TAXATION AND REVENUE: Missouri Power & Light Company not liable for Missouri income tax upon refunds ordered paid to consumers.

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June 11, 1947

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Mr. Haskell Holman, Supervisor
Income Tax Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter requesting an official opinion of this office and reading as follows:

> "Enclosed herewith is the carbon copy of a letter from Mr. Lester G. Seacat, an attorney for the Missouri Power & Light Company.
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> "After studying this letter will you please advise whether or not in your opinion the Department of Revenue would be permitted to enter into such agreement with the Missouri Power & Light Company."

The letter referred to by you in your inquiry reads, in part, as follows:

> "The facts are these: In 1942 the Federal Power Commission issued an order reducing the rate chargeable by the Panhandle Eastern Pipe Line Company for gas sold by it to the Missouri Power & Light Company (and other distributors) for resale to the customers of the Missouri Power & Light Company. The Panhandle Company prosecuted a proceedings to obtain a judicial review of that order. The order lowering the rates was stayed pendente lite on condition that the Panhandle Company pay to a custodian appointed by the court that part of the

amount received by it from time to time in payment for gas at the old rate which represented the difference between the old rate and the new rate fixed by the Federal Power Commission.

"In conformity with the stay order, during the balance of 1942, all of 1943 and 1944 and part of 1945, the Missouri Power & Light Company, in the usual course of business, paid for the gas it purchased for resale from the Panhandle Company at the old rate. After the receipt of those payments the Panhandle Company determined the difference between the amounts payable under the old and new rate and paid that difference to the court's custodian. The amounts so deposited with the court by the Panhandle representing excess payments made by the Missouri Power & Light Company aggregated $595,843.26.

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"In 1945, the Supreme Court of the United States affirmed the order of the Federal Power Commission, and remanded the case to the Circuit Court of Appeals for the Eighth Circuit for further action in accordance with that decision. Later, in 1945, the Department of Justice, on behalf of the United States of America, intervened in the proceedings then pending in the Circuit Court of Appeals for the Eighth Circuit and asserted in substance that the moneys in the impounded fund belong in equity to the ultimate consumers of the gas represented thereby and sought an order that such moneys be distributed directly from the court's custodian to the individuals who were customers of the Missouri Power & Light Company while the fund was being accumulated.

"In connection with its intervention, the Government also sought and procured an order from the court requiring the Missouri Power & Light Company (and other distributors similarly situated) to claim or disclaim any interest in the fund. In response to that

> order the Missouri Power & Light Company filed with the court a limited disclaimer wherein it declared that it was willing to disclaim any interest in the impounded fund in favor of its customers who were consumers of the gas represented thereby on condition that it could effect a determination by the taxing authorities of the United States and the State of Missouri that there would be no liability for income tax asserted against the Missouri Power & Light Company in the event the court should order this money to be distributed directly to the consumers.
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> "So far as the State of Missouri is concerned, the question arises as to whether or not the fact that the legal title to that portion of the impounded fund which represents excess payments made by the Missouri Power & Light Company during the pendency of the litigation may have reverted by operation of law to the Missouri Power & Light Company upon the affirmance of the order of the Federal Power Commission by the Supreme Court of the United States created income of the Missouri Power & Light Company which is taxable under Article 21 of Chapter 74, Revised Statutes of Missouri, 1939, and the amendments thereto, even though the Court may hold that the ultimate consumers have a superior equitable title thereto and order its custodian to distribute the fund directly to such ultimate consumers."

We are further informed that the Missouri Power & Light Company uses the accrual system of bookkeeping for income tax purposes. We also understand that the several proposed plans of distribution of the impounded funds each contemplate their direct distribution to the consumers of the Missouri Power & Light Company, and that no part of such moneys will come into the hands of the Missouri Power & Light Company.

At the outset, we wish to point out that there is no provision in the Missouri state income tax law authorizing "closing agreements" such as are permitted under Section 3760 of the Internal Revenue Code of the United States. Therefore, this opinion necessarily will consider only the legal effect of the facts

set out herein, and is not to be construed as amounting to such a "closing agreement."

We think the question presented must be resolved by determining whether or not the holding of the naked legal title to the funds representing the overcharge made by the Panhandle Eastern Pipe Line Company constitutes "income" to the Missouri Power & Light Company. Throughout this opinion we assume that ultimately all of such excess charges will be distributed directly to the consumers based upon their equitable title to such impounded funds. Of course, if in fact any portion of such impounded funds is returned to the Missouri Power & Light Company for its own use and benefit, then certainly such funds must be treated as income to that company.

We have no appellate court decisions in Missouri declaring when income may be said to have "accrued." However, there are several decisions construing the Internal Revenue Laws on this subject, and we feel that they are strongly persuasive. Your attention is directed to H. Liebes & Co. v. Commissioner of Internal Revenue, 90 Fed. (2d) 932, l. c. 937, 938:

> "From the above expressions, it is apparent that the general definition of 'accrued' is limited when taken in connection with income returns. We may conclude that income has not accrued to a taxpayer until there arises to him a fixed or unconditional right to receive it.
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> * * * * * * * * *
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> "The complete definition would therefore seem to be that income accrues to a taxpayer, when there arises to him a fixed or unconditional right to receive it, if there is a reasonable expectancy that the right will be converted into money or its equivalent.
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> * * * * * * * * *
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> "It is clear that where a claim exists, no income may accrue, in the absence of a settlement, so long as a judgment has not been entered. * * * "

With this in mind, it seems that there will be no accrual of income to the Missouri Power & Light Company of any portion

of the impounded funds in the event that such funds are ultimately ordered distributed direct to the consumers of the Missouri Power & Light Company. We, therefore, are led to the view that no liability for Missouri state income tax will be incurred by the Missouri Power & Light Company.

As we have already considered the lack of statutes authorizing the Department of Revenue or any other state department or official to enter into "closing agreements" similar to those contemplated by the Federal statutes, we think it unnecessary to further discuss that phase of your inquiry.

CONCLUSION

In the premises, we are of the opinion that no liability will be incurred by the Missouri Power & Light Company with respect to funds impounded in the registry of the Federal Court, representing excess charges made by a wholesaler of gas to said company, to the extent that such impounded funds are ordered by the Federal Court to be distributed directly to the ultimate consumers.

We are further of the opinion that neither the Department of Revenue nor any other state department or official has the authority to enter into a "closing agreement" with a taxpayer similar to such agreements executed under Section 3760 of the Internal Revenue Code of the United States.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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