TAXATION:
SALES TAX:
NATIONAL BANKS:

Sales of tangible personal property to national banks are not subject to the Missouri retail sales tax.

October 4, 1946

FILED
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10-16

Honorable W. O. Jackson
Sales Tax Supervisor
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date herein you request an official opinion from this department as follows:

> "In the Rules and Regulations relating to the Missouri Sales Tax promulgated by Forrest Smith, State Auditor, on Page 34, is found Rule 12, which is in part as follows:
>
> "'Sales of tangible personal property or taxable services made directly to National Banks for use or consumption by the National Bank are exempt from the payment of the tax levied under the Sales Tax Act.' * * *
>
> "Will you please advise me if this Rule is a correct statement of the law at the present time."

The Sales Tax Act has been in effect in this state since 1935. It has been re-enacted at each session of the General Assembly, including the 63rd General Assembly. It was re-enacted by the 63rd General Assembly in House Bill No. 652 which was approved on April 29, 1946. In so far as your question is concerned, the present Act applies as did the law when the regulation referred to in your request was promulgated. Section 11411 of the Act provides in part as follows:

> "* * *The seller of any property or person rendering any service, subject to the tax imposed by this article, is directed to collect the tax from the purchaser of such property or the recipient of the service as the case may be.* * *"

Section 11409 of the Act exempts from the provisions of the Act retail sales which the State of Missouri is prohibited from taxing under the Constitution or Laws of the United States. In the case of School District of Kansas City vs. Smith, 111 S. W. (2d) 167, 168, the court said:

> "* * *The purchaser is the taxpayer, and the seller, although responsible, is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax.* * *"

On November 5, 1935, an opinion was rendered by the Attorney General's office, holding that the State of Missouri could not impose the sales tax on the sales of personal property, services, substances and things to national banks for use or consumption by such banks. We are assuming that the regulation referred to in your request was based upon that opinion.

The question of the authority of states to impose excise taxes upon national banks and other federal instrumentalities has been before the United States Supreme Court and state courts on a number of occasions since 1935, so in order to bring our 1935 opinion down to date, we will discuss these various cases.

The question involved in your request is whether or not the state may impose a sales tax on a federal instrumentality. National banks are instrumentalities of the United States, Owensboro National Bank vs. City of Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850. In the case of First National Bank of Guthrie Center vs. Anderson, 70 L. Ed. 295, l. c. 302, the United States Supreme Court, in discussing the relationship of national banks to the United States, said:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under state authority except as Congress consents, and then only in conformity with the restrictions attached to its consent.* * *"

Also in the case of Maricopa County, Ariz., et al. vs. Valley National Bank of Phoenix, 318 U. S. 357, 63 S. Ct. 587, the United States Supreme Court had before it the question of the authority of the State of Arizona to collect

taxes on shares of preferred stock of a national bank owned by the Reconstruction Finance Corporation. In speaking of the authority of states to impose taxes on national banks, the court in that case said: (l. c. 588)

> "* * *The authority by which the taxes in question were levied did not stem from the powers 'reserved to the States' under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation.* * *"

The Maricopa County opinion, supra, was rendered by the United States Supreme Court on March 1, 1943. These rulings clearly demonstrate that the United States Supreme Court has taken the position that federal instrumentalities may be taxed by the states only when Congress consents to such taxation. In other words, on account of being agencies of the sovereignty, they are impliedly exempt from taxation by the states and until Congress authorizes states to tax such agencies, they cannot be taxed.

The Act of Congress relating to taxation of national banks is found in Title 12, Section 548, U. S. C. A., and has not been amended or modified since March, 1926. This section provides in part as follows:

> "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> "1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.* * *"

The State of Missouri imposes a tax under House Bill No. 888 of the 63rd General Assembly, approved April 23, 1946, by Section 3A thereof in the following manner:

> "Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, and every other banking institution as herein defined shall be subject to an annual tax for the privilege of exercising its corporate franchises within the State of Missouri according to and measured by its net income pursuant to the provisions of this Act."

