

OPINION
79-286

January 19, 1979 (OPINION)

The Honorable Wayne G. Sanstead
Lieutenant Governor
State Capitol
Bismarck North Dakota 58505

Dear Lieutenant Governor Sanstead:

This is in reply to your letter of January 4, 1979, requesting my opinion in answer to the following question quoted from your letter:

"Can a Rural Water System, whether a co-op or a nonprofit corporation, reclassify the monthly billing whereby sales tax is not paid on the debt service portion of the members bill?"

We assume from your question that the debt service portion of the monthly billing for water furnished to a member of such a rural water system is for an amount to cover principal and interest payments on money borrowed by the rural water cooperative or nonprofit corporation for either the construction of the system or its operation or both and that the members of the cooperative or nonprofit corporation do not have any personal liability for the debt.

For the reasons set out below it is our opinion that sales tax applies to the full monthly billing for water furnished to a member, including any part of the billing that represents the cost of debt service paid by the co-op or nonprofit corporation.

We cannot find any provision in the retail sales tax law, Chapter 57-39.2 of the North Dakota Century Code, that either authorizes or requires retail sales of water or water service made by a rural water cooperative or nonprofit corporation to its rural members to be treated differently from retail sales of water or water service made by any other kind of retailer.

Subsection 1 of Section 57-39.2-02.1 of the sales tax law imposes a 3% sales tax "upon the gross receipts of retailers from all sales at retail . . . of the following to consumers or users:

* * *

- b. The furnishing or service of steam, gas, water or communication services.

* * *

Subsection 6 of Section 57-39.2-01 of the sales tax law provides that "'Gross receipts' means the total amount of sales of retailers, valued in money, whether received in money or otherwise"

Subsection 1 of Section 57-39.2-08.2 of the sales tax law requires the retailer to add the tax to the sales price or charge and to

collect it from the customer.

Subsection 3 of Section 57-39.2-01 of the sales tax law defines "retail sale" as including "the sale of steam, gas, electricity, water, and communication service to retail consumers or users."

The foregoing provisions clearly intend that the retail sales price that is taxable shall include whatever portion of his debt service cost or any other costs the retailer might take into account in establishing his sales price. The price paid by the customer is for water he buys and is not in part for water and in part for debt service owed by the retailer which the customer neither buys nor is obligated for as such.

While the following cases involve different facts than those presented here, they do consider principles of law for defining a retail sale for sales tax purposes that are pertinent here: *Kistner v. Iowa State Board of Assessment and Review*, 280 N.W. 587 (Iowa, 1938); *Bay City v. State Board of Tax Administration*, 290 N.W. 395 (Mich. 1940); and *Voss v. Gray*, 70 N.D. 727, 298 N.W. 1 (1941).

There is nothing in any of the above provisions of the sales tax law or elsewhere in the law which states that a retailer of steam, gas, electricity, water, or communication service can separate out of his sales price his cost of debt service or any other cost that he takes into account in establishing his retail price to the customer and thereby make that part of the retail sale nontaxable. Nor is there any provision which permits any other retailer to do so.

It is therefore our opinion that a rural water system, whether a co-op or nonprofit corporation, cannot reclassify its monthly billing to its customers so as to make the debt service portion of its water charges not subject to sales tax.

Sincerely yours,

ALLEN I. OLSON

Attorney General