

September 5, 1944

Mr. W. W. White, Chief Accountant
Arizona Highway Department
Phoenix, Arizona

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ARIZONA ATTORNEY GENERAL

Attention: Mr. Fields

Dear Sir:

This opinion is given you in response to your request and it is intended to apply only to the imposition of the Sales Tax upon the sales of tangible personal property by a retailer to the state (Highway Department), the state (Highway Department) being the ultimate consumer of the property purchased.

As we understand the statements of Mr. Fields, the State Tax Commission demands the payment by the retailer, and consequently by the Highway Department, of a 2% sales tax upon the 2% sales tax imposed upon the gross proceeds of sales to the state. To illustrate:

The sales price is - - - - -	\$100.00
The sales tax @ 2% is - - - -	2.00
2% on the sales tax is - - - -	.04

A total of \$102.04 sales price of which \$2.04 is Sales Tax.

The item objected to is the \$.04 imposed on the Sales Tax.

We believe that the item is clearly objectionable. We are wholly unable to find the slightest authority for its imposition in the State Excise Revenue Act, or in any other law. The Highway Department clearly should not accept nor pay an invoice which includes such a tax. It should be disallowed not merely because it is a tax on the state itself, and is an excise upon an excise, but fundamentally because it is not authorized by law.

The sum total of this excise is probably negligible. The law, however, is concerned, not with the amount of the excise, but with its legality. We can find no justification in the law for its imposition.

The foregoing answers your direct question. We feel however that the serious problem you have to solve is the right of the Tax Commission to impose any sales tax at all upon direct sales by a retailer to the state or its agencies. The state being the ultimate consumer. This has been done without being questioned for almost ten years and the Highway Department has probably paid out several hundred dollars of its highway funds without, as we believe, any legal sanction. The subject has never been submitted to this Division, but we believe that we are justified in bringing it to your attention.

The sales tax is levied upon persons engaged in certain lines of business. It is a tax on the privilege of doing business.

The definition given to the word "person" in the law does not include the State but does include a municipal corporation. A state is not a municipal corporation. Hence, while the tax would be paid by a county or city to the retailer, there is no logic whatever in requiring the state to pay the tax to the retailer who in turn pays it back to the state. The same would be true as to the Highway Commission or any other agency of the state. Such agencies merely buy for the state and the article purchased becomes and remains the property of the state. The tax thus becomes, not a tax on the privilege of doing business as a retailer, but becomes a tax on the privilege of owning property as a state.

The decisions of our Supreme Court are so conflicting and confusing as to be of no value. None of them have considered the question as we now raise it.

The first Pleasant-Hasler case (72 P. 2d 573) held that a contractor erecting a structure for the state is a retailer of the materials going into the structure, and hence taxable.

The second Pleasant-Hasler case (76 P. 2d 225) merely holds that the contractor is a taxable retailer, but applies a different tax rate.

As nearly as we can interpret Moore v Arizona Box Co. (126 P2d 305) the ruling is that if a packer buys crates to use in shipping to the consumer the packer is a wholesaler and not taxable. However, if the State should buy the crates for its own use the box company would be a retailer, and it and consequently the state would pay a 2% tax.

Apparently to get away from these peculiar rulings the Legislature in 1943 passed Sec. 73 - 1329A, which exempts from the tax materials purchased by a contractor for use in a building constructed by him under contract. The effect of this section is that if the state contracts with a contractor to build a structure, no tax is paid, but if the state builds the structure itself, a tax is paid.

In view of these erratic decisions and laws, we believe the matter should be again presented to the court. A speedy way of doing this would be for the Department to refuse to allow a sales tax to the retailer upon equipment or material sold to the state, and let the Tax Commission file suit to declare the law or to collect the tax.

Very truly yours,

JOE CONWAY
ATTORNEY GENERAL

A. R. LYNCH
ASSISTANT ATTORNEY GENERAL

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