

**OPINION
70-487**

January 14, 1970 (OPINION)

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

RE: Taxation - Sales Tax Exemption - Poultry

This is in reply to your letter of January 8, 1970, requesting an opinion of this office with regard to the application of Section 57-40.2-04.1 of the 1969 Supplement to the North Dakota Century Code. We presume you also refer to section 57-39.2-04.1 of the 1969 Supplement to the North Dakota Century Code. The provision in chapter 57-40.2 refers to a use tax exemption. The provision in chapter 57-39.2 refers to the concomitant sales tax exemption. Your questions are stated as follows:

Would frozen poultry in a cryovac bag be exempt from the sales tax?

Would unfrozen, fresh poultry which was packaged in an airtight package at the grocery store be exempt from sales tax?"

Section 57-39.2-04.1 of the 1969 Supplement to the North Dakota Century Code provides:

SALES TAX EXEMPTION FOR CERTAIN FOOD PRODUCTS. Beginning January 1, 1970, gross receipts from sales for human consumption of milk and milk products and of fresh and cured meat, including poultry and fish and other fresh and salt water animal products when purchased by consumers for consumption off the premises where purchased, shall be exempt from the sales tax imposed by chapter 57-39.2, except that fresh and cured meat, fish and other fresh and salt water animal products shall not include such products if preserved by enclosure in an airtight container."

We would assume that a "cryovac bag" refers to a flexible, possibly transparent material formed into a sacklike container. We would further assume that the "cryovac bag" to which you make reference is probably sealed and that air cannot pass freely through same.

Looking to the words of the statute it would appear that the term "fresh and cured meat" as first used therein does include poultry and poultry would, in the first instance, therefore be exempt from the sales tax under section 57-39.2-04.1 and from the use tax under section 57-40.2-04.1. Looking to the exception from this exemption at the end of the statute, we note that the term "fresh and cured meat" shall not include such products if preserved by enclosure in an airtight container.

Frozen poultry enclosed in a cryovac bag would not be "preserved by enclosure" in the cryovac bag, but if preserved would be preserved by the original freezing and by being kept below freezing temperature.

The cryovac bag would possibly help to prevent contamination and possibly dehydration of the frozen poultry but of itself, without continuance of the low temperature, it would not and does not "preserve" the poultry. On such basis it is our opinion that frozen poultry in a cryovac bag would not fall within the exception to the exemptions furnished by said sections 57-39.2-04 and 57-40.2-04.1, and such frozen poultry in a cryovac bag would be exempt from sales and use taxes referred to in said statutes.

In response to your second question, unfrozen, fresh poultry which was packaged in an airtight package at the grocery store would be exempt from sales and use taxes under these statutory provisions, unless by the phrase "packaged in an airtight package at the grocery store" you mean "preserved by enclosure in an airtight container." In this context "preserved by enclosure in an airtight container" would mean canned or otherwise processed and enclosed in airtight tin cans or glass jars in such a manner that the enclosure of the product in the airtight containers without further freezing, cooling or dehydrating will preserve them from spoilage. "Preserved by enclosure in an airtight container" does not include wrapping, bagging or packaging, where the wrapping, bagging or packaging does not of itself, together with previous processing, prevent them from spoiling regardless of whether the package, bag or wrapping is airtight.

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Attorney General