SALESTAX: A contract of sale made by parties within the State of Missouri of merchandise to be shipped from outside the State, involves interstate commerce and is exempt from the tax.

11-20

November 19, 1935.

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

Dear Sir:

This department is in receipt of your letter of October 9 wherein you submit to this department for a ruling the question of whether or not a car load of milk bottles would be subject to the tax under the conditions as outlined in your letter, which is as follows:

> "A, a foreign corporation, authorized to do business in Missouri, and having a jobbing house in St. Louis, enters into a contract with the Central Dairy at Columbia, Missouri to furnish the Dairy a car load of milk bottles. The contract specifies that the bottles are to be manufactured for the Central Dairy with the name Central Dairy on the bottles. The contract also specifies that the bottles may be shipped direct from the factory to the Central Dairy. 'A' causes the bottles to be manufactured by a manufacturer located outside the State of Missouri, and the bottles are shipped direct from the factory outside the State to the Central Dairy at Columbia, Missouri.
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> "'A', the jobber in St. Louis, bills the Central Dairy for the milk bottles and receives remittance from the Central Dairy. 'A', the jobber in St. Louis, pays the factory for the bottles.
>
> "The question, is this a sale made in interstate commerce and therefore not subject to the Missouri sales tax?"

You have very kindly called the attention of this department to several decisions which appear to be in point.

In the case of Federal Trade Commission v. Pacific States P.T. Asso., 273 U.S. l.c. 64, the Court discusses a contract and transaction similar to the one here involved, in the following language:

> "Paragraph (c) applies only to mill shipments from one state to another. For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and the manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Co. v. United States, 196 U.S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. Dozier v. Alabama, 218 U.S. 124, 128, 54 L. Ed. 965, 967, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transporta-

> tion, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. Dahnke-Walker Mill. Co. v. Bondurant, 257 U.S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; Lemke v. Farmers Grain Co., 258 U.S. 50, 55, 66 L. ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling) 262 U.S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. Dozier v. Alabama, supra; Western U. Teleg. Co. v. Foster, 247 U.S. 105, 113, 62 L. ed. 1006, 1015, 1 A.L.R. 1278, P.U.R. 1918D, 865, 38 Sup. Ct. Rep. 438; Lemke v. Farmers Grain Co., supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

As the decision in the case of Sonneborn Bros. v. Cureton, 262 U.S. 506 is referred to and the holding therein contained in the Federal Trade Commission Case, supra, we will make no further reference to it.

The case of Banker Bros. Co. v. Pennsylvania, 222 U.S. l.c. 214 bears strongly on the right to tax sales as in the instant case, and the Court said:

> "It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price.
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> "This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.
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> "The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce Company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price F.O.B. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the

manufacturer direct.

"These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U.S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365; American Exp. Co. v. Iowa, 196 U.S. 146, 49 L. Ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

There is, however, this controlling difference in the Banker Bros. Case and the instant case - the contract in the instant case specifies that the bottles are to be shipped direct from the factory to the user, while in the Banker Bros. Case it was not specified that there was a third party or that the automobile in question was to come from outside the state; therefore, as said in the Federal Trade Commission Case, "such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse, and it includes the buying and selling of commodities for shipment from one state to another." And further, "If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states."

CONCLUSION

In view of the Federal Trade Commission decision, supra, we are of the opinion that the transaction mentioned in your letter is not subject to the sales tax for the reason that it tends to burden interstate commerce.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

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