

**OPINION
59-277**

November 9, 1959 (OPINION)

TAXATION

RE: Special Fuels Tax Levy - Tax Levied - Applicability
to Institutions of Higher Learning

This is in reply to your request for an opinion whether or not the special fuel tax levy as provided for in chapter 381 of the 1959 Session Laws is applicable to institutions of higher learning.

Section 2 of this Act provides:

TAX LEVIED. There is hereby levied and imposed a special excise tax on all sales of special fuel which are exempted from the tax imposed under chapter 57-52 of the 1957 Supplement to the N.D.R.C. of 1943 as amended to a special fuel user at the rate of two percent of the sale price of such special fuels, provided, however, that discounts for any purposes allowed and taken on such sale shall * (not) be included as a part of the sale price."

In the absence of a constitutional provision the state has power to tax the property of its cities, counties and other political subdivisions. The rule, however, appears to be contrary as applied to governmental agencies or instrumentalities. Whether the institution of higher learning is such an agency need not be considered for reasons set out hereinafter.

. . . . The property of the United States and of the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. . . ."

The tax referred to is a tax on property (ad valorem tax).

The tax in our question is on the sale of certain fuel. The tax is a special tax on all sales of special fuel which are exempt from tax under chapter 57-52.

While it is generally assumed or implied that the state and its governmental instrumentalities are exempt from paying property taxes, even though there is no specific expression to exempt them, such presumption as a general rule does not exist in the case of excise and privilege taxes (51 Am. Jr. section 1275).

Being that this is a sales or excise tax, the general rule on exemptions applies. The rule is that generally an exemption from taxation is never presumed but on the contrary the presumption is against exemption. The burden lies on the claimant to establish clearly his right to the exemption within the terms and conditions of the statute, (84 C.J.S. section 225). After examining all of the

provisions of chapter 381, it is observed that no exemption is made for any person.

It is possible that this question came to rise because the political subdivisions, instrumentalities of the state, municipal corporations, etc. are exempt from the present North Dakota sales tax. It is recognized that there is a strong similarity between the North Dakota Sales Tax Act passed in 1935 made no provision for exempting cities, counties, political subdivisions, etc. Under that Act the Attorney General's office held in an opinion dated September 13, 1935, that a school district must pay a sales tax on coal purchased.

As a matter of information the Legislature in 1937 specifically provided that the term "person" included the State of North Dakota, its cities, villages, etc. This provision remained in effect until 1943 and the sales tax was made applicable to the various political subdivisions.

In 1943 the Legislature specifically provided that the sales of personal property to the United States, the State of North Dakota and its subdivisions be exempt from the sales tax. After the passage of this legislation the state and the political subdivisions were no longer subject to the sales tax. It could well be that because of this provision that it was assumed that the special fuel tax, which is similar to the sales tax, was not applicable to the state or its political subdivisions. Being that chapter 381 contains no exemption for any person, we must presume that the tax applies equally well to every person, including state institutions and political subdivisions. To arrive at a different conclusion would first require legislation permitting such exemption.

It is therefore our opinion that the special fuel tax levy is applicable to institutions of higher learning.

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