TAXATION AND REVENUE: (1) Park superintendents who operate concessions in state parks with permission of the State Park Board must collect sales tax. (2) State Park Board charging camp fees in state parks for reimbursement of wood used by campers is not liable for sales tax.

July 8, 1938

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Honorable I. T. Bode
Director, State Park Board
Jefferson City, Missouri

Dear Mr. Bode:

We desire to acknowledge your request for an opinion of July 1st, which is as follows:

> "In several of the parks we have Concessionaires who are state employees and who operate their concessions on a percentage basis, that is, the Concessionaire provides the operating capital and returns a percentage of the net profit to the state.
>
> "The question is, should these park Superintendents who operate concessions in this manner collect sales tax? It has been suggested that since the state participates in the net profit of the concessions, that they are state-operated and that a sales tax should not be charged. Actually, we are collecting sales tax and would like to know if we are proceeding in the proper manner.
>
> "We have other concessions which are let for a cash consideration and in these instances the Concessionaires are paying a sales tax the same as any other merchant. The matter of collecting a sales tax on a camp fee has arisen. In this case we are not collecting sales tax. You will recall that the camp fee which is charged in the parks is 25¢ per day and was set up for the purpose of reimbursing the state for wood used by campers.

> This money goes back into the general revenue but actually the amount received does not reimburse the state for the cost of the wood which is used by campers."

Your request for an opinion is divisible into two parts. First, under the 1937 statute relating to sales tax, should park superintendents, who operate a concessionaire in state parks, providing their own operating capital and giving the State Park Board a percentage of the net profits, pay sales tax on such sales? Second, should the State Park Board in charging camp fee of 25¢ per day, which is charged in the different parks of the state for the purpose of reimbursing the state for wood used by campers be required to pay sales tax on such fees?

I.

The Missouri Sales Tax Act, being House Bill No. 6 of the 59th General Assembly of Missouri, 1937 Laws, provides in Section 2 (b) as follows:

> "A tax equivalent to two (2) per cent of the amount paid, for admission and seating accomodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events."

The Legislature has defined the term "person" in Section 1 (a) of the 1937 Sales Tax Act on page 555 to include as follows:

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department) estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

On page 556 of said 1937 Session Acts, the Legislature has defined the term "purchaser" and "seller" to include those persons buying, selling or furnishing tangible property or rendering services, the receipts from which are taxable under the Sales Tax Act.

Therefore, state park superintendents, who operate concessions by permission of the State Park Board, furnishing their own capital and paying the state a percentage of the net profit of such sales, are liable for the collection and payment of sales tax on such sales, unless they be exempt from such payment by one of the two sections of said Act providing who may be exempted.

Section 46 of the Sales Tax Laws of 1937 provides exemption from sales tax for religious, charitable, educational, eleemosynary and penal institutions and said Act could not possibly be construed so as to bring said concessionaires within its exemptions, and if they shall be exempted, it is by virtue of Section 3 of said Laws of 1937, which is as follows:

> "There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made 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 Constitution of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state. In order to avoid double taxation under the provisions of this Act, no tax shall be paid or collected under this Act 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 or electrical current 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."

Taxation is a sovereign right of the state, and the abandonment of the right to exercise it can never be presumed; but the intention to abandon it must appear in the most clear and unequivocal

terms which must be clear and unambiguous and should not be created by implication. Scotland County v. Railroad Co., 65 Mo. 134; State ex rel. v. Arnold, 136 Mo. l.c. 450, 38 S.W. 79. Pacific Railroad v. Cass County, 53 Mo. l.c. 27.

The construction of laws exempting property from taxation must be strictly construed and as a rule all property is liable to taxation and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. Fiterrer v. Crawford, 157 Mo. l.c. 58, 57 S.W. 533, 50 L.R.A. 191.

As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and must be clear and unambiguous. Kansas Exposition Driving Park v. Kansas City, 174 Mo. l.c. 433, 74 S.W. 981. In State ex rel. Globe Democrat Pub. Co. v. Gehner, 316 Mo. 696, 294 S.W. l.c. 1018, the court said:

> "The policy of our law, constitutional and statutory, is that no property other than that enumerated shall be exempt from taxation."

