

N.D.A.G. Letter to Lee (Jan. 31, 1992)

January 31, 1992

Mr. Robert N. Lee
Cavalier City Attorney
P.O. Box B
Cavalier, ND 58220

Dear Mr. Lee:

Thank you for your December 23, 1991, letter regarding the city lodging tax and the city lodging and restaurant tax which may be imposed by a city pursuant to N.D.C.C. ch. 40-57.3. The statutes indicate that these taxes may not exceed a certain percentage of gross receipts described in the statutes. You ask whether a city may impose a flat dollar amount on a monthly or yearly basis as long as the city does not set an amount that would exceed the percentage amounts stated in N.D.C.C. ch. 40-57.3. For example, you ask, may a city set the tax at \$5.00 per month.

The relevant parts of N.D.C.C. ch. 40-57.3 are as follows:

40-57.3-01. City lodging tax --Imposition -- Amount -- Disposition. The governing body of any city may, by ordinance, impose a city tax, not to exceed two percent, upon the gross receipts of retailers on the leasing or renting of hotel, motel, or tourist court accommodations within the city for periods of less than thirty consecutive calendar days or one month. . . .

40-57.3-01.1. City lodging and restaurant tax -- Imposition -- Amount -- Disposition --Referral. In addition to the tax under section 40-57.3-01, the governing body of any city may, by ordinance, impose a city tax, at a rate not to exceed one percent, upon the gross receipts of retailers on the leasing or renting of hotel, motel, or tourist court accommodations within the city for periods of less than thirty consecutive calendar days or one month and upon the gross receipts of a restaurant from any sales of prepared food or beverages, not including alcoholic beverages for consumption off the premises where purchased, which are subject to state sales taxes. . . .

N.D.C.C. §§ 40-57.3-01, 40-57.3-01.1.

Exercise only those powers specifically them by the Legislature. N.D. Const. art. § 1. A city is an agency of the state and has only the powers expressly conferred upon it by the legislative branch or those powers which may be necessarily implied from the powers expressly granted. Further, when defining a city's powers, the rule of strict construction applies. Any doubt as to the existence or extent of the powers must be resolved against

the city. N.D. Const. art. VII, § 1; *Roeders v. City of Washburn*, 298 N.W.2d 779, 782 (N.D. 1980). They must exercise their powers and duties within the limits set by the Legislature.

In this case, the Legislature has provided that a city may impose a city lodging tax "not to exceed two percent, upon . . . [certain] gross receipts." N.D.C.C. § 40-57.3-01. A city may also impose a separate city lodging and restaurant tax "at a rate not to exceed one percent, upon . . . [certain] gross receipts." N.D.C.C. § 40-57.3-01.1.

The language in N.D.C.C. § 40-57.3-01.1, that a city lodging and restaurant tax must be imposed "at a rate" not to exceed one percent, clearly indicates that this tax must be imposed on a percentage basis as opposed to a flat fee basis.

The phrase, "at a rate," however, is not present in N.D.C.C. § 40-57.3-01, regarding a city lodging tax. This statute simply states that a city may impose such a tax "not to exceed two percent, upon . . . [certain] gross receipts." N.D.C.C. § 40-57.3-01. This would appear to indicate that the Legislature intended that the city lodging tax could be imposed on some basis other than a percentage basis. Upon further analysis, however, the conclusion that the city lodging tax must also be imposed on a percentage basis must be reached.

A city may impose a city lodging tax "upon . . . [certain] gross receipts."

N.D.C.C. § 40-57.3-01 (emphasis supplied). "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears" N.D.C.C. § 1-02-02. Upon means "[o]n." *The American Heritage Dictionary* 1328 (2nd col. ed. 1982). On is "[u]sed to indicate . . . [t]he object of an action directed, tending, or moving against it." *The American Heritage Dictionary* 867 (2nd col. ed. 1982). In this case, the tax is directed against certain gross receipts. Thus, the tax must be assessed with respect to such gross receipts. Assessing a tax by imposing a flat dollar amount does not constitute a tax against or with respect to the gross receipts. On the contrary, imposing a flat dollar amount constitutes a tax without regard for the amount of gross receipts. Thus, it is necessary to conclude that the city lodging tax which may be imposed pursuant to N.D.C.C. § 40-57.3-01 must also be imposed on a percentage basis.

In conclusion, the Legislature has determined that if a city adopts either or both of these taxes, the tax must be imposed upon certain gross receipts on a percentage basis.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

pg