SALES TAX: A contractor who makes permanent installations of personal property into real estate is not required to collect 2% sales tax for the materials used in the installation. Further, where a contractor purchases tangible personal property from a subcontractor or a material man 2% sales tax must be paid.

January 15, 1958

Honorable Tom A. Stapleton, Supervisor
Sales Tax Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Stapleton:

This is in reply to your request for an opinion from this office as follows:

"In accordance with a recent telephone conversation between you and Mr. Milton Carpenter, this department respectfully requests an official opinion relative to the following:

"A contractor accepts a contract from an individual to modify and to make certain physical changes in a building owned by an individual.

"The contractor in turn subcontracts a portion of the original contract.

"The portion of the contract subcontracted calls for the subcontractor to furnish all labor, materials, equipment and services necessary to fabricate and deliver to the job site certain doors, frames and window settings. In this situation, the prime contractor would install the finished items mentioned above.

"Would in this situation, the subcontractor be correct when billing the prime contractor to include a 2 percent

> charge for Missouri sales tax, remembering the subcontractor would not install the items, but delivers the finished items to job site for the prime contractor.
>
> "When a contractor subcontracts a portion of an original contract as referred to above and the subcontractor is required to install the items in the building, would the subcontractor when billing the prime contractor include a 2 percent charge for the Missouri sales tax, remembering the subcontractor delivers the finished items and installs the items for the prime contractor.
>
> "In the event that the same situation prevails in each of the above two questions, would the interpretation be the same if the subcontractor was classed as a retailer; that is, he has been and is using a sales tax code assigned by this division."

It is noted in your letter that the first question asked involves a situation where a subcontractor furnishes all labors, materials, equipment and services necessary to fabricate and deliver to the job site certain doors, frames and window settings. In this situation this material is then taken from the subcontractor and installed by the prime contractor.

In regard to the problem involved here, it is thought that a pertinent rule has been established in the case of City of St. Louis v. Smith, 114 S.W. 2d 1017, wherein at l. c. 1019 the Supreme Court of Missouri considered Section 2, Laws of Missouri, 1935, page 415, now contained in the Missouri Sales Tax Law, in Sections 144.020 and 144.010, RSMo 1949, it was stated:

> " 'From and after the effective date of this Act and up to and including December 31, 1937, 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 one(1) per cent. of the purchase price paid or charged.'
>
> "Section 1 of the act (Laws 1935, p. 413) defines a 'retail sale' 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.' "

It is further stated at l. c. 1019 as follows:

> "[1] 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. * * * "

There has been no substantial change between the statutes quoted above and their present counterparts, which will be found as subsection 1 of Section 144.020, RSMo 1949, and paragraph 8 of subsection 1 of Section 144.010, RSMo 1949.

In the Smith case, supra, the court, at l. c. 1019,

quoted from Ruling Case Law as follows:

> "In 23 R.C.L. p. 1233, § 49, the law is thus stated: 'A contract to do certain work on a building and to supply the requisite material is not a contract of sale of such material within the statute of frauds; so a contract to furnish material, and, after performing labor thereon, attach it to the realty, as a part of the building in the course of construction, is not a sale of goods or chattels.' "

In construing the above quotation in regard to the point involved, it was then stated, l. c. 1019-1020, as follows:

> "[2] In our judgment the contractors in this case did not buy the materials in question for the purpose of re-selling 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."

It is believed that the law stated above is authority for the statement that, if a subcontractor sells tangible personal property to a contractor who uses and consumes the property in the erection of buildings constituting real estate, the payment of 2% sales tax is required under the law to be paid by the prime contractor to the subcontractor. On the other hand, if a subcontractor furnishes all labor,

materials, equipment and services necessary to fabricate certain doors, frames and window settings and installs them permanently to real estate, it is believed that there is no liability on behalf of the contractor or the subcontractor for sales tax upon this transaction.

In the case of State ex rel. Otis Elevator Co. v. Smith, 212 S.W. 2d 580, at l. c. 582, it was stated by the Supreme Court as follows:

> "We are unable to follow the latter part of this reasoning. If the materials have the legal status of tangible personal property when the title passes, they are subject to sales tax. On the other hand, if by the act of attaching them to the real estate they are converted into realty and the title passes to the landowner they will not be subject to the tax because it does not go against real estate. * * *"

In answer to the last question in regard to the effect upon the application of the law to the transactions involved, in the event the subcontractor is classed as a retailer, an answer appears unnecessary, inasmuch as the same situation does not prevail in the two above questions.

In subsection 8 of Section 144.010, RSMo 1949, the following definition of a sale at retail is stated:

> "(8) '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; * * *."

Sales tax liability attaches in accordance with subsection 1 (1), Section 144.020, RSMo 1949, which appears in pertinent part in the quotation from the case of City of St. Louis v. Smith, supra. The definition of business is stated in Section 144.010 of the Sales Tax Law as including any activity engaged in by any person, or caused to be engaged in, with the object of gain, benefit or

advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of this chapter. It is, therefore, thought that it would make no difference as to whether a contractor is a retailer or wholesaler, in the event the transaction in which he is engaged is such a transaction that is taxable under the sales tax law.

CONCLUSION

Therefore, it is the opinion of this office that a contractor who makes permanent installations of personal property into real estate is not required to collect 2% sales tax for the materials used in such installation. It is further the opinion of this office that where a contractor purchases tangible personal property from a subcontractor or a material man, 2% sales tax must be paid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Very truly yours,

John M. Dalton
Attorney General

JWF:ld:lc