OCCUPATION TAX: Deductibility of (1) sales of electric energy to municipally owned power and water plants; (2) sales of electrical energy to buildingowners to be remetered to tenants; (3) sales of electrical energy to companies for propelling street cars; (4) sales of electrical energy from transmission lines; (5) sales of electrical energy in other states by a Mo. company; (6)Rental receipts from property used in operations; (7) Sales of material and supplies to Employees Mutual Benefit Associations.

May 31, 1935.

FILED

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of May 22 wherein you request an opinion involving seven questions pertaining to the taxability or non-taxability of certain sales of tangible personal property and the rendering, furnishing or selling for a valuable consideration certain substances, things and services. We shall answer your questions in their numerical order.

I

Sales of electric energy to municipally owned plants for power purposes, i.e., sales to municipal water companies for use in pumping water, etc.

The section of the Occupation Tax Law dealing with electricity is sub-section (b) of Section 2A. Same relates to the privilege of engaging in the business of rendering services, furnishing and selling the substances and things therein stated, i.e., "Sales of electricity or electrical current, water, sewer service, gas (natural or artificial) to domestic,commercial or industrial consumers."

We must determine whether or not sales of electricity to municipally owned plants for power purposes is to be classified as domestic, commercial or industrial. A domestic consumer is defined as "One who consumes electricity or electrical current for household or domestic purposes." In the case of Maasdam v. Blokland, 261 P. 66, a commercial consumer is defined as "one who uses electricity or electrical current for trade or commercial purposes. In the case of Railroad v. Fulgham, 91 Ala. 555, industrial consumer is defined as "one who uses electricity or

electrical current for manufacturing,power and light purposes."

It is the opinion of this department that when a municipally owned plant buys or receives electrical energy to be used by the city for power purposes in pumping water, it constitutes a sale for commercial purposes. It would, therefore, involve "Sales * * * to domestic, commercial or industrial consumers," and the amount of such energy should be computed in the gross receipts of companies who furnish such power to municipalities.

II

Sales of electric energy to building owners which is remetered by said building owner to the individual tenants in said building. The utilities hold that such sales are sales for the purpose of resale. However, we believe that in the stipulation of the K.C. Power and Light Company case, they agreed to pay on such sales, but the other companies have not yet done so, and have continued to deny liability.

This question involves the element of resale as may apply to Section 2A, which will be more fully discussed under Question IV. Referring to the definition of "commercial, domestic and industrial consumers" as contained in Question I, we are of the opinion that the amount of electrical energy distributed to owners of buildings is not a legal deduction. The owner of a building is not engaged in the electrical business--he merely divides the electricity among the various tenants of the building, or meters the same to them in order that each tenant may be compelled to pay for the actual amount of electrical energy consumed. The owner of the building does not receive the profit from the sale of electricity to his tenants and the company that sells such energy to building owners should include such sales in its gross receipts.

III

Sales of electric energy by the electric company for use in propelling street cars

Under Section 2A of the Act, the tax is imposed on the gross receipts from "sales of electricity or electrical

current, water * * * to domestic, commercial or industrial consumers". If the use of electricity by a street railway company is to be included within the terms of the Act, the company using such electricity must be deemed a commercial consumer.

In the case of Conecuh County v. Simmons, 95 So. 488, it was said of "trucks" as follows:

> "Trucks used by a lumber manufacturer for hauling logs, timber, lumber and commissary provisions as well as provisions used by the owner's family, were used for 'commercial purposes' within the meaning of Gen. Acts, 1915, p. 573, and therefore subject to a privilege or license tax assessed by the county commissioners."

