AX: Grain shipped to mill between two intrastate points, transportation charges are subject to 1% tax regardless of whether or not same is to be rebilled and sold in interstate commerce.

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September 16, 1935.

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

Dear Sir:

This department is in receipt of your letter of September 2, together with correspondence from several parties giving their views in regard to the question which will be hereinafter discussed. Your letter is as follows:

> "Re: Merchants' Exchange of St. Louis;
> F. Gordon Willis, Kansas City;
> Waggoner-Gates Milling Company, Independence, Mo.
>
> FREIGHT ON INTERSTATE TRANSIT SHIPMENTS OF GRAIN.
>
> "I am enclosing letters from each of the above mentioned companies, with the request you furnish this department an official opinion as to whether or not the one per cent sales tax will apply on transportation charged on grain in Missouri, milled-in-transit, and destined for points in other states. * * * *"

It must be readily conceded that if grain is shipped and sold in interstate commerce, the tax on the transportation charges are exempt from the Missouri state sales tax. Section 3 of the Act, being one of the exemption sections, specifically makes it so, but regardless of whether or not such shipments are exempted by the Act itself, the commerce clause of the Constitution and decisions bearing on the same prohibit such a

tax from being imposed on such shipments. Therefore, you, as State Auditor, can exact a tax on transportation charges only on intrastate shipments.

Your question restated is:

> When grain is shipped from a given point in Missouri to another given point for the purpose of milling, and from the milling point to be shipped out of the State for final sale to purchasers out of the State, are the transportation charges taxable in whole or in part?

We shall at once eliminate from the question the last shipment, i.e., from the mill to the purchaser outside the state, as that transaction constitutes interstate commerce; this leaves for discussion the question of the first transaction, i.e., from the producer to the mill.

The Missouri Sales Tax Act undertakes to impose a tax on two forms of sale--sales of tangible personal property when not sold for resale, and a tax of one per cent of the amount paid or charged for certain substances, services and things. Among the services enumerated is the following (Laws of Mo. 1935, Sec. 2 (h), p. 416):

> "A tax equivalent to one (1) per cent. of the amount paid or charged for tickets, fares and services by every person operating a railroad, sleeping car, dining car, express car, and such buses and trucks as are licensed by the Public Service Commission of Missouri, engaged in the transportation of persons or freight for hire."

We note from the attached correspondence numerous mention that the grain itself is in each instance being transported for the purpose of resale. This element, we think, has no bearing on the question. The grain, or the commodity itself, is tangible personal property and whatever tax, if any, is imposed on the same is imposed under sub-section (a) of Sec. 2, dealing with

tangible personal property. There is no exemption of any nature under the sections dealing with taxation of services wherein the element of resale of same automatically exempts the services from the collection of the tax from the purchaser, the exemption from resale being strictly confined to the sale of tangible personal property. Whether the transaction in question is or is not taxable must therefore be determined solely by the terms of sub-section (h) supra.

Further, we are of the opinion that the rates and rules promulgated by the Interstate Commerce Commission, permitting a lesser or greater rate by transportation companies on shipments of grain when milled in transit, would have no bearing on the question if the shipment of the grain by the producer or broker to the mill constitutes a complete and final transaction within the borders of the State of Missouri.

We note that Mr. Cunningham of the Waggoner-Gates Milling Company incloses two forms of bills of lading covering flour shipped from Lexington to Independence on July 18, 1935, and certain flour shipped from Lexington to Minneapolis on August 22, stating that the rate differed in the case of intrastate shipments from that of the interstate shipment. To us this appears to be one shipment of an intrastate nature and another interstate in its nature.

We note the statement of Mr. F. Gordon Willis and copy the following excerpt from his letter:

> "After years of experience with milling-in-transit, carriers and shippers alike found it impracticable to bill shipments to the final destinations, with instructions to stop at specified points for milling; and for years it has been the custom to bill the cars to the milling point as if that were the destination, and after milling, the shipments are rebilled to their respective destinations. That is the custom in the handling of 'transit shipments', both in intrastate and interstate commerce."

From the facts contained in the above, we base our statement heretofore made that the rates, interstate and intrastate, decreasing or increasing, would not have a bearing on the question, as we would still be confronted with a question of fact, i.e., as to whether or not the first transaction is a final and complete intrastate transaction.

Assuming, as Mr. Willis states in his letter, that the grain is to be reshipped after milling in interstate commerce, the transportation company, as stated in his letter, treats the first shipment as a final one for convenience and to avoid confusion. If the first shipment is final, it is subject to the tax, because it is an intrastate shipment.

