6101.

APPROVAL—BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO, $100,000.00.

COLUMBUS, OHIO, September 19, 1936.

Industrial Commission of Ohio, Columbus, Ohio.

6102.

SALES TAX—TRANSACTION INVOLVING PAYMENT BY LESSEE OR LICENSEE OF MONTHLY RENTAL FOR USE OF EQUIPMENT AFTER LEASE OR LICENSE HAS EXPIRED NOT SUBJECT TO SALES TAX—WHERE ORIGINAL CONTRACT INVOLVED INTERSTATE COMMERCE.

SYLLABUS:

Where under a license contract or lease providing therefor, tabulating machines and other office equipment are delivered to a lessee or licensee in this state under an agreement set out in the instrument whereby the lessee or licensee is required to retain and use such equipment for one year and to pay a stated monthly rental therefor, and the lessee or licensee is given the privilege, at his option, of retaining and using the equipment thereafter from month to month at the same rental, the exercise by the lessee or licensee of this privilege of retaining and using the equipment after the expiration of such one year period, does not constitute a transaction which is subject to the incidence of the sales tax provided for by section 5546-2, General Code.

COLUMBUS, OHIO, September 21, 1936.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: This is to acknowledge the receipt of your recent communication which reads as follows:

> "The Tax Commission of Ohio hereby refers to you the following question relative to the administration of the Ohio Sales Tax Act, for an opinion. The facts are as follows:
>
> The International Business Machines Company, a corporation having its headquarters and home office in New York, N. Y.,

does a business in this state consisting of the rental of business office equipment, bookkeeping and calculating machinery and similar items. All of such rental of equipment and machinery takes place pursuant to a form of contract, a copy of which is attached hereto, and marked 'Exhibit A'.

Under the terms of this contract, the equipment so rented is shipped into the State of Ohio from their headquarters located in New York, and is installed. The agreement requires that the lessee of the equipment use the same, and pay the rental thereon for a period of one year following the installation, during which period the lessor is bound absolutely to permit the use thereof under the terms stipulated in the contract. The obligation to pay the rental for one year, is absolute on the part of the lessee. Thereafter, the use of the machinery and the obligation to pay therefor, continues on a month to month basis as provided in the contract, the use thereof being terminable at any time by either party upon the giving of certain notices as provided in the contract, the form for which has been designated as 'Exhibit A'.

The Tax Commission of Ohio has assessed the International Machines Company in the manner provided by law with the amount due as sales tax on rentals of equipment so leased, after the initial twelve-month period had elapsed. The theory upon which this was done is as follows:

The movement of the machinery and equipment into the State of Ohio is conceded to be a movement in interstate commerce, and the absolute right to use, and obligation to pay for the same for a period of one year, is conceded to rest upon the same consideration and be an integral part of such interstate movement. After the expiration of the year, however, the use and obligation to pay therefor, is a matter within the discretion of the parties operating within the limitations laid down in the original agreement, and appears not to be referable to the original consideration.

The Tax Commission takes the view that each month's use constitutes a separate transaction with relation to the subject matter already in the state, and as such, is subject to the Ohio Sales Tax. It is the view of the Tax Commission that the use from month to month, after the term of one year, rests upon no consideration until the use actually takes place, and that the lessor is in a position to merely maintain a continuing offer which is referable at any time, and which ripens into a contract only as the lessor accepts the use thereof from month to month.

The International Business Machines Company resists the collection of this assessment on the theory that the monthly rentals, however long continued after the expiration of the initial twelve month period, are part and parcel of the original transaction in interstate commerce, and as such, continue to benefit from the limitations imposed by the Constitution of the United States upon the taxing power of the State of Ohio.

The question, therefore, submitted for your opinion is:

'Is the possession of the equipment originally leased pursuant to a contract of the type designated as "Exhibit A," after the initial twelve month period, a transaction subject to the application of the Ohio Sales Tax Act, or is it a part of a transaction in interstate commerce, and, therefore, not subject to the taxing power of the State of Ohio, for that reason'?"

Under the contract referred to in your communication, which is therein designated as "Exhibit A", which is set out in the form of an offer by the International Business Machines Corporation and an acceptance thereof by the customer, said company furnishes to the customer one or more of the tabulating machines therein named for a stated monthly rental as to each of the machines used by the customer. The right thereby given to the customer to use the machine or machines covered by the contract is therein referred to as a non-assignable license. The contract, however, partakes of the nature of a lease and as to this it is provided that all "leased" machines are to remain the exclusive property of the company and may be removed by it at any time after the termination of the contract.

Touching the question presented in your communication, the contract contains the following provision:

"This agreement for the aforementioned equipment shall remain in force for One Year from the date the machines are installed ready for your use, and may be terminated by you or this Corporation then, provided written notice is received three months prior, otherwise this agreement shall remain in full force and effect. Thereafter it may be terminated by you or this Corporation at the end of any calendar month provided three months prior written notice is received or unless terminated by us in accordance with the stipulations of this contract."

It is noted that the contract requires the lessee or licensee to use the machines covered by the contract for at least one year at the monthly rental therefor therein provided for, with an option on the part of such lessee to continue the use of such machines from month to month thereafter at the same monthly rentals.

The question presented in your communication is whether the continued possession of the leased equipment by the lessee, under the right and privilege given to him by the contract, after the initial period of one year, during which the lessee is required to use the equipment and to pay the stipulated rental therefor, is a transaction subject to the incidence of the sales tax provided for and imposed by section 5546-2, General Code. Under the provisions of section 5546-2, General Code, an excise tax is levied on each retail sale made in this state of tangible personal property occurring during the period beginning January 1, 1935, and ending March 31, 1937, other than such retail sales as under the provisions of this section are specifically exempted from the tax thereby imposed. Under the provisions of section 5546-1, General Code, retail sales under the Sales Tax Act include all sales other than those specifically excepted and specifically includes all transactions whereby a license to use tangible personal property is granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by any means whatsoever.

In a consideration of the question here presented under the above noted provisions of the Sales Tax Act, the question more specifically stated is whether the continued possession of the leased equipment by the lessee after the expiration of the period of one year provided for in the contract is in itself a transaction by and between the lessor and the lessee or licensee whereby a license is granted to use such equipment which is separate and apart from the transaction by which the equipment came into the possession of such lessee or licensee in the first instance with the right and obligation of using the equipment for the one year period provided for in the contract. The answer to this question depends, perhaps, upon whether the provision in this instrument giving the lessee or licensee the right or option to continue the use of the leased equipment after the expiration of the one year period at the monthly rental therein provided for is to be considered from the standpoint of the lessee or licensee as a right to renew the contract on a month to month basis after the expiration of the one year period, or whether the right and option thus given to the lessee or licensee is one for the extension of the one year term provided for in the contract. In consideration of rights and options of this kind as the same are found in leases generally, most of the adjudicated cases and the textwriters as well make a distinction between a covenant in a lease for a renewal and a provision therein for the extension of the term

at the option of the lessee. In the latter, upon the exercise of the option by the lessee, the lease instrument as executed is considered as granting a present lease for the full term to which it may be extended and not a lease for the lesser period with the privilege of a new lease for the extended term. After considering this question at some length, Underhill in his work on Landlord and Tenant, Vol. 2, par. 803, says:

> "Where a lease gives the lessee a renewal at his election, and he elects to continue, a present demise is created which is subject to all the conditions and covenants of his former lease, and it is not necessary that a new lease should be executed. In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended. This must appear from the express language of the parties. The reason for the presumption is the fact that the making of a new lease will involve trouble and expense which should be avoided by the courts, if possible, unless it is very clear that the parties had expressly agreed to incur such trouble and expense."