The above decisions announce a rule on exemptions in regard to personal and real estate.

In State ex rel. Mo. Portland Cement Co. v. Smith, 90 S.W.2d 405 (1936), the court says:

> "A tax imposed upon every retail sale in the state of tangible personal property is an excise and not a property tax, and the imposition of such tax on a sale of personal property to the State Highway Department does not violate a provision of the State Constitution exempting the property, real and personal of the state, counties, and municipalities from taxation, since such exemption provision applies to property taxes only."

But, said concessionaires being included in the classification of those who must collect and pay the sales tax, unless exempted under Section 3, supra, it must clearly show that it was the intent of the Legislature to include them in such exempted class.

In the case of State v. Smith, 90 S.W.2d 405, l.c. 408, in passing on the question as to whether an agency of the state may be liable for the collection and payment of sales tax, the court said:

> "Undoubtedly it was within the power of the Legislature to make the tax applicable to the state and its agencies. But the theory underlying the presumption that property belonging to the state is not taxable, i.e., that such taxation would merely be taking money out of one pocket and putting it into another, seems to us to have peculiar application here, notwithstanding the general rule hereinabove noticed with respect to the extent of the principle of exemptions. It must be remembered that the involved tax is levied and collected solely by and for the benefit of the state and not by any municipality or other subdivision."

In giving the right to concessionaires to use their own capital in putting in a stock of goods and selling them in the state parks and retaining the percentage of the net profits, neither the State Park Board nor the State is making the sale. The concessionaire is not even an agent of the State, but becomes an individual seller. The fact that the sales are made by a park superintendent in a state park does not make their sales the sales of the State, nor the State Park Board.

In passing on a similar question, the Court in Burnett v. A. T. Jergins Trust Co., 288 U.S. 508; 53 S.Ct. 439; 77 L.Ed. 925, held:

> " * * that under an oil and gas lease made by a city to a private party the receipts of the lessee are not exempt from federal tax because the subject taxed was remote from any governmental function in the collection of the tax and does not trench upon the immunity of the state as a sovereign."

In passing on a similar question, the Court in Helvering v. Mountain Producers Corp., 58 S.C.R., held that mere theoretical conceptions of interference to the functions of the state is not a test as to whether income from a gas and oil lease covering state land is subject to federal income tax, an income from such a lease is taxable where the leasee derives his profits in the same way as others who are engaged in similar business.

CONCLUSION

Therefore, it is the opinion of this department that where the State Park Board permits park superintendents to operate concessions in the state parks, said park superintendents, who use their own capital in the business and paying a percentage of the net profit to the State for the use of the concession, must collect and pay sales tax under said 1937 Session Acts.

II.

The State Park Board, as an agency of the State, has the right to charge a camp fee of 25¢ per day in the state parks for the purpose of reimbursing the state for wood used by campers, and not collect and pay sales tax on said fee.

Under Section 1 (a) of the 1937 Sales Tax Act, the Legislature made the sales tax applicable to the State and its agencies, but under the decision in State v. Smith, supra, the State and its agencies were exempted on the payment of sales tax for the reason:

> " * * that such taxation would merely be taking money out of one pocket and putting it into another."

Section 1 and subsection "g" thereof of said 1937 Session Acts at page 556 defines "sales at retail" as follows:

> "'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. Where necessary to conform to the context of this Act and the tax imposed thereby, it shall be construed to embrace."

If the above transaction comes within said definition, it is under (5) of said subsection (g), which is as follows:

> "Sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, tourist cabin, or other

> place in which rooms, meals or drinks are regularly served to the public."

Therefore, said (5) supra clearly shows that no such transaction was contemplated by the Legislature as being covered by the Sales Tax Act.

CONCLUSION

Therefore, it is the opinion of this department that the State Park Board charging camp fees in state parks for reimbursement of wood used by campers is not liable for sales tax.

Respectfully submitted,

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APPROVED:

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