TAXATION:
SALES TAX:
INTERSTATE COMMERCE TRANSACTIONS:

Contracts for sales of goods or for services consummated within the State of Missouri are subject to the provisions of sales tax regardless of the residence of the parties to the contract or of the location of the property.

June 9, 1939

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on three questions involving the applicability of the Missouri Sales Tax. These questions regard transactions in which interstate shipments are involved and will be more specifically referred to hereinafter.

In approaching your questions we are quoting certain sections of the Sales Tax Act which are applicable and controlling on these questions. Subsection (b) of Section 1 of the Act provides 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."

Subsection (a) of Section 2 of the Act provides 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."

Section 5 provides in part as follows:

> "* * * * * * * * * The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. * * * * * * *"

From these provisions of the act it is quite apparent that the lawmakers intended that the tax be imposed on all of the sales or services mentioned in the act which are made in the state of Missouri. On the question of the power of the Legislature to impose such a tax, we do not think it is necessary to go into that in this opinion.

Section 3 of the Act provides in part as follows:

> "There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made 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 person-

> al property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state.
> * "

Evidently the lawmakers intended by this section to exempt from the provisions of the Act transactions which are interstate in character. Regardless of whether or not the lawmakers have included such an exemption, they would not be taxable on account of the provisions of the Federal Constitution.

By this provision we think that where an offer to buy a certain article or to perform a service which is included in the Missouri Act, is made in Missouri and accepted in another state, then it is an interstate transaction and not taxable. If a sale, whether made by a non-resident or a resident of Missouri, is consummated in Missouri, then it is a Missouri sale and taxable under the Act.

On the question of the place of the contract we find in Daggett et al. v. Kansas City Structural Steel Co., et al., 65 S. W. (2d) 1036, 1039, the court said:

> "It is settled law that the place where the final act occurs which makes a binding contract is the place of contract. Appellants' contention in the case at bar is that Daggett's act in beginning work in the state of Kansas was the final act which completed the contract of employment and for that reason it was a Kansas contract. This insistence is based upon appellants' claim that where an offer calls for the performance of an act, the doing of the act is necessary to complete the contract. We do not agree with appellants' statement of the law. Of course, if an offer calls for the

performance of an act, and further provides, either expressly or by necessary implication, that acceptance shall be made by performance of the act, then the acceptance must be in the manner indicated in the offer. But where an offer calls for the performance of an act, and does not provide the manner of acceptance, we know of no reason why the other party could not accept the offer and thus complete the contract by either performing the act called for in the offer, or by agreeing to perform it. The distinction between an offer which calls for a promise, and one which calls for the performance of an act, is that in the former, notice of acceptance is always essential, while in the latter such notice is not required if the act called for in the offer is performed, because performance of the act is an acceptance. Leesley Bros. v. Fruit Company, 162 Mo. App. 195, 208, 144 S. W. 138; Williams v. Emerson-Brantingham Implement Co. (Mo. App.) 198 S. W. 425, 427. However, a holding that notice of acceptance is not essential where the act called for in the offer is performed, is not a holding that the offer could not be accepted by agreeing to perform the act called for in the offer. In 35 Cyc. 55, the law is stated thus: 'An order for goods to be shipped or delivered to the buyer becomes an agreement when the goods are shipped or delivered according to the terms of the order without communication of the acceptance. But until the goods are shipped or delivered, there is no acceptance unless acceptance be communicated."

Applying the foregoing rule, any sale which is finally completed in Missouri is a Missouri transaction and subject to the provisions of the Sales Tax Act.

By the inquiry which you have submitted it seems that you are under the impression that the fact that the goods involved in the sales transaction are shipped from another state would have some bearing on this question. We do not think so if the sale is made in Missouri. In support of this view we refer you to State v. Brodnax and Essex, 228 Mo. 25, 52. This case went to the United States Supreme Court and was affirmed in 219 U. S. 284, 55 L. Ed. 219. In that case the defendants were prosecuted because they had failed to attach a revenue stamp to the memorandum of a sale of stocks, bonds, grain, etc., sold on the board of trade. The defendants raised the question of the constitutionality of the act because it was an attempt to interfere with interstate commerce transactions. The facts in that case showed that some of the transactions for which they were charged with having failed to attach a stamp to the memorandum of same, involved the shipment of grain in interstate commerce and also involved transactions between residents of different states.

