SALES TAX: Automobiles sold in Missouri by a local agent for a Nebraska principal, to be delivered in Nebraska, are not subject to sales tax in Missouri.

February 6, 1940.

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Captain A. D. Sheppard
General Headquarters
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Captain Sheppard:

We desire to acknowledge your request for an opinion on January 31, 1940, which is as follows:

> "Will you kindly render this department an opinion based on the following facts:
>
> One Ed Burge, living near Craig, Missouri, is a salesman for a Mr. Novak, Plymouth dealer in Falls City, Nebraska. Burge has sold several cars, both new and used, in this territory, Holt County, Missouri. He is the agent of the company, but the cars are delivered in Falls City, Nebraska.
>
> "Does this constitute a violation of sales tax law? No sales tax is paid on these sales, and dealers in the territory are concerned about this unfair competition as the sales tax on a new car is a consideration."
>
> "This information is for the particular attention of our Troop A. Lee's Summit, Missouri.
>
> "Your cooperation will be appreciated."

Sub-section (a) of Section 2 of House Bill No. 91, Laws of Missouri 1939, relating to sales taxes at page 859-60, is as follows:

> "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." (Underscoring ours)

Sub-section (b) of Section 1, thereof, at page 858, is as follows:

> "The term "Sale" or "Sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration any of the substances, things and services hereinafter designated and defined as taxable under the terms of this Act." (Underscoring ours)

The court, in the case of Artophone Corporation vs. Coale, 133 S. W. (2nd) 343, 348, in defining a transaction, said:

> "The word 'transaction' may and often does have a broader meaning than 'contract.' In Scott v. Waggoner, 48 Mont. 536, 139 P. 454, 456, L. R. A. 1916C, 491, 494, it is said: 'The term "transaction" is not legal and technical, it is common and colloquial; it is therefore to be construed according to the context and to approved usage. * * * As so construed, it is broader than

> "contract."' In Ritchie v. Hayward, 71 Mo. 560, 562, we said that 'transaction' is a more comprehensive term than 'contract.' To like effect see Barnard v. Weaver, Mo. App., 224 S. W. 152, 153. And in Roberts v. Donovan, 70 Cal. 108, 113, 9 P. 180, 182, 11 P. 599, we read that the term 'transaction' is a broader one than 'contract' - 'A contract is a transaction, but a transaction is not necessarily a contract.' And in Moore v. New York Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 371, 70 L. Ed. 750, 45 A. L. R. 1370, 1378, we read: '"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

Sub-section (a), supra, provides for a sales tax "upon every retail sale in this state" and sub-section (b), supra, defines a sale as "every closed transaction constituting a sale".

Therefore, every closed transaction constituting a sale shall be upon sales in this state before the Auditor of the state may impose a sales tax.

The right of a state to tax and the limitation of such right is stated in the case of M'Culloch v. Maryland, 4 Law Ed. 579, 607, 4 Wheat, 316, wherein Mr. Chief Justice Marshall said:

> "*It may be exercised upon every object brought within its jurisdiction. * * * All subjects over which the sovereign power of a state extends, are objects of taxation; *but those over which it does not extend, are, upon the soundest principles, exempt from taxation. * * * "

The same rule was stated in the case of Cleveland, Painesville & Ashtabula R. R. Co. v. Pa. 82 U. S. 300, 21 Law Ed. 179, in the following language:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

In the case of Campania General De Tabacos De Filipinas v. Collector of Internal Revenue, 73 Law Ed. 704, 706, 279 U. S. 306, 49 Sup. Ct. 304, the Supreme Court of the United States, in an excise tax case, had for decision the question as to whether sales took place in the Philipines at the branch office of a Spanish firm or whether the final acts, making effective the sales, took place in the United States. The court held:

"While the stipulation states that the merchandise was 'sold' in the United States by petitioner's agency there, this statement cannot be taken without qualification; it must be read with the limitation immediately following that such sales were 'subject to confirmation and absolute control as to price and other terms and conditions' by petitioner's Philippine branch. It does not appear whether the confirmation was, in each case, given by the Philippine branch direct to the buyer or was otherwise the final act consummating the sales within the Philippine Islands, or whether, as the trial court and petitioner seem to have assumed, it was a mere approval or ratification of the negotiations had by petitioner's American Agent, and authority to him to confirm or otherwise complete the sales in the United States. Certainly, if the former, the final acts of petitioner making effective the sales, which were the source of the profit, took place in the Philippine Islands as an incident to and part of its business conducted there. See Holder v. Aultman, M. & Co. 169 U. S. 81, 89, 42 L. ed. 669, 671, 18 Sup. Ct. Rep. 269; Lloyd Thomas Co. v. Grosvenor, 144 Tenn. 349, 233 S. W. 669; Charles A. Stickney Co. v. Lynch, 163 Wis. 353, 158 N. W. 85; Shuenfeldt v. Junkermann (C.C.) 20 Fed. 357.

"If, in fact, the sales were thus made in the Philippine Islands, we think it unimportant whether the merchandise sold was exported before or after its sale; it could not be seriously contended, and indeed petitioner does not contend, that a profit derived from such transactions would not be subject to

> the tax. For, in such a case, the entire transaction resulting in a profit, with the exception of the negotiations in the United States preceding the sale, would have taken place in the Philippines. Instead, petitioner asks us to construe the stipulation so as to bring it within the ruling of the Attorney General applied to a state of facts where every act effecting the sale took place outside the taxing jurisdiction. * * * "

In the case of McGoldrick v. Berwind-White Coal Mining Co., decided by the United States Supreme Court on January 29, 1940, the court held that "transfer of possession to the purchaser within the state * * * is the taxable event, regardless of the time and place of passing title" and that:

> "The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

Transfer of possession to the purchaser within the state being the taxable event and a necessary prerequisite for a closed transaction would preclude an assessment in Missouri where delivery was to be made in Nebraska.

In the case of Gunther v. McGoldrick, 279 N. Y. Reports, 148, 150, the court said:

> "The determination of the Comptroller with respect to the disputed assessment was annulled by the Appellate Division and a refund directed of the of the amount deposited upon the ground that under the undisputed facts the transactions in question involving future deliveries outside the city of New York were not taxable as they were not consummated until the merchandise was delivered to the petitioner's customers outside the territorial limits of the city, including merchandise delivered in interstate commerce to points outside of the State of New York."

CONCLUSION

Therefore, it is the opinion of this department that the acts of a Missouri agent, of a Nebraska principal, in making local sales of automobiles to be delivered in Nebraska by such principal to the purchaser does not effectuate a closed transaction necessary to constitute a sale under the Sales Tax Act, Laws of Missouri 1939.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

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