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LETTER 61-116-L



DEPARTMENT OF LAW
OFFICE OF THE

Attorney General

STATE CAPITOL
Phoenix, Arizona

August 15, 1961

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Mr. Frank A. Eyman, Superintendent
Arizona State Prison
Florence, Arizona

Dear Mr. Eyman:

In your letter of July 3, 1961, you asked a question concerning the possible liability of the State Prison for certain sales taxes. In order to answer the question, I have rephrased it as follows:

"Is the State Prison liable to pay a distributor the Arizona transaction privilege tax on sales made by the distributor to the State Prison, when the sales price did not include any tax?"

It is our opinion that the State Prison is not bound to pay the sales tax. In order to answer the question, we have to assume the following facts:

First of all, we must assume that the distributor did not believe that the sale in question was a sale at retail. We must further assume that the distributor was incorrect and that, as a matter of law, the sale by the distributor to the State Prison was a sale at retail and subject to the transaction privilege tax. (A.R.S. §42-1312).

There is no Arizona case precisely on point. However, the case of State Tax Commission vs. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P. 2d 549, (1951) gives us a very clear idea of the meaning of our transaction privilege tax as it is applied to the parties to the transaction. The Court in that case plainly stated that the taxes imposed by A.R.S. §42-1301 through 42-1347 are not sales taxes as such, but rather, taxes imposed on the privilege of engaging in business; that the taxes are not imposed on the consumer or purchaser, but on the seller. The Court further held that the seller is not a tax collector, but is personally, solely and directly responsible for the tax. The specific facts in that

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case were that the taxpayer in making an automobile sale added 2% as the sales tax. To use the Court's example, the retail price was \$3,000 and the taxpayer added 2% sales tax, for a total of \$3060. The issue was whether or not the automobile company had to pay a tax on the \$3,000 listed as the sale price of the automobile or upon the \$3,060 actually collected from the customer. The Court held that the 2% tax was properly levied on the total amount of \$3,060, as this was the actual sales price.

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It would, therefore, follow that where a price is listed as the sales price, the seller is liable for the total amount that he receives, whether or not he considers any part of the total price to be sales tax which he attempts to collect from the purchaser. Therefore, if a purchaser does not add to his sales price anything referred to as sales tax at the time the purchase is made, he cannot add another amount after the sale is completed and call it a "sales tax". The Court made it clear that no matter what the label the amount is merely a part of the "gross proceeds of the sale." The consumer does not have to pay the tax - only the seller has to pay the tax. If the seller, after the transaction is completed, attempts to collect an additional amount of money, he is doing so on his own account, since he is not entitled to collect the tax for the State. If it is being collected on his own account, it would be a change in the sales contract after the contract had been fully executed. It would, in fact, be a new contract, and inasmuch as the other party to the contract, the purchaser, (in this case the State Prison), would receive nothing of value for the money which the seller is trying to collect, it, therefore, would be a contract for which there was no consideration. A contract which lacks this element of "consideration" is not a contract and could not be binding on the State, and as the State can only pay those obligations which are strictly legally binding upon it, it would be unlawful for the State to agree to pay this additional amount.

I trust that this will answer your immediate question.

As far as future sales are concerned, whether or not a distributor or supplier wishes to list a figure as a sales tax makes no real difference at all. The total price is the controlling factor and if the State Prison wishes to pay a total figure, part of which is referred to as a sales tax, is up to the State Prison itself as a matter of contract between the parties. Some State Agencies do pay it and others refuse

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to, but the only effect of the refusal would be that no sale can be consummated unless the seller is willing to change his price. It is a matter of negotiation, not law.

Very truly yours,

ROBERT W. PICKRELL
The Attorney General

PHILIP M. HAGGERTY
Assistant Attorney General

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