The case of Central Railroad Co. of New Jersey v. United States, 257 U.S. 245, being an injunction suit to restrain the Interstate Commerce Commission from enforcing an order on the ground that it was arbitrary and void, discussed the question of forest products being creosoted in transit, and the Court said (l.c. 254-255):

> "By the privilege called creosoting in transit, forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named. Where the privilege is granted and availed of, delivery is made of the commodity to the creosoting plant, as if that were the final destination. It is there unloaded and treated; and at some time thereafter it is delivered to the carrier, as if there were an initial shipment of the creosoted product. Then it is forwarded to the final destination. Although some charge is made for the transit service, the shipper secures thereby a lower freight rate. For through rates are generally much less than the rate on the untreated forest product from point of origin to the transit point, plus that on the treated product from there to destination."

Again, in the same decision which was mentioned in the letter to the grain companies, we quote the following: (l.c. 256)

> "Creosoting in transit, like other transit privileges, rests upon the

fiction that the incoming and outgoing transportation-services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. The practice has its origin partly in local needs, partly in the competition of carriers for business. The practice is sometimes beneficial in its results; but it is open to grave abuses. To police it adequately is difficult and expensive. Unless adequately policed, it is an avenue to illegal rebates, and seriously depletes the carriers' revenues. Railroad managers differ widely as to the policy of granting such privileges. The Commission clearly has power, under section 1 of the Act to Regulate Commerce, as amended, to determine whether, in a particular case, a transit privilege should be granted or should be withdrawn. For that section requires, among other things, that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations. The Commission might, therefore, acting under section 1, have directed the Central and the Pennsylvania to establish the creosoting in transit practice at Newark, if it deemed failure to do so unreasonable or unjust; or it might, in an appropriate proceeding, have directed the southern and midwestern carriers to discontinue the practice on their lines, if it deemed the granting of the privilege to be unreasonable or unjust. But it did neither. Instead, it sought to accomplish by indirection either one result or the other, and ordered, under section 3, that the discrimination found to exist to be removed. Twenty-one of the appellants are powerless either to cause the Central and the Pennsylvania to install the privilege at Newark, or to cause the southern and midwestern carriers to discontinue the practice on their lines. The Central and the Pennsylvania are likewise powerless to cause these connecting

> carriers to withdraw the privilege. They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so, would involve departure from a policy to which they have steadfastly adhered, and adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege at Newark, they would act contrary to their judgment, and would adopt a practice which some connecting carriers had introduced without their concurrence or consent,and which may hereafter, upon appropriate inquiry, be held by the Commission to be unjust and unreasonable. Congress could not have intended that, under such circumstances, relief should be afforded under section 3, when a direct remedy is available under section 1."

The question of the power of the state to tax property which has come to rest within the state is discussed in the case of Minnesota v. Blasius, 290 U.S., l.c. 11, as follows:

> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power. In Brown v. Houston, 114 U.S. 622, 29 L. ed. 257, 5 S. Ct. 1091, coal mined in Pennsylvania and sent by water to New Orleans to be sold there in the open market was held to have 'come to its place of rest, for final disposal or use', and to be 'a commodity in the market of New Orleans', and thus to be subject to taxation under the general laws of the State; although the property might, after arrival, be sold from the vessel on which

the transportation was made for the purpose of shipment to a foreign port. As the Court said in Champlain Realty Co. v. Brattleboro, supra (260 U.S. p. 376, 67 L. Ed. 313, 43 S. Ct. 146, 25 A.L.R. 1195), the coal in Brown v. Houston 'was being held for sale to anyone who might wish to buy.' A similar case is Pittsburg & S. Coal Co. v. Bates, 156 U.S. 577, 39 L. Ed. 538, 15 S. Ct. 415, 5 Inters. Com. Rep. 30. In General Oil Co. v. Crain, 209 U.S. 211, 52 L. Ed. 754, 28 S. Ct. 475, the company conducted an oil business at Memphis where it gathered oil from the North and maintained an establishment for its distribution. Part of the oil was deposited in a tank, appropriately marked for distribution in smaller vessels in order to fill orders for oilalready sold in Arkansas, Louisiana and Mississippi. The Court held that the first shipment had ended, that the storage of the oil at Memphis for division and distribution to various points was 'for the business purposes and profit of the company;' and that the tank at Memphis had thus become a depot in its oil business for preparing the oil for another interstate journey. This decision followed the principle announced in American Steel & Wire Co. v. Speed, 192 U.S. 500, 48 L. Ed. 538, 24 S. Ct.365. See Champlain Realty Co. v. Brattleboro, supra (260 U.S. p. 376, 67 L. Ed. 313, 43 S. Ct. 146, 25 A.L.R. 1195); Atlantic Coast Line R. v. Standard Oil Co., 275 U.S. 257, 270, 72 L. Ed. 270, 275, 48 S. Ct. 107; Carson Petroleum Co. v. Vial (279 U.S. supra, pp. 104, 105, 73 L. Ed. 630, 49 S. Ct. 292).

