

Overruled in part by N.D.A.G. 98-L-142

**LETTER OPINION
93-L-32**

February 10, 1993

Kathi Gilmore
State Treasurer
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Ms. Gilmore:

Former Treasurer Robert E. Hanson requested an opinion in a December 31, 1992, letter on whether the state may refund a portion of the wholesale alcoholic beverage license fees paid under an interpretation of law which was later changed.

Until an Attorney General's opinion issued July 8, 1991, alcoholic beverage wholesalers were required to obtain a wholesale license for each warehouse location operated by the wholesaler. In a July 8, 1991, letter opinion to Representative Richard Kloubec, former Attorney General Nicholas Spaeth concluded that N.D.C.C. § 5-03-01 required an individual wholesaler to obtain only one license even if the wholesaler operated out of more than one location. This interpretation differed from prior Practice.

Based on Attorney General Spaeth's legal interpretation of N.D.C.C. § 5-03-01, former Treasurer Robert Hanson asked whether the state may refund the "overpayments" made by the affected wholesalers, and, if so, whether there was a limitation on the number of years for which refunds could be given.

The rule of law on the duty to refund overpayments of taxes or license fees voluntarily made under a misinterpretation of law was stated by the North Dakota Supreme Court in *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580 (N.D. 1984). The Supreme Court

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held:

Finally, we note that the taxes were not paid under protest. The weight of authority is to the general effect that a payment of taxes, with knowledge of all the facts, is not rendered involuntary by the fact that it was paid in the mistaken belief that the statute or ordinance under which it was levied was valid. Manufacturer's Casualty Ins. Co. v. Kansas City, 330 S.W.2d 263, 265 (Mo.App. 1959); see 72 Am.Jur.2d State & Local Taxation, § 1087, p. 349. Generally, in the absence of a statute to the contrary, a person who has paid a license fee or tax which is illegal or in excess of the sum which might lawfully be exacted cannot recover the amount paid if the payment was made voluntarily with full knowledge of the facts, although it was made in good faith, through a mistake or in ignorance of the law, unless the recovery is permitted by an agreement entered into at the time the payment was made. Ibid.

350 N.W.2d at 585, 586.

A review of N.D.C.C. ch. 5-03 does not disclose general refund authority for overpayments on wholesale alcoholic beverage license fees. Furthermore, the Treasurer's current biennial appropriation does not contain specific authority for refunds in its line items. 1991 N.D. Sess. Laws ch. 28, § 1, subdivision 6. This office has previously determined that statutory authority and an appropriation are necessary to pay refunds. 1975 N.D. Op. Att'y Gen. 74. A copy of that Opinion is attached.¹

Because no statute requires a refund of wholesale license fees under these circumstances, and because, to my knowledge, no agreements were made to make refunds, nor were the fees paid under protest, it is my opinion that the state of North Dakota does not have the authority to issue refunds of the wholesale alcoholic beverage license fees.

¹The miscellaneous refund appropriation to the Department of Accounts and Purchases (now Office of Management and Budget) mentioned in that 1975 letter continues to be made. 1991 N.D. Sess. Laws ch. 31, § 1, subdivision 1. However, for that appropriation to be used, there must be other statutory authority for paying the refunds in question.

Kathi Gilmore
February 10, 1993

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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