OPINION
68-287

February 23, 1968 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Sales Tax - Conditional Sales Contracts

This is in response to your request for an opinion on the following specific hypothetical situation:

> "* * * The dealer sold an automobile in 1962 for $3,600, less trade-in of $600, and computed sales tax on the $3,000 at the rate of 2 percent and remitted $60.00 to the state of North Dakota at the time and transaction was consummated. The automobile was sold under a conditional sales contract and the dealer subsequently assigned the $3,000 conditional sales contract to a bank. This consignment agreement contained a recourse provision obligating the automobile dealer to repurchase the contract from the financial institution in the event of default on the contract by the purchaser. The purchaser then pays $1,000 in installment payments that are applied against the principal and then defaults on the transaction. The automobile dealer then repossesses the automobile and is required to pay the bank $2,000 as a result of the repurchase of the contract. The automobile dealer subsequently sells the automobile and collects and remits sales tax on that sale. However, the automobile dealer deducts as a credit on his return $40.00 which he has sustained as a tax loss as a result of the repossession. The $40.00 is computed at the rate of 2 percent of $2,000, representing the repurchase price of the contract."

The pertinent provision of the Sales Tax Act which has application here is Section 57-39-01(6), which provides as follows:

> "6. 'Gross receipts' means the total amount of the sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purposes allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided, 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. 'Gross receipts' shall also mean, with respect to the leasing or renting of tangible personal property, the amount of consideration, valued in

money, whether received in money or otherwise, received from the leasing or renting of only such tangible personal property the transfer of title to which has not been subjected to a retail sales tax in this state;

* * *" (Emphasis supplied.)

The above underscored language has specific application to the question under consideration.

We must also observe that the tax is imposed upon gross receipts. (See Section 57-39-02.) "Gross receipts" are defined in Section 57-39-01(6), which is quoted above, and particular reference is made to the underscored language.

In addition to this, the North Dakota Act contains a provision relating to worthless accounts, which is found in Section 57-39-04 of the old Act. A similar provision has been construed by other jurisdictions. It is significant to note that the jurisdictions which have had occasion to construe sales tax worthless accounts relating to the question at hand reached conclusions that the conditional sales or deferred payment programs did not, per se, come within the worthless account provision. In this connection see Olympia Motors v. McCroskey, 132 Pac. 2d. 355. See also Montgomery Ward & Company v. Fry, 269 N.W. 166. In reviewing these cases it is found that the tax act under consideration did not have a similar definition of "gross receipts" as pertaining to conditional sales contracts. They had the other provisions defining "gross receipts" but not the one pertaining to "conditional sales contracts."

The North Dakota Supreme Court had under consideration the worthless account provision in Standard Oil Co. v. State Tax Commissioner, 299 N.W. 447, 71 N.D. 146, and with reference to the worthless account provision said:

> "These provisions speak for themselves and clearly evidence an intention that the seller shall collect for, and pay to, the state a sales tax of two percent (2 percent) upon the gross receipts from all sales of tangible personal property, but that he shall not be required to collect or pay such tax except upon the sales price that he actually receives. Thus, the act provides that if a discount is allowed and taken, the amount of the discount shall be deducted and the sales tax computed only on the amount that is actually paid; and if the property is returned by the purchaser and the sales price is refunded, either in cash or by credit, the seller is not required to pay or account for a sales tax."

While the foregoing statement specifically referred to the provisions of the worthless account statute, it nevertheless states the tenor of the sales tax act of North Dakota. There is no reason why the legal concepts placed upon the worthless account statute should not apply to the underscored provisions of law pertaining to gross receipts as pertaining to conditional sales contracts. The tax is imposed only upon that portion of the sale for which cash or payment has actually been received by the retailer.

The mere fact that the 1967 Legislature enacted Section 5 of Chapter 459 of the 1967 Session Laws, clarifying situations arising out of conditional sales contracts cannot be considered as a reversal of previous concepts or as a substantial change to the previous tax act. In this instance it is considered to be remedial clarifying legislation.

The sales tax act never contemplated that the retailer should pay a sales tax on actual losses sustained. In an opinion issued to the Honorable R. Fay Brown on August 2, 1966, relating, amongst other things, to conditional sales contracts, we also said:

> "* * * 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.
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> * * *."
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> "* * * 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 extent 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."

We have reviewed previous correspondence by Mr. Kenneth Jakes to Mr. Douglas Dahlin, Sales and Use Tax Deputy, dated October 7, 1961; correspondence to Mr. Perry Krabbenhoft of Northwood, North Dakota, dated January 10, 1963; and a letter from this office to Mr. Lloyd Omdahl, Tax Commissioner, dated October 2, 1963. The subject matter contained in those letters pertain to the supposition where the retailer (seller) had, in fact, collected the tax on the entire purchase price and no credit was given to the purchaser for such payment in subsequent defaults or repossessions.

It is somewhat difficult to understand the actual business practices resulting in collecting the tax on the full purchase price where only a portion of the full price was paid. But, we are not concerned with that here, nor will we attempt to discuss accounting practices.

As to the specific question at hand, assuming that the conditional sales contract deferred or extended the payments for a period longer than sixty days, it is our opinion that the retailer under the factual situation given is entitled to a credit of $40.00, which may be taken on subsequent sales or use tax returns filed by said retailer.

It is our further opinion that where a proper application is made by the retailer who is unable to use the same as a credit on future returns, the retailer is entitled to a refund.

HELGI JOHANNESON

Attorney General