SALES TAX: Job printing, lithographing, etc., done by printers and newspapers subject to the sales tax.

September 27, 1935.

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Honorable Frank P. Briggs,
State Senator, Ninth District,
Macon, Missouri.

Dear Senator:

Sometime ago this department received a letter requesting an opinion as to the status of job printing and the liability of same for the sales tax as contained in House Bill No. 198. Your letter is as follows:

> "I note that in Auditor Forrest Smith's book on sales tax, pages 56 and 57 he includes printing.
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> "I am asking for an official opinion from you as to whether or not printing is, in fact, included in the list of manufactured articles to be taxed.
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> "If you will note, the legislature included printing committee substitute for House Bill No. 198 along with book binding, engraving, lithographing etc., lines 35, 36 and 37, Section 4 page 6 of the perfected bill.
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> "I note that the state auditor has failed to include lithographers in the new tax, has also recognized book binding as a service and has generally construed that this particular section (1) was repealed by the adoption of the Clark amendment which did not mention printing in any way.
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> "You, of course, know that I am interested in printing and this opinion is asked for my own information as well as for information of other printers in the state."

Under the original act the question of job printing, lithographing, etc., was a mooted question due to the fact that practically all of the charge was due to the skill and labor necessary to make the finished product. Conceding that the same situation with respect to printing now exists, however the new act which became effective August 27th is broader in its scope.

In a recent decision under the Illinois act, Burgess Co. v. Ames, 359 Ill. 1. c. 429, the court discusses the liability of blue-printers, photostaters and commercial photographers in the following language:

> "The raw material with which blue-printers and photostaters work is sensitized paper of such a chemical character as to be destroyed for any further use when exposed to light. It is alleged in the bill and admitted by the motion to dismiss that they have no property right in the sketch, drawing or other document which is brought to them to be reproduced or copied. By the use of their apparatus and the destruction of sensitized paper they produce for each individual customer the required copies of the customer's own property. It is the contention of the department that the paper, with the reproduction on it, is the subject of sale; but this can hardly be true under the act we are considering, because the paper is destroyed when the exposure is made, and it has no further use or value to anyone other than the person interested in that particular reproduction. We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blue-print produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstracter for showing a chain of title. The paper is a mere incident; the skilled service is that which is required.
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> "There is even less room for argument as to the case of commercial photographers. As above pointed out, they exercise an

> art whereby photographs are produced which are calculated to be of such quality and have such characteristics as to make them desirable for advertising or commercial purposes. The photographer hires the model rather than being paid by the person sitting for the photograph. Having produced a picture of artistic merit he then grants a license to the advertiser, retaining title to the picture itself and giving only the right to reproduce. This transaction confers upon the customer of the commercial photographer an intangible right, and while it is a property right it is nothing more than a license, and is clearly not a transfer of tangible personal property within the meaning of the Retailers' Occupation Tax act."

It is noted that commercial photographers were exempted for the reason that the title to the property was never actually transferred, but only a license granted.

As stated above, the new act is broader in its scope in the definition of "gross receipts". Laws of Missouri 1935, page 414:

> "(d) 'Gross receipts' means the total amount of the sale price of the sales at retail including any services that are a part of such sales made by the businesses herein referred to, capable of being valued in money, whether received in money or otherwise; provided, however, that 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. For the purposes of this Act, the total amount of the sale price above mentioned shall be deemed to be the amount received. It shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if

> outright sale were made; in such cases the same shall be taxable as if outright sale were made and considered as a sale of such article and the tax shall be computed and paid by the lessee upon the rentals paid."

Therefore, while under the Illinois act that form of printing may be exempt, yet by the definition of "gross receipts" under the Missouri act, we think the same is within the terms of the act because the recipient of the forms of printing mentioned above has the continuous right of possession or use of the article under a lease or contract, "and such transfer of possession would be taxable if outright sale were made" and "paid by the lessee upon the rentals paid. "

Referring to the usual job printing which the ordinary printing or newspaper office conducts, we think the situation very similar to the photographer. The State of Kentucky has an act very similar to that of Missouri and the Supreme Court of that state in deciding the question of whether a photographic studio was subject to the tax, said in the case of Cusick et al. v. Commonwealth et al., 84 S. W. (2d) 14:

> "Briefly stated, the facts pleaded are: Plaintiffs are operating and conducting a photographic studio in the city of Louisville, and are engaged in drawing, painting, enlarging, and making pictures, and in operating their said business of art studio they are not engaged in business as merchants, or otherwise selling or vending tangible personal property. Their work consists entirely of labor, and their said business is one of personal service requiring science, skill, and talent in drawing, painting, and enlarging pictures, and the small amount of material, such as chemicals, paints, oils, crayons, etc., going into the making or drawing of the picture is expressly exempted from taxation under the provisions of the Gross Sales Tax Law.
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> "In addition to the facts pleaded, we have the following argument: The cost of a picture portrait or drawing is not the pasteboard or canvass on which it is painted or drawn, but is the art, skill,

and talent of the artist. It is a creation of art made under contract for a particular party. It is not kept for sale, cannot be sold, and never becomes merchandise within the meaning of the act. Though the argument is strongly pressed, we are inclined to the view that photographs fall within the provisions of the law. The tax is imposed on every merchant engaged in the sale of tangible personal property, and a merchant is 'a person regularly engaged in the vending of tangible personal property.' A photograph is personal property, and being corporeal in character, it cannot be doubted that it is tangible personal property. Not only so, but the act is not confined to personal property kept for sale. It is true that the term 'store' is defined 'as a building, room, or place in or at which tangible personal property is kept for sale,' but it is also defined as a place 'or from or at which such property is sold.' That being true, it is not necessary that the tangible personal property be kept for sale, but sufficient that it be actually sold. Coming to the argument that a photographer is engaged in selling service, and that service is not taxable, it must not be overlooked that the chief value of many articles consists in the cost of the service and skill by which they are produced, rather than the cost of materials out of which they are made. Moreover, the situation is not the same as if the patron took an article to another to be repaired and paid only for the service rendered. One who desires a photograph of himself or his family does not contract simply for service. He desires the finished article, and that is what he buys and what the photographer sells. It is true that the photograph is of a particular person, and that the market is limited, but that is more or less true in every case where clothing or other articles are made to order for a particular person, or a particular purpose, and are not regularly kept on hand."

CONCLUSION

We are of the opinion that by the terms of the act and by the decisions quoted, supra, job printing, lithographing, etc., are subject to the tax of one per cent as contained in House Bill No. 198.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
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