

OPINION
46-36

November 2, 1946 (OPINION)

CITIES

RE: No Power to Impose Sales Tax

This is in reply to your letter of October 31, 1946, in which you request the opinion of this office as to the right of a city to enact an ordinance imposing a sales tax on retail sales therein.

Section 130 of the state Constitution provides:

"The legislative assembly shall provide by general law for the organization of municipal corporations restricting their powers as to levying taxes and assessments, borrowing money and contracting debts, and money raised by taxation, loan or assessment for any purpose shall not be diverted to any other purpose except by authority of law."

Subsection 1 of section 40-0501 of the 1943 Revised Code authorizes the governing body of a municipality "to enact or adopt such ordinances, resolutions, and regulations, not repugnant to the Constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to repeal, alter, or amend the same. * * *"

Subsection 4 of section 40-0501 authorizes the governing body of a municipality "to levy and collect taxes on real and personal property for general and special purposes."

No authority has been conferred upon cities to impose a sales tax. The home rule charters under which cities in some states operate, and the laws conferring the power to impose such taxes in others, enable a number of cities--such as New York and many cities in California--to impose a retail sales tax. It has been held by the Supreme Courts of several states that where the Legislature confers on a municipality the general power of taxation, the Legislature grants all power possessed by itself. But no such power has been conferred on cities by the Legislature of this state.

"The general rule is that municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation." (37 Am. Jr. p. 722, sec. 112).

With respect to the extent and limit of municipal taxing power, American Jurisprudence says:

"It is a generally recognized principle that a grant by the Legislature of the taxing power to a municipal corporation is to be strictly construed. It is likewise an established rule

that the authority of municipalities to levy a tax must be made to clearly appear, and that doubts, if any, as to the power sought to be exercised, must be resolved against the municipality; the power to tax is a separate, independent power, and exists in municipal corporations only to the extent which it is clearly conferred by their charters or other state statutes, * * *." (38 Am. Jr. Sec. 385, page 72).

In the case of State v. Wetz, 40 N.D. 299, 160 N.W. 835, the Supreme Court of North Dakota held:

"Under section 130 of the Constitution, the Legislature is given plenary control over the taxing power of municipalities, and section 179 of the Constitution, as amended in 1914, does not give to local taxing districts the constitutional right to retain upon their tax lists all of the property within such districts."

"In its essence, the objection interposed in this case on behalf of the city of Fargo amounts to a complaint that its taxing power is impaired, but, by section 150 of the Constitution, the Legislature is given plenary control over municipalities in the matter of the limitations upon their taxing power. In fact their power to tax is derived from legislative grant." (State v. Wetz, 40 N.D., page 316).

In the case of Minot Special School District v. Olsness, 53 N.D. 690, 200 N.W. 968, 45 A.L.R. 1337, our state Supreme Court quoted with approval the following language from the decision of the Supreme Court of the United States in the case of Atkin v. Kansas, 101 U.S. 207, 48 L.ed. 148, 24 Sup. Ct. Rep. 124:

"Such corporations (municipal corporations) are the creatures, mere political subdivisions, of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character in dome under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purpose of local government. They may be created, or, having altogether withdrawn at the will of the Legislature; the authority of the Legislature, when restricted or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

It is, therefore, my opinion that cities of North Dakota do not, under existing laws, have the power to impose a tax on retail sales.

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