

TAXATION: Retail sales of tangible personal property to cost-plus-fixed-fee contractors for the Federal Government
SALES TAX: or its agencies are taxable under the Sales Tax Act.

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Dear Sir:

A few weeks ago we received a request from you inquiring about the application of the Missouri Sales Tax to certain transactions therein described. A few days after we received the request, we wrote for more information, and to date have not received a reply to that inquiry.

After further examination of your original request, I have decided to write an opinion based on the facts you have stated in your request. Your letter reads as follows:

"Pursuant to our conversation yesterday in regard to the sales tax on a plus cost contract which my client J. E. Dunn Construction Company has with the United States Government under the FPHA construction program I would like to have your office write an opinion whether or not my client should pay the sales tax on the materials purchased for the construction of the government houses.

"It is my opinion that under a plus cost contract the J. E. Dunn Construction Company would only be the agent of the government and therefore not liable for sales tax on materials purchased for the construction of these homes.

"Under the decision of the State of Alabama v. King Bowzer decided by the Supreme Court of the United States in November, 1941, and reported in 62 S.Ct. 43, the governmental exemption does not apply and the sales tax should be charged. However, they also

state that if the material is sold directly to a federal agency then it could not be taxable. All of the materials purchased by the J. E. Dunn Construction Company as the agent of the government goes to the FPHA construction program which is a federal agency. Either way I should like to have an opinion from your office so that I can pass same on to the Dunn Construction Company."

I note from your letter that you seem to be of the impression that because the construction company is acting as an agent for the government, and since the government is immune from state taxation, that the tax should not be imposed on sales to the Dunn Construction Company, which has a contract with the United States Government under the FPHA construction program. I think the case of State of Alabama v. King & Boozer, referred to in your letter, is controlling on the question here submitted.

The Missouri Sales Tax Act imposes the tax on the purchaser and requires the seller to report and pay the tax to the State Auditor. In the case of School District of Kansas City v. Smith, 111 S.W.(2d) 167, l.c. 168, the court said:

"* * * The purchaser is the taxpayer, and the seller, although responsible, is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax. * * *"

In the case of City of St. Louis et al. v. Smith, 114 S.W. (2d) 1017, the court had before it the question as to whether or not contractors for the improvement of real estate were consumers of the articles which they purchased for such improvement or whether they were sellers of such articles to the person who owned the real estate to be improved. At l.c. 1019, the court, in ruling on the question, said:

"In our judgment the contractors in this case did not buy the materials in question for the purpose of reselling 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."

From what you have written in your letter, it appears that the Dunn Construction Company, as a cost-plus-fixed-fee contractor under the FPHA construction program, would be in the same classification as a contractor in the case of City of St. Louis, supra.

The Missouri Sales Tax, in so far as it provides for the imposition of the tax on the purchaser and the reporting and paying of it by the retailer, is similar to the provisions of the Sales Tax Act for the State of Alabama which was under consideration by the United States Supreme Court in the King & Boozer case, 62 S. Ct. 43. From a reading of the King & Boozer case, it will be seen that the tax in that case was contested on the theory that a cost-plus-fixed-fee contractor was acting as an agent for the Federal Government, and since the Federal Government is immune from state taxation, then the tax should not be imposed on the agent for materials which he used in constructing buildings for the Federal Government. On the question of immunity from state taxes by the Federal Government, the court, in the King & Boozer case, said at l.c. 45:

"* * * The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who

furnish supplies to the Government and who have been granted no tax immunity.
* * *

"The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, its legal incidence is on the Government rather than on the contractors who ordered the lumber and paid for it, but who, as the Government insists, have so acted for the government as to place it in the role of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract."

Following the above statement, the court said that the question of whether or not a sales transaction is not taxable on account of federal immunity will depend upon the terms of the contract. The court then went into the provisions of the contract between the cost-plus-fixed-fee contractor and the Government, and in summing up the provisions of the contract, the court at l.c. 47 said:

"* * * The lumber was sold and delivered on the order of the contractors which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser

would be shifted to the Government by reason of its contract to reimburse the contractors." (Underscoring ours.)

From an examination of this entire opinion, we are led to the conclusion that the imposition of the tax in this case turned on the fact that the materials used by the contractors were sold and delivered to the contractors on their orders, and that the Government was not bound to pay for these materials. The court, in the King & Boozer case, thought that the legal effect of the contracts was to obligate the contractors to pay for the lumber used by them in their contracts with the Government.

As stated above, we do not have before us the contracts of the Dunn Construction Company with the Government; but if these contracts contain provisions similar to those contained in the King & Boozer case and in which the Dunn Construction Company, in its contracts for the purchase of articles of tangible personal property used, obligates the contractors to pay for the materials, then such transactions would be subject to the Missouri Sales Tax, even though the contractors were reimbursed for these materials by the Federal Government.

CONCLUSION

It is, therefore, the opinion of this department that if the contracts of the Dunn Construction Company with the Government under the FPHA construction program provide that the contractors obligate themselves to pay for the articles of tangible personal property used in such contracts, and they do pay for them, then such transactions are subject to the Missouri Sales Tax Act, even though the Dunn Construction Company may be reimbursed by the Government for these payments, pursuant to the terms of the contract.

Respectfully submitted,

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APPROVED:

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