

**OPINION  
78-203**

April 11, 1978 (OPINION)

The Honorable Byron L. Dorgan  
Commissioner  
Office of State Tax Commissioner  
State Capitol  
Bismarck, ND 58505

Dear Mr. Dorgan:

This is in reply to your letter requesting the opinion of this office on a number of questions pertaining to licensing of cigarette dealers and distributors and the collection of cigarette taxes on cigarettes sold on Indian reservations in this state.

As you noted, the provisions for licensing cigarette dealers and distributors are administered by this office and the provisions for collection of cigarette taxes are administered by your office but they are interrelated and to some extent must be considered together, particularly because of recent federal court decisions. Your questions relating to those provisions have been extensively considered here and each of those questions, followed by our opinion in answer to it, follows.

QUESTION 1. Are the cigarette taxes imposed by Sections 57-36-06 and 57-36-32 excise taxes on the sales of the cigarettes to the distributor (wholesaler), or on the sales to the dealer (retailer), or on the sales to the consumer?

The cigarette taxes are "levied and assessed" by North Dakota Century Code Sections 57-36-06 and 57-36-32 "upon all cigarettes sold in this state . . . payment thereof to be made prior to the time of sale and delivery thereof." This language imposing the cigarette taxes is similar to the language in the state's retail sales tax law which imposes the sales tax "upon the gross receipts of retailers from all sales at retail. . . .", see Section 57-39.2-02.1. Similar language was used in the early retail sales tax laws, as appears in the language quoted below from *Standard Oil Co. v. State Tax Commissioner*, 71 N.D. 156, 299 N.W. 447. In that case the State Supreme Court held that federal excise taxes on sales of gasoline were not part of the "gross receipts" on which the retail sales tax applied. The Court in determining the nature of both the federal gasoline tax and the state's retail sales tax said:

"The laws of the United States impose 'on gasoline sold by the producer or importer thereof or by an producer of gasoline, a tax of one cent a gallon,' . . . . "71 N.D. at 149, 299 N.W. at 448.

"The State Sales Tax Act provides: 'There is hereby imposed, beginning the 1st day of July, 1939, and ending June 30th, 1941, a tax of two percent (2 percent) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in

this Act, sold at retail in the state of North Dakota to consumers and users . . . ." 71 N.D. at 150, 299 N.W. at 449.

"The Federal excise tax upon gasoline in question here is not a tax on the gasoline itself or on the manufacture, production or importation thereof, but is a tax only on the sale of the gasoline. (citations omitted) 'It is laid on the sale, and on that alone. It is levied as of the time of the sale.' Indian Motorcycle v. United States (U.S.) supra. 'The tax attaches at the instant the sale is made.' U.S. Treasury Regulation 44, Art. 4, under the Revenue Act of 1932, as amended. The state sales tax likewise is a tax on the sale. No tax is laid either under the act of Congress or under the State Sales Tax Act until there is a sale. Both the federal tax and the state tax are imposed upon the sale." 71 N.D. at 151-152, 299 N.W. at 449-450.

It is our opinion that the language in Sections 57-36-06 and 57-36-32 which levies the cigarette taxes "upon all cigarettes sold in the state" is language which levies those taxes on the sale of cigarettes because it is so similar to the language in the federal gasoline tax law and the North Dakota retail sales tax law that was construed in the above quoted paragraphs from the Standard Oil Co. case as imposing those taxes on the sale of gasoline.

Both the retail sales tax imposed by Section 57-39.2-02.1 and the cigarette taxes imposed by Sections 57-36-06 and 57-36-32 are excise taxes imposed on the sales that each taxes. They are sales taxes, but, although the retail sales tax is imposed on the sale to the consumer, it is our opinion that the cigarette taxes are imposed on the first sale of the cigarettes that occurs in North Dakota and therefore are not imposed on the retail sale of the cigarettes in North Dakota because of the following statutory provisions.

A cigarette distributor, as defined in Section 57-36-01(2), must be licensed as provided in Section 57-36-02, which also provides that:

"Stamps or insignia provided for in this chapter shall be sold to and affixed by licensed distributors only."