If the street railway is owned by a corporation that is engaged in carrying passengers from place to place, and organized for gain and profit, the same as any private corporation, we would deem it to be of the same character as a railroad company carrying passengers. The distinction between a street railway and a railroad carrying freight and passengers is made in the case of Hartzell v. Alton, Granite & St. Louis Traction Co., 183 Ill. App. 641, wherein it was said:

> "Commercial railroads embrace railroads for all freight and passenger traffic between one town and another or between one place and another. They are usually not constructed upon streets and highways, except for short distances. Street railways embrace all such railroads as are operated upon public streets for the purpose of conveying ordinary passengers, with hand baggage, from one place to another on the street, but the character is determined by the character of traffic or service, and not by the location."

This question is now on appeal to the Supreme Court of Missouri from the Circuit Court of Jackson County, and as yet no decision has been rendered.

We are of the opinion that electrical energy used by street railways for propelling street cars constitutes commercial consumption of electricity, and the receipts by the electric company for the same should be included in the return

to the State Auditor. It is in no wise a legal deduction.

IV.

Sales of electric energy from transmission lines, i.e., the company in question generates the electric energy, conveys same by transmission line to a given point where it is metered to another company and the latter company then resells same to the ultimate user or consumer.

This question involves the element of resale as it might apply to Section 2A of the Act. "Sale at retail", as defined in the Act, means "any transfer 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." We must bear in mind that the Act is in reality in two parts, (1) the tax to be computed on the gross receipts derived from sales of tangible personal property, and (2) for the privilege of rendering services, furnishing and selling the things as set forth under the subdivisions of Section 2A. We consider the words "furnishing or selling", as used in Section 2A of the Act as being synonymous in their meaning.

In the case of admission tickets, electricity, sewer service, gas, telephone service, telegraph messages, newspaper advertising, laundry, railroad fares and billboard service, no tangible property passes from the vendor to the vendee; the person merely pays for the service received, or pays a stipulated amount for having the things enumerated furnished by persons engaged in the business. It would be highly impractical and highly improbable to conceive of the resale of telephone service or of messages sent by telegraph companies. The question of reselling electricity, gas, water, sewer service, etc. is not contemplated by the Act, nor does the Act, under Section 2, provide for the exemption in any wise of the resale of those things, as it does in the case of tangible personal property.

In 60 Corpus Juris, 1213, "tangible property" is defined as follows:

> "That which may be felt or touched. It must necessarily be corporeal, but it may be real or personal. As used in a revenue act, the term has been defined by the statute as meaning

> 'stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, lease-holds, and other property other than tangible property.'"

We think it was the intention of the Legislature to impose a tax for the privilege of any person engaging in rendering services, furnishing or selling substances and things, regardless of the fact that such person may be furnishing the substances and things in wholesale quantities or to groups and individuals, and each person who furnishes or sells the same electricity, gas, etc. is subject to the tax. We are therefore of the opinion that no legal deduction can be made by persons subject to the tax under subsection (b), for electricity, water, sewer service, gas or the other things mentioned in the subsections, by reason of the fact that they are resold before reaching the ultimate user or consumer.

Having disposed of the question of resale in so far as the terms of the Act may apply, we shall next discuss whether or not taxing a resale of the above mentioned substances and things would constitute double taxation. To constitute double taxation it is necessary that one person contribute twice to the same burden. As was said in the case of Harvey Coal Company v. Coke Co., 53 S. E. l.c, 941,

> "By 'double taxation' is understood the requirement that one person, or any one subject to taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once; but where the same property represents distinct values belonging to different persons, the fact that each is taxed on the value which the property represents in his hands does not constitute 'double taxation.'"

Also, in the case of Cook v. City of Burlington, 13 N.W., l.c. 114, it was said:

> "'Double taxation', within the policy of the law which prohibits double taxation, means the taxing of the same piece of property twice to the same person, or taxing the same piece of property once to one

> person and again to another; but the imposing of a tax on the shares of a corporation in the hands of its stockholders, and also on the property of a corporation, will not constitute such double taxation."

