OPINION
66-308

August 22, 1966 (OPINION)

Honorable R. Fay Brown

State Representative

Bismarck, North Dakota

RE: Taxation - Sales Tax - Required Records

This is in response to your letter in which you make reference to Title 57 of the North Dakota Century Code.

In paragraph no. 1 of your letter you specifically call our attention to section 57-39-08, SALES TAX RECORDS REQUIRED, and section 57-40-08, USE TAX RECORDS REQUIRED. You also observe that prior to the 1963 Legislative Session taxpayers were required to keep records for only a two-year period. Effective July 1, 1963, the requirement was changed to six years. You then ask the following questions:

) Can the Tax Commissioner require production of records from a North Dakota taxpayer on a sales and use tax audit for any period earlier than June 30, 1961?

) Can a taxpayer be required to 'prove' through documentary evidence and records, deductions claimed on sales and use tax returns for periods prior to June 30, 1961; when the statute allowed the destruction of such records?"

In paragraph no. 2 of your letter you also refer to section 57-39-01, section 57-39-02 and section 57-39-04, and applicable use tax provisions and you then ask the following questions:

) Is the re-sale of property repossessed after default in the terms and conditions of a conditional sale contract, subject to sales tax, provided the re-sale thereof does not result in a greater net realization to the merchant?"

) If such re-sale is taxable, and the merchant charged with responsibility for its collection, should the unpaid balance on the initial conditional sale contract be treated by the Tax Commissioner as a 'worthless account' under section 57-39-04; and credit given for taxes paid thereon?"

In paragraph no. 3 of your letter you refer to section 57-39-16 and then ask the following question:

"May the Tax Commissioner assess penalties when a taxpayer files returns in good faith, claiming certain transactions as exempt, and a later determination is made that such transactions are not exempt from taxation, when no disallowance of such claimed exempt transactions is made by the Tax Commissioner for a period of years following the filing of such

returns?"

As to the questions in paragraph no. 1 of your letter it is observed that prior to the amendment to section 57-39-08 the retailer was required to keep and preserve sales tax records for a period of two years only. In 1963 by Chapter 400 this section was amended, requiring the preservation of said records for a period of six years. The 1963 amendment could not undo what was permitted under the provisions of section 57-39-08 prior to the amendment. Consequently, the six-year provision would apply only from July 1, 1963, plus two years preceding that date. The provisions relating to the keeping and preserving of sales tax records, in effect, placed a limitation on the collection of the sales tax. The authorization to destroy records or the affirmative provision to preserve the records only for a certain number of years compels a conclusion that the Legislature, in effect, intended the same period to constitute a statutory limitation.

The combined result of the earlier provisions of section 57-39-08 and the 1963 amendment thereto would be that a retailer would have to maintain sales tax records for a period of six years beginning from July 1, 1961. As time progresses, the six year limitation would correspondingly move up.

With reference to the use tax, section 57-40-08 prior to the 1963 amendment (Chapter 400) merely provided that the retailer shall keep records. This language standing alone could be construed to mean that the records would have to be maintained indefinitely or until the normal operations of the statute of limitations would apply. However, because of the provisions of section 57-40-16 which adopts the administrative provisions of the sales tax, the limitation pertaining to the keeping of sales records in section 57-39-08 would apply. The 1963 amendment of section 57-40-08 (Chapter 400) specifically required that the use tax records be kept and preserved for a period of six years, however, because the records would only be required to be kept for a period of two years the six year period would not begin to run until July 1, 1961. Therefore, the conclusions reached on the sales tax as pertaining to the records to be kept, etc., would apply to the use tax.

In direct response to question (a) under paragraph no. 1 of your letter, it is our opinion that the Tax Commissioner is limited to the tax records on use tax and sales tax audits retroactive only to June 30, 1961. Also in direct response to question (b) under paragraph no. 1 of your letter, it is our opinion that the retailer is not required to produce any records pertaining to sales or use tax prior to June 30, 1961.

As to questions under paragraph no. 2, as is material here, section 57-39-01(6) in part provides as follows:

> "* * * Provided further, however, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall

> be accounted for, for the purpose of imposition of tax imposed by this chapter, as has actually been received in cash by the retailer during each quarterly period as defined herein. * * *."

Section 57-39-04 of the North Dakota Century Code provides as follows:

> "CREDIT FOR TAXES PAID ON WORTHLESS ACCOUNTS AND REPOSSESSION. 1. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are hereafter collected by the retailer, a tax shall be paid upon the amount so collected."

It is thus observed that on conditional sales contracts only the actual payments made on the conditional sales contract is considered a receipt for purposes of the sales tax account. This, in effect, means that the sales tax, even though computed on the entire purchase price, is not considered paid or collected until the payment is made. Under the provisions of section 57-39-04, adjustment is allowed where the tax was paid on accounts which are found to be worthless. To the extent of the taxes paid on a worthless account the same may be charged off or may be used as a subsequent credit. However, if the worthless account is collected at a later date, the tax on said account is collected and must be remitted.

The resale of repossessed property is subject to a sales tax. The resale becomes a separate transaction and the mere fact that a sales tax had been paid earlier does not exempt such property from the sales tax. However, if the tax was paid on the full purchase price on a conditional sales contract but only a portion of the purchase price was paid then only to the extend of the payment made would the tax be due. In such instance, adjustment can be made or the difference can be used for future payments.

Thus in direct response to question (a) under paragraph no. 2 of your letter, it is our opinion that the resale of property repossessed because of a default under the terms of the conditional sales contract would nevertheless be subject to the sales tax. Any tax collected or paid which should not have been so paid or collected can be adjusted, or used for future credit in remitting sales tax receipts to the Tax Commissioner.

In direct response to question (b) under paragraph no. 2 of your letter, any taxes collected or paid and remitted on a worthless account can be adjusted or used for future purposes. However, we wish to make a distinction between a worthless account and a default of a conditional sales contract as the two are not necessarily the same.

The conditional sales contract may be treated as a worthless account if a tax was collected and remitted on the full purchase price, whereas in fact only a portion of the purchase price was paid. Normally the term "worthless account" refers only to those transactions in which the tax was computed and entered on the account

as being due and owing.

As to the question in paragraph no. 3 of your letter, the Tax Commissioner is authorized to assess penalties against retailers who fail to file returns or to remit the payments. However, if the delay of remittances is excusable, the penalty in all probability would not apply. Any penalty assessed by the Tax Commissioner, however, must be enforced through the courts, unless the retailer voluntarily pays such penalty. The courts would take into account extenuating circumstances and good faith on the part of the retailer in determining whether or not the penalty should apply. It is very unlikely that a court would affirm a penalty or award a judgment thereon if the retailer acted in good faith in all matters pertaining to the collection and remittance of taxes.

HELGI JOHANNESON

Attorney General