SALES TAX:
TAXATION - SALES:

Sales by Missouri buyers to Missouri sellers, goods shipped from without the State, are intrastate sales and not exempt from the Missouri Sales Tax Act.

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

Dear Mr. Burke:

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

"An amendment to interstate commerce regulation was issued by Mr. Bates under date of the 22nd of November, 1944 after decision in the cases of the American Bridge Company vs. Forrest Smith and the Binkley Coal Company vs. Forrest Smith, one paragraph which reads as follows: "Retail sales transactions involving delivery f.o.b. destination, in which the merchandise sold moves in interstate commerce, and in which the title and ownership to such merchandise pass to the purchaser while it is moving in commerce, or immediately after the movement in commerce has ended, are not subject to the provisions of the Missouri Sales Tax Act." Some of the field-men would like to have this clarification by statement from you.

"In case the sale is made from one Missouri seller to a Missouri customer and the merchandise is shipped direct to the customer from without the state, my contention is that the above paragraph does not apply. But, they have several cases where the taxpayer quotes this paragraph and claims no sales tax is due, and your decision on this matter has been requested."

Section 11408(a), Laws Missouri 1947, Volume I, page 535, levies and imposes "upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged." Section 11409, the Exemption Section, which has recently been reenacted as H. B. No. 303 by the 65th General Assembly, reads in part 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 prohibited from taxing or further taxing by the Constitution of this State. * * * * * "

Section 11409 has been construed by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S. W. (2d) 12, 352 Mo. 616, 157 A.L.R. 798, to exempt not only such retail sales as infringe the interstate commerce clause of the Constitution of the United States, but also all sales at retail in the sales transactions in interstate commerce. The court held at l. c. 17 that:

> "The failure of the legislature to enact a general compensating use tax, and the failure of the legislature to amend by expressly restricting the exemption section to exempt only retail sales in interstate commerce which infringe the Commerce Clause, lend support to our conclusion that the legislature intended that the section should exempt all sales at retail in the sales transactions of interstate commerce."

The question, therefore, is whether or not sales by Missouri sellers to Missouri buyers, in which the merchandise is shipped by the sellers to the Missouri buyers from without the State, constitute sales in interstate commerce which would exempt such from the Missouri Sales Tax.

In the case of Graybar Electric Co. V. Curry, 189 So. 186, 238 Ala. 116, sales were made by an Alabama seller to an Alabama buyer with the subjects of the sales being shipped directly to the buyer from without the State. The court held that if the sales were in interstate commerce, the license tax attempted to be imposed thereon would be illegal and void. We find the following at l. c. 190:

> "As to the sales included in Classes "B", "C" and "D", the evidence shows that the complainant was in fact and truth the seller; that its place of business was in Birmingham, Alabama; that it was at this place the complainant accepted the purchasers' orders for the goods; that the purchasers and ultimate consumers were residents of Alabama; that the goods contracted to be bought of the complainant were to be delivered to them in Alabama; and that the goods were paid for by the consumers to the complainant in Alabama. The sales were Alabama sales. The means by which, and the place from which, the complainant obtained the goods to fulfill its contract were but incidents in the transaction, and cannot serve to change the status of transactions. The consumers had no dealings with the nonresident manufacturers. Their contracts were with the complainant in Alabama for the sale and delivery of the goods to them in Alabama. Their contracts with the complainant were valid, enforceable contracts. Baker v. Lehman, Weil & Co., 186 Ala. 493, 65 So. 321. The tax assessed against the complainant as for sales included in Classes "B", "C" and "D" were properly made. The complainant is liable for said taxes. National Linden Service Corporation v. State Tax Commission, supra.
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> "Under the agreed facts relating to the sales described in Class "A", is the complainant liable for the payment of the tax of two per cent assessed by the state taxing authorities? These sales amount in the aggregate to $32,689.11, and the tax thereon is $653.78, if such sales were in fact taxable under the Alabama Sales Tax Law.
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> "These goods were ordered by the customers in Alabama, from the complainant in Alabama, for comsumption here. In the orders the cost price of the goods which the customers were to pay was stated and fixed, and agreed on, in each order. These orders were accepted by the complainant in

Alabama, and carried with them the agreement that the goods were to be delivered to the purchasers in Alabama. It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause.' Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General, 280 U.S. 390-396, 50 S. Ct. 169, 170, 74 L. Ed. 504; Browning v. Waycross, 233 U.S. 16, 23, 34 S.Ct. 578, 58 L. Ed. 828-832.