Section 57-36-08 permits the Tax Commissioner to sell the cigarette stamps only to licensed distributors, including licensed wholesale distributors located outside of this state.

Section 57-36-11(1) authorizes use of tax meter machines by manufacturers and distributors in place of cigarette stamps and:

"In such case, the tax commissioner shall collect and receive the tax prescribed by this chapter on all cigarettes sold in or delivered to dealers in the state for sale, barter, gifts, or any other purpose . . . ." (Underlining added.)

Section 57-36-13 provides in part that:

"It shall be unlawful for any person to transport into, receive, carry, or move from place to place in this state, by automobile, truck, boat, airplane, conveyance, vehicle, or

other means of transportation, except in the course of interstate commerce, any unstamped cigarettes. . . ." (Underlining added.)

In addition to the foregoing provisions which indicate that the cigarette taxes are on the first sale in North Dakota of the cigarettes after their movement in interstate commerce into the state has ended, the history of the cigarette tax law set out below shows that originally the taxes were levied on cigarettes sold to consumers but that the reference to consumers was removed in the 1941 revision of the cigarette tax law which is the basis of the current law, Chapter 57-36.

The first cigarette tax was imposed in 1925 under a statute which provided that:

"From and after the taking effect of this act, there is hereby levied and assessed and shall be collected and paid to the state treasurer upon all cigarettes and cigarette papers or wrappers and tubes sold in North Dakota to consumers the following taxes, to be paid prior to or at the time of sale and delivery to the consumer. . . ." (Section 10183a5 of the 1925 Supplement to the Compiled Laws of 1913. Underlining added.)

This 1925 law provided for the sale of cigarette stamps by the state treasurer to "every person, partnership or corporation carrying on the business of selling or keeping for sale cigarettes or cigarette papers, or maintaining a place where such cigarettes or cigarette papers are kept with intent to sell. . . ." See Section 10183a6 and Sections 10183a1 through 10183a4 of the 1925 Supplement to the Compiled Laws of 1913.

In 1941 the cigarette tax law was completely revised and the administration of it was placed in the Tax Commissioner. See Chapter 271, S.L. 1941. This 1941 revision provided for licensing of all cigarette distributors (wholesalers) by the Tax Commissioner and included the express provision that "no retailer shall be granted a distributor's license." See Section 2 of Chapter 271, now 57-36-02. The act provided for the sale of cigarette stamps by the Tax Commissioner "only to dealers holding a 'distributor's license'." See Section 7 of Chapter 271, now 57-36-08.

Section 6 of the 1941 act, now Section 57-36-06, provided that:

"From and after the taking effect of this act, there is hereby levied and assessed, and there shall be collected and paid to the state tax commissioner on all cigarettes, cigarette papers, or snuff sold in this state the following taxes to be paid prior to the time of sale and delivery thereof. . . ."

This 1941 tax imposition provision just quoted does not include any reference whatever to levying the tax on cigarettes sold "to consumers" and for payment of the tax prior to or at the time of sale and delivery "to the consumer" as did the original 1925 imposition section quoted earlier. This omission in the 1941 act of any reference to the consumer in the imposition section is of course consistent with the fact that the 1941 act provided that the stamps

should be sold only to a licensed distributor and a distributor's license could not be issued to a retailer. Neither the original 1941 act nor its provisions as codified into Chapter 57-36 of the Revised Code of 1943 and the Century Code include any provision for collection of cigarette taxes from a retailer.

Finally, in reference to the conclusion above that the sale that is taxed is the first sale in this state of the cigarettes after they have been brought into the state and interstate commerce of them has ended, the following relating to the retail sales tax law is quoted from *Boeing Company v. Omdahl*, 169 N.W.2d. 696 at 713 (N.D. 1969):

"Where delivery and transfer of title or possession in this State by a retailer occurs at the same instant, then a retail sale has occurred. If the article has come into the State through interstate commerce, a sales tax could not be levied on the sale by conceivably a use tax could be and is levied in North Dakota. The use tax is not upon the operations of interstate commerce, but upon the privilege of the use after commerce is at an end. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S. Ct. 524, 31 L. Ed. 814 (1937)."