According to the authorities herein before cited, since the State of Missouri has chosen to impose a tax on national banks on the basis of their net income, then it has no authority to impose any other tax on such banks. In the case of Federal Land Bank of St. Paul vs. Bismarck Lumber Co., 314 U. S. 95, 62 S. Ct. 1, the court had before it the question of the authority of the State of North Dakota to collect a sales tax on a sale of tangible personal property made by a lumber company to a federal land bank. The bank had purchased farms under foreclosure, and the lumber purchased from the Bismarck Lumber Co. was being used by the Federal Land Bank on these farms. The Sales Tax Act of North Dakota imposes the tax on the purchaser as does the Missouri Sales Tax Act. At l. c. 5, the court, in discussing the authority of states to impose a sales tax on federal instrumentalities, said:

> "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 477, 59 S. Ct. 595, 599, 83 L. Ed. 927, 120 A. L. R. 1466. It also follows that when Congress constitutionally creates a corporation through which the federal government

lawfully acts, the activities of such corporation are governmental. Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 32, 60 S. Ct. 15, 17, 84 L. Ed. 11, 124 A. L. R. 1265; Graves v. New York ex rel. O'Keefe, supra, 306 U. S. page 477, 59 S. Ct. page 596, 83 L. Ed. 927, 120 A. L. R. 1466.

"The federal land banks are constitutionally created, Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.' Federal Land Bank v. Priddy, 295 U. S. 229, 231, 55 S. Ct. 705, 706, 79 L. Ed. 1408; Federal Land Bank v. Gaines, 290 U. S. 247, 254, 54 S. Ct. 168, 171, 78 L. Ed. 298. The national farm loan associations, the local co-operative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. Knox National F. L. Asso. v. Phillips, 300 U. S. 194, 202, 57 S. Ct. 418, 422, 81 L. Ed. 599, 108 A. L. R. 738; Federal Land Bank v. Gaines, supra, 290 U. S. page 254, 54 S. Ct. page 171, 78 L. Ed. 298.

"Congress has the power to protect the instrumentalities which it has constitutionally created. This conclusion follows naturally from the express grant of power to Congress 'to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States.* * *"

One of the most recent cases before the United States Supreme Court on the question of immunity of state or federal

instrumentalities from taxes is the case of State of New York and Saratoga Springs Commission vs. United States, 90 L. Ed. page 265. This case was decided on January 14, 1946. The question involved in that case was whether or not the State of New York, which owned Saratoga Springs and derived revenue therefrom, was subject to the federal income tax. The court in that case by majority opinion held that the state was liable for the tax. In this case, the court departed farther from the principle of immunity of states from federal taxation than it had theretofore. However, from a reading of that opinion, it will be found that the court still adheres to the principle announced in McCulloch vs. The State of Maryland, 4 Wheat. 316, 4 L. Ed. 579, to the effect that states may not tax federal instrumentalities in any manner other than that granted by Congress. In our research on this question, through the Missouri Supreme Court opinions, we find that the Missouri Supreme Court in the case of the City of Carthage vs. The First National Bank of Carthage, 71 Mo. 508, had before it the question of the authority of a political subdivision of the state to impose a license tax on a national bank. This opinion was rendered in 1880, but in our research on the question, we failed to find where it has been overruled or modified. At l. c. 509, the court, in treating the question, said:

> "In the case of McCulloch v. The State of Maryland, 4 Wheat. 316, it was held that congress had the constitutional right to authorize the incorporation of banks; that a bank thus incorporated had a right to establish its offices of discount and deposit within any State, and that when so established the State could not tax it. This decision was made with reference to the question whether the State of Maryland could impose a tax on the bank of the United States, incorporated under an act of Congress of April 10, 1816. The principle therein announced, has been re affirmed and applied to the act of congress authorizing the incorporation of National Banks, in the following cases: Van Allen v. Assessors, 3 Wall. 573; Bradley v. The People, 4 Wall. 459; Lionberger v. Rouse, 9 Wall. 468; Tappan v. The Bank, 19 Wall. 490; McBurn v. School Directors, 23 Wall. 480. In all of these cases it has been held that a State can only impose such a tax upon these national banking corporations as is authorized in the act of congress creating

> them, and that said act only authorizes a tax on the shares in such bank and not upon its capital stock that such banks derive their authority to do business in the States by virtue of a United States statute which is supreme. It therefore follows, that the right of defendant to conduct its business as a banking institution is in no way dependent on a license to be obtained either from the State or any of its municipalities." * * *

All of the authorities herein before referred to, including the United States Supreme Court and the Missouri Supreme Court, conclusively hold that a state may not tax a federal instrumentality in any manner other than that authorized and provided by Congress. Since the State of Missouri has chosen to tax the shares of national banking associations on a valuation measured by the net income of the respective banking organizations, then applying the foregoing rules, it would not have authority to tax national banks in any other manner.

CONCLUSION

From the foregoing, it is the opinion of this department that the State of Missouri may not impose a tax on retail sales of tangible personal property which are sold to national banks for use and consumption by such banks.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM