoning and answering your question, We will say that if the ownership and title to the property sold, under a 'retail sale' made outside this state, passes outside the state, then the tax may not be imposed regardless of the fact that the articles are bought for use and consumption in the state of Missouri.

Answering your inquiry as to whether or not House Bill 125 could be construed as a 'use tax', we refer you to our opinion to Senator Falzone, in which our holdings are that this tax is not a 'use tax'. We are enclosing a copy of this opinion for your information.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB/mh