

3961.

SALES TAX—CONTRACT SPECIFYING SALE SUBJECT TO “REQUIREMENTS” OF PURCHASER CONSTITUTES TAXABLE SALE WHEN SUCH PROPERTY DELIVERED OR PAID FOR.

SYLLABUS:

A contract whereby a seller agrees to sell to a buyer tangible personal property, designating the amount of property contracted to be sold as “your requirements” for a specified period without otherwise fixing any amount of goods contracted for, does not constitute a taxable sale under the provisions of the Sales Tax Act, but deliveries made pursuant to such contract constitute taxable sales when made or when paid for as provided in section 3 thereof.

COLUMBUS, OHIO, February 23, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

“We are enclosing herewith a copy of a common form of contract used in various industries in the State of Ohio. It is a contract entered into before the effective date of the Act, specifying ‘Your requirements’ as the quantity of merchandise sold under the contract.

We are submitting it to the Attorney General's office for an immediate opinion as to whether or not such a contract is taxable under the provisions of Amended House Bill No. 134.”

The specimen contract attached to your communication provides in so far as pertinent to your question:

“Dec. 27, 1934.

“The C. Oil Co., C., Ohio agrees to sell, and

The M. Co., C., Ohio

agrees to purchase

QUANTITY Your requirements

DURATION From Jan. 2nd, 1935 to December 31st, 1935.

GRADE

PRICE in Iron Drums

C. Crown Paraffine Oil12c per gallon

C. Red Engine Oil19c per gallon

C. H. P. Cylinder Oil48c per gallon in 5-gal. Containers
Containers to be charged extra with equal credit allowance when returned to us, complete and in good condition, within ninety days from the date of invoice.

C. 302 Lubricant (50-lb. Kegs)10¼c per lb.

The billing price of all oils specified in this contract will vary in accordance with any changes in The C. Oil Company's (seller) list price for the products covered herein, as posted in seller's C., Ohio Office, but the buyer shall have the right to order for delivery within thirty days, his thirty day normal requirements of the products herein set forth, at prices in effect prior to variance.

It is agreed that the maximum prices herein stated shall be increased by the amount of all taxes and charges which the C. Oil Company may be required by any governmental authority to collect or pay with respect to the manufacture, transportation, importation, sale, delivery, and use of the petroleum products covered in this contract. Said prices are also subject to the condition that if seller's costs are increased due to the enactment or promulgation of any state or federal laws or regulations affecting seller's business, including the establishment of minimum wage rates and similar measures, including depreciation of the currency of the United States of America, the said prices may be increased by a proportionate amount to be determined according to accepted accounting practices.

TERMS 1% 10 days, net 30 days.

ROUTE Via C. Trucks

DELIVERY As required by the purchaser in fairly even monthly quantities.

This contract is made subject to strikes, accidents, car supply, or other causes beyond control.

The buyer and seller, in entering into this contract, realize the uncertainty of absolute deliveries, growing out of strikes, casualties, failure of usual source of supplies or materials, or other causes beyond the control of either party; and it is hereby mutually acknowledged that the intent of this agreement is not to bind either party as to failure to perform, or modified performance by reason of matters beyond the control of the party in default, but that the material shall be shipped by the seller and accepted by the buyer as per delivery specified, so far as the labor, the physical conditions at the respective plants, and the ability of the carrier will permit, regardless of conditions arising from over contracting or changes in market values, during the life hereof.

This contract is not assignable by the Purchaser except with the written consent of the Seller.

This Contract is not valid unless signed by an officer of the company.

Approved

.....
Sales Representative

By.....

The C. Oil Company

By....."

Your specific question is whether or not such a contract entered into before the effective date of the Sales Tax Act is taxable under the provisions of that act. A contract entered into prior to such date, even though it were to expressly pass title to specific personalty and acknowledge receipt of payment therefor, thus clearly constituting a sale, would still not be taxable if executed before such effective date. I presume, therefore, that your question is as to whether or not the contract in question will serve to exempt deliveries made pursuant thereto during the year 1935 from the imposition of this tax, or to put the question in another way, whether or not such contracts entered into during the year 1935, covering the requirements of the purchaser during the year 1936 after the expiration of the act, would be taxable.