Although this holding in *Boeing* related to retail sales in interstate commerce, the same principle would apply to any other sale made in interstate commerce. Therefore, the sale of cigarettes to a licensed distributor in this state by delivery and transfer of title to them in this state as part of the interstate shipment of them to him would be a sale that is immune from a state sales tax. It follows that it is the next sale in this state after interstate commerce of the cigarettes into the state has ended that is the first sale in this state that is subject to the cigarette taxes. Since these cigarette sales taxes are collected in advance of that sale when the licensed distributor purchases the cigarette tax stamps for affixing to the cigarettes, they are precollected taxes in the same general sense as were the Montana cigarette sales taxes in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634 at 1645, except that the Montana cigarette taxes were by statute "'conclusively presumed to be a direct tax on the retail consumer precollected for the purpose of convenience and facility only.'"

Having concluded for the reasons set out in the paragraphs above that the cigarette taxes imposed by Sections 57-36-06 and 57-36-32 are excise taxes that are imposed on the first sale of the cigarettes that occurs in North Dakota, we will now consider your other questions.

QUESTION 2. Is a cigarette distributor (wholesaler) located in this state who is licensed pursuant to Section 57-36-02 permitted to sell cigarettes to an Indian distributor (wholesaler) or dealer (retailer) engaged in business on an Indian reservation in this state if that Indian distributor or dealer is not licensed pursuant to Section 57-36-02?

The United States Supreme Court decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 95 S. Ct. 1634 (1976), was concerned with the Montana cigarette tax law and appears to be applicable to North Dakota also insofar as it concludes that the

State cannot impose a cigarette vendor's license fee on Indian vendors transacting business within the boundaries of an Indian reservation. While an argument might be made that in spite of the Moe decision a licensed cigarette distributor in this state may not under any circumstances sell cigarettes to an unlicensed Indian retailer transacting business on an Indian reservation in this state, thereby attempting to coerce such retailer into purchasing a dealer's license, that approach would not appear to be compatible with the spirit of the Moe decision.

It is therefore our opinion that a cigarette distributor in this state who is licensed pursuant to Section 57-36-02 may, under the two different circumstances described below, sell cigarettes to an Indian dealer transacting business on an Indian reservation in this state even though the Indian dealer is not licensed pursuant to Section 57-36-02. The two circumstances under which such sales to the Indian dealer may be made are:

- 1) When the cigarettes sold by the distributor bear the required North Dakota cigarette tax stamps. A cigarette distributor in this state who is licensed as provided by Section 57-36-02 is not permitted to carry unstamped cigarettes in his inventory in this state for the purpose of eventually selling them to Indian distributors or dealers engaged in business on an Indian reservation. Subsection 2 of Section 57-36-07 requires a licensed distributor in this state to attach the cigarette tax stamps to the cigarette packages "immediately upon receipt" by him of the cigarettes. Since the cigarettes would no longer be in interstate commerce after the licensed distributor placed them in his inventory, any transportation of them after that to some other place within this state without the cigarette tax stamps attached to them would be unlawful as provided in Section 57-36-13.
- 2) When the licensed cigarette distributor in this state orders the cigarettes, either with or without the cigarette tax stamps attached, from a supplier outside of North Dakota for delivery directly in interstate commerce to the Indian dealer on the Indian reservation. This is because, as indicated in our answer to QUESTION 1, whether the sale to the Indian dealer on the reservation occurs outside of North Dakota or when interstate commerce ends on the reservation when delivery to the Indian is made there, that sale of the cigarettes is not a sale in this state that is subject to the cigarette taxes.

QUESTION 3. Is a cigarette distributor (wholesaler) located outside of this state who is licensed pursuant to Sections 57-36-02 and 57-36-08 permitted to sell cigarettes to an Indian distributor (wholesaler) or to an Indian dealer (retailer) engaged in business on an Indian reservation in this state if that Indian distributor or dealer is not licensed pursuant to Section 57-36-02?

Our answer to this question is "Yes" if the cigarettes are delivered directly in interstate commerce from outside the state to the Indian

dealer on the reservation.