In order to constitute double taxation, the tax must be imposed upon the same property at the same time. In the case of State v. Ingalls, 135 P., l.c. 1180, the Court said:

> "'Double taxation', in the objectionable and prohibited sense exists only where the same property is taxed twice when it ought to be taxed but once, and to consider such double taxation,the second tax must be imposed upon the same property by the same state or government during the same taxing period."

The above quoted cases refer to double taxation with reference to ppoperty. In the instant question the tax is upon the privilege of a person engaging in the business of selling tangible personal property or rendering services; hence, the only essential is that each person must be exercising a separate and distinct privilege. We therefore hold that the taxing of such sales would not constitute double taxation, and the same will apply to all of the other subsections as enumerated under Section 2A. However, under subsection (b) (sales of electricity or electrical current, water, sewer service, and gas) the Legislature has seen fit to limit the taxing of the gross receipts to "domestic, commercial or industrial consumers."

We shall next discuss that portion of your question, - "the company in question generates the electric energy, conveys same by transmission line to a given point where it is metered to another company and the latter company then resells same to the ultimate user or consumer", from the viewpoint of determining whether or not such sales may be classed as services to domestic, commercial or industrial consumers.

The various "persons" through which the electrical energy passes before reaching the ultimate consumer cannot be classed as domestic, commercial or industrial consumers according to the definitions of those terms. They are in the nature of brokers or middle men. It cannot be said that when they relay or sell the electrical current from person to person, that those persons consume the current; therefore, such sales are deductible, not because they constitute resales, but for the reason that the

electrical energy is not used or consumed domestically, commercially or industrially.

In our opinion relating to this question we have treated the resale of electrical energy, gas, water, etc. as separate and distinct from the other subsections under Sec. 2A, as the section relating to those services qualifies the users or consumers, while the other sections do not so qualify them; hence, we repeat that there is no legal deduction for the resale of things in Section 2A, and the exception made in the case of electrical energy, gas, water, etc. is not made on the grounds of resale, but because the Legislature qualified or limited the user or consumer.

V.

Sales of electric energy in other states by a Missouri company where the electric energy is generated in Missouri, conveyed by transmission line to a point in some other state and there sold to another company or sold by the Missouri company to the ultimate user or consumer.

This question involves the interstate commerce feature. Section 3 of the Retail Occupation Tax Act is as follows:

> "There are hereby specifically exempted from the provisions of this act and from the computation of the tax levied, assessed or payable under this act, such portion of the gross receipts as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such portion of the gross receipts as is derived from sales of tangible personal property, services, substances and things which the State of Missouri is prohibited from taxing or further taxing under the Constitution of this state."

In the case of Texoma Natural Gas Co. v. Railroad Commission of Texas, 59 F. (2d) 750, the question of companies engaging exclusively in producing, selling and transporting gas from one state to another was discussed. The Court said (l.c. 753):

> "The plaintiffs are engaged exclusively in producing, selling, and transporting gas from the State of Texas for delivery to purchasers in other states, under contracts made prior to the enactment of the statute. These are the essential elements of interstate commerce. Producers Transportation Co. v. California Railroad Commission, 251 U.S. 228. * * * *"

The general principle of law relating to interstate commerce is found in the opinion in the case of Dahnke-Walker Co. v. Bondurant, 257 U. S., l.c. 290-291:

> "The commerce clause of the Constitution, Art. I, Sec. 8, Cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446-447; American Steel & Wire Co. v. Speed, 192 U.S. 500, 519. On the same principle, where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa, 196 U.S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in Welton v. Missouri, 91 U.S. 275, 280: 'Commerce is a term

> of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities.' In Kidd v. Pearson, 128 U.S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In United States v. E.C. Knight Co., 156 U.S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

The question of transmitting water, gas, electricity, etc. from one state to another and there sold to another company or sold by a Missouri company to the ultimate consumer is discussed in the case of Missouri v. Kansas Gas Co., 265 U.S. 298, l.c. 306, as follows:

> "The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption but for resale to consumers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer, Public

