SALES TAXES: Operator of community sales must disclose his principal and, in his sale statement, show that the commodities so sold are exempt from sales taxes.

September 1, 1942

9-25 FILED 48

Honorable H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Kelso:

This is to acknowledge your inquiry of August 20, 1942 relating to the question of collection of sales taxes by the operator of a community sales pavilion, which is as follows:

> "In my official capacity as prosecuting attorney I wish to respectfully request an opinion construing Rule No. 29 of the Rules relating to the Missouri Sales Tax Act.
>
> "My facts are briefly these: An operator of a Community Sales Pavilion has not been collecting sales tax where he sold surplus items of farmers and other persons not engaged in the regular business of selling. He adopted this policy because of the last sentence of Rule No. 29 aforementioned which reads, "persons selling livestock, live poultry, and those persons not engaged in retail business who personally dispose of surplus items through community sales, are not required to collect and remit the tax thereon."
>
> "Could you inform me wheather or not he has placed the proper construction on this Rule?"

Section 11408, Laws of Missouri, 1941, is in part as follows:

> "From and after the effective date of this article and up to and including December 31, 1943, there shall be and is hereby levied and imposed and there shall be collected and paid:
>
> "(a) 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, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

Subsections (f) and (g) of Section 11407, defining the word "seller" and "sale at retail" are as follows:

> "The word 'seller' when used in this article means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed under Section 11408.
>
> " '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."

Section 11409 of said act, relating to exemptions and embracing the above subject is 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. In order to avoid double taxation under the provisions of this article, no tax shall be paid or collected under this article upon the sale at retail of any motor fuel, subject to an excise or sales tax under another law of this state; or upon the sale at retail of fuel to be consumed in manufacturing or creating gas, power, steam, electrical current or in furnishing water to be sold ultimately at retail; or feed for livestock or poultry, which is to be used in the feeding of livestock or poultry to be sold ultimately in processed form or otherwise at retail; or grain to be converted into foodstuffs which are to be sold ultimately in processed form at retail."

Section 11413, thereof, is in part as follows:

> "For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the State Auditor shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article."

Rule No. 29, promulgated by the Auditor and relating to such subject is as follows:

> "Many times persons regularly engaged in the business of selling tangible personal property offer property such as furniture, apples and other fruits, potatoes and other vegetables, building materials or fence posts, through community sales. The person, agency, firm or corporation managing, conducting or acting as auctioneer or otherwise officiating at such sales should require the purchaser of items such as those mentioned above to pay Missouri Sales Tax on their purchases and should remit said tax to the State Auditor. Persons selling livestock, live poultry, and those persons not engaged in retail business who personally dispose of surplus items through community sales, are not required to collect and remit the tax thereon."
> (Underscoring ours)

The sales mentioned in your inquiry, therefore, are comprehended by the Sales Tax Act, unless exempted under the provisions of the above statute and rule.

The status of taxes and their vital need in support of government was very aptly expressed by the Supreme Court in the case of State ex rel. v Rowse, 49 Mo. 589, l.c. 592, in the following language:

> "By the common law all debts due the crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. The liability for them is not an ordinary one, and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government."

The strict construction rule relating to exemptions from taxation was announced by the Supreme Court in the case of National Cemetery Association v. Benson, 129 S.W. 2d. in excerpts on pages 844 and 845, which are as follows:

> ***
> "An exemption from taxation can be sustained only when expressed in explicit terms and it cannot be extended beyond the plain meaning of those terms."
> ***
> "The burden is on the property owner clearly to establish that his property falls within the exempted class."

