

OPINION
65-426

November 5, 1965 (OPINION)

Mr. Jack D. Paul

Executive Secretary

North Dakota Trade Commission

RE: Trade Commission - Powers - License

This is in reply to your letter dated October 28, 1965, wherein you requested an opinion from this office regarding the North Dakota Trade Commission created pursuant to House Bill No. 800, chapter 330 of the North Dakota Century Code, as amended). Your questions read as follows:

First, this office requests an opinion regarding the commission's power to promulgate and adopt rules and regulations of procedure in administering the provisions of the Unfair Practices Law, chapter 51-10, North Dakota Century Code, and/or if a publication and filing are actually necessary.

Second, we request an opinion relative to the words used on the Retail Sales Tax Permit, to wit: 'is hereby licensed to engage in business as a retailer in the State of North Dakota,' and our licensing program. Many inquiries have accused this office of double licensing. I realize that two different laws involving different purposes are involved.

Third, section 15-10-01 defines sales at retail and the same section defines retailer. We request you to include in your opinion the status as a retailer the following businesses and like businesses:

1. Municipal Governments.
2. Door to door salesmen of such items as books, cosmetics, etc. and if each person is required to be licensed or just the general agent
3. Vending machine operators. Does each machine have to be licensed or just the business
4. Church bazaars, rummage sales, etc.
5. Farmers Union Elevators and Farmers Union Oil Stations whose parent company is apparently in St. Paul
6. Installation contractors
7. Auctioneers

8. Livestock auction houses
9. Hospitals, Nursing Homes and Medical Clinics
0. Restaurants
1. Optometrists; who provide lenses and eyeglass frames for patients and who professional fee is reflected in the cost of these prescriptions.
2. General contractors - road and building
3. Sub-contractors

Fourth, in establishing this office, we sent applications to all people, firms and corporations, domestic and foreign, holding a Retail Sales Tax Permit. Our specific question is this: Who, if any, of these holders of Tax Permits would not come under this law and especially those whose domicile is outside the State and do not maintain offices here, only agents?"

Your first question deals with the power of the North Dakota Trade Commission to promulgate necessary rules and regulations to aid in administering chapter 51-10.

Section 28-32-01, subsection 1 of the North Dakota Century Code provides: "* * * 'Administrative agency' or 'the agency' shall include any officer, board, commission, bureau, department, or tribunal other than a court, having state-wide jurisdiction and authority to make any order, finding, determination, award, or assessment which has the force and effect of law and which by statute is subject to review in the courts of this state; * * *."

Chapter 51-10 of the North Dakota Century Code creates the North Dakota Trade Commission and provides for the appointment of its members by the Governor. This chapter gives the North Dakota Trade Commission state-wide jurisdiction as well as the authority to make orders and findings, etc., which have the force and effect of law. It subjects such findings, etc., to review by the courts of this State. It is our opinion, therefore, that the North Dakota Trade Commission is an administrative agency within the meaning of section 28-32-01, subsection 1, of the North Dakota Century Code.

Section 28-32-02 of the North Dakota Century Code gives every administrative agency in the State the authority to promulgate, amend and repeal, reasonable rules and regulations in regard to statutes administered by such agency. It is our further opinion that the North Dakota Trade Commission has the authority to promulgate reasonable rules and regulations relevant to chapter 51-10 of the North Dakota Century Code, and that upon submitting same for approval pursuant to section 28-32-02 and filing same pursuant to section 28-32-03, they would be entitled to full force and effect of law.

In regard to your second question, you state that the Retail Sales Tax permit contains language to the effect that the licensee "is

hereby licensed to engage in business as a retailer in the state of North Dakota." You state further that many people have inquired as to whether this is "double licensing" and hence illegal.

