TAXATION - SALES:
SALES TAX:

Failure to obtain resale certificates upon sales to peddlers creates no absolute liability for sales tax; failure to have such certificates merely constitutes prima facie evidence that such are retail sales.

April 24, 1950

FILED
13

Honorable W. H. Burke
Assistant Supervisor
Department of Revenue
Division of Collection
Jefferson City, Missouri

Dear Mr. Burke:

This department is in receipt of your recent request for an official opinion. Your request reads as follows:

> "In St. Louis we have certain concerns who hire or use peddlers for disposing of their merchandise. These peddlers have no place of business and will work for a short time and be removed and new peddlers will take their place in various territories.
>
> "The merchant claims he does not hire these people as they are only paid a commission on their sales, and he further claims that they buy the merchandise for resale and, therefore, he should not collect the sales tax.
>
> "The merchant furnishes the peddler a certain amount of merchandise each morning for which he pays cash, but any unsold merchandise can be turned back to the merchant and the peddler will get his money back.
>
> "Please advise if we should hold him liable for the sales tax on sales to peddlers as described above."

We have here the question of whether or not concerns who utilize peddlers to dispose of their merchandise should be held liable for sales tax on the sales of merchandise to such peddlers.

Should the peddlers in these instances be agents or employees of concerns in question, their sales would then be the sales of the concerns and the concerns would be subject to the sales tax. Though the facts recited in your opinion request regarding the relationship between the concerns and the peddlers are not too complete, we feel that they are sufficient to justify the views that the peddlers in these instances do not have the legal status of employees. In the case of Garcia v. Vix Ice Cream Co., (Mo.App.) 147 S.W. (2d) 141, the status of a public vendor of ice cream eclairs and other frozen novelties was in question; the court held at l.c. 143, that:

> "Accepting claimant's version of the facts in this case, it is made clear that the Vix Ice Cream Company neither had nor exercised any control over his sales of ice cream. Claimant set his own hours for work; he chose his own territory except he was told not to go in the other fellows' territory; he himself chose the amount of ice cream he thought he could sell; and each day he quit work when he desired and returned and paid for what he had sold at the rate of 65% of what he had received from sales.
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> "If under such an arrangement he was an employee, then so would the poor peddler of shoe laces and chewing gum be an employee of the merchant from whom he procures his wares at wholesale prices; and so would the newsboy be an employee of the publisher.
>
> "This man's relationship with the Vix Ice Cream Company is comparable with the relationship of a newsboy to the publisher, and it is held that a newsboy is not an employee. In the case of Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 123 Cal.App. 151, 10 P.2d 1035, the newspaper engaged the boy as a newsboy to sell their papers and had the right to discharge him in the event it so desired and the boy did not have the right to return unsold papers at the end of the day but was required to pay for them; he worked or not at will; the engagement was for no fixed time. The court held the boy was not an employee but an independent contractor.

> "In the case of Bernat v. Star-Chronicle Pub. Co., Mo.App., 84 S.W.2d 429 was a 'newsboy' case in which the boy after purchasing a route from another entered into contract with the publishers whereby the papers would be sent to him daily by railway train, and the boy would meet the train and receive the papers and proceed to disbribute copies of his regular customers and to sell extra copies to such purchasers as he might obtain; his contracts were for a definite time; he agreed to devote his earnest endeavor to the creation and establishment of a regular sale and demand for the papers; and prior to giving up the business to give the Company notice and to endeavor to secure a successor; and to pay all bills at a stated time at the regular prevailing wholesale rate, and to charge for the papers the regular rate established by the Company; he was required to keep a list of subscribers, the list to be the property of the Company; the Company reserved the right to sell papers to others, and the right to annul the agreement, without notice should any of its conditions be violated. This Court held the boy was not an employee."

We believe that under the language of Gracia v. Vix Ice Cream Company, the peddlers under consideration cannot be considered employees of the concerns whose merchandise they dispose of. It is true that this case involved the Workmen's Compensation Laws, but the definition of an employee under these laws has a broad meaning. It was so held in Bernat v. Star-Chronicle Pub. Co., (Mo.App.) 84 S.W.(2d) 429, l.c. 432:

> "Undoubtedly the form of definition employed indicates a legislative intent that in cases arising under the act the term 'employee' shall be given a broad meaning (Pruitt v. Harker, 328 Mo. 1200, 43 S.W.(2d) 769), and yet it does not appear that the term was intended to include persons as to whom the accepted and recognized characteristics of service or employment were lacking. So we conclude that even though an 'employee' under the act is not in all events to be restricted to one serving under a contract of hire, express or implied (Pruitt v. Harker, supra), yet the fundamental conception of the relationship of employer and employee has not been altered in the enactment of the new legislation, and in all

> essential respects the creation and existence of the relation under the act must still depend upon the same considerations as have been held to govern under the rules of master and servant law generally."

Therefore, for the purposes of this opinion, we shall consider the peddlers under discussion to be independent contractors, assuming that the additional facts regarding their relationship with the concerns are not such as would warrant classifying them as employees.

Section 11408(a), Laws Missouri 1947, Volume I, page 547, provides for a sales tax "upon every retail sale in this State of tangible personal property." Section 11407(g), Laws Missouri 1947, Volume I, page 535, defines a sale at retail as any transfer of "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." The sales by the concerns in these instances to the peddlers as independent contractors, who in turn sell same to consumers, are undoubtedly sales for resale and not subject to sales tax.

However, Section 11413, Laws Missouri 1947, Volume I, page 554, provides in part:

> "For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article. * * *"

Section 11420, Laws Missouri 1947, Volume II, page 435, provides in part:

> "The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale, except with respect to sales, services, or transactions provided for in subsection (b) of Section 11412. * * *"

Pursuant to the authority of Section 11413 to make rules and regulations, Rule No. 32 of the Rules and Regulations relating to the Missouri Sales Tax Act has been made and promulgated, which Rule 32 reads in part:

> "When tangible personal property is purchased by hawkers, peddlers and street vendors who do

> not have regular established places of business, the person making said sales should obtain from said persons resale certificates, having the howker, peddler or vendor place thereon the code number under which he is paying sales tax to the State of Missouri. If such hawker, peddler or street vendor does not have a code number and is not collecting and remitting tax to the State of Missouri, he should pay the sales tax on the purchase of the merchandise which he intends to sell. Sellers of merchandise to such persons will be held strictly accountable for the sales tax on all sales for resale claimed by him unless he obtains and keeps in his files signed resale certificates as above outlined."

As held in an official opinion of this department addressed to you under date of January 13, 1950, "sales by a wholesaler to a purchaser, who is not coded and paying sales tax, may be considered sales at retail within the meaning of the sales tax act, and that sale was actually not a retail sale within the meaning of the act." Therefore, failure of the concerns to have resale certificates signed by the peddlers may constitute prima facie evidence of liability for sales tax, but the concerns, who have the burden of proving such, may prove that the sales were for resale.

An administrative agency has only authority to make rules and regulations to carry out the statutory provisions which are to be administered. Any regulation promulgated by an agency must be in conformity with the statutes, and not contrary thereto. It was so held in Washington Printing & Binding Co. v. State, 73 P (2d) 1326, l.c. 1328, 192 Wash. 448, that:

> "The Tax Commission cannot, by such rule, impose a tax upon property or a transaction that is not mentioned in the statute as taxable. The rule making power is given only for the purpose of empowering the commission to carry out the provisions of the statutes.
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> "'The power vested in the commission to prescribe rules and regulations for making returns for ascertaining assessment and collection of the tax imposed by the act does not vest in the commission any discretion whatsoever in the matter of requiring the payment of a sales tax by any other

> than such as are designated in the act. It is true that an administrative body within prescribed limits, and when authorized by the lawmaking power, may make rules and regulations calculated to carry into effect the expressed legislative intention.' Western Leather & Finding Co. v. State Tax Commission of Utah, 87 Utah 227, 48 P. 2d 526, 527."

Regarding sales to peddlers, Rule 32, supra, provides that "sellers of merchandise to such persons will be held strictly accountable for the sales tax on all sales for resale claimed by him unless he obtains and keeps in his files signed resale certificates as above outlined." This rule cannot be construed as making absolute the liability of such concerns as here considered for sales tax when resale certificates are not obtained from the peddlers. Such construction would constitute an imposition of liability where none lies under the act, as it would in effect be imposing liability upon sales which were for resale. Failure to have in possession such resale certificates can only constitute prima facie evidence of liability and the concerns in question may overcome same by proof that such sales were sales for resale.

CONCLUSION

In the premises, it is the opinion of this department that concerns who sell merchandise to peddlers for resale and who fail to obtain resale certificates from them cannot be held absolutely liable for sales tax. Failure to obtain such certificates can only constitute prima facie evidence that such sales were retail sales under the act. However, these concerns may prove that such sales were for resale, and upon a showing of such, there can be no liability for sales tax.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General