"The facts of the case must determine whether it falls within the protection of the commerce clause of the Federal constitution, and not the words of the contract. The desire to make its act an act in commerce among the states is unimportant, when the facts show it to be otherwise, Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General, Supra."

In Commissioner of Corporations and T. v. Ford Motor Co., 33 N. E. 2d 318, 308 Mass. 558, the court held at l. c. 324:

"The board found that the fifth item of the schedule of sales 'embraced sales to dealers located in Massachusetts within the territory of the Somerville branch, but filled by branches outside the State' and that these were 'interstate sales.' Read with the other findings of the board concerning the character of the other groups of sales comprised in the said schedule,

> we interpret the finding as to the sales included in this fifth item to be one that the goods were ordered at the Somerville branch of the company by its dealer customers located within its territory in this Commonwealth and that the goods were delivered to them by branches of the seller located without the Commonwealth. We do not concur in the view of the board that these were 'interstate sales,' similar to those where sales are made by a company having an office here which is used as headquarters for salesmen who solicit orders in this Commonwealth and in other New England States. We are of opinion that these sales were intrastate sales made by the taxpayer at its Somerville branch (where it also assembles and sells automobiles and sells parts) to its customers located in this Commonwealth and within the territory of that branch and that the character of these sales was not affected by the fact that the company caused delivery of the automobiles to be made to such customers by its branches situated outside the Commonwealth. Graybar Electric Co. v. Curry, 238 Ala. 116, 189 So. 186, affirmed, 308 U.S. 513, 60 S. Ct. 139, 84 L. Ed. 437. * * * * * * * * * * * * * *"

Again in Hollis & Co. v. McCarroll, 140 S.W. (2d) 420, 200 Ark. 523, the question was whether or not the Arkansas retail sales tax law applied to sales by an Arkansas seller to an Arkansas buyer where the shipments were from without the state directly to the buyer. The court held that such sales were not transactions in interstate commerce and states as follows at l. c. 423:

> "Nor (in view of decisions of the Supreme Court of the United States) do we think the sales made by appellant were transactions in interstate commerse. McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Company, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. ---; McGoldrick, etc. v. A. H. DuGrenier, Inc, 309 U.S. 70, 60 S.Ct. 404, 84 L.Ed. --. *
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> "That appellant in the case before us did not carry certain articles of merchandise or machinery in stock and ordered from distributors or manufacturers in other states, with directions that shipments be made to its customers, does not

relieve the transactions of their essential intrastate characteristics. The contracts of purchase were made in this state. In each case appellant's undertaking was to supply the merchandise and the customer's obligation was to pay appellant. The transaction was consummated in Arkansas. The point from which shipment was made was merely incidental, and of no concern to appellant's customer. The customer was not obligated to the nonresident shipper. Appellant profited to the extent of the difference between the price charged it and the price it in turn charged the customer."

In view of the above authorities it must be concluded that such sales as here under consideration are intrastate sales in the State of Missouri, and are not transactions in interstate commerce. Any interstate shipments which might occur are merely incidential to the transactions, the intrastate characteristic of the transactions not being affected. The Missouri sales here in question must therefore be considered intrastate transactions which are subject to the Missouri Sales Tax.

CONCLUSION

It is, therefore, the opinion of this department that sales by Missouri sellers to Missouri buyers in which the merchandise is shipped directly to the buyers from without the State are intrastate sales and not exempt from the Missouri Sales Tax Act.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL