OPINION
70-482

March 17, 1970 (OPINION)

Mr. Byron L. Dorgan
State Tax Commissioner

RE: Taxation - Sales and Use Tax - Soft Drink Containers

This is in reply to your letter of March 4, 1970, relative to the applicability of the North Dakota sales or use tax to the following:

> Members of the soft drink industry of the state of North Dakota are now using a relatively new method of merchandising or selling soft drinks in which the soft drink is prepared in a similar manner to other soft drinks but rather than packaging the product in the usual small containers the product is placed into a large stainless steel container which permits the bulk handling and dispensing of the product. The container is then attached to a premix dispensing system involving pressurized gas, a cooling system and a dispensing valve.
>
> I have informed the soft drink industry that the premix dispensing system, because it is an item of tangible personal property used and consumed by the companies in their business, would be subject to North Dakota sales or use tax. I have also advised the industry that the stainless steel tank would also be subject to sales or use tax and would not be exempt from sales tax as a container pursuant to Rule No. 39 of the North Dakota Sales and Use Tax Laws, Rules and Regulations because the title to the container does not pass from the soft drink company to their customers with the merchandise sold. No objection has been raised to the imposition of a sales or use tax on the dispensing system. However, members of the soft drink industry feel that the galvanized steel tank which holds or encompasses the soft drink product is a container and is not subject to North Dakota sales or use tax.
>
> Information furnished to this office by the soft drink industry indicates that the container is used solely by the soft drink bottling companies in this state to hold or encompass the product, is attached to the premix system for dispensing the product as indicated above and that title to the tank remains in the soft drink company and does not pass to the purchaser of the soft drink product. It is also my understanding that when a tank is empty the tank is returned to the soft drink company owning same to be refilled for future use.
>
> May I please have your opinion as to whether the stainless steel tank is subject to North Dakota sales or use tax when purchased by the soft drink company for use in dispensing a soft drink product."

Rule No. 39 of the North Dakota Sales & Use Tax Laws, Rules & Regulations, as adopted by the tax commissioner and approved by and filed in this office states:

CONTAINERS, WRAPPING MATERIAL, CARTONS, STRING, ETC. Receipts from the sale of containers, labels, cartons, packing cases, wrapping paper, wrapping twine, bags, bottles, shipping cases and similar articles and receptacles sold to manufacturers, producers, wholesalers, retailers or jobbers, which are used by the groups above mentioned as containers which hold or encompass the tangible personal property which they are engaged in selling, either for resale or at retail, are not subject to the sales tax provided the charge made for the property sold includes the container and title to the container passes to the purchaser with the merchandise sold. Containers purchased by retailer, selling items expressly exempt under section 57-39.2-04 and used by them to hold or encompass the exempt tangible personal property, are also exempt.

Receipts from the sale of containers, labels, cartons, packing cases, wrapping paper, wrapping twine, bags, shipping cases and similar articles and receptacles sold to those whose business is that of rendering service, such as dry cleaners, laundries and similar services, are subject to the sales tax as these businesses are the users or consumers of such items and sales to them are taxable.

Some containers are used for the purpose of delivering tangible personal property sold to customers, which are to be, or may be returned to the seller of the tangible personal property. This class includes such containers as milk bottles, water bottles, drums and many others, the title to which remains in the seller and which are ordinarily used by him in making other deliveries. He consumes or uses them in his business and the sale to him of such containers is subject to the tax. Such tax liability is not avoided if a deposit is made by, or required of the customer to secure the return of the container."

It appears that under the above cited rule, which rule has been properly adopted and filed, the containers in question would be subject to the sales tax when sold to the soft drink company. The first paragraph of the above regulation exempts from the sales tax those containers to which title passes to the purchaser with the merchandise sold. In this instance, as we understand it, the title to the container does not pass with its contents to the retailer or purchaser. Only the contents of the container are sold to the retailer or purchaser by the soft drink company.

The second paragraph applies to containers, etc., sold to those whose business is that of rendering a service, such as dry cleaners, etc., and would appear applicable herein since the soft drink companies are actually selling tangible property. In any event the second paragraph provides the containers, etc., are taxable to the companies who use them in their business.

The third paragraph of Rule 39 would appear to be the controlling paragraph in this instance. It provides that containers which are used for the purpose of delivering tangible personal property to a customer and which containers are returned to the seller of such property are taxable to the seller since he uses them in his

business. In this instance the seller uses the containers in his business, i.e., delivering the soft drink product. The containers are returned to the seller (the soft drink company) when they are empty. The title remains in the soft drink company. As such soft drink companies are the ultimate consumer of the containers.

Rule 39, cited above, is obviously based upon the premise that when a container is sold with the property which it contains, a tax is paid on that sale by the consumer. The title to the container passes to the ultimate consumer. Since he pays a tax on such sale and since the seller of the product is not the ultimate consumer of the container, there is no tax due. However, the rule also contemplates that in those instances in which the container is not sold with the product, the container is necessarily used in the business of the seller and such seller is the ultimate consumer. Therefore the seller must pay a sales tax on the container when he purchases it.

The statutory basis for such rule may be found in the definitions used in the sales tax act. Thus section 57-39.2-01(3) of the North Dakota Century Code, as amended, provides in part:

> 'Retail sale' or 'sale at retail' means 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; * * *. By the term 'processing' is meant any tangible personal property including containers which it is intended, by means of fabrication, compounding, manufacturing, producing or germination shall become an integral or an ingredient or component part of other tangible personal property intended to be sold ultimately at retail. * * *"

The tax is, of course, imposed on "sales at retail" or "retail sales." Thus we note that the sales for any purpose other than for processing or for resale would be included within the definition of "retail sale" and subject to the tax. Sales for processing or for resale would not be so included and would not be subject to the tax. The statute further defines the term "processing" to mean property, including containers, which, by various means, become an integral or ingredient or component of other tangible personal property intended to be sold ultimately at retail. In this instance the containers are not sold to the soft drink companies for resale. They are not sold for "processing" since they do not become an integral or ingredient or component of the soft drink which is ultimately sold at retail. We must therefore conclude the sale of the containers to the soft drink companies does not constitute an exempt sale.

The instant situation is not substantially different from a situation in which a bulk milk dispenser system, acetylene tanks, butane tanks, etc., are used by the seller of milk or gas in delivering their products to the consumer with the title remaining in such seller. These containers have previously been held by the tax department to be subject to the sales tax when sold to the company. Rule 39 as adopted by the tax commissioner and approved by this office is of relatively long standing. It is a rule of statutory construction that when the interpretation of a statute is being considered the long standing interpretation placed upon that statute by the agency or department charged with its administration will be given

considerable weight. See, e.g., In Re Blacks Estate, 23 N.W.2d. 35 (ND 1946).

It is therefore our opinion the stainless steel tanks referred to herein are subject to the North Dakota sales or use tax when purchased by the soft drink company for use in dispensing a soft drink product.

HELGI JOHANNESON

Attorney General