> Utilities Comm. v. Landon, 249 U.S. 236, 244-245; and the interest of the former in the commodity ends with its delivery to the latter, to which title and control thereupon pass absolutely. The question is, therefore, presented in its simplest form; and if the claim of state power be upheld, it is difficult to see how it could be denied in any case of interstate transportation and sale of gas. Both federal courts denied the power. The state court conceded that the business was interstate and subject to federal control, but rested its decision the other way upon the fact that Congress had not acted in the matter and that, in the absence of such action, it was within the regulating power of the State. The question is controlled by familiar principles. Transportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. In Public Utilities Comm. v. Landon, supra, at p. 245, this Court said: 'That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State.' See Pennsylvania v. West Virginia, 262 U.S. 553, 596, and cases there cited."

It will be noted by the above decision that there is no distinction as to the interstate commerce feature when pipe lines sell to the ultimate consumer or when they sell to a distributing company.

The right to tax an occupation, or the privilege of doing business, is decided in the case of Ozark Pipe Line Co. v. Monier, 266 U.S., l.c. 561, as follows:

> "The tax is one upon the privilege or right to do business (State ex rel.Marquette Hotel Invest. Co. v. State Tax Commission, 282 Mo. 213, 234, 221 S.W. 721); and if appellant is engaged only in interstate commerce, it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, -- whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup v. Mobile, 127 U.S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U.S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce, and beyond the power of state taxation. Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 272, 66 L. ed. 227, 231, 42 Sup. Ct. Rep. 101; United Fuel Gas Co. v. Hallanan, 257 U.S.277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105. But the contention in justification of the tax is that appellant is also engaged in doing local business, the basis of such contention being the facts concerning its ownership and use of property other than the pipe line, and its various acts and activities within the state hereinbefore recited; and, further, that the purpose for which it is incorporated, as declared in its articles, comprehend other activities than that of transporting petroleum; namely, the acquisition and operatinn of telegraph and telephone lines, dealing in and transporting merchandise, etc."

In the case of Crew Levick Co. v. Pennsylvania, 245 U.S. l.c. 297, certain taxes were held to be legal even though it applied to interstate commerce transactions (in the instant case it applies to a tax on gross receipts) and the Court said:

> "These taxes were held valid, because unlike a gross receipt tax, they do not

> withhold for the use of a state a part of every dollar received in such transactions."

It is the opinion of this department that sales of electrical energy, water, gas, heat, etc., when conveyed to another state and there sold to another company or other distributors, or to the ultimate consumer or user, are legal deductions in computing the retail occupation tax.

In the event a company is engaged in both intrastate and interstate sales of electricity, etc., all intrastate sales should be computed in arriving at the amount of the tax. This, however, is not applicable to tangible personal property sold in interstate commerce transactions, as there are various elements which enter into the sale of tangible personal property as it may be affected by the commerce clause.

This conclusion is based solely on the facts as presented in your question, and cannot be considered as decisive of all questions wherein the commerce clause is involved. The facts in each instance will require individual consideration.

VI.

Rental receipts from property used in operations, including rental of apparatus and real estate, rental of pole space, and conduit space, and rental of sub-station and equipment.

If this question applies to Section 2A in its entirety, it will be necessary to divide the question. If the rental receipts relate to telephone companies, then subsection (c) will govern. Subsection (c) provides:

> "Sales of service to telephone subscribers and others for the transmission of messages and conversations, both local or long distance, and upon the sale, rental or leasing of all equipment or services pertaining or incidental thereto."

Subsection (c) is plain and unambiguous in its terms and definitely states that such receipts are to be included. Subsections (a), (b), (d), (e), (f), (g) and (h) contain no such specific provisions with reference to the receipts from rental or leasing of other equipment, but clearly state that the receipts derived from the sale of services pertaining thereto are taxable, and it is our opinion that no legal deduction can be made therefrom in the case of subsection (c).

