

SOCIAL SECURITY: Persons selling vehicle and driver's licenses and  
COMPTROLLER: collecting of other taxes for the State Department of  
MOTOR VEHICLES: Revenue under the provisions of Laws of Mo. 1951,  
page 863, are not covered under the provisions  
of the Old Age and Survivor's Insurance, page 788,  
Laws Mo. 1951.

JOHN M. DALTON  
XXXXXXXXXX



May 5, 1953

XXXXXXXXXX

J. C. Johnsen

Mr. Newton Atterbury  
State Comptroller and  
Director of the Budget  
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of  
this office reading as follows:

"The question has been presented as to  
the status of persons selling license  
plates, titles, etc.

"Are persons selling license plates, titles,  
etc. for the State Department of Revenue,  
who receive no salary from the Department  
of Revenue, and who make a charge to the  
purchaser a fee for his services, subject  
to Social Security as a state employee?

"I respectfully request your official opinion  
on this question."

It is understood from the context of your letter and the  
material which you have submitted with it that the statute with  
which we are here concerned is the new provision for agents of  
the Department of Revenue to collect motor vehicle licenses and  
taxes as provided in Laws of Mo. 1951, Section 1, page 863, as  
follows:

"Any person who is selected or appointed by  
the state director of revenue to act as an  
agent of the department of revenue, whose  
duties shall be the sale of motor vehicle  
licenses and the collection of motor vehicle  
sales and use taxes under the provision of  
section 144.450, RSMo. 1949, and who receives

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no salary from the department of revenue shall be authorized to collect from the party requiring such services additional fees as compensation in full for all services rendered on the following basis:

"(1) For each motor vehicle or trailer license sold, renewed or transferred--twenty-five cents;

"(2) For each application or transfer of title--twenty-five cents;

"(3) For each chauffeur, operator or driver's license--twenty-five cents;

"(4) No notary fee or other fee or additional charge shall be paid or collected."

It will be noted that the fee to be paid is to be paid by the party requiring the service. On these occasions the party, or parties, requiring the service are applicants for various kinds of motor vehicle licenses, as provided in the section. It will be noted further that no provision whatsoever is made for the payment of any of the so-called agents by the State of Missouri.

It has been declared to be the law in this state that public officers are not entitled to compensation unless they can specifically point out the statute authorizing such compensation.

In *Nodaway County v. Kidder*, 129 S.W.(2d) 857, l.c. 860, it was stated by our Supreme Court as follows:

"(8) It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackman, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

In the above quoted section, Laws Mo. 1951, page 863, it may be seen that there is no compensation provided for by the state for the service as outlined. The tenor of the statutory language is to the opposite effect. The fee is to be paid by the party requiring the service. Unless the statute so provides there can be in accordance with the *Nodaway County* case no consideration of fees, salary, or compensation of any kind moving from the State of Missouri to

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the agent as described in the above quoted section of the law.

It was held in one of the earliest cases decided since the participation of the states in old age and survivor's benefits under the Federal Social Security Act, which was Shamburger v. Commonwealth, 240 S.W.(2d) 636, l.c. 637, as follows:

"The fundamental point, it seems to us, is the fact that contributions (or excise taxes) required by the law to be paid by both employers and employees, is a percentage of wages or compensation paid and received. 26 U.S.C.A. Secs. 1400, 1410. Therefore, so far as liability for payment is concerned, the controlling point is the source of the compensation, i.e., who pays the salaries."

In a closely related question involving Federal Social Security, the United States Circuit Court in Magruder v. Yellow Cab Company of D.C. Inc., 141 Fed.(2d) 324, l.c. 325-326, held as follows:

"(1) It is crystal clear that two essential conditions precedent must concur in order that a valid tax may be here levied: (1) There must exist a relationship of employer and employee; (2) wages must be paid by the employer to the employee. \* \* \* We proceed to a brief consideration of the two problems: (1) The relationship; (2) wages.

\* \* \* \* \*

"(2) Wages.

"(4) We think too, that Judge Chestnut was eminently correct in his finding of fact: 'Plaintiff(Yellow Cab) paid no money to the drivers for wages or otherwise.' Yellow Cab paid nothing to the drivers, that is conceded.

"The only money passing between Yellow Cab and the driver was paid by the drivers to Yellow Cab as rent for the taxicabs. We are asked to hold, though, that the fares received by the drivers from passengers constitute wages paid by the Yellow Cab to the drivers. Our imaginations are not quite so lively. It is true that the term 'wages' is given a broad meaning by the Regulations, but we might point

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out that Social Security Tax Regulations 106, Sections 402.228(e) and 403.228 expressly exclude from the denotation of wages: 'Tips or gratuities paid directly to an employee by a customer of an employer and not accounted for by the employee to the employer.' In the instant case, Yellow Cab had no title or interest in, no power to make the drivers account for, the money received by the drivers from passengers. Yellow Cab was entitled to receive and did receive, only the rent paid by the drivers.

"There can, of course, arise the relation of employer and employee without the payment of wages. A young doctor, for example, might become an employee of a distinguished physician without any pecuniary compensation. The youthful medico might feel that he is amply compensated by the knowledge and experience he acquires, and the prestige he derives, from association with an eminent colleague. Hardly could it be said here that the budding disciple of Aesculapius is the recipient of 'wages,' as that term is used in the instant tax statutes."

In consideration of the foregoing authorities, it must be concluded that this is a tax based upon a percentage of money paid for service and the conditions as outlined in the Magruder and Shamburger cases, supra, are not met.

#### CONCLUSION

Therefore, it is the opinion of this office that persons selling vehicle and driver's licenses and the collecting of other taxes for the State Department of Revenue under the provisions of Laws of Mo. 1951, page 863, are not subject to withholding tax or benefits under the provisions of the State Old Age and Survivor's Insurance, page 788, Laws Mo. 1951.

The foregoing opinion, which I hereby approve, was written by my assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON  
Attorney General

JWF:mw