The same question was ruled by the same court in Young Women's Christian Association v. Baumann, 130 S.W. 2d. 499, 501 in the following language:

> "*** The principles to be followed in construing provisions for exemption from taxation, have been announced in many cases. They are well stated by Judge Lamm in State ex rel. Spillers v. Johnston, 214 Mo. 656, 113 S.W. 1083, 21 L.R.A., N. S., 171. Suffice it to say they call for a strict construction against the right of exemption. Taxation is the rule, exemption is the exception; yet strict construction must be a reasonable construction. ***"

In the case of St. Louis Young Men's Christian Association v. Gehner, 47 S.W.2d. the plaintiff sought to enjoin the collection of taxes on realty belonging to it, althoug h it was renting such property for lodgings, and operating cafeterias, barber shops, etc. The court, at page 778 of such decision held:

> "*** These contentions may be conceded, and still the property is not exempt for the reason the statute does not exempt property that may be used for purposes purely charitable, but exempts property that is exclusively used for such purposes.
>
> "In ruling the question in State ex rel. v. Board of Assessors, 52 La. Ann. 223, 26 So. 872, Loc. cit. 876, it was said: 'The argument is that caring for the social, moral and spiritual condition of men is charity in the broadest sense, and that a place provided by the association where young men can assemble for religious exercises, and be secluded from temptation, is a charity and blessing. We wish we could yield to this reasoning. It demonstrates the capacity of the association to aid in the intellectual improvement of young men, and the usefulness of the association in promoting religious purposes. But, in our opinion, the argument fails to bring the association and its rooms within the exemption granted in the constitution to property actually used for charitable purposes.***"

There is no ambiguity in the above statute. The rule based thereon is obviously reasonable. Therefore, the question is settled by interpretation of the above rule.

The rule on its face clearly shows that the Auditor had no intention of attempting to enlarge the exemption statute by bringing within an exempt class anypersons or types of taxable sales.

The rule made by such Auditor, with full knowledge of the law relating to exemptions, with reference to persons and sales, was made and promulgated with the sole purpose of defining <u>who</u> might sell the mentioned exempt commodities through community sales without collecting and remitting taxes.

Both statute and rule are silent as to definition of the words "community sales." The customary manner of conducting such sales is on a commission basis or by paid employees.

The Auditor cannot, by rule, enlarge nor restrict a class of persons or property, that are exempt from taxation, by statutory enactment which does not violate a constitutional provision. He cannot, by rule prohibit a person from selling personally, by agent or through an operator of a community sales pavilion, the property of such person which is tax exempt. Neither can he, by rule, require any of such parties to collect and remit sales taxes on such transaction when made in such manner.

However the auctioneer or employee sells tangible personal property-- not his own-- which is taxable per se unless exempt per se. Unless in his sales statement, he names the owner and commodity so as to show that the exemption exists it would be questionable as to whether taxes were due.

Section 11420, Laws of Mo. 1941, is in part as follows:

> "***The burden of proving that a sale of tangible personal property , services, substances or things was not a sale at retail, shall be upon the person who made the sale.***"

Rule No. 62 promulgated by the Auditor is in part as follows:

> "*** The burden is placed upon the seller of feed to determine at the time of the sale whether or not the sale is taxable. Therefore such sellers are directed to take from the purchaser a blanket certificate of resale, and must retain the same in their records to support deductions for feed taken on their tax report.***"

Rule No. 63 is in part as follows:

> "*** Where persons conduct markets, sale barns, and the like, at which agricultural produce is sold for use or consumption to purchasers, by agents on behalf of principals who are unknown or undisclosed, such persons conducting such markets or sale barns must collect and remit the tax on said sales.***"

Under a well established rule of the Appellate Courts of this state, the burden is placed on the property owner to clearly establish that his propertyfalls within the exempted class. The above statutes and rules are based upon and follow such reasoning.

C O N C L U S I O N

THEREFORE, it is the opinion of this department that the Auditor may require an operator of a community sales pavilion to make a return showing that no sales taxes are due from sales made by him in such capacity unless, at the time of each sale, in his sale statement, he discloses his principal and clearly shows that commodities so sold are exempt from such taxation.

Respectfully submitted

S. V. MEDLING
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APPROVED:

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