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January 19, 1951
Op. No. 51-22 ✓

Arizona State Tax Commission
State House
Phoenix, Arizona

Attention: Elwood W. Driggs
Director of Revenue

Gentlemen:

We have your letter of January 2, 1951 wherein you ask our opinion regarding the sales tax liability on certain types of businesses where personal services are definitely included as part of the cost of the sale of tangible personal property. You also ask in relation to specific illustrations what are sales at retail taxable under the Excise Revenue Act. Listed in your letter are pharmacists preparing medicines and filling prescriptions, sale of medicine to physicians used by them with services in prescribing for patients, shoe repair shops, morticians, tire recapping and jewelry repair establishments and tailors and decorators. You also refer to druggists selling medicines to hospitals which employ a pharmacist for dispensing such medicines (we presume from stock in a hospital dispensary) and doctors prescribing medicines from a hospital pharmacist for hospital patients, the cost of such medicines being added to the hospital bill of the patient.

The question is not without difficulty. The cases demonstrate a variety of opinions upon the question of what constitutes sales at retail, particularly as concerning occupations involving personal services to a greater or lesser degree. Our Supreme Court has passed upon the problem only as concerning the business of contracting where by statute labor charges are deductible. Duhane v. State Tax Commission, 65 Ariz. 268, 179 P. 2d 252. We are therefore obliged to express our views somewhat as a prophecy of what our court would hold upon the presentation to it in a proper case of each factual situation. Each case must turn to a large extent upon its own facts.

In accordance with your inquiry we limit our opinion to those situations arising out of the language of Section 73-1303 (c) 1, as amended, Excise Revenue Act of 1935:

"(c) At an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

1. Selling any tangible personal property whatsoever at retail, except bonds and stock.

When any person is engaged in the business of selling such tangible personal property at both wholesale and retail, the retail rate shall be applied only to the gross proceeds of the sales made other than at wholesale when his books are kept so as to show separately the gross proceeds of sales of each class, and when his books are not so kept the retail rate shall be applied to the gross proceeds of every sale made."

These definitions from Section 73-1302 must be considered:

"'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes any transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price; it also includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property;
'Retail sale' or 'sale at retail' means a sale for any purpose other than for resale in the form of tangible personal

property, but the expressions 'transfer of possession,' 'lease,' and 'rental' as used in the definition of 'sale' means only such transactions as are found upon investigation to be in lieu of sales as defined without the words 'lease or rental';

* * * * *

'Gross income' means the gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and without any deduction on account of losses;

'Business' includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect, but not casual activities or sales;

'Gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income;
* * * (Emphasis supplied)

* * * * *

'Gross receipts' means the total amount of the sale, lease, or rental price, as the case may be, of the retail sales of retailers, including any services that are a part of the sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of every kind or nature, and any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, materials used, labor or service performed, interest paid, losses or any other expense, but does not include cash discounts allowed and taken nor the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit;

'Tangible personal property' means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses; * * * (Emphasis supplied)

In the Duhame case our court held that the individual businessman is obliged to select the base (gross proceeds of sales or gross income) applicable to his situation of computing the tax. There seems no question from the above definitions but that if a person is engaged in a business enumerated as taxable under Section 73-1303 and the base applicable to his situation is "gross income", he is taxable on the whole of such income expressly including any services that are a part of the sales. It is to be noted that the definitions of "gross income" and "gross receipts" expressly include receipts from "services" while the definition of "gross proceeds of sales" does not. The court in the Duhame case clearly indicated that "services", being thus excluded from the latter definition, were not taxable where that base was proper. The broad definition of "gross income" and "gross receipts", including "sales", "sale of tangible personal property", etc., give some credence to a contrary view.

In answering your question, the first determination to be made in each particular case is whether or not the particular person is engaged in the business of selling tangible personal property at retail. Under our Act a sale for any purpose other than for resale is denominated a "retail sale" or a "sale at retail". It can be concluded from a consideration of the definition of "wholesaler" that if a sale is for consumption by the purchaser it is a retail sale. Therein lies the difficulty. Who is the ultimate consumer or rather in what instances can it be properly said that a resale takes place? The cases indicate generally that the retail sale is that to the person who destroys the substance of the article or the person who makes use of the product as long as it lasts.

It is difficult from the authorities to treat the two problems, what is a retail sale and when is a sale of services in connection with retail sales taxable, separately. They overlap to a large degree. General text discussions upon the questions you raise are found in 53 C.J.S., Licenses, Section 30, (e) and (f); 47 Am. Jur., Sales and Use Taxes, Sections 24, 25, 26, and 27. An exhaustive annotation supplementing earlier ones is found in 139 A.L.R., at pages 372 et seq.; and see 11 A.L.R. 2d beginning at page 926.

It is impossible to lay down a single rule which the commission can use to measure every case. Furthermore the decisions of the courts are in definite disagreement insofar as the results reached in particular cases are concerned. Our Act must be given a practical and commonsense application. We believe that the following principles can be deduced from our Act:

1. Section 73-1303 (c) 1, as amended, does not place a tax upon the sale of personal, professional or other services, nor does it place a tax upon sales, but does place a tax upon the business of selling tangible personal property at retail.

2. In determining whether a sale is one for resale it is not the quantity sold that is decisive, but rather the nature of the transaction and the purpose for which the property is sold.

