

LETTER OPINION
94-L-137

April 29, 1994

Mr. Stephen J. Rice
Walsh County State's Attorney
Walsh County Courthouse
Grafton, ND 58237

Dear Mr. Rice:

Thank you for your letter asking whether Walsh County, a home rule county, may impose a use tax only on gravel, sand, pea rock, or other gravel sold in Walsh County and on clay and other related materials used in highway and road construction sold within Walsh County. You wish to know whether this proposal falls within statutory home rule county authority.

The list of taxes home rule counties may adopt does not specifically include a "use" tax. See N.D.C.C. ? 11-09.1-05(2). However, later in the same subsection, it states, home rule county taxes "may not supersede any state law which determines what property or acts are subject to, or exempt from, ad valorem or sales and use taxes." N.D.C.C. ? 11-09.1-05(2) (emphasis added). Reading the sentences together to give meaning to both and not render either useless, I have concluded (as indicated in my December 23, 1993, letter) that the Legislature intended to allow home rule counties to impose use as well as sales taxes. See Litten v. City of Fargo, 294 N.W.2d 628, 633 (N.D. 1980).

The state's sales and use taxes are general in nature, "the purposes of which [are] to tax the retail purchases made in North Dakota, to tax the use of certain purchases made at retail in North Dakota, and to tax the use of purchases made at retail outside North Dakota." Boeing Co. v. Omdahl, 169 N.W.2d 696, 714 (N.D. 1969). Also see F. W. Woolworth Co. v. Gray, 46 N.W.2d 295 (N.D. 1951); Maichel, North Dakota Sales and Use Tax Laws and Their General Application, 47 N.D.L. Rev. 383 (1971). Sales taxes imposed only on the sale of a specific commodity . . . "are usually

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denominated 'selective sales taxes,' as distinguished from 'general sales taxes' which are applicable to goods or commodities in general." 68 Am. Jur.2d Sales and Use Tax ? 7.

N.D.C.C. ? 11-09.1-05(2) regulates home rule county taxing authority by providing that county taxes "may not supersede any state law which determines what property or acts are subject to, or exempt from, ad valorem or sales and use taxes." Therefore, if a home rule county seeks to enact sales and use taxes, those taxes must be general in nature and not vary from the acts or property taxed or exempted under state sales and use tax laws. See N.D.C.C. chs. 57-39.2 and 57-40.2.

The effect of the proposal of the Walsh County Commission would be to enact a selective use tax that differs from the state's general sales and use taxes. That action would not fall within the statutory constraints set forth in my December 23, 1993, letter.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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