Although the sales tax lapsed as of July 1, 1965, the provisions of chapter 57-39 of the North Dakota Century Code as they apply to the use tax are still in effect. The permits or licenses issued pursuant to the provisions of that chapter are for the purpose of aiding in the collection of the use tax - not for the purpose of regulating the business of the licensee. The licenses issued pursuant to chapter 51-10 of the North Dakota Century Code, on the other hand, are for the express purpose of regulating, curbing and preventing unfair trade practices. The two licenses mentioned above are not based on the same transaction, nor are they used for the same purpose. They are issued pursuant to separate and independent statutes and are used for separate and independent purposes.

For this reason it is our opinion that the issuance by this State of two different licenses "to engage in the business of retail sales" is not double taxation and is not contrary to law.

Your third question lists thirteen (13) categories or organizations, occupations and businesses and you ask which of these are covered by the provisions of chapter 51-10 of the North Dakota Century Code. You further ask in regard to your third question whether foreign corporations who only have soliciting salesmen in this State are required to be licensed.

Section 51-10-01, subsection 3, of the North Dakota Century Code provides: "* * * 'Sell at retail.' 'sales at retail,' and 'retail sale' shall mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing, except that sales to contractors or subcontractors engaged in any type of building operation or the repair of buildings or other improvements upon real estate shall be deemed sales for consumption and not for further processing or manufacturing. The terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price; * * *." (Emphasis supplied.)

Section 51-10-10, subsection 5, of the North Dakota Century Code provides: " * * 'Retailers' shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at retail within this state. In the case of a person, partnership, corporation, or association engaged in the business of making sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business; * * *." (Emphasis supplied.)

Section 51-10-14 of the North Dakota Century Code, as amended, provides as follows:

51-10-14. RETAILER'S LICENSE - PENALTY. The state trade commission shall require and provide for the annual registration and licensing of every retailer now or hereafter

doing business within this state which license shall not be transferable. Upon the payment of an annual fee of two dollars and fifty cents, the state trade commission shall issue an annual license to such persons as may be qualified by law to engage in the business of making sales at retail. * * *."

MUNICIPAL GOVERNMENTS. The only word found in chapter 51-10 which might reasonably be construed to make the chapter applicable to municipal governments is the use of the word "corporations." It is an accepted rule of statutory construction that words found in statutes are to be understood in their ordinary sense unless a contrary intention plainly appears. The ordinary meaning of the word "corporation" in a statute is "private corporation", particularly where municipal corporations are involved, as legislatures have generally shown a disposition to treat private corporations and municipal corporations as separate things. A good illustration of this is found in Section 144 of the North Dakota Constitution, which provides: "* * * The term 'corporation', as used in this article, shall not be understood as embracing municipalities or political divisions of the state unless otherwise expressly stated, but it shall be held and construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." The mere fact that a municipal corporation participates in some enterprise that could properly be called a sale at retail would not bring them within the purview of chapter 51-10. To be covered by this chapter an organization would have to be classified as a person, partnership, corporation, or association, as those words are ordinarily understood.

It is our opinion that a municipal government does not fit any of the above named classifications, and hence is not covered by the Act.

DOOR TO DOOR SALESMEN OF SUCH ITEMS AS BOOKS, COSMETICS, ETC. It seems clear that a door to door salesman is a person within the meaning of the Act and is covered if he is selling at retail. Unless special circumstances are shown, it is our opinion that his solicitations and sales would be "retail sales."

Whether the salesman himself or his superior would have to pay the license fee would depend upon the legal status of the salesman. If he were a mere "agent" or employee of the superior, then only the superior would be required to pay a license fee which would cover all of his "agents" and employees. The superior in such case would be responsible for the acts of such "agents" and employees. If, on the other hand, the salesman was an independent contractor he would be required to pay his own license fee and would be responsible personally for any violations of the Act. Who would be an "agent or employee and who would be an independent contractor would depend upon the facts of each individual case. To say that each door to door salesman must have a license regardless of his legal status would be the same as requiring that each store clerk must obtain a license. This was obviously not the intent of the Legislature.