For the purpose of giving a complete picture of the court's view on this question, and because we think that the opinion in this case is very important as to the construction which should be placed upon the Missouri Sales Tax Act, we are quoting the court's ruling quite fully. At l.c. 49 the court said:

> "This brings us to the consideration of the insistence on the part of the appellants that the statute now under consideration is illegal and invalid for the reason that it interferes with interstate commerce, and is therefore violative of the provisions of section 1, article 8, of the Constitution of the United States.
>
> "It is sufficient to say upon this proposition, after a most careful consideration of the subject, that

in our opinion the license or stamp tax required by the statute involved in this proceeding upon sales made at the places and in the manner provided by the statute does not, even in the remotest degree, interfere with interstate commerce. This subject was in judgment in the Supreme Court of the United States in the Hatch case. It was fully discussed by that court and all of the authorities applicable to the subject were fully considered, and the conclusion reached was that there was not a shadow of a ground for calling the transaction between the parties, in which a stamp tax was required upon a memorandum of sales, interstate commerce. The court said in that case, in treating of this subject, that 'the communications between the parties were not between different States, as in Telegraph Co. v. Texas, 105 U. S. 460, and the bargain did not contemplate or induce the transport of property from one State to another, as in the drummer cases. Rearick v. Pennsylvania, 203 U. S. 507. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another State before they made it. It does not appear that the petitioner came into New York to sell his stock ..... It appears only that he sold after coming into the State. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made..... The facts that the property sold is outside of the State and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several States, and that is all that there is here. On the

general question there should be compared with the drummer cases the decisions on the other side of the line. (Nathan v. Louisiana, 8 How. 73; Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622; Emert v. Missouri, 156 U. S. 296.) A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. (American Steel & Wire Co. v. Speed, 192 U. S. 500.) We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong.'

"It must not be overlooked that the license or stamp tax required by the statute involved in this proceeding is not a tax upon property, but is a requirement to place a twenty-five cent stamp upon the sale of property made in the manner and at the places provided for by such statute. In other words, it is a license or stamp tax upon a particular kind of contract when made in this State. This proposition confronted the New York Court of Appeals in the Hatch case, supra, and in treating of the subject of a stamp tax upon sales of certificates of stock, that court thus stated the law: 'The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the State, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller

to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.'

"In further discussing that question it was said that 'jurisdiction over the persons who made the contract does not depend on their residence, but on their presence within the State when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here .... When two citizens of Connecticut come into this State and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the State, and is as binding on them as if they resided in the State. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less.

The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the State they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the State it is subject to taxation by the State.'

"Manifestly the State has power within its territory to regulate all business done, and, as was said in Matter of McPherson, 104 N. Y. 306:

"'It has never been questioned that the Legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.'

"The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places, as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute, that the seller shall make a memorandum of such sale, and place upon such memorandum a twenty-five cent stamp. We repeat, that transactions of this character have no influence whatever upon commerce between different States,

> and, as was in substance said by the Supreme Court of the United States, sales of this character do not contemplate or have anything to do with the transportation of property from one State to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them happens to be a resident of another State, in no way, legally or practically, affects the transaction and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce and should not be held invalid for that reason."

We also find in New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415, 423, that the court said:

> "* * * * The facts that the property sold is outside of the state, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. * * * * * * * * * * * * * * * * "

The Missouri Sales Tax is an excise tax the same as was the tax in the Brodnax and Essex case, supra.

As to whether or not these transactions are Missouri transactions will depend upon each particular contract. In Republic Steel Corporation v. Atlas Housewrecking and L. Corporation, 113 S. W. (2d) 155, 158, the court said:

> "It is now well settled, not only by the Federal Courts but the Supreme Court of our State, that all interstate commerce is not sales of goods; that importation from one state to

> another is the indispensable element or test of interstate commerce and all dealing relative to the goods which contemplates and causes such importation is a transaction in interstate commerce. Furst v. Brewster, 282 U. S. 493, 51 S. Ct. 295, 75 L. Ed. 478; Butler Bros. Shoe Co. v. U. S. Rubber Co., 8 Cir. 156 F. 1; Yarbrough v. W. A. Gage & Co., supra."

