

OPINION
61-237

October 19, 1961 (OPINION)

TAXATION

RE: Equalization of Retail Stocks of Merchandise - Use of Sales Tax
 Information

This is in reply to your request for my opinion regarding the powers of the State Tax Commissioner and the State Board of Equalization to use sales tax information to equalize the valuations of retail stocks of merchandise in some political subdivisions but not in others, which request you made in your letter of September 14, 1961, on behalf of your city council.

You specifically requested "information on where and when the State Tax Commissioner has derived the authority to base valuations for Tax Equalization of Retail Merchants Stocks, on the amount of Sales Tax collected by a Retail Merchant." You suggest that "if the Tax Commissioner and the State Board of Equalization are to use the Sales Tax method, that it should be required to be used by all political subdivisions in their equalization," and you state that: "By using the Sales Tax method for equalization of Retail Merchants Stocks, the Personal Property tax becomes a Sales Tax imposed only on Retail Merchants, which is discriminatory and illegal."

I can find no provision in the law which expressly directs the Tax Commissioner to compile information based on sales tax statistics or to compile any other information for the use of the State Board of Equalization in equalizing assessed valuations of the various classes of property assessed in this state. For this reason I believe it is necessary to consider generally the powers and duties of the State Tax Commissioner and the State Board of Equalization with respect to equalization matters and then to specifically consider the use of sales tax statistics for state and local equalization purposes.

It is apparent that since the State Board of Equalization does not have employees of its own and since it does not function throughout the year as a board in continuous session, but meets only three different times each year, in August and September, it must rely on some source other than itself for much of the information it needs in equalizing property assessments throughout the state when it meets for that purpose on the fourth Tuesday of August each year as directed by section 57-13-03 of the North Dakota Century Code.

Because the Tax Commissioner is a member of the State Board of Equalization (section 57-13-01) and because each county auditor must furnish to him each year a copy of the abstracts of the real and personal property lists of assessments as equalized by the County Board of Equalization (section 57-12-08) which list must be examined and compared by the State Board of Equalization (section 57-13-03) it is logical for the Tax Commissioner to compile and analyze the information for those abstracts and to compile and analyze

information from various other sources for his own use as a State Board member and for the use of the other Board members. The very nature of the Tax Commissioner's powers and duties as prescribed by the Legislature imply that he should furnish the State Board of Equalization with any information that would be helpful to the Board in performing its equalization duties. This is evident particularly from his power and duty to exercise general supervision over all assessors and local boards of equalization (subsection 1 of section 57-01-02); from his authority to require from other public officers information relating to assessments and taxes and information needful in the administration of the tax laws (subsection 5 of section 57-01-02); from his authority to "summon witnesses to appear and give testimony and produce books, records, papers, and documents relating to any matter which he or the State Board of Equalization may have authority to investigate or determine" (subsection 6 of section 57-01-02); and from his duty to transmit to the Governor and each legislator "the report of the commissioner and state board of equalization" (subsection 9 of section 57-01-02).

The Legislature in enacting chapter 57-13, North Dakota Century Code, relating to the State Board of Equalization and its powers and duties, could have, but has not,

. . . set a standard of evidence by which the state board of equalization must be guided. Ordinarily, however, it may equalize from its own knowledge, with or without outside evidence; and the State Tax Commission has wide latitude in securing information in the performance of its duties in connection with equalization. Accordingly, except as statutes may provide otherwise," (see section 57-13-05) "a formal hearing is not required to be held; and the board is not generally required to examine witnesses or to base its action on any particular kind or quantum of evidence, but may proceed in its own way and act on any information which is satisfactory to it; nor need the board divulge the basis of its findings" 84 C.J.S. Taxation, page 948, Section 503(c).

The decision of the state board of equalization is judicial in character" 84 C.J.S. Taxation, page 949, citing Northern Pacific Railway Co. v. State 71 N.D. 93, 104, 299 N.W. 696, 699.

Since the Legislature has made no provision for appeal from the determinations of the State Board of Equalization:

. . . a decision of the state board, within the scope of its authority, is final; and the courts cannot interfere with the judgment of a board of equalization when it is honestly and legally exercised," (citing Northern Pacific Railway Co. v. State, 71 N.D. 93, 109, 299 N.W. 696, 700) "without gross excessiveness or discrimination. Thus, a court is powerless to substitute its judgment for that of the board as to value, or to review any errors of judgment which it may make." 84 C.J.S. Taxation, pages 951-952.

