

**OPINION  
69-446**

May 7, 1969           (OPINION)

The Honorable Byron L. Dorgan

State Tax Commissioner

RE: Taxation - Oleomargarine - Refund for Stamps

This is in response to your letter of April 24, 1969, in which you requested our opinion to several questions concerning whether or not you are authorized to grant certain credits or refunds for oleomargarine revenue stamps which were either in the inventory of manufacturers or distributors or affixed to oleomargarine packages in the possession of manufacturers, distributors and retailers on July 1, 1969, the effective date of the oleomargarine tax reduction provisions enacted by House Bill 405 of the Forty-first Legislative Assembly of this state.

Your specific questions are quoted as follows:

- "1. Is the tax commissioner authorized to grant a credit against the future purchase of oleomargarine revenue stamps, a refund, or may the tax commissioner exchange outdated stamps for stamps of current issue, said outdated stamps being unaffixed to oleomargarine cartons and in the possession of the manufacturer or distributor on July 1, 1969?

(In connection with your examination of this question, your attention is called to your conclusion in a previous opinion concerning the same question previous to the change in the imposition section, as outlined above. This opinion was addressed to Mr. Lloyd Omdahl, State Tax Commissioner, and dated April 1, 1966, a copy of which is attached. You will note that the specific reference is found in the last paragraph of page two on the attached copy.)

- "2. Do the provisions of section 19-05-10 or any other provisions of chapter 19-05 authorize the tax commissioner to grant a credit or refund to manufacturers and distributors (wholesalers) for the value of 10 cents for each pound of stamped oleomargarine in their possession which bears a 10 cents and 20 cents oleomargarine stamp and which will be sold subsequent to July 1 and to retailers for the value of 10 cents for each pound of stamped oleomargarine in their possession which bears a 10 cents and 20 cents oleomargarine stamp and which will be sold subsequent to July 1, either alone or in conjunction with the legislative intent, if any, which may be concluded by the passage of House Bill 405 by the Forty-first Legislative Assembly of the State of North Dakota?
- "3. If it is your opinion that the tax commissioner is authorized to grant such a credit or refund, may the credit

or refund be granted to all of the following:  
Manufacturers, distributors (wholesalers) and retailers?"

The present credit and refund provisions of chapter 19-05 as pertaining to oleomargarine taxes are found in section 19-05-10. Subsection 1 authorizes a refund where the tax has been paid as a result of mistake. Subsection 2 authorizes a redemption and repayment for unused stamps whenever the manufacturer, wholesaler, distributor, jobber or any person acting as such destroys oleomargarine stamps accidentally or intentionally, or because of staleness or unfitness for sale, stamps are removed from oleomargarine. Subsection 4 authorizes the tax commissioner to destroy oleomargarine revenue stamps which represent an outdated denomination or which have been taken from packages which contain oleomargarine determined unfit for sale. Subsection 3 authorizes a credit or refund under any conditions set forth in section 19-05-10.

These provisions apparently are predicated on the assumption that the tax on oleomargarine is static. We are, however, confronted with a situation where the tax has been decreased. If the tax had been increased, we would not have much of a problem. A tax stamp representing the amount of increase could be merely added to the stamp which is already affixed. This procedure would not be applicable to the present situation. The legislature did not take this into account and did not provide specific legislation thereon. It is conceivable that the legislature deemed this to be an administrative matter and for that reason did not provide any legislation thereon. The tenure of section 19-05-10 strongly suggests that refund or credit should be allowed in every instance where there is legal justification. We must also consider the statutory provisions which imposed the tax and the results reached thereon.

Section 19-05-08 imposes the oleomargarine tax upon "all oleomargarine held for sale or consumption in this state." The current imposition section was enacted by chapter 169, section 8, 1967 Session Laws. It is the intent of the statute to impose the tax on all oleomargarine "held" for sale or consumption in this state. The term "held" would mean "at the time acquired" or "at the time possession was taken" in this state for the purposes of sale or consumption. We believe and it is our opinion that the incidence upon which the tax is first imposed by this chapter occurs at the time the oleomargarine is first "held" for sale or consumption in this state.

The proposition that the incidence of the tax on oleomargarine occurs at the time the oleomargarine is first "held" for sale or consumption, is further supported by the provisions of subsections 2 and 3 of section 19-05-08. Subsection 2 provides for the time of the attachment of the penalty for the failure of "purchasing and attaching the oleomargarine stamps" by the manufacturer or wholesaler at the time of acquisition of the oleomargarine. The penalty provision states that the penalty attaches "from the date of acquisition of the oleomargarine" until the tax is paid. Subsection 3 relates to the possession of untaxed oleomargarine by any person and provides that:

"Every person who has in their possession any oleomargarine upon which the tax in this chapter has not been imposed, shall immediately upon acquisition of the untaxed oleomargarine notify the state tax commissioner of the oleomargarine in their possession and remit the tax as provided in this chapter,  
\* \* \*."

This subsection further provides that the same penalty provisions apply to violations of this subsection as apply to subsection 2. The application of the penalty from the time of acquisition of the untaxed oleomargarine clearly indicates to us that the incidence of the oleomargarine tax occurs at the time the oleomargarine is first held or acquired in this state by the manufacturer, wholesaler or retailer for sale or consumption in this state.

In response to your first question, it is our opinion that you are authorized to grant manufacturers and distributors a credit against future stamp purchases for the outdated stamps returned by them, provided that the stamps were never affixed to oleomargarine packages. Since there is not a tax and there cannot be a tax on or with respect to any package of oleomargarine until the incidence out of which the tax arises occurs, in legal contemplation there is no tax until the package of oleomargarine is held in this state for sale or consumption, at which time the stamps are required to be affixed. The purchase of the stamps by the manufacturer or distributor is in reality a payment in advance of an amount that it is expected will become a tax when and if there is a holding in this state for sale and consumption. The money received in prepayment of the tax on this anticipated basis is held in trust by the state until the actual incidence of the tax occurs. This opinion is consistent with a previous opinion rendered by this office on this same question, dated April 1, 1966, addressed to Mr. Lloyd Omdahl, State Tax Commissioner.

As to the second question, we must keep in mind that the tax is imposed when the oleomargarine is held for sale in this state. This in effect means that whenever oleomargarine comes within the confines of this state and is destined for sale, the tax is imposed and as a result thereof the stamps must be attached to the oleomargarine. A manufacturer, wholesaler, distributor or jobber is required to have the current tax stamp affixed on every container of oleomargarine which is found within the state of North Dakota prior to midnight June 30, 1969. Or in the alternative, in anticipation of the change in taxes such persons would have to hold such containers outside of the state of North Dakota until midnight of June 30, 1969. If the manufacturer, wholesaler, distributor or jobber were to place oleomargarine within the state prior to July 1, 1969, containing only stamps representing the tax due after July 1, 1969, same would be in violation of the present Act.

It is therefore our opinion that a credit or refund may be allowed for the difference in the tax stamps attached to oleomargarine which were affixed but which were not sold prior to July 1, 1969. The tax commissioner may implement any reasonable procedure to accomplish such refund or credit and may employ any method to prevent duplication or fraud.

It is our further opinion that the tax commissioner may require

certain certifications or other evidence which would prevent duplication or fraud in claiming such refunds or credits. The methods which may be employed by the tax commissioner in allowing credit or refund as a result of the change in tax upon oleomargarine is basically an administrative matter. He is vested with reasonable latitude in accomplishing this administrative function.

HEIDI JOHANNESON

Attorney General