

**OPINION
66-316**

November 1, 1966 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Use Tax - Refunds

This is in response to your request for an opinion on the question of refunds as a result of the Marthaller case, which held that the use tax on motor vehicles for out of state purchases was at the rate of 2 percent instead of 2 1/4 percent on the purchase price after allowing a deduction for the trade-in.

The memorandum opinion is dated October 4, 1966, and is entitled Marthaller v. State of North Dakota. Your specific question is:

In instances where a license or certificate of title to a motor vehicle has been issued and the tax paid thereon, can the motor vehicle registrar legally refund any money or tax which was in excess of the amount allowable under the recent Marthaller case?" (Underscoring yours.)

You also ask some other questions which need to be answered only if the answer to the foregoing question is in the affirmative.

Prior to this time the use tax collected on motor vehicles purchased outside the state was at the rate of 2 1/4 percent without allowing any deduction on the purchase price for any trade-in. At the same time the tax on motor vehicles purchased inside the state was at the rate of 2 percent on the purchase price after allowing a deduction for the trade-in. The Marthaller case pertains only to motor vehicles purchased outside the state.

The distribution of the taxes collected upon which the refund question is raised is governed by section 57-40.1-07, as amended by chapter 438 of the 1965 Session Laws, and provides as follows:

57-40.1-07. DISTRIBUTION AND USE OF REVENUE. Fifty percent of the moneys accruing by virtue of section 57-40.1-02, promptly upon collection, shall be remitted by the motor vehicle registrar to the state tax commissioner and by him shall be paid to the state treasurer to be transferred and credited to the general fund and fifty percent to the motor vehicle registration fund."

On the basis of the decision of the District Court, it appears that some persons were charged a greater tax than was permissible. The major variance is in the allowance for a deduction on the trade-in where the motor vehicle was purchased inside the state as compared to no allowance for deducting the trade-in where the motor vehicle was purchased outside the state. In addition to this, there was a variance of 1/4 percent on vehicles purchased inside the state as compared to vehicles purchased outside the state. The variance on

the trade-in allowance between purchases outside the state and purchases inside the state have existed for some time and said provisions would have been vulnerable upon attack at any time independent of the action by the 1965 Legislature and the subsequent referral of some of the tax laws.

While it appears that some persons are entitled to refunds, it is more difficult to determine from what funds or in what manner or under what circumstances the refunds can be made, if at all. It is noted that under the provisions of section 186 of the North Dakota Constitution, which is presently not involved in the proposed constitutional amendments, provides that:

"* * * All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the State Treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the Legislature; * * *."

No appropriation for refunds has been made by the Legislature of the tax money collected which is involved herein. The Legislature, however, has provided for the distribution of these funds under section 57-40.1-07. Under this section 50 percent of said taxes collected go to the motor vehicle registration fund and 50 percent go into the general fund. The 50 percent which goes to the motor vehicle fund is distributed to county highway funds and special municipal highway funds pursuant to the provisions of section 39-04-39.1 as created by chapter 438 of the 1965 Session Laws.

The 1965 Legislature in chapter 28 provided for and made an appropriation for miscellaneous refunds (subdivision 45) with line item "Grant - benefits and claims in the amount of \$30,000." and line item "Deficiency (to be made available immediately upon passage and approval, \$5,000.)." This appropriation is from the general fund and does not appear to be available for the refunds in question. If it were used, which is doubtful that it could be, it would deplete the general fund to the benefit of county and municipal highway funds on a 50 percent basis.

We are also concerned about the manner and under what circumstances a refund can be made. The North Dakota Supreme Court had a similar question under consideration and in *Oesterle v. Lavik*, 78 N.D. 888, 52 N.W. 2d., 297 the court said:

"We think consideration of the constitutional provisions and the statutes, set forth above, leads inevitably to the conclusion that all taxes collected, whether disputed and paid under protest, or not, when paid over to the state treasurer, become a part of the particular state fund to which they are allocated by statute and that refunds of taxes collected can only be made from funds specifically appropriated for that purpose. * * *." (Underscoring ours.)

No appropriation has been made for purposes of refunds from the use tax moneys collected. Refunds can only be made from moneys

appropriated for that purpose. In this instance there appears to be no appropriation for said purpose.

It is therefore our opinion that no refunds can be made on the taxes collected until such time and under such conditions and circumstances as the Legislature might provide and from such funds as the Legislature might make appropriation therefor.

Because of the results reached herein, it is unnecessary to answer the other questions submitted. Most likely if an appropriation is made for purpose of refunding excess taxes collected, the Legislature would also provide the manner and procedure to be followed, which would answer some of the other questions you have asked.

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