TAXATION: Fire[illegible] sold to a refractory not subject to sales tax.

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May 18, 1946

Honorable Hugh P. Williamson
Prosecuting Attorney
Fulton, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"I would like to have your official opinion regarding the payment of sales tax in the following situations:

"(a) One A. D. Bridges owns his farm, has opened a fire clay pit on this farm and gets out fire clay from it which he delivers to the freight cars here in Fulton which take the fire clay to the Mexico Refractory. The refractory pays Bridges a certain amount per ton depending upon the kind and type of clay. Who pays the sales tax?

"(b) In this case Bridges leases land to be worked for fireclay. He opened a mine and works the mine. He pays the owner of the land $ .10 per ton for all fire clay which he gets out of the mine. Who pays the sales tax on the payment by Bridges to the owner of the land?

"(c) Bridges buys a mine for a lump sum and gets out the fire clay. Who pays on the lump sum which he paid for the mine?"

From the facts as given in your request we presume that the fire clay is sold for the purpose of being made into bricks which are then sold by the manufacturer, and that none of said clay is used by the manufacturer for his own use.

The General Assembly in 1937 enacted what is known as the "Sales Tax Act" (Laws of Mo., 1937, page 552; Article 24, Chapter 74, R. S. Mo. 1939), which act imposed a tax of two percent on the purchase price of every retail sale in this state of tangible personal property.

Section 1 of the Act (now Section 11407, R. S. Mo. 1939, as amended) defines "sale at retail" 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. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace:
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> * * * * * * * * * * "

The statute does not impose a tax upon all sales of tangible personal property. The tax is imposed only upon sales "for use or consumption and not for resale in any form as tangible personal property." Berry-Kofron Dental Laboratories Co. v. Smith, 345 Mo. 922, 137 S. W. (2d) 452. As was said in City of St. Louis v. Smith, 342 Mo. 317, 114 S. W. (2d) 1017, l. c. 1019:

> "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 order to determine whether the transactions set forth in your request are sales for use or consumption or are sales for resale in any form, it must be first ascertained to what use the fire clay is to be put. "Fire clay" is defined in 11 C. J., page 832, as "the particular kind of clay used in the manufacture of fire brick." We do not believe it necessary to go into a lengthy discussion as to how bricks are

made or the part that clay plays therein because such matters are matters of general knowledge. (For exhaustive discourse, see 4 Ency. Brit. 111.) The definition of a "brick" as given in 9 C. J., page 416, and Webster's Dictionary will suffice. Said definition is as follows:

> "A building and paving material made from clay, either pure or mixed, as with sand, lime, etc., by molding into blocks while moist and hardening in the sun or by fire; * * *"

It will be seen therefore that fire clay when sold to a refractory or a brick plant and there used and processed, becomes a substantial ingredient or component part of the finished product, i. e., bricks.

We find no case in Missouri dealing directly with this question. However, it is a well-established rule of statutory construction that a construction of a statute by those charged with the duty of enforcing it, while not binding upon the courts, is entitled to great weight. Automobile Gasoline Co., v. City of St. Louis, 326 Mo. 435, 32 S. W. (2d) 281; Robertson v. Manufacturing Lumbermen's Underwriters, 346 Mo. 1103, 145 S. W. (2d) 134.

The Rules and Regulations Relating to the Missouri Sales Tax Act, issued by Forrest Smith, State Auditor of Missouri, who is intrusted with the enforcement of said Act, at page 20 reads as follows:

> " * * Sales of goods which, as ingredients or constituents, go into and form a part of tangible personal property for resale by the buyer are not taxable. * * *
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> "An illustration of a sale of tangible personal property which becomes an ingredient or constituent part of a finished product is as follows:
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> "Tangible personal property, such as flour, milk, salt, yeast, sugar and various other constituents, are pur-

> chased by a baker who uses the same in the process of baking bread. These items enter directly into and form a part of a loaf of bread and their purchase is made for resale purposes by the baker. The final sale of the bread by him for use or consumption is the taxable sale."

In State v. Southern Kraft Corp., 8 So. (2d) 886, the Supreme Court of Alabama had before it the question of whether certain chemicals purchased by the Southern Kraft Corporation, a paper company, to be used in the manufacturing of Kraft paper, were subject to the Alabama sales tax. The facts as stipulated in said case were as follows, l. c. 887:

> "'All of the testimony in the case shows without dispute that the chemicals listed on Exhibit "A" to the stipulation, namely, salt cake, sulphur and lime, enter into and become a component part of Kraft pulp and that at least a part of said chemicals remain there and that salt cake, sulphur, lime, starch, hydrate of lime and chlorine, the chemicals or materials listed on Exhibit "A" to said stipulation, enter into and become a component part of Kraft paper when used in the appellant's processes of manufacture and remain there. In both instances the testimony shows that the presence of these chemicals in the finished articles is detectable by analysis.'"

Both sides conceded and the court agreed that the starch and the wood pulp entering into the manufacturing of the paper was not taxable. In regard to the chemicals, the court said, l. c. 889:

> "* * * Therefore interpreting the act in the light of the established rule that taxing statutes are strictly construed against the taxing power and said arbitrary standards and definitions, the legislative intent apparently is that the uses of tangible personal property by

> a manufacturer in manufacturing articles of tangible personal property, for sale, which are used with the intent and do in fact become a substantial ingredient or component part of the finished product, are non-taxable. This interpretation is supported by the practice of the Department of Revenue in treating the use of wood, which loses 80% of its substance in the process, as non-taxable; and the concession by the State Department that the use of starch is non-taxable, though it loses 20% of its quantity in the process of manufacture. * * *"

The Supreme Court of Illinois in the case of Smith Oil & Refining Co. v. Department of Finance, 371 Ill. 405, 21 N. E. (2d) 292, held that core oil used in making cores in iron castings was subject to the sales tax because,(l. c. 294):

> "* * * Before a commodity can be said to have been resold as an ingredient of the finished product, it must be shown to have been used with the intention that it should become a part of it, and not solely for some other and distinct purpose."

However, the court laid down the general rule as follows, l. c. 293:

> "* * * If in the process of manufacturing, the core oil, in any form, becomes an ingredient or constituent of the iron castings, it is resold as tangible personal property and the vendor of the oil is not subject to the tax. But if, on the other hand, it is used merely as a part of the core around which the iron is poured, and no part of it becomes an integral part of the finished product, either as core oil or as carbon, it is not resold and the vendor of the oil is subject to the tax."

In view of the above authorities it will be seen that where a product is sold to a manufacturer, which product is to be used with the intent and does in fact become a substantial ingredient or component part of the finished product, that such a sale is not a sale at retail under the Sales Tax Act.

With this rule in mind, we will answer your questions in the order that they are set forth in your request.

(a) In view of the fact that the person in question sells the fire clay from his own pit to the Mexico Refractory, which in turn manufacturers bricks from said fire clay, then such sale is not subject to the Missouri Sales Tax Act.

(b) A person who leases land which contains fire clay and mines said fire clay, paying to the owner a royalty on each ton so mined, does not have to pay a sales tax upon the royalty.

(c) A sale of a mine containing fire clay is not subject to the Missouri Sales Tax Act because said Act applies only to sales of "tangible personal property" and not to sales of realty.

Conclusion

It is, therefore, the opinion of this department that a sale of fire clay to a refractory or brick plant, to be used in the manufacturing of bricks, is not subject to a sales tax thereon unless said bricks are manufactured by the refractory for its own consumption.

Respectfully submitted,

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