TAXATION:
SALES TAX: Cost-plus-contractors who pay a sales tax on materials which they use in such contracts may bill the firm with which they are contracting for reimbursement of the amount of such tax and such contractors would not be required to remit the amount of such reimbursement to the State Collector of Revenue.

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June 19, 1947

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Honorable W. O. Jackson, Supervisor
Sales Tax Unit
Department of Revenue
State Capitol Building
Jefferson City, Missouri

Dear Mr. Jackson:

This is in reply to yours of recent date wherein you request an official opinion from this department on the following statement of facts:

> "The question has arisen in regard to the collection of sales tax from certain contractors in the City of St. Louis and the opinion of the Attorney General is desired as to whether or not these contractors are liable to the State for the remittance of tax.
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> "The situation out of which this controversy arises, is as follows:
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> > "Certain contractors in the handling of their Cost-plus-contracts, would use materials which they had purchased and upon which they had paid the sales tax, but in billing the firms with which they were contracting, they would include in their bill an item 'Two Per Cent Sales Tax $30.99', or some other amount, being the amount of sales tax which the contractors had paid on the material used.
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> "Section 11416 of House Bill 652 enacted by the 63rd General Assembly, Laws of 1945, l.c. 1871, directs the filing of sales tax returns and the remittance of the tax collected and contains the following words:
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> > 'Including any and all monies collected from the purchaser as sales tax.'

> "An opinion from your office will be greatly appreciated, advising us whether or not under the style of billing above described, the contractors doing contract work on a Cost-plus basis should remit to the State Collector of Revenue, the amounts shown in their invoices as sales tax."

The Missouri Sales Tax Act was passed originally in 1935; it has passed at each session of the General Assembly since that time and the latest act was passed in House Bill No. 652 by the 63rd General Assembly and is now found at page 1865, Laws of Missouri 1945.

Section 11416 of the act, and to which you refer in your request reads in part as follows:

> "Every person making or rendering any sale, service or transaction taxable under this article, shall on or before the fifteenth day of the month after this article becomes effective, and on or before the fifteenth day of every calendar month thereafter, individually or by duly authorized officer or agent make and file with the Director of Revenue a written return, in the manner and form designated or prescribed by said Director of Revenue, and upon blanks furnished by him showing the amount of gross receipts from sales, services and taxable transactions by such person and the amount of tax due thereon during and for the preceding calendar month, or that portion thereof subsequent to the effective date of this article, and with such written return such person shall remit to the Director of Revenue the amount of said tax due, including any and all monies collected from a purchaser as sales tax. * * * * * * * * * * * "

The Sales Tax Act until 1939 did not include the clause "including any and all moneys collected from a purchaser as sales tax." This section was amended, Laws of Missouri 1939, page 862, by including the foregoing clause. The reason for this amendment was that in many instances, especially where the sales were of small items, the tax collected exceeded the amount which would be derived by multiplying the gross sales by two per cent (2%); the lawmakers taking the position that any moneys collected as a sales tax on retail sales belonged to the State and that the retailers should not be permitted to keep these excess taxes.

The sales tax is imposed on "retail sales" of tangible personal property for use and consumption and for certain services set out in the act. The term "retail sale" is defined in Subsection G of Section 11407 of the act, Laws of Missouri 1945, page 1867 as follows:

> "'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, 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. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace: * * * * * * * * * * * * * "

The Sales Tax Act has been before the Supreme Court for consideration on many occasions. One of the earliest cases wherein the act was being considered by the court was in Kansas City Power & Light Company v. Smith, 111 S. W. (2d) 513. In that case the court applied the following rules of construction with respect to the administration of the act, l. c. 513-515.

> "'Under our system of taxation, there can be no lawful collection of a tax until there is a lawful assessment, and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose.' (Italics ours) *
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> "'It is a generally accepted rule that taxing statutes should be strictly construed in favor of the taxpayer, and such is the rule in this state.' * "

These rules have been applied throughout the administration of the Sales Tax Act.

In your request you refer to cost-plus-contractors. For the purpose of this opinion we are assuming that these are construction contracts for the improvement of real estate and are similar to the contracts which were before the Missouri Supreme Court in the case of City of St. Louis v. Smith 114 S. W. (2d) 1017. In that case the court had before it the question of whether or not the City of St. Louis for whom the contractor had contracted to pave streets, construct sewers and build a hospital, was the

purchaser of the materials which went into these contracts. The City of St. Louis took the position that it was not the purchaser of these materials within the meaning of the Sales Tax Act, and therefore was not liable for the payment of the sales tax. After setting out various provisions of the Sales Tax Act relative to the question and especially the definition of the term "sell at retail," The court said at l. c. 1019:

> "It is clear from these statutory provisions that where one buys tangible personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax. In this case, the contractors agreed with the city to furnish all labor and material necessary to construct, and to construct, the improvement in question for a fixed sum of money. It was necessary for the contractor to purchase and use all material necessary to complete said work in order to be in a position to deliver to the city a completed structure as provided in the contract. Our judgment is that it cannot be said by the contractor that he resold the materials to the city for its use, and did not use or consume them in the performance of his contract. * * * * * * * * * * * * * * *
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> "In our judgment the contractors in this case did not buy the materials in question for the purpose of reselling such materials to the city. They were under contract to deliver to the city a finished product. It was the inseparable commingling of labor and material that produced the finished product. Our conclusion is that the contractors used and consumed the material in order to produce the finished product in compliance with their contract. Since the contractors used and consumed the material, they and not the city are primarily liable for the one per cent sales tax. The sale of the materials by the dealer to the contractors was the taxable transaction, and it was the duty of the dealer to collect the tax from the contractors at the time the sale was made."

