

OPINION
67-304

April 3, 1967 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Sales Tax - Motion Picture Films

This is in response to your letter in which you state the following:

"The Motion Picture Association of America, Inc., through their counsel, Mr. Bruce Thompson of Neville, Johnson & Thompson, 1705 First National Bank Building, Minneapolis, Minnesota, has requested a ruling from this office as to whether motion picture films distributed to theatre owners and television stations in the state of North Dakota are subject to North Dakota sales or use tax under the rental provisions of the North Dakota sales and use tax laws enacted by the 1967 legislature.

"Our understanding of the facts relating to this question is that the theatre owner or television station operator acquires temporary possession of the motion picture print or tape and, pursuant to a contract has the right, under copyright, to exhibit the motion picture or television feature in public. It is our understanding that the cost of the motion picture print or tape is a relatively minor portion of its value, running from slightly over \$200 for a normal black and white feature to \$1,000 for colored pictures. The cost of producing the motion picture, which is the value of the copyright attached thereto, apparently is rarely less than \$1,000,000 and in many cases runs much higher than a \$1,000,000."

A "sale" for North Dakota sales and use tax purposes is defined as "any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration, . . ."

The term "retail sale" for sales and use tax purposes is defined as "the sale, including the leasing or renting, to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property; . . ."

In this connection, see subsections 2 and 3 of section 1 and subsection 1 of section 26 of House Bill No. 731, 1967 legislative session.

In addition, subsection 6 of section 3 of House Bill No. 731 imposes a sales tax on the leasing or renting of tangible personal property, and subdivision b of subsection 6 of section 26 of House Bill No. 731 imposes a use tax on the leasing or renting of tangible personal property. The term "use" for use tax purposes is defined in subsection 2 of section 26 of House Bill No. 731 as "the exercise by any person of any right or power over tangible personal property

incident to the ownership or possession of that property. . ."

To our knowledge the question presented by you has not been judicially determined in this state; however, the North Dakota Supreme Court in *Voss v. Gray*, 70 N.D. 727, 298 N.W. 1, in holding that the furnishing of photographs was subject to sales tax concluded that photographs were tangible personal property within the meaning of the sales tax law. In addition, the North Dakota Supreme Court in the *Bismarck Tribune Company v. Lloyd Omdahl*, 147 N.W.2d. 903, in determining that the North Dakota use tax was not applicable to newsprint and ink used and consumed in the publication of a newspaper considered the nature of property taxable under the use tax law and concluded that "tangible" personal property for use tax purposes means "personal property that can be touched or handled."

In states having sales and use tax laws that are very similar to the sales and use tax laws of this state, the courts have held that the gross amount paid by exhibitors for the rental or the transfer of possession of movie film to motion picture theatres is subject to sales or use tax. The courts, in reaching this conclusion, have considered the fact that there is a transfer of a license to exhibit in addition to the transfer of the necessary film and have concluded that the transfer of the license without the transfer of possession would be valueless and together they must be regarded as a taxable transaction constituting a "sale." See *United Artist Corporation v. Taylor*, 273 N.Y. 334, 7 N.E.2d. 254; *Saenger Realty Corporation v. Grosjean*, 193 S. 710; *Crescent Amusement Co. v. Carson*, 213 S.W.2d. 27, and *Prentice-Hall State & Local Taxes* (Sales Tax Volume 1, Paragraph 92,570).

The fact that the North Dakota sales tax law imposes a tax on admissions to places of amusement would have no bearing on the taxability of items such as motion pictures, rented or obtained and used by a motion picture exhibitor as the motion picture films are obtained for use and consumption by the exhibitor in his business operation and are not acquired for resale purposes. See Sales Tax Rule No. 38.

In view of the above, it is our opinion that the amount paid by theater owners and television stations to the film distributing agencies for use of or rental of motion picture films would be subject to the North Dakota sales or use tax law, either under the theory that the payment constitutes rental receipts from the "sale" of tangible personal property, or, if the transaction is construed to be the granting of a license to exhibit tangible personal property coupled with the necessary transfer of physical possession rather than a rental, the gross receipts derived therefrom would be subject to sales or use tax by reason of a "sale", that is, transfer of possession of tangible personal property.

HELGI JOHANNESON

Attorney General