TAXATION: Fruit tree spray and garden spray sold to owners of commercial orchards and truck gardens are "sales at retail" within subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536. Such sprays not within exemption clause contained in Section 11409, Laws of Missouri, 1945, p. 1869, which clause refers to "seed, limestone or fertilizer".

March 7, 1949.

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Mr. G. H. Bates, Director
Department of Revenue
State of Missouri
Jefferson City, Missouri

Attention: Division of Collection,
Sales Tax Unit.

Dear Sir:

This department is in receipt of the recent request of Mr. Smith N. Crowe, Jr., Acting Assistant Supervisor, Sales Tax Unit, for an official opinion, which request reads as follows:

> "May I have an official opinion of your office on the question of whether or not sales tax should be collected by the seller of fruit tree spray and vegetable garden spray to the owners of commercial orchards and commercial truck gardens? The spray referred to is a liquid which is used to prevent the onset of disease to the plant or to the fruit.
>
> Section 1, page 1865, Laws of 1945, provides that seed, limestone or fertilizer which is to be used for seeding, liming or fertilizing crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into foodstuffs which are to be sold ultimately in processed form at retail, are exempt from the Sales Tax Act.
>
> Without restricting the question above stated, may we have your opinion as to whether the liquid spray referred to herein may be considered to be in the same classification as seed, limestone or fertilizer."

If the "spray" under consideration is furnished to owners of commercial orchards and truck gardens by a "sale at retail" as that term is defined in subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536, such sale becomes subject to taxation as provided in the Sales Tax Act of Missouri, unless specifically exempted from such tax by exemption clauses to be found in the Sales Tax Act at Section 11409, Laws of Missouri 1945, p. 1869. This statement involves two propositions which will be disposed of in the order in which they have been stated.

For a definition of "sale at retail" we quote that portion of subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536, defining the term, as follows:

> "* * * (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; provided however, that for the purposes of this act and the tax imposed thereby, purchases of tangible personal property made by duly licensed physicians, dentists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale * * *."

The Sales Tax Act does not impose a tax upon all sales of tangible personal property. The tax is imposed only upon sales "for use or consumption and not for resale in any form as tangible personal property." Berry-Kofron Dental Laboratory Co., v. Smith, 345 Mo. 922, 137 S.W. (2nd) 452. As was said in City of St. Louis v. Smith, 342 Mo. 317, 114 S.W. (2nd) 1017, l.c. 1019.

> "It is clear from these statutory provisions that where one buys tangible

> personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax."

In the case of Berry-Kofron Dental Laboratory Co., v. Smith, cited, supra, the Supreme Court of Missouri discussed the words "use" and "consumption" in the following language found in 137 S.W. (2nd) 452, l.c. 454:

> "The words 'use' and 'consumption' are not technical words having a peculiar meaning in law, but words in common use and as employed in the statute must be given their plain, ordinary meaning. Webster's New International Dictionary defines the noun 'use' as 'Act of employing anything, or state of being employed; application; employment, as the use of a pen; his machines are in use'; 'The fact of being used or employed habitually; usage, as, the wear and tear resulting from ordinary use. * * * * * * Consumption is defined as 'Act or process of consuming; waste; decay, destruction; also the using up of anything, as food, heat or time: 'Consume' is defined as meaning to destroy the substance of--to use up, expend, waste--to eat or drink up (food)."

Your inquiry discloses the use to which the fruit tree spray and garden spray is put by the purchasers thereof when it is stated therein that "the spray referred to is a liquid which is used to prevent the onset of disease to the plant or to the fruit." Consequently we have in this instance tangible personal property bought and used, or consumed by the purchaser. Now we must determine whether this spray, after it has been used for the purpose heretofore disclosed, can be said to be

avaliable as tangible personal property for resale in any form.

It is a well established rule of statutory construction that construction of a statute by those charged with the duty of enforcing it, while not binding upon the courts, is entitled to great weight, Automobile Gasoline Co., v. City of St. Louis, 326 Mo. 435, 32 S.W. (2nd) 281; Robertson v. Manufacturing Lumbermen's Underwriters, 346 Mo. 1103, 145 S.W. (2nd) 134.

The Rules and Regulations relating to the Missouri Sales Tax Act, at page 20, provide in part, as follows:

> "* * * Sales of goods which, as ingredients or constituents, go into and form a part of tangible personal property for resale by the buyer are not taxable. If tangible personal property is sold and the buyer uses and consumes same in manufacturing or producing another item of tangible personal property, such a sale is made at retail and is taxable."
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> *
>
> "An illustration of a sale of tangible personal property which becomes an ingredient or constituent part of a finished product is as follows: 'Tangible personal property such as flour, milk, salt, yeast, sugar and various other constituents, are purchased by a baker who uses the same in the process of baking bread. These items enter directly into and form a part of a loaf of bread and their purchase is made for resale purposes by the baker. The final sale of the bread by him for use or consumption is the taxable sale."