Where the board acts within its jurisdiction, its judgment, in

the absence of fraud, is not open to collateral impeachment;" 84 C.J.S. Taxation, page 952, citing Northern Pacific Railway Co. v. State 71 N.D. 93, 108, 299 N.W. 696, 700.

While the Northern Pacific Railway case dealt with the scope of powers of the State Board of Equalization in assessing railroad property, the case undoubtedly applies with equal force to the scope of its powers in equalizing property valuations.

Section 57-13-06 of the North Dakota Century Code provides that:

The proceedings of the state board of equalization shall be presumed to be regular and the determinations of such board shall not be impaired, vitiated, nor set aside upon any ground not affecting substantially the reasonableness of the tax
"

Even in the absence of such a statute, the presumption provided in section 57-13-06 would undoubtedly be applied. See 84 C.J.S. Taxation, pages 953, 954; subsection 15 of section 31-11-03, North Dakota Century Code; Moffit-Hazelton Special School District No. 6 v. Ward 107 N.W.2d. 636, 644; and the Northern Pacific case supra, 71 N.D. at 108, 109, 299 N.W. at 700.

It is apparent from the foregoing that both the Tax Commissioner as a member of the State Board of Equalization and the State Board itself have a wide latitude in obtaining and using information from any source that is relevant to the board's power and duty to equalize property valuations for assessment and taxation purposes, and that the board's determinations and judgments with respect to equalization matters will not be set aside by a court unless they are so unreasonable as to, in effect, constitute a fraud, either actual or constructive, upon the rights of the taxpayers.

Considering now your specific question relating to use of sales tax information for state equalization of retail merchants stocks of merchandise, you no doubt have reference to use of the so-called "sales tax formula" devised by the State Tax Commissioner about ten or twelve years ago to aid the State Board in equalizing retail stocks of merchandise. This formula or method, I am advised, involves the separating of total sales tax receipts reported by retail merchants within a particular city or village to the Tax Commissioner during the twelve-month period preceding the April first assessment date (see subsection 2 of section 57-02-11), multiplying the total of those sales tax receipts by fifty to convert it to a total volume of retail sales in that city or village, and then dividing that total retail sales figure by a factor which is intended to take into account the average markup over cost and the average inventory turnover of all retail inventories. The resulting figure is then compared to the assessed valuation of all retail stocks in the particular city or village as certified in the abstract sent to the Tax Commissioner by the County Auditor (section 57-12-08).

The State Board then determines what change, if any, should be made in the total assessment of the retail stocks after giving consideration to this comparison and to any other information of

which it may have knowledge, including information furnished to it by the governing body of the city or village or any other political subdivision at the hearing before the State Board as provided by section 57-13-05 of the North Dakota Century Code.

I believe this formula or method is of value to the State Board of Equalization in the equalizing of valuations of retail stocks of merchandise, that it is within the scope of the Tax Commissioner's authority to furnish the information to the State Board since it does not disclose facts relating to an individual merchant's business, and that the State Board may use the information, together with any other pertinent information available to it, as long as the formula is not applied in such an arbitrary or discriminatory manner as to constitute fraud in the legal sense.

Insofar as use of the sales tax formula by all political subdivisions is concerned, it apparently is not possible for this information to be assembled in time for use by them. Since the assessment of stocks of merchandise is based on the average inventory for the twelve-month period preceding April first (subsection 2 of section 57-02-11) and the sales tax returns for the last calendar quarter of that period are not due until the end of May, it is not possible to compile the information in time for the various local equalization board meetings held in the first half of June (sections 57-09-01, 57-10-01 and 57-11-01). Insofar as changes might be made by the State Board in the valuations of retail stocks in some political subdivisions and not in others, it is not required that changes be made in every subdivision, and it is presumed (section 57-13-06) that if the valuation was not changed in a particular subdivision by the State Board, it was because none was found necessary. The determinations of the State Board cannot be set aside by the courts, even where errors in judgment are made, unless shown to be so arbitrary or discriminatory as to constitute fraud in the legal sense.

Use of sales tax information, such as the sales tax formula described above, does not convert the property tax on retail merchandise stocks to a sales tax even though retail stocks of merchandise are the only class of property to which the sales tax receipts can be logically related. Use of a particular method of measuring valuation together with use of other pertinent information relating to value does not convert a tax of one type into another type of tax.

It is, accordingly, my opinion that the consideration given to the sales tax formula by the State Board of Equalization when it equalizes the valuations of retail stocks of merchandise does not cause the personal property tax on retail stocks to be changed into a sales tax on retail stocks.

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