In Vol. 16, R. C. L., page 885, it is said:

> "A distinction is made between a covenant in a lease for a renewal and a provision therein for the extension of the term at the option of the lessee, the courts treating the latter, upon the exercise of the privilege, as a present demise for the full term to which it may be extended and not a demise for the shorter period with a privilege for a new lease for the extended term. Thus it has been held that a lease which provided for a 'term of three years from and after a certain date, with the privilege of two years more at the expiration of said first three years, making, if said privilege of two years more is exercised, a total of five years,' operated upon the exercise of the option to extend the term for the additional term as a present demise for the full term of five years, and not a lease for three years with a covenant to renew for two years, and that therefore where the lease also contained a covenant on the part of the lessee not to sublet without the consent of the lessor, his consent to a particular subletting was operative to justify the continuance of the subletting throughout the period of five years."

In the case of Marckres Bros. v. Perry Gas Works, 189 Ia., page 1204, 1209, the court in its opinion in discussing this question says:

> "The distinction is that a mere *extension* is an enlargement of the original term of the lease; whereas a *renewal* creates an additional term, rather than an enlargement of the first. The practical effect of this distinction is held to be that, where a written lease contains an option to the lessee to have an *extension,* then, if he continues in possession after the expiration of the original term, he is presumed to have elected to take the extension without any other evidence on the question. In other words, the presumption that he is holding as a tenant at will does not obtain in his favor. On the other hand, if the option be for a *renewal,* then mere continuance in possession after the expiration of the term of the original lease, is not, in itself, sufficient evidence of an election to *renew.*"

In the case of Gross v. Clauss, 6 O. App., 140, 143, the court said:

> "We think that the best considered authorities hold that a lease for a term with a privilege or option in the tenant of a renewal or extension for a further term upon the same terms and conditions is a present demise as to the renewal to begin at a future time, and under such leases no new lease need be required, but any indication on the part of the tenant of his intention to avail himself of his privilege operates to extend to him the right of the additional term."

Even if in the contract here in question nothing had been said as to the right of the lessee or licensee of the leased equipment to possess and use such equipment from month to month at his option after the expiration of the definite period therein provided for, it would seem that any continued possession of the equipment which at the option of the lessor might constitute a new agreement for the use of the equipment on the same terms set out in the original lease or contract, would, nevertheless, be referable to the original contract. Touching this point, the Supreme Court of this state in its opinion in the case of Bumiller v. Walker, 95 O. S., 344, 349, said:

> "In the absence of any agreement, if a yearly tenant holds over his term, the law implies a contractual proposal on his part to hold over for another year upon the same terms and conditions as stipulated in his former term, and in such case the continuity

of his possession is referable only to his former contract. It can be referable to no other, for no other exists."

The authorities above noted support the view that the right which the lessee or licensee under the contract here in question has to the use of the leased equipment after the extension of the primary one year period is to be considered as an extension of the rights given to him for such one year period and for the rental therein provided for and is not to be considered a new contract for the lease of the equipment from month to month after the expiration of such one year period provided for in the contract. Other authorities supporting this view are: Neal v. Harris, 140 Ark., 619, 624; Pugsley v. Aikins, 11 N. Y., 494; Swan v. Inderlied, 187 N. Y., 372; Tiffany Landlord and Tenant, Vol. 1, page 122, Vol 2, page 1514.

It follows from this that the right of the lessee or licensee to the continued use of the leased equipment after the expiration of the period of one year provided for in the contract is likewise referable to the contract as originally executed by the parties, which contract, under the authorities, is to be considered as one not only for a term of one year but for a term of one year and for such additional time as the lessee in the exercise of his option from month to month may continue in the possession and use of such equipment.

I am of the opinion, therefore, in answer to the question presented in your communication, that the continued possession by the lessee or licensee of equipment leased to him under this contract, after the expiration of the one year period therein provided for, is not a transaction which under the Sales Tax Law is subject to the incidence of the tax therein provided for.

Respectfully,
JOHN W. BRICKER,
Attorney General.

6103.

JURORS—ENTITLED TO PER DIEM COMPENSATION AND MILEAGE—WHEN THEY APPEAR ON ORDER OF COURT BUT ARE EXCUSED FOR THE DAY.

SYLLABUS:

A person who is on a jury list and who, in answer to an order of the court, appears in court but who is excused from sitting as a juror for that day, is entitled to his per diem compensation as fixed by the court and his mileage, as provided by Section 11419-43, General Code.