VENDING MACHINE OPERATORS. It is our opinion that a vending machine

operator comes within the definition of the chapter and is hence covered by it. It would seem, however, that he need only obtain one license which would be applicable to all of his vending machines. The law does not require that the retailer's license be issued with reference to any particular location or place of business. All that is required is that the retailer obtain a license before he engages in business. It is also our opinion that one license would authorize him to do business anywhere in the State of North Dakota. The reference in section 54-10-14 to a license being non-transferable means only that it cannot be transferred from person to person, etc.

CHURCH BAZAARS, RUMMAGE SALES, ETC. Section 51-10-07, subsection 5, of the North Dakota Century Code, provides: "* * * The provisions of this chapter shall not apply to sales at retail or sales at wholesale, where:

5. Merchandise is sold for charitable purposes or to relief agencies: * * * ."

It would seem that section 51-10-07 would expressly exclude from coverage all bake sales, rummage sales, etc., sponsored by charitable organizations, unless it could be clearly demonstrated that said organizations did not intend to apply to proceeds to a charitable organizations, unless it could be clearly demonstrated that said organizations did not intend to apply to proceeds to a charitable purpose. This section would also exclude from coverage of the Act any sales made by organizations other than charitable associations or organizations if the purpose of the sale was to further a charitable purpose.

FARMERS UNION ELEVATORS AND FARMERS UNION OIL STATIONS WHOSE PARENT COMPANY IS APPARENTLY IN ST. PAUL. Presumably even though the parent company is located in St. Paul, Minnesota, the local stations and elevators are independently organized and operated. If this is the case, they would each have to have a license of their own if they make any sales at retail.

Although it is questionable whether most co-operatives could be deemed "corporations" it would seem that they are covered under the term "association." For purposes of chapter 10-15 dealing with co-operative associations, section 10-15-01, subsection 3, of the North Dakota Century Code defines "association" as follows: "3. 'Association' includes both co-operatives and foreign co-opeatives." Since co-operatives were not expressly excluded from the statutes, it is our opinion that they are covered by it.

INSTALLATION CONTRACTORS. It is not clear exactly what is meant by the term "installation contractor" but it would seem that if the "installation contractor" actually supplied a substantial part of the material he installed he would be covered by reason of the fact that he has sold goods at retail. The installation service in such case would be incidental and separate from the sale. The mere fact that a contractor or subcontractor works on a project would not classify him as a retailer unless it can be shown that he has done more than sell his services. (See the discussion of contractors and subcontractors below.)

AUCTIONEERS. An auctioneer does not hold title to the property he sells, consequently, a sale by an auctioneer would not be a retail sale within the meaning of section 51-10-01, subsection 3. To be a retail sale the title must pass from a seller to a buyer. Since the auctioneer is not a seller but an agent, he would not be required to be licensed as a retailer. Most auction sales would not be within the contemplation of the Act. Section 51-10-07 of the North Dakota Century Code provides as follows:

* * * The provisions of this chapter shall not apply to sales at retail or sales at wholesale, where:

1. Merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such;

* * *

4. Merchandise is sold upon the final liquidation of any business;

* * *."

The above subsections would cover most business auction sales. It would seem that nonbusiness auction sales would not be covered either, for they would ordinarily not be made in the ordinary course of anyone's trade or business.

LIVESTOCK AUCTION HOUSES. The primary limitation in attempting to license livestock auction houses is the fact that most of the cattle handled by them are on a consignment basis. This being the case, the auction house would never receive title to the livestock and could not be deemed a seller. Hence, they could not be deemed a "retailer" within the meaning of chapter 51-10.

Also, a business is not a "retailer" if it sells goods for resale or for further manufacturing. This would seem to be the case of most if not all livestock auction sales. Most livestock sales made by such concerns are made to meat processors or packers rather than to individual buyers. Even where a sale is made to a farmer or rancher to be used for breeding purposes the sale would probably be deemed one for resale or further manufacturing rather than consumption. It is our opinion, therefore that sales made by a livestock auction house in the ordinary course of trade would not be deemed "retail sales" and said concerns would not be required to obtain a retailer's license, unless it can be shown that a livestock auction house is actually making a sale of its own livestock for consumption or use.

