TAXATION
SALES TAX: Effect of House Amendment No. 2 to House Bill No. 125.

April 14, 1943

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Hon. Joseph A. Falzone
Missouri State Senator
25th District
Jefferson City, Missouri

Dear Mr. Falzone:

This is in reply to yours of recent date wherein you submit and request as follows:

> "On Page 7 of House Bill No. 125, Section 11409, Lines 4, 5 and 6, the following words were stricken from the Bill by the House members on Thursday, April 1st, known as House Amendment No. 2, which appears on Page 928 of the House Journal:
>
> 'such retail sales as may be made in commerce between this state and any other state of the United States, or between this state any any foreign country, and'.
>
> Please furnish me with an opinion just as quickly as possible, advising me as to just how this amendment will affect the citizenry of this state and describe to me in detail your opinion of what retail sales now will be included in the law in the event this Bill becomes a law as amended by the aforesaid amendment No. 2.
>
> Also advise me whether or not the adoption of this amendment in substance is the adoption of a so-called "use tax". In other words, as the Bill now reads as amended by amendment No. 2, does it embrace the elements of a "use tax"?"

Section 11409, R. S. Mo., 1939, before striking out the words included in the above amendment 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 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. * * * * *"

This section as amended will read 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, * * * 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. * * *"

The portion of the exemption Section 11409 not quoted is not pertinent to your inquiry.

From our research of sales tax and use tax acts, Missouri is the only state which has an exemption clause with a provision similar to the clause in Section 11409 which is stricken out by amendment No. 2.

In the litigation which this department has handled, wherein the foregoing provisions of the exemption section were claimed to be applicable, the tax payer has taken the position that any retail sale wherein interstate commerce is involved is exempted by said exemption provisions, regardless of whether or not the state is impowered to impose the tax under the provisions of the commerce clause of the Federal Constitution.

If the bill passes with this clause stricken out, then the state would be authorized to impose the tax on every retail sale, as defined in the act, regardless of the fact that such tax may effect interstate commerce, provided the imposition of the tax would not be in violation of the commerce clause of the Federal Constitution.

The case of McGoldrick vs. Berwind - White Coal Mining Company, 60 S. Ct. 391, 309 U. S. 33, 84 L. Ed. 360, was before the Supreme Court of the United States on certiorari from the Supreme Court of New York and was decided in January 1940. In that case the New York City sales tax act was before the court. The transaction sought to be taxed was a sale of coal which moved in interstate commerce. The Berwind-White Coal Company was a Pennsylvania corporation, with mines in that State but it had a sales office in the City of New York. The sales contracts were entered into the City of New York, the coal purchased under these contracts moved from the mines of Pennsylvania to docks in New Jersey, then by barge to the consumers in New York City.

Section 2 of the New York sales tax act fixed the tax at, "two percentum upon the amount of receipts from every sale in New York." By Section 1 (e) the term "sale" was defined as "any transfer of title or possession, or both, in any manner or any means whatsoever for a consideration, or any agreement therefor." (60 S. Ct. l. c. 390).

The court in speaking of the event at which this tax is imposed said, l. c. 391:

> "* * * It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. * * * "

Applying this ruling to the Missouri sales tax act which imposes the tax on the transfer of title or ownership,

then the event of the transfer of title or ownership would be the condition upon which the tax is imposed.

In the Berwind-White case, supra, the Coal Company contended that the imposition of the tax on the transactions therein mentioned would be in violation of the commerce clause. While commerce was involved in these transactions the court held that that of itself would not prohibit the State from imposing the tax. At l. c. 392, the court said in discussing this question:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, 115 A.L.R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress. * *"

In speaking of certain taxes which states might not impose because they would burden commerce, the court at l. c. 393 said:

> "Certain types of tax may, if permitted at all, so readily by made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disad-

> vantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

The court in this case held that the tax could be imposed without violating the commerce clause of the Constitution even though interstate commerce is involved.

The rule, as announced by the latest decisions, seems to be that the state may impose a tax on commerce if such tax does not burden interstate commerce any more than it does intrastate.

The Supreme Court of the United States in the Western Live Stock case, 303 U. S. 250, held that those engaged in interstate commerce must bear their just share in interstate tax burdens. The Berwind-White case and the Western Live Stock case, supra, are two of the leading and latest cases on the question of the rights of the states to tax transactions in which interstate commerce is involved.

The words included in amendment No. 2 to House Bill 125, if left in the act, and if they do not violate the equality clause of the Federal Constitution, would exempt from the provisions of the retail sales tax act such transactions as are in commerce between the states, etc., even though it would not be in violation of the commerce clause of the Federal Constitution to tax such transactions.

The effect of the amendment is to place interstate retail sales, which may be taxed without violating the provisions of the commerce clause, on the same basis as the intrastate retail sales.

Your further inquiry as to whether or not the adoption of this amendment is substance is the adoption of the so-called "use tax". The sales tax act imposes the tax on the person who purchases the article or service for use or consumption. However, we do not think the act in its present form, or with the proposed amendment, would make it a "use tax". In distinguishing between a use tax and a sales tax, we find reference to cases in, volume 43 of Words and Phrases, Permanent Edition, at page 103 of the pocket insert:

> "The provision of the Arkansas Retail Sales Tax Law providing that every person, as defined in the act, shall report, as a retail sale, the use or consumption by him of anything on which the sales tax has not been paid, and on which a sales tax would have been levied had the thing in question been sold at retail in the state, and shall pay the sales tax thereon, does not levy or impose a 'use tax,' but rather imposes a 'sales tax.'
> * * *
>
> In the case of a 'use tax' there is no change of possession of the property, no change of ownership, and the owner pays the tax, which is an excise or exaction charged because of the owner's privilege to exercise or assert some of the elements of ownership over the property. Mann v. McCarroll, 130 S. W 2d 721, 726, 198 Ark. 628."

Applying these rules to the Missouri sales tax act, it is the opinion of this department that the act itself, or as amended by amendment No. 2, would not make it a "use tax".

Respectfully submitted,

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APPROVED:

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TWB/mh