Section 2 of House Bill 134 imposes a tax "on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935", with certain exceptions, none of which are pertinent here. The term "sale" is defined in section 1 as follows:

“Sale’ and ‘selling’ include all transactions whereby title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume 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 exchange or barter, and by any means whatsoever.”

The foregoing definition of a sale is very broad. It includes transactions whereby either title or possession of tangible personalty is to be transferred in the future, and also it apparently includes transactions where the consideration is either absolute or conditional. Therefore, a conditional sale, defined in 35 O. Jur. p. 999, as “a contract which provides that the chattel sold is to remain the property of the vendor until the purchase money is paid”, citing *Speyer and Co. vs. Baker*, 59 O. S. 11, and other cases, would be a taxable sale under this act in so far as the element of the title passing in the future is concerned. In the case here under consideration, it would therefore appear that the fact of the title remaining in the vendor would not indicate that the sale, within the meaning of the term as used in the act, took place at the time of delivery.

This contract does not provide an absolute consideration since the price may vary throughout the year, depending upon changes in the seller's posted price lists. This element likewise would not justify a conclusion that the sale, within the meaning of the term as used in the act, took place at a time other than the execution of the contract, since the paragraph defining “sale”, supra, provides that the consideration may be either conditional or absolute.

It must be borne in mind that transactions which are sales within the purview of the Sales Tax Act need not be what are commonly known as completed sales. The third branch of the syllabus of *Village of Bellefontaine vs. Vassaux*, 55 O. S. 323, is as follows:

“As a general rule, a sale of personal property is not completed when anything remains to be done to identify the thing sold, or discriminate it from other like things.”

Under the definition of “sale”, supra, the thing sold apparently need not be identified at the time the contract is entered into,—this for the reason that neither title nor possession need be transferred at the time of the execution of a taxable contract. To illustrate, a contract entered into during the year 1935, while the act is in effect, whereby the purchaser contracts for 100 barrels of oil at a fixed price to be paid on delivery on January 2, 1936, after the expiration of the act, would no doubt be taxable. It would follow, therefore, that a contract to sell which is purely conditional and executory would constitute a taxable sale within the meaning of the act, providing the contract specifies certain definite items of tangible personalty or certain quantities thereof.

In the instant case, however, there is no fixed amount of personalty contracted for. Contracts of this nature have been held void in some jurisdictions, but the weight of authority supports their validity. See *Williston on Sales*, Second Edition, Vol. 2, pages 1171 to 1175. It is assumed for the purposes of this opinion that such contracts are valid in Ohio. It remains to be determined whether such contracts constitute taxable sales within the definition of the term “sale” as used in the Sales Tax Act.

Section 5 of the act provides certain conditions under which the Tax Commission may authorize the prepayment of the tax, which I do not consider pertinent here. Section 3 of the act provides how the tax shall be collected and paid in the following language:

"Excepting as provided in section 5 of this act, the tax hereby imposed shall be paid by the consumer to the vendor in every instance, and it shall be the duty of each vendor to collect from the consumer the full and exact amount of the tax payable in respect of each taxable sale, and to evidence the payment of the tax in each case by cancelling prepaid tax receipts, equal in face value to the amount thereof, in the manner and at the time provided in this section, to-wit:

(a) If the price is, at or prior to the delivery of possession of the thing sold, to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall:

1. Collect the tax with and at the same time as the price.

2. Immediately cancel in the presence of the buyer by immediately tearing into two parts a prepaid tax receipt or receipts of the proper face value, deliver one part of each such cancelled prepaid tax receipt to the consumer or his agent, and retain the other part thereof.