QUESTION 4a. Is a cigarette distributor (wholesaler) located outside of this state who is not licensed pursuant to Section 57-36-02 permitted to sell cigarettes not bearing the North Dakota cigarette tax stamps to an Indian distributor (wholesaler) or to an Indian dealer (retailer) engaged in business on an Indian reservation is this state whether or not that Indian distributor or retailer is licensed pursuant to Section 57-36-02?

Our answer to this question is "Yes" because as indicated in our answer to QUESTION 1, whether the sale to the Indian distributor or dealer on the reservation occurs outside of North Dakota or when interstate commerce ends on the reservation with delivery to the Indian distributor or dealer, that sale of the cigarettes is not a sale in this state that is subject to the cigarette taxes. When the Indian distributor or dealer on the reservation resells the cigarettes on the reservation, that sales is beyond the jurisdiction of the state to tax for reasons set out in *White Eagle v. Dorgan*, 209 N.W.2d. 621 (N.D. 1971). Also see *Mahoney v. State Tax Commission*, 524 P. 2d. 197 at 191-192 (Idaho, 1973).

QUESTION 4b. If the answer to "(4)a" is "Yes", must the distributor deliver the cigarettes on to the reservation to the Indian distributor or dealer or can the Indian distributor or dealer take title to, and delivery of, them outside of North Dakota and bring them into the state and then on to the reservation?

Whether the distributor delivers the cigarettes on to the reservation in this state in interstate commerce or whether the Indian distributor or dealer on the reservation brings them into the state and on to the reservation in the course of interstate transportation of them makes no difference. In either case the sale to the Indian distributor or dealer is not subject to the cigarette taxes because it was either a sale in interstate commerce or was a sale that occurred wholly outside North Dakota and therefore cannot be taxed. See *Mahoney v. State Tax Commission*, 524 P. 2d. 187 at 191-192 (Idaho, 1973); also see N.D.C.C. Section 57-36-13 which makes it unlawful to transport unstamped cigarettes in this state except in the course of interstate commerce.

QUESTION 5a. Is a cigarette distributor (wholesaler) who is licensed as provided by Section 57-36-02 permitted to carry in his inventory for eventual sale to an Indian reservation any cigarettes that do not bear the North Dakota cigarette tax stamps?

Our answer is "no" because a cigarette distributor in this state who is licensed as provided by Section 57-36-02 is not permitted to carry unstamped cigarettes in his inventory in this state for the purpose of eventually selling them to Indian distributors or dealers engaged in business on an Indian reservation. Subsection 2 of Section 57-36-07 requires a licensed distributor in this state to attach the cigarette tax stamps to the cigarette packages "immediately upon receipt" by him of the cigarettes. Since the cigarettes would no

longer be interstate commerce after the licensed distributor placed them in his inventory, any transportation of them after that to some other place within this state without the cigarette tax stamps attached to them would be unlawful as provided in Section 57-36-13.

QUESTION 5b. If the answer to "(5)a" is "yes", must the distributor deliver the cigarettes on to the Indian reservation to the Indian distributor or dealer or can the Indian distributor or dealer take delivery of them at the distributor's place of business that may be either in or outside North Dakota?

Since our answer to QUESTION 5a is "No", an answer to this question is not required.

QUESTION 6a. Can an Indian distributor engaged in business on an Indian reservation in this state legally sell cigarettes to both Indian and non-Indian customers without the license prescribed by Section 57-36-02?

The intent of the question as we understand it is: Can an Indian distributor engaged in business on an Indian reservation in this state but not licensed pursuant to Section 57-36-02 legally sell cigarettes on the reservation to both Indian and non-Indian dealers or other customers?

