

OPINION
66-221

April 1, 1966 (OPINION)

Mr. Lloyd Omdahl

Tax Commissioner

RE: Oleomargarine - Revenue Stamps - Redemption

This is in reply to your letter of March 29, 1966, in which you inquire about the correct procedure for the redemption or repayment of oleomargarine revenue stamps returned by manufacturers or distributors after they have been taken from oleomargarine packages that have been determined unfit for any reason for sale to consumers, or that have been returned by dealers to manufacturers, jobbers, or distributors for any other reason, pursuant to the provisions of section 19-05-10 of the North Dakota Century Code.

The pertinent provision of section 19-05-10 is quoted in part as follows:

19-05-10. TAX COMMISSIONER TO REDEEM STAMPS - * * * The State Tax Commissioner, upon request, shall redeem and make repayment of unused stamps. * * *

In your letter you point out that the actual redemption by repayment may be prohibited by the fact that section 186 of the Constitution does not provide for a continuing appropriation for such repayment, and that the 1943 Code Reviser's Notes indicate legislative intent to the effect that the State Treasurer's appropriation should contain an item for such refunds, since at that time, the State Treasurer administered the tax. It is our understanding that the repayment for these unused stamps with state funds is not contemplated and therefore we are not concerned with this aspect of the matter in this opinion.

Since it is apparent that sections 19-05-08, 19-05-09 and 19-05-10 contemplate that the manufacturer or distributor receive some sort of a redemption for these returned stamps, you ask the following questions relative to the procedure to be used in executing the intent of the statutes involved:

Under the above circumstances, we respectfully request your opinion as to which of the following procedures should be followed to provide redemption or repayment within the intent of the statute:

1. The issuance by the Tax Commissioner of a 'Receipt for Stamps Returned and to be Replaced' or some other similarly entitled writing and the subsequent acceptance of this Receipt by the Tax Commissioner at a later date when the wholesaler returns it with his request that the stamps then be replaced by delivery of them to him; or

2. The actual stamp for stamp replacement of the stamps returned and a subsequent adjustment in the inventory of stamps maintained by this Department.

"Should either of the preceding procedures not satisfy the intent of the statute in your estimation, your opinion as to the correct procedure is requested."

It is necessary to examine the statutes to determine when (that is, upon the occurrence of what incident) the tax arises or attaches as a tax. As to this, it is noted that the oleomargarine tax is collected on "all oleomargarine sold to consumers in this state," section 19-05-08, N.D.C.C., and that the tax is collected by the sale of stamps to wholesalers or jobbers (including manufacturers) who must attach them to the packages of oleomargarine before selling them. It is clear that the tax is imposed on the sale to the consumer; consequently, there is not a tax and there cannot be a tax on or with respect to any package of oleomargarine until the incident out of which the tax arises occurs. In other words, since, in legal contemplation, there is no tax until the package of oleomargarine is sold to a consumer, the purchase of the stamps by a wholesaler is in reality a payment in advance of an amount that it is expected will become a tax when and if there is a sale to a consumer. The money received in prepayment of the tax on this anticipated basis is held in trust by the state until the actual sale to the consumer is made.

When a wholesaler, for example, purchases the stamps, it is clear that the stamps themselves are not money or revenue in any sense because they are not remitted to the state by the wholesaler as payment of a tax; on the contrary, they are received by the wholesaler from the state and since the wholesaler's possession of them is at least some evidence of the amount paid, such stamps would seem to be analogous to a receipt issued by the state for the money remitted by the wholesaler in prepayment of the tax.

If the stamps are returned to the Tax Commissioner by the wholesaler for replacement for any reason such as damage to them before attachment to the oleomargarine packages, removal of them from packages of oleomargarine that are unsalable to consumers because of spoilage or damage, or return of packages of oleomargarine by dealers in this state to wholesalers or jobbers outside of this state, then I believe that neither the replacement of them by the Tax Commissioner immediately upon his receiving them or replacement of them by him at a later date when requested by the wholesaler would violate any statutory or constitutional provisions.

The reason for this conclusion is that this procedure does not involve making a refund of money that is in the state treasury or a diverting of such money to any other purpose in such a way that there is any paying out of state funds such as would be within the provisions of the first sentence of section 19-05-10 and therefore might be subject to the requirements of section 186 of the Constitution requiring an appropriation to have first been made by the legislature. As to the money that has been paid by the wholesaler to the Tax Commissioner and transferred by the Tax Commissioner to the state treasury for such stamps, the replacement

of those stamps by other stamps does not result in the diverting of that money in the state treasury to the payment of the tax on a different and separate or distinct sale of oleomargarine because, as already explained, the payment for the stamps in the first instance is in fact the prepayment of an anticipated liability for a tax that will not attach as such until there has been a sale of the oleomargarine to a consumer; since, as to the stamps that have been returned to the Tax Commissioner for replacement, there has not at the time of replacement or prior thereto been any sale of oleomargarine to a consumer with respect to which a tax under this oleomargarine tax law has attached, the replacement of those stamps therefore cannot be regarded as diverting the money in the state treasury that was received in payment for them to the payment of the tax on other sales of oleomargarine.

It is therefore my opinion that you may replace such returned stamps either immediately upon receipt of them by you or at such time as the wholesaler may specifically request and that this procedure will not violate any statutory or constitutional provision. It is assumed, of course, that a proper accounting for the replaced stamps will be made and that the returned stamps will not be disposed of except in the manner provided by Section 19-05-08.

HELGI JOHANNESON

Attorney General