The foregoing rule is applicable in the construction of the contract, but when we come to considering the contract as to whether or not it is a Missouri transaction, we do not think the foregoing rule would be applicable especially in cases where the shipment of the goods sold is incidental to the sale. For the purpose of bearing out our theories on this point we refer to the case of Wiloil Corporation v. Pennsylvania, 297 U. S. 168, 79 L. Ed. 839. In the Wiloil Corporation case, supra, a tax of three cents a gallon was imposed on liquid fuels sold and delivered by distributors in Pennsylvania. The Wiloil Corporation, through its agent in that state, ordered thirteen tank cars of oil to be delivered to its purchaser in that state. The oil was ordered from Delaware and shipped to the purchasers in Pennsylvania. The oil was billed to the Wiloil Corporation and the purchaser of the oil from the Wiloil Corporation, both in Pennsylvania. In this case it did not appear that the Wiloil Corporation people had any product on hand or that there was any such product in existence. The purchaser did not make any selection of the goods nor was there any contract between the purchaser and the Wiloil Corporation from what place the oils were to be shipped, and at l. c. 840 the court, in speaking of these transactions, said:

> "* * * * Upon these considerations, the state supreme court held that the liquid fuels in question were by appellant 'sold and delivered' to purchasers in Pennsylvania. * * * * "

> "These contracts did not require or necessarily involve transporation across the state boundary. The precise question is whether the mere fact that appellant caused the fuels to be shipped from Delaware for delivery in tank cars--deemed original packages (Askren v. Continental Oil Co. 252 U. S. 444, 449, 64 L. ed. 654, 659, 40 S. Ct. 355)-- on purchasers' sidings as agreed makes imposition of the tax repugnant to the commerce clause. There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. * * * * * * * * * * * * "

On page 841 of the same case the court said:

> "* * * * * Admittedly the sales contracts were made in Pennsylvania. Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transportation was not required or contemplated, it may be deemed as merely incidental. * * * * * * * * * * * * * * "

CONCLUSION

Referring back to your request the first question is as follows:

> "We rule that where cement is sold to a building contractor or user in

Missouri by a Missouri dealer or material supply house or by a salesman, person or agent for a Missouri dealer, either directly or indirectly, the Missouri Sales Tax should be collected on the gross receipts of the sale, irrespective of the method of shipment or delivery to the purchaser. Ordinarily, as you no doubt know, cement is sold for highway and public constuction by salesmen who act both as agents for the cement companies and for the Missouri cement dealers. When they receive an order for cement for a project within the corporate limits of a city, the salesman who receives the order transmits it to his company and the local dealer is notified that the order has been received, and the cement in most instances is shipped consigned to the contractor but in the name of the local material dealer. The local material dealer bills the contractor and collects from him. Oftentimes the cement originates outside the State of Missouri and is shipped from the plant located outside the State of Missouri to the contractor. We hold in these cases that the sale is taxable regardless of the origin of the cement. This is on the theory that the sale is consummated by the local material dealer and that the movement of the cement in interstate commerce is incidental and not essential to the sales agreement. Is this a correct interpretation of the law?"

In answer to this question will say that under the foregoing authorities and under the facts submitted on this question we think that this is a Missouri transaction and is subject to the Missouri Sales Tax Act and that you are correct in your interpretation of the law.

Referring to the second question which is as follows:

> "Under the following set of circumstances we have ruled the sale to be made in interstate commerce and not subject to tax. On highway and public work projects outside the corporate limits of cities or towns, cement is sold by the cement companies direct to the contractor and there is no billing or other type of contact with the local material dealer in the area where the project is being constructed. We have ruled, therefore, that where cement is sold to a contractor or user and where the order in writing specifies a specific brand of cement to be shipped directly to the purchaser from a specified cement plant located outside the State of Missouri, and where no Missouri cement dealer or his agent gets a commission or profit on the sale, and where the cement is billed directly to the purchaser and paid by him directly to the cement manufacturer, that this sale is not subject to the Missouri Sales Tax. This is on the theory that the shipment in interstate commerce is essential to the sales agreement and therefore the tax under the Missouri Sales Tax Act cannot apply. Is this a correct interpretation of the law?"

In answer to this inquiry will say that if this contract is finally accepted in another state and the goods are shipped in pursuance to the order, it is an interstate transaction and that you are correct in your interpretation of the law as it applies to such transactions.

Referring to your third proposition which is as follows:

"We have further ruled that where the order placed with the cement manufacturer does not specify that the cement is to be shipped directly from a specified plant located outside the State and the Cement Company is free to fill the order from a supply either within or without the State, that such sales are subject to the Missouri Sales Tax regardless of the fact that the cement might move in interstate commerce from its point of origin to the contractor or consumer. Is this a correct interpretation of the law?"

We think this answer will depend on the question of where the contract is completed. Under the ruling in the Wiloil Corporation case, supra, we do not think that the fact that the product is shipped from without the state would be controlling.

We are further fortified in our views on this question by the ruling in the case of State v. Brodnax and Essex, supra. So if the contract is a Missouri contract, you are correct in your interpretation of the third question which you have submitted.

Respectfully submitted

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