SALES TAX: City of St. Louis is liable for tax for supplies used by contractors in fulfilling contracts for improvements of which the city is the ultimate user.

10-31

August 29, 1935.

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Hon. John G. Burkhardt,
Tax Attorney,
The City of St. Louis,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter of August 27 wherein you request an opinion regarding the 1% sales tax now effective in the State of Missouri as it may apply to contracts of the City of St. Louis. Your letter is as follows:

> "We have just received a copy of the State Auditor's Special Rule No. 13 interpreting the 1% State Sales Tax. According to this rule it would appear that municipalities are liable for the 1% sales tax upon projects under contract, either upon the full contract price of the project or the price of materials, supplies and fixtures that are used in the project, if same are separately itemized and billed.
>
> "We do not believe that a contractor who buys building materials for use in building a structure for a municipality is buying same for resale. We believe rather that he, the contractor, is the consumer, liable for the tax, rather than the municipality.
>
> "Will you kindly give us your opinion on this matter?"

The original act contained no specific terms making municipalities subject to the tax. The new act, however, in defining the word "person" includes municipalities in the following language (Laws of Mo. 1935, Sec. 1 (a), page 413):

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporations, municipal or private, 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."

There are a number of decisions to the effect that municipalities are subject to the tax, the most recent being the case of City of Covington v. State Tax Commission, 77 S.W. (2d) 386, l.c. 391; at the time the decision was rendered, Kentucky had a similar act to that of Missouri. The Court said:

> "It therefore follows that municipalities are liable for the tax for purchases made by said municipalities."

Having disposed of the personal liability of the city for the tax on purchases made by it, or sales to the municipality, we come to the question of the liability of the municipality in making contracts in which materials, supplies and fixtures are used by the contractor in his contract with the city.

The question of liability for the tax as it relates o to contractors and the materials, supplies and fixtures sold to them has been a controversial one for this department ever since the enactment of the original privilege or occupation tax. Who is the ultimate user or consumer--the contractor who purchases the materials from the wholesaler, or the city who receives the benefits of the contract and accepts and approves the project?

The act relieves from tax liability tangible personal property which is sold for resale. The State of Illinois has an act similar in its nature to that of Missouri, the principal element of difference being the fact that the seller is not compelled to collect from the purchaser the amount of the tax. We assume that he merely adds it to the purchase price and treats it as overhead. In the decision in the case of Bradley Supply Co. v. Ames, 359 Ill., l.c. 169-171, the Supreme Court of Illinois in deciding this question as it relates to plumbing and heating contractors, said:

"Defendant contends that the attaching of the plumbing and heating supplies under a contract with the owner is not a sale but that title passes by accession and that the supplies become real property. He relies upon Raff Co. v. Murphy, 147 Atl. (Conn.) 709, which held that a contract to do certain plumbing and electrical work and to furnish materials therefor was not a sale within the meaning of the Statute of Frauds so that it had to be in writing. He also relies on Steiger Terra Cotta and Pottery Works v. City of Sonoma, 100 Pac. (Cal.) 714, where it was held that a contract to furnish and set on a tile roof was a contract for work and labor and not of sale, and that replevin would lie until the tile were installed on the roof. Benjamin on Sales (7th ed. sec. 108) also says that such contracts are for work or labor and not sales of personalty. We agree with these rules and with the contention that the materials furnished become fixtures when attached to the realty and thus lose their identity as personal property; also that a mechanic's lien can be claimed for the value of the improvements so made. (Fehr Construction Co. v. Postl System, 288 Ill. 634; Fifield v. Farmers' Nat. Bank, 148 id. 163, 169; Sword v. Low, 122 id. 487, 496). The question before us is not whether the transaction between the contractors and owners of land is a sale of personalty as that term is defined at common law, in the decisions of courts or in the Uniform Sales act, but whether it is a transfer of tangible personal property to the purchaser for use or consumption and not for resale within the meaning of the Retailers' Occupation Tax act. The definition of 'sale at retail' as 'any transfer of the ownership of, or title to, tangible personal property,' is broad enough to cover the transfer of title made by a contractor who attaches tangible personal property to real estate in accordance with a contract. It is clearly a transfer of title for a valuable consideration.

"Plaintiffs are not liable to pay the tax for another reason. The business of selling plumbing and heating supplies to contractors who intend to install them in a building or attach them to realty is not the occupation intended to be taxed by the legislature. These are not transfers to purchasers for use or consumption. The terms 'use' and 'consumption' have an ordinary or popular meaning. 'Use' means a long-continued possession and employment of a thing to the purposes for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional. Webster's Dictionary defines the word 'use' as an act of employing or state of being employed; to convert to one's service; to employ. (Treolo v. Auto Insurance Underwriters, 348 Ill. 93) It is true that in one sense of the word the contractor does use the supplies in fulfilling his contract, but in the same sense a merchant who sells an article over the counter to a customer would be a user. The user or consumer contemplated by the statute is the ultimate user or consumer who will use the heating and plumbing in his house as long as it lasts or until he desires to do away with it.

"In support of defendant's contention that the sale contemplated by the act is the last sale before use or consumption, stress is placed upon the words 'and not for resale' in the definition of a 'sale at retail.' These words must be considered in connection with the other words of the definition--i.e., in the sense of 'any transfer'--and not as intending a sale of personalty as ordinarily defined."

CONCLUSION

The decision of the Illinois Supreme Court, quoted herein, appears to be directly in point and to hold that the user or consumer is not the contractor but the party who receives the structure contracted for. The serious element in so holding, we think, involves the question of whether or not contracts made with the city for the erection of structures, when so erected, become part of the real estate, or in other words, real estate; therefore, the same would be no longer tangible personal property. However, as stated before, the above quoted decision holds that the city would be the user and consumer and such is our opinion until the Supreme Court of our state has passed upon the question.

Respectfully submitted,

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APPROVED:

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(Acting) Attorney General.

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