Subsection (a) of Section 2A places a tax of one-half of one per cent on sales of admission tickets, cash admissions, charges and fees to places of amusement, games and athletic events; subsection (b) relates to sales of electricity, water, sewer service and gas, while subsection (d) relates to sales of service for transmission of messages by telegraph companies. Subsection (g) relates to sales of tickets, fares and services by railroad companies, express companies, bus lines, truck lines, and all character of transportation companies engaged in the transportation of persons or freight for hire. It is our opinion that so far as the rental receipts as contained in your question are pertinent, the receipts from the same should not be included in the instances enumerated, i.e., subsections (a), (b), (d) and (g).

Subsection (e) of Section 2A relates to sales of newspaper advertising and newspaper service; subsection (f) relates to commercial laundry, cleaning and dyeing service; and subsection (h) relates to billboard and all other kinds of outdoor advertising. Section 2A states: "For the privilege of a person engaging in the business of rendering the services * * * a tax is hereby imposed upon such person at the rate of one-half of one per cent of the gross receipts * * *" In these three above mentioned subsections the Legislature has not stated definitely that the tax shall be computed on sales alone, as mentioned in the other subsections; therefore, we are of the opinion that the rental receipts wherein they include the furnishing of services as mentioned in the Act are not legal deductions.

VII.

Sales of material and supplies to employees mutual benefit association, sales of material and supplies to employees and sale of material and supplies in conjunction with house wiring.

Referring to the first part of your question, i.e., sales of material and supplies to employees of mutual benefit associations, it is our opinion that the same should be governed by subsection (g) of Section 1 (Laws of Mo. 1933-34, Extra Session, p. 156), which is as follows:

> "'Sale at retail' means any transfer 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."

Sub-section (b) of Sec. 1 is further pertinent to the question, and provides as follows:

> "'Sale' 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 and things and services hereinafter designated and defined."

Sub-section (a) of Sec. 1 of the Act provides that a "Person" includes any * * * syndicate or other group or combination acting as a unit, and the plural as well as the singular number." We think that mutual benefit associations are included in the definition of the word "person" - that the association is conducting a business and selling at retail; therefore, the receipts should be computed in arriving at the tax. If, however, this question involves the element of wholesalers selling to mutual benefit associations, then the element of resale would be involved and the same would be deductible.

As to the sale of material and supplies to employees, we assume that this refers principally to wholesale firms who permit their employees to buy at wholesale or retail prices. The Act does not specifically exempt persons engaged exclusively in the wholesaling of merchandise; it merely exempts all tangible personal property which is sold for resale; hence, in the case of a wholesale firm making retail sales, the gross amount of such sales are subject to the tax. Therefore, when wholesale firms sell directly to the employees, for use or consumption, such sales are taxable, regardless of the amount of the consideration for such sales.

In regard to the question of sales of material and supplies in conjunction with house wiring, if same involves contractors, we have recently rendered an exhaustive opinion regarding the same. However, eliminating the question of contractors, the retail market value of the material and supplies should be included in the return, but the labor performed in connection with the material and supplies is a legal deduction.

We have heretofore rendered your department an opinion as to the taxability or non-taxability of the Act as it relates to municipal street lighting, municipal building, lighting and sales of electricity to state, county and federal governments for use in lighting public buildings, also sales to religious, charitable and fraternal and non-profit organizations.

As to fraternal, religious, charitable and non-profit organizations, the fact that an organization is religious

charitable or fraternal in nature does not necessarily exempt the gross receipts from the tax. The test is whether or not such an organization is a domestic, commercial or industrial organization. If it is a lodge or meeting place or a church used exclusively for that purpose, then the electrical energy consumed would, in our opinion, be deductible, but if the organization is carrying on a business in conjunction therewith, charitable, fraternal or religious in its nature, then the business in connection therewith would be using electrical energy under one of the above classes of consumers; therefore, the amount of energy consumed would not be deductible.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH