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MUNICIPAL CORPORATIONS)
AND TAXATION) : State not subject to Ordinance No. 44678 of the City of St. Louis (Earnings tax).

FILED
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October 29, 1948

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date which reads as follows:

> "Ordinance No. 44678 of the City of St. Louis effective September 1, 1948 imposes an earnings tax on salaries and other incomes in the city.
>
> In as much as there are many state employees working in St. Louis, will the state be required to withhold the earnings tax imposed by this ordinance from salaries paid state employees? We should like to have your opinion.
>
> A copy of this ordinance is enclosed for your study."

House Bill No. 475, passed by the 64th General Assembly, authorized the City of St. Louis to levy and collect an earnings tax. Section 1 of said bill reads as follows:

> "Section 1. Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of 700,000 inhabitants, according to the last Federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on salaries, wages, commissions and other compensation earned by its residents; on salaries, wages, commissions and other compensation earned by non-residents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses

or other activities conducted in the city by non-residents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city."

Pursuant to the authority granted it by H. B. 475, the City of St. Louis enacted Ordinance No. 44678. Section 2 of said ordinance provides as follows:

"Section Two. A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1948, by resident individuals of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1948, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1948, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1948, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1948, by all corporations as a result of workdone or services performed or rendered, and business or other activities conducted in the City."

Since the question submitted by you involves the salaries earned by employees of the State of Missouri in St. Louis, we are only concerned with subdivisions (a) and (b) of the foregoing section. It will be seen that the ordinance levies a tax on the salaries, wages, commissions and other compensation earned by residents of the City of St. Louis or paid to non-residents of the city for work done or services performed in the city. The tax is a tax on the earnings, and it is not

a tax against the employer. Section 5 of said ordinance requires the individual earning a salary as above mentioned to file a return with the collector of said city setting forth his salary during the preceding calendar year. Said section reads in part as follows:

> "Section Five. Except as hereafter provided each individual, association, business, corporation, fiduciary, or other entity, whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 30th of each year, unless an extension is granted by the Collector, make and file with the Collector a return, on a form obtainable from the Collector, setting forth the aggregate amount of salaries, wages, commissions, compensation or net profits earned by such taxpayer during the preceding calendar year and subject to the said tax, together with such other pertinent information as the collector may require: * * * Provided, however, that where any portion of the tax so due shall have been deducted at the source and shall have been paid to the Collector by the employer making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due, and only the balance, if any, shall be due and payable at the time of the filing of said return:
>
> Provided, further, that no return shall be required of any taxpayer who has received only wages, salaries, commissions or other compensation and from which the tax has been withheld at the source, as hereinafter provided. The failure of any employer or any taxpayer to receive or procure a return form shall not excuse such employer or taxpayer from making a return or paying the tax due."

It will be seen by Section 5 that even if the tax due by an individual is not withheld by his employer, the individual is obligated to pay the tax nonetheless.

Section 6 of said ordinance provides in part as follows:

> "Section Six. Every employer within the City who employs one or more persons on a salary, wage, commission, or other compensation basis, shall deduct at the time of the payment thereof, the tax of one-half of one per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and subject to tax, and shall quarterly make his return and pay to the said Collector, on the 30th day of April, July, October and January of each year, the amount of taxes so deducted for the three calendar months next preceding the month in which the return is required to be filed:"

It will be seen by Section 6 that "every employer within the city" is required to withhold the tax from the salaries of persons subject to said tax. Section 1 of said ordinance defines "employer" as follows:

> "'Employer'--An individual, association, corporation (including a corporation not for profit), governmental administration, agency, arm, authority, board, body branch, bureau, department, division, subdivision, section or unit, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis, whether or not such employer is engaged in business as hereinbefore defined."

It will be noted that the state is not included under the definition of employer. Even though employees of the state are assigned to work within the City of St. Louis, they are nevertheless employees of the State of Missouri. They receive their pay from the State of Missouri. They are not employees of a department or governmental administration, but they are employees of the state. We do not think that it can be said that the State of Missouri is an employer within the City of St. Louis, and hence, we do not believe the ordinance in question intended to attempt requiring the State of Missouri to withhold the taxes due under said ordinance.

Another portion of the ordinance which we think shows that the city did not intend to include the State of Missouri is Section 7 of said ordinance which reads as follows:

> "Section Seven. Every employer collecting and remitting the tax herein provided for on any resident or non-resident employee shall be entitled to deduct and retain three per centum of the total amount so collected as compensation to the employer for collecting and remitting the tax."

We do not think the city was undertaking to provide compensation for the State of Missouri. Moreover, Section 12 of said ordinance provides for penalties for its violation as follows:

> "Section Twelve. Any person or taxpayer who shall fail, neglect or refuse to make any return required by this ordinance, or any employer who shall fail, neglect or refuse to withhold or pay over to the City any amount of tax subject to withholding hereunder, or any person or taxpayer who shall refuse to permit the Collector, or his duly authorized deputy or agent, to examine his books, records or papers, or who shall knowingly make an incomplete, false or fraudulent return, or who shall attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment for not more than six (6) months, or by both such fine and imprisonment."

It will be noticed that any person who fails or refuses to make any return required by the ordinance is subject to a penalty. Section 6 of the ordinance, supra, requires every employer to make a return quarterly of the taxes withheld. As pointed out above, the State of Missouri is the employer of the employees mentioned in your letter. We do not believe the city had in mind that it could prosecute the State of Missouri for failure to file a return. Likewise, Section 12 provides that

an employer who fails to withhold the tax is subject to a penalty. We do not believe the city had in mind that it could penalize the State of Missouri for not paying the tax. The state officials who would refuse to make a return or to withhold the tax could not be prosecuted under this ordinance for the reason that they are not the employers and, hence, are not required to make a return or to withhold the tax.

We are of the opinion, therefore, that the ordinance itself shows that the city did not have in mind trying to require the State of Missouri to comply with the provisions of this ordinance. It is, therefore, not necessary to go into the question as to whether or not the city could require the state to comply with the ordinance.

Conclusion

It is, therefore, the opinion of this office that the State of Missouri is not required to withhold from the earnings of its employees who reside or work in the City of St. Louis the tax imposed by Ordinance No. 44678 of the City of St. Louis nor to make any of the returns required by said ordinance.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

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J. E. TAYLOR,
Attorney General.

HHK/vlv