"In Bacon v. Illinois, 227 U.S. 504, 57 L. Ed. 615, 33 S. Ct. 299, supra, Gacon, the owner of the grain and the the taxpayer, had bought it in the South and had secured the right from

the railroads transporting it to remove it to his private grain elevator for the purpose of inspecting,weighing, grading, mxing, etc. He had power to change its ownership, consignee or destination, or to restore the grain, after the processes above mentioned, to the carrier to be delivered at destination in another State according to his original intention. The Court held that, whatever his intention, the grain was at rest within his complete power of disposition, and was taxable; that 'it was not being actually transported and it was not held by carriers for transportation;' that the purpose of the withdrawal from the carriers 'did not alter the fact that it had ceased to be transported and had been placed in his hands;' that he had 'the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit.' What he had done was to establish 'a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.' Id. p. 516. In Champlain Realty Co. v. Brattleboro, supra (260 U.S. p.375, 67 L. Ed. 313, 43 S. Ct. 146, 25 A.L.R. 1195), the court thus restated the point of the Bacon Case: 'His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey.' 'He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought

> the grain within the taxable jurisdiction of the State.' See also Susquehanna Coal Co. v. South Amboy, 228 U.S. 665, 669, 57 L. Ed. 1015, 1016, 33 S. Ct. 712, and Nashville C. & St. L. R. Co. v. Wallace, 288 U.S. 249, 269, 77 L. Ed. 730, 737, 53 S. Ct. 345, 87 A.L.R. 1191."

A question similar to that involved in the instant case is found in State ex rel. v. Public Service Commission, 269 Mo. l.c. 72-73:

> "These definitions are sufficient to distinguish generally between the two classes of commerce--the one regulated by Federal and the other by State law. Thus regulated we look to the rulings of the United States Supreme Court and those of our own court to aid in the construction of these statutes and thus determine the classification of a shipment in any given case.
>
> "Here it is admitted that the contracts of shipment were from points in the State to Kansas City, Missouri. There is an absence of intention, either express or implied, on the part of shippers to ship the grain beyond Kansas City, Missouri. Intention, while it may not in some instances be controlling, is in these cases important. The owners of the grain, in the exercise of a proper dominion over their property, ship it to said city for sale. It is there delivered to and sold by a consignee of the shipper on the floor of the Board of Trade. The delivery to the consignee completes the contract between the shipper and the carrier (Adams Express Co. v. Kentucky, 214 U.S. l.c. 223; L & N R.R. Co. v. Cook Brewing Co., 223 U.S. l.c. 82;Kirkmeyer v. Kansas, 236 U.S. l.c. 572), and the transaction having been confined to this State, no question can arise as to the nature of the shipment, viz, that it is

> intrastate. The following concurrent conditions confirm this conclusion: (1) The intention of the parties evidenced by the bill of lading naming Kansas City, Missouri, as the point of final destination; (2) the continuous movement of the grain to such point; and (3) its delivery there to the consignee of the shipper on the hold tracks of the carrier. The essential character of the commerce is properly determinable from the presence of these requisites, and while influenced by the billing or form of contract, the character of the shipment is not to be controlled by it except when taken in connection with the other essentials in the case. Upon the sale of the grain its further movement is subject to the direction of the purchaser. He may, dependent upon the location of his business or his purpose in the disposal of the grain, direct its shipment to a point outside of the state, but until he so directs the character of the commodity as an article of commerce continues as under the original shipment."

In the case of Arkadelphia Milling Company v. St. Louis S.W.R. Co., 249 U.S. 134, the Court discussed the example of rough lumber being shipped to a point and there graded, smoothed and otherwise processed, and reshipped in interstate commerce. We believe the same to be controlling in the instant question. The Court said:

> "Likewise, the hauling from the forest by a railroad of rough lumber to a milling point, where it was manufactured into materials for barrels and casks and most of the finished product sold and carried to customers outside the state, while the wastings were burned, was not interstate commerce, so as to render inapplicable rough shipment freight rates by the Arkansas railroad commission, where the whole process

of manufacturing and storing until sales were made occupied a period of five months, for the reason that there was no continuous movement and no intention to transport the lumber out of the state until its character, utility, and value were changed, although there were knowledge and intention that the greater part of the finished product would be carried out of the state."

CONCLUSION

In determining whether or not a shipment is intra or interstate commerce, the facts in the individual case govern strongly. Most of the decisions consulted involve the jurisdiction of the Interstate Commerce Commission to fix or change rates. It does not follow that because the courts hold that a shipment is sometimes subject to the jurisdiction of the Interstate Commerce Commission, the same is interstate or not interstate in its nature, thereby precluding the state from taxing the shipment. We are of the opinian that the facts in the instant case and the decisions controlling the same warrant our conclusion that when grain is shipped to a mill between two intrastate points, regardless of the fact that the grain is to be rebilled, shipped and sold in interstate commerce, the first shipment is an intrastate shipment and the transportation charges are therefore subject to the tax of 1%.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
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