

OPINION
66-416

February 4, 1966 (OPINION)

Mr. Lloyd Omdahl

Tax Commissioner

RE: Taxation - Use Tax - Credits and Refunds

We have received your letter of February 2, 1966, in which you requested our opinion on two questions relating to credits or refunds for use taxes paid by retailers who made clerical errors or mistakes on use tax returns filed by them with your office.

Your questions are quoted below as they appear in your letter:

1. Can a refund or credit for use taxes be granted under the above circumstances pursuant to section 57-40-16 of the North Dakota Century Code, as amended?
2. If the answer to question No. 1 is yes, to what fund in the state treasury should any use tax refunds made after July 1, 1965, be charged?"

Section 57-40-16 of the North Dakota Century Code was amended by chapter 426 of the 1965 Session Laws by adding to it the words underlined in the following quotation of the section:

57-40-16. Provisions of sales tax law applicable. The provisions of chapter 57-39, pertaining to the administration of the retail sales, tax, including provisions for refund or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter."

The North Dakota retail sales tax as enacted in 1935 and all of the subsequent enactments or extensions of that law included provisions for both credit or refund of erroneously paid sales taxes. The provision for refund and credit that was added to section 57-40-16 by the 1965 amendment undoubtedly has reference to the following quoted section of the retail sales tax law:

57-39-22. CORRECTION OF ERRORS. If it shall appear that, as a result of a mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the commissioner."

The fact that the retail sales tax law has not been in force since July 1, 1965, does not invalidate or prevent reference to it by provisions of another law for the purposes of administering that law.

In this connection, see 82 C.J.S. section 301, p. 517, and 2 Sutherland Statutory Construction (3rd Ed.) section 5208, P. 549.

As section 57-40-16 of the North Dakota Century Code specifically incorporates by reference the credit and refund provisions of the retail sales tax law for purposes of administration of the use tax law and as there appears to be no conflict between the provisions of chapters 57-39 and 57-40 with respect to refunds or credits for taxes paid by error or mistake, it is our opinion that a credit or refund for use tax purposes may be approved by you under the above circumstances pursuant to section 57-40-16 of the North Dakota Century Code.

In regard to your second question, Section 186 of the Constitution of the State of North Dakota prescribes the method for disbursement of public funds. This section appropriates the necessary funds required for refunds made under the provisions of the "Retail Sales Tax Act." It would appear that the words "Retail Sales Tax Act" as used in Section 186 are general terms embracing the levy of a tax measured by a percentage of the purchase price of a commodity purchased at retail, that is, for final use or consumption.

As the term "Retail Sales Tax Act" refers to the nature of the tax rather than to any specific tax as such, it is our opinion that this term encompasses the imposition of the tax under chapter 57-39 as well as a tax that is in pari materia with the sales tax, such as the use tax imposed by chapter 57-40 of the North Dakota Century Code.

ATTORNEY GENERAL

Helgi Johanneson