(b) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold, to the consumer, cancel or cause to be cancelled by tearing into two parts prepaid tax receipts equal in face value to the amount of the tax imposed by this act. Thereupon and thereby the amount of the tax with respect to such sale, payment of which to the state is evidenced by such cancellation, shall become a legal charge in favor of the vendor and against the consumer, which shall in every case be collected by the vendor, as herein provided, in addition to the price; and at or immediately after such collection, the vendor shall deliver one part of each such cancelled prepaid tax receipt to the consumer and retain the other part thereof."

The foregoing section should be considered in construing section 1, defining taxable sales, under authority of *Cincinnati vs. Guckenberger*, 60 O. S. 353, cited in my Opinion No. 3946, rendered to your commission, holding that "A code of statutes relating to one subject, is presumed to be governed by one spirit and policy, and intended to be consistent and harmonious, and all of the several sections are to be considered in order to arrive at the meaning of any part, unless a contrary intent is clearly manifest."

If the contract in question were entered into during the year 1935, no tax could be collected thereon at the time of its execution, for the reason that there is no fixed amount of tangible personalty contracted for upon which to compute the tax. To say that deliveries made pursuant to such a contract do not constitute taxable sales when made or when paid for because the contract constituted the sale within the meaning of the term as used in the act, would be adopting a construction of the definitive language of section 1 thereof which would, I believe, be clearly contrary to the legislative intent and result in avoidance of the provisions of the act. To illustrate, such a contract could now be entered into specifying as to amount "your requirements for the balance of the year." No tax could be collected upon the contract as a sale as above indicated, and no tax could be collected on deliveries made this year pursuant thereto.

It is my opinion that a contract whereby a seller agrees to sell to a buyer tangible personal property, designating the amount of property contracted to be sold as "your requirements" for a specified period without otherwise fixing any amount of goods contracted for, does not constitute a taxable sale under the provisions of the Sales

Tax Act, but deliveries made pursuant to such contract constitute taxable sales when made or when paid for as provided in section 3 thereof.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3962.

COUNTY COMMISSIONERS—NOT REQUIRED TO ADVERTISE FOR BIDS
BEFORE LETTING CONTRACTS FOR PURCHASE OF EQUIPMENT FOR
COUNTY OFFICES AND JAIL.

SYLLABUS:

There is no requirement that county commissioners shall advertise for bids before letting contracts for the purchase of any equipment, authorized by the statute, for offices of the county officers and the county jail.

COLUMBUS, OHIO, February 23, 1935.

HON. PAUL D. MICHEL, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I have your letter of recent date, which reads as follows:

“Will you kindly give me your opinion on the following matters:

1. Have the County Commissioners the right to purchase a refrigerator for the County Jail, the estimated cost of which is \$300.00 without first advertising for bids on the same?
2. Have the County Commissioners the right to purchase office supplies, fixtures, equipment, etc., costing more than \$500.00 without first advertising for bids on the same?

Relative to these questions I have been unable to find any statute on the subject other than sections 2353 and 2354 of the General Code of Ohio relative to the cost of public buildings, bridges and bridge substructures which I do not believe applies in this case.

I have found in Volume 63, Laws of Ohio, of the year 1866, Page 32 the following:

‘Section 2: That the County Commissioners of any county shall not make, suffer or cause to be made any purchase or contract for any outlay of money for or on behalf of their county, the estimated value or expense of which shall exceed \$500.00 without first causing 20 days notice to be given in one or more newspapers of general circulation in the county that proposals will be received for the performance of any job or work or for the furnishing of any goods, wares, merchandise or material for said county * * *.’

Is this statute or any part of it still the law in Ohio?”

The statute which you quote in your letter, namely, section 2 of an act passed by the legislature on March 9, 1866 (63 Ohio Laws, 32, entitled “An act relating to the duties of county commissioners, and amending section two (2) of an act passed April 8, 1856,” (S. & C., page 250) was expressly repealed by section 7437 of the Revised Statutes of 1880, passed by the 63rd General Assembly, on June 20, 1879, and effec-