The liquid spray we are considering is without doubt used and consumed by owners of commercial orchards and truck gardens

in guarding the produced crop against insects and disease. Its use is a preventative process used to insure a healthy and marketable crop. No suggestion has been made that this spray does, or even could, become an ingredient or constituent part of the crop on which it is sprayed. It seems clear to us that the buyer of this spray, a tangible personal property, has purchased the same for his own use and consumption and has not used the same in such a manner as to classify it as an ingredient or constituent element of any product of orchard or garden. We rule the first proposition in favor of the taxing statute on the definition of "retail sale" as disclosed in subparagraph (g) of Section 11407, cited supra.

Our second proposition stated herein may be disposed of by a construction of that section of the Sales Tax Act covering exemptions and which is designated as Section 11409, Laws of Missouri, 1945, p. 1869. This section is quoted in its entirety as follows:

> "There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibiting from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this article, no tax shall be paid or collected under this article upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be

> consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into food stuffs which are to be sold ultimately in processed form at retail; or seed, limestone or fertilizer which is to be used for seeding, liming or fertilizing crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into foodstuffs which are to be sold ultimately in processed form at retail." (Underscoring ours)

If the facts of the case at hand are to be brought within any of the exemption clauses of Section 11409, supra, they must fall, if at all, in the exemption clause referred to in your request, and which we have underscored in the above quoted statute. Before proceeding further in this opinion we will outline the rules of statutory construction on which our ultimate conclusion is to be based regarding the exemption clause under consideration.

The Supreme Court of Missouri, in construing one of the exemption clauses contained in Section 11409, supra, in the case of Mississippi River Fuel Corporation v. Smith, 350 Mo., 1,164 S.W. (2nd) 370, l.c. 377, used the following language:

> "That portion of Sec. 11409 in question is a statute exempting from taxation, and will be strictly construed against him who claims to be exempt under it, and no presumption will be indulged in favor of an exemption."

The rule to be followed in construing taxing statutes and exemption clauses therein has been well stated in the following language of the Supreme Court of Missouri in the case of American Bridge Co., v. Smith, 352 Mo. 616, 179 S.W. (2nd) 12, l.c.15:

> "The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the manifest purpose of the statute, considered historically, is properly given consideration * * *. While statutes authorizing a particular tax are to be construed strictly against the taxing authority, a tax exempting statute will be strictly construed against him who claims to be exempt under it."

With the above rules in mind we turn to the exemption clause contained in Section 11409, supra, which exempts from the sales tax "seed, limestone or fertilizer which is to be used for seeding, liming or fertilizing **crops**, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into foodstuffs which are to be sold ultimately in processed form at retail."

A well known canon of statutory construction, of almost universal application, is that the expression of one thing is the exclusion of another. Facts in the instant case do not warrant us in deviating from this rule in determining the question at hand. Unless we can classify "fruit tree spray" and "vegetable garden spray" as terms germane to the words "seed, limestone or fertilizer" appearing in the exemption clause, it necessarily follows that such sprays are not exempted from the tax and it will be unnecessary to discuss the ultimate disposition to be made of crops and fruits treated with such spray.

"Seed" as a noun, is defined as the fertilized and matured ovule of the higher or flowering plants (57 C.J. p. 94). "Limestone" is a rock, more or less crystalline or crystalline granular in condition, and consisting chiefly of calcium carbonate and yielding lime when burned (53 C.J.S., p. 886). The word "fertilizer" is a mere synonym for "manure" (Words and Phrases, Vol. 16, p. 489). No disclosed facts covering the content, use or purpose of the liquid spray under consideration bring it, in our opinion, within the statute's descriptive words of "seed, limestone or fertilizer", which words have a common and well understood meaning. Having reached this conclusion, it is not necessary to extend this opinion on the question of disposition to be made of crops within the additional terms used in the exemption clause of the statute.

CONCLUSION.

It is the opinion of this department that sales of "fruit tree spray" and "vegetable garden spray" sold to owners of commercial orchards and commercial truck gardens are "sales at retail" as that term is defined in subparagraph (g) of Section 11407, Laws of Missouri, 1947, Vol. 1, p. 536. It is also the opinion of this department that such "fruit tree spray" and "vegetable garden spray" are not within the exemption clause contained in Section 11409, Laws of Missouri, 1945, p. 1869, which specifically exempts from the provisions of the Sales Tax Act "seed, limestone or fertilizer" used under the conditions stated in such exemption clause.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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