Our answer to this question is "Yes" because, as stated in the answers to QUESTIONS 2 and 3, the licensing requirements of Section 57-36-02 do not apply to Indian distributors located on an Indian reservation and because, as explained in the answer to QUESTION 4a, the state cannot tax a sale made on the reservation by an Indian. But, although the Indian distributor need not be licensed under Section 57-36-02 to sell cigarettes on the reservation to anyone, if the customer buying from him is a non-Indian distributor either on or off the reservation, that non-Indian customer must be licensed pursuant to Section 57-36-02 because the state's jurisdiction does extend to him. If, however, the customer of the Indian distributor is a non-Indian dealer, either on or off the reservation, that non-Indian dealer is in effect prevented from buying unstamped cigarettes from the Indian distributor because the non-Indian dealer must be licensed pursuant to Section 57-36-02 and is prevented by that section from buying state cigarette tax stamps and from having in his possession cigarettes that do not have state tax stamps attached. If the customer of the Indian distributor is a non-Indian consumer either on or off the reservation, then that consumer is required to pay a consumer's cigarette use tax directly to the Tax Commissioner under the conditions prescribed by Section 57-36-27.

QUESTION 6b. Can an Indian dealer (retailer) engaged in business on an Indian reservation in this state legally sell cigarettes to both Indian and non-Indian customers without the license prescribed by Section 57-36-02?

As to sales made on the reservation by an Indian dealer, our answer is "Yes", because, as stated in the answers to QUESTIONS 2 and 3, the licensing requirements of Section 57-36-02 do not apply to an Indian dealer located on an Indian reservation. But, if the customer of

that Indian dealer is non-Indian dealer either on or off the reservation, that non-Indian dealer is in effect prevented from buying unstamped cigarettes from the Indian dealer because a non-Indian dealer is subject to the jurisdiction of the state and must be licensed pursuant to Section 57-36-02 but is prevented by that section from buying state cigarette tax stamps and from having in his possession cigarettes that do not have state cigarette tax stamps attached.

If the customer of the Indian dealer is a consumer either on or off the reservation, then that consumer is required to pay a consumer's cigarette use tax directly to the Tax Commissioner under the conditions prescribed by Section 57-36-27.

QUESTION 7a. If the answer to question 6a is "Yes", can that Indian distributor sell to Indian and non-Indian customers any cigarettes that do not bear North Dakota cigarette tax stamps?

As to sales made on the reservation, our answer is "Yes", because sales made on an Indian reservation by an Indian cannot be taxed by the state. If, however, the customer of the Indian distributor is a non-Indian distributor, a non-Indian dealer, or a non-Indian consumer, the same requirements apply to them as are set out for them in the answer to QUESTION 6a.

QUESTION 7b. If the answer to question 6b is "yes", can that Indian dealer sell to Indian and non-Indian customers any cigarettes that do not bear North Dakota cigarette tax stamps?

As to sales made on the reservation, our answer is "Yes", because sales made on an Indian reservation by an Indian cannot be taxed by the state. If, however, the customer is a non-Indian dealer or a non-Indian consumer, the same requirements apply to them as set out for them in the answer to QUESTION 6b.

QUESTION 8. If the answer to questions 7a or 7b is "yes", can that Indian distributor or dealer be required to collect the North Dakota cigarette tax on any of the cigarettes sold and pay the tax over to the State Tax Department?

Our answer to this question is "No". Although *Moe v. Consolidated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, holds that a state can require an Indian retailer on an Indian reservation of the kind involved there to collect a state cigarette sales tax from non-Indian consumers where the state law provided that the tax was on the consumer, the provisions of Chapter 57-36 do not impose any such collection requirement on any cigarette dealer (retailer). Section 57-36-27 makes only the consumer responsible to pay the consumer's cigarette use tax directly to the Tax Commissioner on cigarettes to which cigarette tax stamps are not attached, and it does not require the dealer to collect the tax from him in any case and pay it to the State Tax Commissioner.

QUESTION 9. If the answer to questions 7a or 7b is "no", can that Indian distributor or dealer be required to report to the State Tax Department the name and address and the date and amount of cigarettes he sold to either his Indian or non-Indian



customers?

An answer to this question is not required since our answer to QUESTIONS 7a and 7b, as set out above, is "Yes". Further, we are not aware of any provision of law in North Dakota Century Code Chapter 57-36 or elsewhere which purports to impose any such reporting requirements on an Indian distributor or an Indian dealer who makes cigarette sales on an Indian reservation.

Sincerely,

GERALD W. VANDEWALLE

Chief Deputy Attorney General