

SALES TAX:
PAPER UTENSILS:

The retailer of food and drink, which is sold upon the premises where served, should pay the sales tax upon any paper items in which such food and drink is served.



December 21, 1955

Honorable M. E. Morris
Director, Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"We request an official opinion to clarify our Rule No. 34, relating to the Missouri Sales Tax Act.

"The question is whether or not paper cups, paper plates, paper containers and paper souffle cups used to serve or deliver food or beverage are taxable or exempt.

"A conference was recently held with the attorneys for the Lily-Tulip Cup Corporation, participated in by this office and Assistant Attorney General Hugh P. Williamson. This question was discussed at length but no conclusion was reached."

On April 13, 1945, Tyre Burton, Legal Adviser to the Sales Tax Department, wrote an opinion construing Rule 34. A copy of this opinion is attached, is marked "Exhibit A", and is made a part of this opinion. It will be noted that the Burton opinion holds that restaurants, cafes, and any retail place selling food and drink to the public, which serves food and drink in paper plates, paper cups, and similar items, for consumption by the public at the place where sold, is liable to pay a sales tax to the manufacturer or wholesaler from whom such paper items were purchased.

The Lily-Tulip Cup Corporation, which has a large plant in Springfield, Missouri, objects to the imposition of a sales tax

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on these items, and takes the position that the purveyor of food and drink should not be liable to pay a sales tax on these items, but that such tax should be paid by the person to whom the food and drink is served in and on the paper items enumerated above. The theory of the Lily-Tulip Cup Corporation on this point is that the paper items are sold to the purchaser of the food and drink at the same time and in the same manner that the food and drink is sold.

We have carefully reviewed the Burton opinion and remain of the belief that it is a correct interpretation and application of Rule 34 of the Department of Revenue, relating to the Missouri Sales Tax Act. We, therefore, reassert this opinion, and hold it to be controlling in the instant situation. In doing so, we have taken note of the rulings of other states upon this matter. We would observe that such rulings, even if upon identical statutes and rules, are not binding or controlling in the State of Missouri, but that in the majority of instances cited, such rules and regulations either do not have similar wording or are not in point upon the particular matter before us here.

In conclusion we would point out that in the interpretation of such rules as No. 34, the administrative agency may put upon it such construction as it believes to lie in the rule, unless such construction is clearly unreasonable or is in conflict with statutes governing the subject matter.

In the case of Kroger Grocery and Baking Company v. Glander, 77 N.E. 2d. 921, at l.c. 924, the court stated:

"This rule, like those of other administrative agencies, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter. State ex rel. Kildow v. Industrial Commission, 128 Ohio St. 573, 580. 192 N.E. 873; Zangerle, Aud. v. Evatt, Tax Com'r, 139 Ohio St. 563, 572 et seq., 41 N.E. 2d 369; Helvering, Com'r, v. Winnill, 305 U.S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52; Standard Oil Co. of California v. Johnson, Treas., 316 U.S. 481, 484, 62 S. Ct. 1168, 86 L. Ed. 1611; Helvering, Com'r. v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 59 S. Ct. 423, 83 L. Ed. 536; Neil House Hotel Co. v. City of Columbus, 144 Ohio St. 248, 252, 58 N.E. 2d. 665. And unless the rule is unreasonable or contrary to law, the Tax Commissioner must

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apply it as formulated, until it is amended
or repealed in the manner provided in Section
1464-4. General Code."

CONCLUSION

It is the opinion of this department that the retailer of
food and drink, which is consumed upon the premises where served,
should pay the sales tax upon any paper items in which such food
and drink is served.

The foregoing opinion, which I hereby approve, was prepared
by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

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Enclosure (1)
Copy of opinion to:
Tyre Burton, 4/13/45.