

**OPINION
70-485**

March 6, 1970 (OPINION)

Mr. Ellis L. Berg
Executive Secretary
North Dakota Poultry Improvement Board

RE: Taxation - Sales Tax - Eggs Not Exempt

This is in reply to your letter with regard to the application of section 57-39.1-04.1 of the North Dakota Century Code to eggs.

You point out that as the North Dakota Egg Producers Association has stated in a previous letter to us, eggs are a poultry product, and a protein product used as a substitute for meat in human nutrition and therefore it is unfair to tax the sale of eggs and exempt meat for this makes the law discriminatory against egg producers.

On such basis you request an opinion from us on whether eggs are exempt under this new exemption law.

It is our understanding that at the current moment, the state tax department has taken the position in guidelines issued, but not formally promulgated as rules of that department that eggs are not exempted from the sales tax under this statutory provision. We note also letter from this office to the president of the North Dakota Egg Producers Association which is quite informative on this question.

Looking to the language of the statute we feel it is clear on the face thereof that it was not intended to and does not exempt eggs. Obviously they are not meat or poultry, nor are they a fresh water or salt water animal product. Noting your comments as to unfairness and as to discriminatory effect, we might call your attention to the decision of the Supreme Court of Washington in *Morrow v. Henneford*, 47 P.2d. 1016, where appellant attacked the validity of a Washington statute which exempted from the Washington sales tax, sales of milk, raw fruits, vegetables, butter, eggs, cheese and bread sold by retailers for consumption off the premises but taxed the prepared foods which he served the patrons of his restaurant. The court in that case pointed out at page 1020 of the P.2d. Reporter that:

The courts hold that a wide discretion is conceded to the legislature in classifying for the purpose of excise taxation."

We note in 47 Am. Jur. 203-206, Sales and Use Taxes, section 6, the statement that:

6. EQUALITY AND UNIFORMITY. While it is frequently declared that express constitutional requirements as to equality and uniformity of taxation are applicable to property taxes and not to excises, and while in a number of instances particular statutes imposing sales taxes have been held not violative of constitutional declarations providing in effect that taxes on property should be ad valorem and uniform upon the same class of subjects within the

territorial limits of the authority imposing the tax, because such constitutional provisions do not apply to excise taxes but only to property taxes, constitutional provisions requiring taxation to be equal and uniform are in some jurisdictions held to be applicable to excises, at least to the extent of compelling the burden imposed by such impositions to be placed alike upon all persons who are in the same situation - a rule generally recognized even in the absence of an express constitutional requirement of uniformity. Such constitutional provisions, whether express or implied, are also frequently held to require that any discriminations made by the legislature with respect to excise taxation be not unreasonable, arbitrary, or irrational. The equal protection clause of the Fourteenth Amendment to the Federal Constitution is frequently invoked as requiring equality and uniformity with respect to sales taxes.

* * *

Attempts have sometimes been made to contest the validity of sales tax statutes upon the ground that discriminations with respect to the tax rates imposed resulted in a deprivation of uniformity, but these attempts have usually been unsuccessful. Thus, particular statutes have been upheld as against the contention that they contained unconstitutional discriminations or classification in that they required taxes at different rates as between wholesalers, retailers, and vendors of goods at any exchange or board of trade; imposed different rates upon persons dealing in livestock from those imposed upon agricultural producers dealing in grain provided that sales equaling or exceeding a designated amount for use outside the state should be taxed at the rate provided for the taxation of sales in the state to which the goods were to be taken; or designated a rate different from the average rate throughout the state for general property taxes. It has, however, been held on the highest authority that a sales tax is unconstitutional if under it the rates of levy increase with the volume of sales.

* * *

Various miscellaneous classifications and discriminations contained in sales tax statutes as they were written, interpreted, or applied have been unsuccessfully advanced as being arbitrary and unreasonable."

Very possibly other groups or individuals may be interested in having particular products either exempted or covered by the sales tax act. Various changes have been and probably will be legislatively introduced into the sales tax enactments. If changes in this legislation are deemed appropriate members of the Legislative Assembly can be approached for this purpose. Also, it seems entirely possible that the tax department's current position on this matter could be challenged in judicial proceedings by interested individuals or groups. At the current time, however, appropriate interpretations

thereof do not recognize this statute as exempting eggs from sales
taxation.

HELGI JOHANNESON

Attorney General