HOSPITALS, NURSING HOMES AND MEDICAL CLINICS. It would seem that these institutions are selling service rather than tangible personal property. Even where drugs and medications are used by such institutions they are administered as part of the service. To be a "retail sale" the property sold must be tangible personal property. In many cases it may be a close question whether a service is being sold or whether tangible personal property is being sold. The test would seem to be whether the service is incidental to the product sold or whether the product is incidental to the service. If the former is true, then the transaction would be deemed a "retail sale",

but if the latter is true, then it would not. The only retail sales that would normally be made by the above mentioned institutions would be those from an institutional pharmacy to people other than out-patients or in-patients. Such sales would not be part of the institutional service and a retail license could be required as to them.

RESTAURANTS. It is our opinion that a restaurant is selling at retail and is a retailer within the meaning chapter 51-10 of the North Dakota Century Code. They, therefore, can be required to obtain a retailer's license.

OPTOMETRISTS - WHO PROVIDE LENSES AND EYEGLASS FRAMES FOR PATIENTS - AND WHOSE PROFESSIONAL FEE IS REFLECTED IN THE COST OF THESE PRESCRIPTIONS.

The primary thing sold by an optometrist is his service. He is engaged in the treatment and diagnosis of refractive defects of the human eye. Glasses sold or vended by an optometrist are incidental to his examination and diagnosis. Sales of same by an optometrist would not be a "retail sale" unless the service was incidental to the sale. An optometrist must be distinguished from an optician. The former is primarily concerned with the diagnosis and non-medical treatment of eye ailments whereas the latter is primarily concerned with selling glasses to people who have already obtained a prescription from an optometrist or an oculist, etc.

GENERAL CONTRACTORS - ROAD AND BUILDING. What has been said above with reference to installation contractors also applies here. A contractor would not be deemed a retailer unless he also supplied a substantial part of the materials for a project and sold them to the person for whom the construction was done. Once again, whether a sale was made at retail would depend upon whether or not the contractor was selling his services rather than the goods. If an individual is hired to perform a service of improving real estate and incidentally to such service supplies some of the raw materials to complete same, he would not be deemed a "retailer." If, on the other hand, he holds himself out as a supplier and agrees to install his products as a part of the sale price of the item, he would be "selling at retail" and the installation work would be deemed a mere ancillary contract of employment.

SUB-CONTRACTORS. The question has already been answered by the discussion above.

You asked whether or not a foreign corporation which only has soliciting salesmen in this state are required to be licensed. Without being presented with the facts of a particular case, we would hesitate to make any broad statement as to whether or not chapter 51-10 could constitutionally be applied to all such foreign corporations. Section 51-10-01, subsection 5 thereof in defining retailers limits the definition to persons, etc., "engaged in the business of making sales at retail within this state." Section 51-10-14 in providing for the retailer's license requires only that "a retailer now or hereafter doing business within this state" shall be licensed. Chapter 51-10 would on its face, therefore, seem to be applicable to foreign corporations which have only soliciting agents

within this State if such agents are authorized to make binding sales within the State of North Dakota.

If, on the other hand, the agent is only engaged in soliciting and not actual selling it would seem that the chapter would not be applicable. In such case the sale would be made without rather than within the State.

It has been generally held that even though a state regulation made pursuant to the police power affects interstate commerce, it is not invalid unless it is discriminatory or places an "undue burden" on such commerce. Recent cases in the United States Supreme Court have broadened considerably the states' powers to regulate corporations doing business in interstate commerce. The old "drummer cases" which prevented states from requiring that drummers secure local licenses have been, to a large extent, limited to facts where an actual discrimination or undue burden is shown.

Your fourth question asks who among the current sale and use tax permit holders would be exempt from the provisions of chapter 51-10. The guidelines and discussions set out above should enable you to determine which of the permit holders are covered by the Act. Making an initial determination of the individuals covered by this chapter is an administrative function and should be determined by the Trade Commission.

ATTORNEY GENERAL

Helgi Johanneson