Following this authority the "retail sale" under the Sales Tax

Act has taken place between the cost-plus-contractor and his supplier and such cost-plus-contractor being held to be the purchaser under the Sales Tax Act should pay the tax to his supplier who is the seller under the act.

Then, since the taxable transaction has taken place between the cost-plus-contractor and his supplier the question arises, could the cost-plus-contractor be reimbursed the amount of this tax by the one for whom he performs the cost-plus-contract, and would such contractor be required to remit the amount so reimbursed to the Director of Revenue as sales tax collected. If the cost-plus-contractor is required to remit this tax for which he has been reimbursed, it is solely on account of the language used in said Section 11416 and quoted above which requires the seller to remit the tax due "including any and all moneys collected from a purchaser as a sales tax."

Under the ruling announced by the Missouri Supreme Court in the City of St. Louis case, supra, the contractor is the purchaser and he must pay the tax to his supplier. Then, if it should be held that the foregoing language of Section 11416 requires the contractor to remit this tax by which he has been reimbursed by the party with whom he has the construction contract and in which the reimbursement is for the tax on the same articles which went into the contract, then the State would be double taxing these transactions. We do not think that was the intention of the lawmakers when the Sales Tax Act was passed. In fact, the lawmakers in the act indicated a policy against double taxation of "retail sales."

Section 11409 of the act contains certain exemptions and in that section the lawmakers before setting out the exemptions of certain transactions uses this language, "in order to avoid double taxation under the provisions of this article." We think this language clearly demonstrates that the lawmakers when they enacted the sales tax act, and at each time it has been re-enacted, had no intention of double taxing any retail sale transaction. In this case the cost-plus-contractor has paid to his supplier the sales tax on the material used in the contract. The contractor then bills the firm with which he is contracting for the amount of the tax which he has paid to his supplier. If the contractor is required to remit this money which he collects from the firm to reimburse him for taxes which he has already paid on the sale of the same materials, then that would be a double tax on the same retail sale transaction.

Referring again to the clause "including any and all moneys collected from a purchaser as sales tax," and applying the principle announced and applied by the Supreme Court in the Kansas City Power & Light Company case, supra, the moneys must be collected from the "purchaser as a sales tax" before the person collecting such moneys is required to pay them into the State Treasury. There are two conditions in this clause which must be met before the State is entitled to the moneys collected under it they are: (a) there must be a purchaser, (b) the money must be collected as a sales tax. In this particular case is the firm with whom the cost-plus-contractor contracting a purchaser within the meaning of the Sales Tax Act? Subsection E of 11407 of the Sales Tax Act, Laws of Missouri 1945, page 1867 defines the word purchaser in the following language:

> "The word 'purchaser' whenever used in this Act means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under this Act."

According to this definition the purchaser must be one who purchases tangible personal property, or to whom are rendered services, receipts from which are taxable under the act. In other words, the purchaser must be the one who purchases tangible personal property in a sale at retail as defined in the act. According to the ruling accounced by the Missouri Supreme Court in the case of City of St. Louis v. Smith, supra, the cost-plus-contractor is the "purchaser" of the materials used in the contract. Therefore, the firm for whom the cost-plus-contractor performs the contract could not also be considered the "purchaser" for these same materials. Before the State is entitled to moneys under this act they must be "sales tax moneys." The sales tax is derived from "retail sales." Section 11408 of the Act, Laws of Missouri 1945, page 1868 imposes the sales tax on retail sales of tangible personal property, etc.

The contractor may be reimbursed, by the firm with whom he is contracting for the cost-plus-contract, the amount of taxes which he has had to pay as a purchaser of the materials which he uses in such contract. However, we do not believe that this is such a collection as would be considered as belonging to the State as a sales tax paid by a purchaser under the Sales Tax Act. We base our conclusion here on the fact that: (a) the firm with whom the cost-plus-contractor is contracting is not the purchaser of the materials within the meaning of the Sales Tax Act, (b) that the moneys collected by the cost-plus-contractor from the firm are not sales tax moneys and, (c) that the transaction by the cost-plus-contractor and the firm with whom he is contracting is not a retail sales transaction within

the meaning of the Sales Tax Act. Applying the principle announced by the court in the Kansas City Power & Light case that there can be no lawful collection of a tax until there is a lawful assessment, which must be made in the manner prescribed by law, then the transaction by the cost-plus-contractor and the firm which reimburses him for his sales tax would not be a transaction in which a lawful assessment of the tax could be imposed.

CONCLUSION

From the foregoing it is the opinion of this department that cost-plus-contractors who pay a sales tax on materials which they use in such contract may bill the firm with which they are contracting for reimbursement of the amount of such tax and that such contractors would not be required to remit the amount of such reimbursement as a sales tax to the State Collector of Revenue.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

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