3. The fact that one is engaged in the practice of a profession or primarily engaged in the rendition of services does not preclude the possibility that he is also engaged in the business of selling tangible personal property at retail.

4. If a business is such that the transactions are predominately for the rendition of personal services and it is the skill or services which are bargained for, the value of materials used being a mere incident thereto, and constituting only a very minor part of the gross charge, the business should be classed as one of service and not sales. No tax under the subsection then accrues. Illustrative of this extreme would be barbers, shoeshiners, laundries and drycleaners, with an exception where it is in the regular course of such businesses to make sales of tangible personal property as, for example, barbers regularly selling hair tonic and other preparations to patrons. Tax would then accrue to the extent of the separate business.

5. If the value of the property or materials furnished by a business is the dominant and paramount factor in the gross charge and any services rendered in connection therewith are inseparable therefrom and merely incidental thereto, the business should be classified as one of selling tangible personal property. The person then would be taxable on his entire gross charges. Illustrative of this extreme might be a merchant selling ready-made clothing, who, in connection therewith, makes alterations.

6. A broad, middle ground exists between the above extremes, and the determination of cases falling therein is left to the reasonable discretion of the State Tax Commission through the medium of rules and regulations not contrary to law. See Sections 73-1325 and 73-1333, ACA 1939. Rules or regulations providing that persons engaged in a business having to a substantial degree qualities of both sales of tangible personal property at retail and the rendition of personal services shall report to the Commission and pay taxes upon the gross charge to the consumer of that portion of the business which represents sales of tangible personal property would, we believe, be reasonable and in harmony with the intent of the law. Considerations of practicality may be taken into account. In this regard see Western Leather and Fitting Co. v. State Tax Commission of Utah, 87 Utah 227, 48 P. 2d 526.

The following is our opinion as to the tax liability under Section 73-1303 (c) 1, as amended, of the specific businesses enumerated in your letter:

(a) Pharmacists in preparing medicines and filling prescriptions fall within rule 6 above and are taxable upon all of that portion of their income derived from the sale of medicines, drugs and other pharmaceutical supplies to consumers. See opinion of Attorney General dated July 10, 1940 reaching the same conclusion. See cases cited in 139 A.L. R., at page 403. We are not unaware of the decision in Wray's Pharmacy v. Lee, (Fla. 1941), 199 So. 767, that all receipts of a druggist from sale of prescriptions were subject to a gross receipt tax, where the statute defined "gross receipts" as the amount of sales price including any services that are a part of the sales.

(b) Sales by pharmacists to physicians of medicines and medical supplies, such medicines being used by the physicians merely as an incident to their professional services, are sales at retail and the pharmacists are taxable thereon in accordance with (a) above. See Commonwealth v. Miller, 337 Pa. 246, 11 Atl. 2d 141, and Bigsby v. Johnson, (Cal. 1940) 99 P. 2d 268. This conclusion is subject to the qualification that if on the facts a physician is himself engaged in a separate business of selling medicines, not as a mere incident to his professional services, such sales by him would be retail sales subjecting the physician to tax thereon. In such case the sale to the physician would be one for resale.

(c) Where a druggist sells medicines to a hospital, it employing a pharmacist for dispensing of such medicines from a hospital dispensary, the patient being charged therefor by addition to his hospital bill, the sale by the druggist to the hospital is a sale for resale. The hospital would be liable in such a case for the retail tax on such sales by it so long as its activities were not merely casual and it was engaging in such activities "with the object of gain, benefit or advantage either direct or indirect".

(d) The businesses listed by you as shoe repair shops, morticians, repair garages, jewelry repair and tire recapping establishments, tailors and decorators fall within rule 6 above in all cases wherein the materials, parts or supplies furnished can be said to have a definite and substantial value apart from the services rendered and are not sold for resale. Where, however, in any of such businesses the value of the material furnished is negligible, as for example, a tailor sewing a tear or sewing on a button and supplying only thread, no sale should be considered as having taken place. The rule of de minimis would apply. The cases dealing with these particular businesses are not all in agreement:

Shoe Repair Shops: Western Leather and Finding Co. v. State Tax Commission of Utah, supra; Revzan v. Nudelman, 370 Ill. 180, 18 N.E. 2d 219; 139 A.L.R. page 384; 11 A.L.R. 2d 930.

Funeral Directors: Ahern v. Nudelman, 374 Ill. 237, 29 N.E. 2d 268; Commonwealth v. Dinnien, (Pa. 1936) 182 Atl. 542; Kistner v. Iowa State Board of Assessment and Review, (Iowa 1938) 280 N.W. 587.

Automobile Repair Shops: Doby v. State Tax Commission (Ala. 1937) 174 So. 233; 11 A.L.R. 2d 927.

Jewelry Repair Shops: C. & E. Marshall Co. v. Ames, 373 Ill. 281, 26 N.E. 2d 483; 11 A.L.R. 2d 933.

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Tire Recapping Establishments: Wilson v. Glander,
151 Ohio St. 479, 86 N.E. 2d 761; 11 A.L.R. 2d 930.

We trust the foregoing will be of aid to you in
administering the Act.

Very truly yours,

FRED O. WILSON
Attorney General

RICHARD C. ERINEY
Assistant Attorney General

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