Overruled in part by N.D.A.G. 91-13

LETTER OPINION
80-67

November 21, 1980 (OPINION)

Honorable Byron L. Dorgan
State Tax Commissioner
State Capitol
Bismarck, North Dakota 58505

Dear Commissioner Dorgan:

This is in reply to your letter of August 7, 1980, requesting an opinion in answer to the question of whether the motor vehicle excise tax, chapter 57-40.3, N.D.C.C., applies to an Indian tribe or its resident-enrolled members upon the purchase of, or application for title to, motor vehicles used both within and outside the Indian reservation boundaries.

You state that the question arises because of an inquiry you received from an attorney who asserts that the decision of the United States Supreme Court on June 10, 1980, in Washington et al. v. Confederated Tribes of the Colville Indian Reservation et al. ___ U.S. ___, 100 S. Ct. 2069, requires a ruling that the tax cannot be applied with respect to motor vehicles purchased by Indian tribes or their resident-enrolled members. In that case the State of Washington imposed separate annual excise taxes for the privilege of using motor vehicles and mobile homes, campers and travel trailer taxes in the state. Each tax was assessed annually at a certain percentage of the fair market value of the vehicle.

In that Confederated Tribes case the Supreme Court (100 S. Ct. at 2075 and 2086) compared those Washington taxes to the Montana annual personal property tax that it had earlier held in Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed.2d (1976), could not be applied to motor vehicles owned by trial members who resided on their reservation. The Montana tax was a personal property tax that was assessed annually at a percentage of market value of the motor vehicle. The Supreme Court noted that the only difference between the Montana and Washington taxes was that the Washington tax was called an excise tax that was imposed for the privilege of using the vehicle in that state whereas the Montana tax was labeled a personal property tax. It held that this difference was one of mere nomenclature that under the circumstances was insufficient for distinguishing between the Washington and Montana taxes. The Court therefore held that the Washington excise tax could not be applied to vehicles owned by the Tribe or its resident-enrolled members, but it indicated that perhaps the tax could be levied if it were tailored to only the amount of actual off-reservation use.

The North Dakota motor vehicle excise taxes in question here are each imposed as an "excise tax. . .on the purchase price of any motor vehicle purchased or acquired either in or outside of the state of North Dakota for use on the streets and highways of this state and required to be registered under the laws of this state." Sections 57-40.3-02 and 57-40.3-03, N.D.C.C. "Purchase price" as used in those sections is defined in section 57-40.3-01(9) as meaning the amount paid for the motor vehicle less the amount allowed, if any, for a trade-in as part payment as provided in that subsection. The tax is collected by the

state motor vehicle registrar for each motor vehicle when application for title or license registration is made to him for that vehicle, sections 57-40.3-06 and 57-40.3-07, and the registrar acts as agent of the state tax commissioner for purposes of collecting the tax, section 57-40.3-12.

Section 57-40.3-04 of the motor vehicle excise tax law provides that "There are specifically exempted from the provisions of this chapter and from computation of the amount of the tax imposed by it the following:. . .", after which a number of specific exemptions are set out. None of those exemptions applies specifically to motor vehicles purchased or acquired by an Indian tribe or an enrolled member of that tribe who resides on that tribe's reservation in this state, although a resident-enrolled member of the tribe who meets the conditions of any of those exemptions would be entitled to claim the exemption without regard to his tribal status and residence on the reservation.

Section 57-40.3-07 clearly requires the state motor vehicle registrar to either collect the tax or, if the tax is not paid, refuse to issue a title or license registration to the person making application for it unless that person can establish a claim of exemption under the provisions of either that section or section 57-40.3-04 or under the reciprocity provisions of Section 57-40.3-09. To extend a general exemption for Indian tribes and enrolled tribal members who are residents on their tribe's reservation would require either an amendment to the law or a holding that the provisions of the law as they now exist are unconstitutional when applied to such tribes or tribal members. It therefore is necessary to determine if this excise tax law is unconstitutional when applied to them.

It is axiomatic that a statute should not be held to be unconstitutional either in whole or in part unless its unconstitutionality is clearly established, and this principle applies with particular force to a holding by the Attorney General of this state regarding the constitutionality of a law of this state.

It is necessary to compare the provisions of the motor vehicle excise tax law with those of Montana and Washington that were held by the United States Supreme Court in the Moe and the Confederated Tribes cases, supra, to be unconstitutional when applied to motor vehicles or other vehicles owned by an Indian tribe or its enrolled members residing on the tribal reservation. Both the Montana and Washington taxes were imposed annually at a percentage of the fair market value of the vehicle and because of that the Supreme Court found no substantial difference between the two even though the Montana tax was labeled as a personal property tax and the Washington tax was labeled as an excise tax on the use of the vehicle in the state.

In contrast to the Montana and Washington taxes, the North Dakota tax is not an annual tax on either the motor vehicle or the use of it. The North Dakota tax is imposed (sections 57-40.3-02 and 57-40.3-03) on the "purchase price" of motor vehicles that are "purchased or acquired for use on the streets and highways of this state and required to be registered under the laws of this state." This tax is imposed at the same total rate (3 percent) and on the same amount (purchase price, not including trade-in allowance) as is the state's 3 percent retail sales tax, from which tax retail sales of motor vehicles are exempted, see chapter 57-39.2, N.D.C.C. These characteristics of the motor vehicle excise tax make it substantially more like a sales tax than an annual personal property tax or an annual use tax of the kinds involved in the Moe and Confederated Tribes cases, supra.

It will likely be argued that the motor vehicle excise tax is in reality a use tax even though it is imposed on the purchase price of the motor vehicle rather than on the use of it and that this makes it in substance a property tax on the motor vehicle as was held in Confederated Tribes supra, where the Washington tax imposed annually. But, as stated in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158, 93 S. Ct. 1267, 1275 (1973), with respect to use taxes and property taxes: "That is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes."

As already noted, if the motor vehicle excise tax law were to be held inapplicable to Indian tribes and their resident-enrolled members, it would be necessary to hold that the law is to that extent unconstitutional. As also noted, a statute is held to be unconstitutional only when its unconstitutionality is clearly established and this principle applies with particular force to this office when the constitutionality of a statute of this state is under consideration.

When we take into account all of the considerations discussed above, we do not believe we can say with any real certainty that the motor vehicle excise tax law is either clearly constitutional or clearly unconstitutional when applied generally to Indian tribes and their resident-enrolled members. Under these circumstances, it is our opinion that the law must be regarded as constitutional and that the collection of the tax should be continued unless either the Legislature or the courts require otherwise.

Sincerely,

ALLEN I. OLSON
Attorney General