TAXATIONS . Fees and charges paid for privilege of fishing
SALES TAX : are not subject to the provisions of the 2% Sales Tax Act.

September 23, 1937.

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Mr. Wayne V. Slankard,
Prosecuting Attorney
Newton County,
Neosho, Missouri.

Dear Sir:

This office acknowledges receipt of the following request from your office dated September 15, 1937:

> "A man in this county who operates a fish farm, has asked me whether or not he should collect and remit sales tax on his business. The business is operated as follows: He has two or three ponds in which the fish are kept and he allows any person, who so desires, to fish in these ponds and charges them for this privilege, so much per inch on the fish caught. I would like your opinion on this question."

In passing upon this question we have considered the following sections of the 2% Sales Tax Act which we think are applicable to the subject of your inquiry, viz:

Sub-section "b" of Section 2 of said Act is as follows:

> "A tax equivalent to two (2) per cent of the amount paid, for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events."

Relative to definitions of the term "sale at retail" we find clause "1" of Sub-section "g" of Section 1 of said Act includes the following:

> "Sales of admission tickets, cash admission, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events."

In Sub-section "i" of Section 1 of said Act we find the following in reference to the term "admission":

> "For the purposes of this Act the term 'admission' includes seats and tables, reserved or otherwise, and other similar accommodations and charges made therefor and amount paid for admission, exclusive of any admission tax imposed by the Federal Government or by this Act."

From our research upon the question of the Sales Tax being applicable to the charge made for fishing, we find that the 2% Sales Tax Act as applicable to such charges is similar to the provisions of the 1% Sales Tax Act of Missouri passed in 1935 except that the words "or in" have been inserted in clause 1 of Sub-section "g" of Section 1 of the Act and in Sub-section "b" of Section 2 of the Act.

By the foregoing Sections and Sub-sections of the Act, the legislature imposed the tax upon charges paid to or in places of recreation, etc. The word "recreation" is defined by Webster's New International Dictionary as, "refreshment of the strength after toil or diversion". Diversion is synonymous with the words amusement, entertainment, pastime, sport, game, play and merriment, and the word "sport" is defined in said dictionary as some particular play, game or mode of amusement such as, fowling, hunting fishing, rowing, etc. We, therefore, find that if fishing is taxable under the Act it is because it comes within the classification of "recreation".

Next, is the charge or fee paid for the privilege of fishing, one that the lawmakers intended to include within the Act. In construing sales tax statutes, we find the following rule laid down in the case of Doby v. State Tax Commission, 174 So. 222:

> "Sales Tax Statutes must be strictly construed in consideration of the coverage and no strained construction may be indulged against the taxpayer because of the purpose to raise needed revenue."

The same rule has been applied in Missouri in the case of, In re: Estate of Clark, 270 Mo. l. c. 362, wherein Judge Faris J. states as follows:

"Statutes by which the state taxes the property of the citizens are to be strictly construed."

This rule is not, however, to be followed so far and so technically as to defeat the intention of the legislature and the same rule has been followed in the case of State ex rel. Ford Motor Company v. Gehner, City Assessor, et al 27, S. W. (2d) 1. c. 3. The Supreme Court of Missouri in the case of State ex rel. Smith 90, S. W. (2d) 405, has held that the sales tax is an excise tax.

If said Act by the terms "charges and fees paid to or in places of recreation", includes those who participate in such recreational activities, then it applies to those who pays for the privilege of taking an active part in such recreation or sport.

We further find, that under the 1% Act and before the aforesaid amendment, no tax or charge was made for those taking part in recreational activities and we conclude that if they are taxable under the 2% Act it is on account of the additions of the words "or in" to the aforesaid Section of the said 2% Sales Tax Act.

The legislature in no uncertain terms, in clauses 3 and 5 of Sub-section "g" of Section 1 of said Act, stated, what shall be taxed for the use of certain services and things, that is, hotel rooms, tourist cabins, telephones, etc., but it failed to include those who participate in recreational activities,such as fishing,within the definition of the words "sale at retail", and it also failed in Section 2 of the Act to impose a 2% Tax upon the amount paid by those participating in recreational activities for the privilege of taking part in such activities. When a legislature has spoken in such specific terms it ceases to speak in general terms and only those subjects mentioned within the bounds specifically referred to can be included in such Act, Authority 25 C. J. 220.

If the legislature had intended to tax those who participate in recreational activities, such as fishing, upon the amount they pay for such privilege, then it could easily have found appropriate language in which to express that purpose. By failing to do so, it indicated its purpose not to impose the Sales Tax upon such recreational activity. We think the maximum "the expression of one thing is the exclusion of the other" would apply in this particular case, 25 C. J. 220; Lexington et al v. Commercial Bank, 130 Mo. App. 692.

Further considering the Act and the words "or in" which were added to the aforesaid sections and by considering the definition of the word "admission", Section 1, Sub-section "i", as "applying to seats and tables, reserved or otherwise, and other similar charges made therefor", we conclude that the words "or in" were inserted in the 2% Sales Tax Act for the purpose of collecting a tax on the charge that is made for reserved seats and tables within such places of amusement, and after the person is admitted and has paid an admission charge to enter such places.

CONCLUSION

The legislature having failed to embrace within the definition of the term "sale at retail" in Section 1 of the Act, those participating in recreational activities, such as fishing, hunting, etc. or any other activity for which the participants pay the fee or charge and having failed in Section 2 of the Act to levy and impose a tax upon the amount paid for the privilege of entering into such activity and by strict construction of the Sales Tax Act, so far as it applies to the aforesaid subjects, but not such a strict construction as to destroy the intention of the legislature, it is the opinion of this department that the amount which a party pays for the privilege of fishing in lakes, ponds, etc. or for entering into any other recreational activity as a player, is not subject to the provisions of the 2% Sales Tax Act and is not taxable under the Act.

Yours very truly,

TYRE W. BURTON
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

TWB:LB