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# NORTH DAKOTA SALES AND USE TAX LAWS AND THEIR GENERAL APPLICATION

JOSEPH R. MAICHEL\*

This article is not intended to provide an intensive review or an analysis of the North Dakota sales and use tax law or its administration but rather relates to a general discussion of that law, including some of the problems which are encountered in applying it and contains a brief review of the North Dakota Supreme Court cases which have construed the North Dakota sales and use tax law.

## NORTH DAKOTA SALES TAX LAW

The North Dakota sales tax law was first enacted in 1935 to provide revenue to replace in part the tax then imposed upon property.<sup>1</sup> However, the original enactment was undoubtedly also prompted largely by the basic need for revenue as a result of the economic conditions caused by the depression.

Our law was modeled after the sales tax law of the state of Iowa.<sup>2</sup> The basic structure of the original sales tax law has been somewhat destroyed through the years as a result of the many legislative changes which increased the number of exemptions as well as broadened the scope of the law.

The present law is codified in Chapter 57-39.2 of the North Dakota Century Code.<sup>3</sup> It is designed as a uniform tax upon consumer expenditures imposed at the rate of 4% upon the gross receipts derived by retailers from sales of tangible personal property and certain designated services sold at retail in the state to users or consumers.<sup>4</sup> Thus, to determine whether the tax is applicable to a transaction one must first determine whether the seller is a "retailer"<sup>5</sup> as that term is defined in the law. That is, whether the seller is engaged in the activity of selling property or services taxable

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1. N.D. Sess. Laws 1935 Ch. 276.

2. *F. W. Woolworth Co. v. Gray*, 77 N.D. 757, 762, 46 N.W.2d 295, 297 (1951).

3. N.D. CENT. CODE § 57-39.2-01 to -27 (Supp. 1969).

4. N.D. CENT. CODE § 57-39.2-02 to -03.1 (Supp. 1969).

under the sales tax law to final users and consumers with the object of gain, benefit or advantage, either direct or indirect.

Not all sales made by a person, even though the subject matter of the sale is such that it would normally be subjected to tax, are taxable under the sales tax law as the law only purports to tax those sales made by a person who is engaged in the business of selling at retail and, thus, casual or occasional sales (sales made by individuals not operating a retail business) are excluded from the act.<sup>6</sup> In addition, to determine if the law is generally applicable, one must ascertain whether the subject matter is such that the activity is encompassed within the scope of the law and is not expressly exempted or excluded therefrom.

The law broadly imposes a tax on sales of tangible personal property, on the sale or the furnishing of certain services, and on the sale of certain designated intangibles, including but not limited to the leasing or renting of tangible personal property.<sup>7</sup> The specific services subjected to tax are steam, gas, electricity, water and communication services. The intangibles or semi-intangibles subjected to tax are tickets or admissions to places of amusement, entertainment or athletic events, including the amounts charged for participation therein as well as receipts derived from the playing of a machine for amusement or entertainment in response to the use of a coin and the sale of subscriptions to magazines and periodicals.

Tax laws commonly contain exclusions as well as exemptions. In this regard the sales tax law is no exception. The specific exclusions contained in the law are, however, limited to two. These are sales for "resale" and property purchased for "processing."<sup>8</sup> The resale exclusion is limited to purchases made with the express purpose of reselling the property in the form as purchased. The sale, however, may be either at wholesale or at the retail level. Also included under this exclusion are containers, labels and packaging supplies, which are used by persons selling tangible personal property provided that the charge made for the property sold includes the container, etc., and title thereto passes to the purchaser with the merchandise when sold.<sup>9</sup>

To facilitate control over this exclusion, the law requires that

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5. N.D. CENT. CODE § 57-39.2-01(5) (Supp. 1969).

6. N.D. CENT. CODE § 57-39.2-01(5) (Supp. 1969); N.D. Sales and Use Tax Laws, Rules and Regulations, Rule No. 42 (July 1, 1970).

7. N.D. CENT. CODE § 57-39.2-02 to -03.1 (Supp. 1969).

8. N.D. CENT. CODE § 57-39.2-01(3) (Supp. 1969).

9. N.D. Sales and Use Tax Laws, Rules and Regulations, Rule No. 39 (July 1, 1970). Containers purchased by retailers selling items expressly exempt from sales tax and used by them to hold or encompass the exempt property are also exempt. However, containers, labels, etc., when sold to businesses that render services, such as dry cleaners, laundries and similar services are subject to sales tax because these businesses are deemed to be the users or consumers of such items in the rendition of the non-taxable service.

the purchaser purchasing for resale purposes execute a "resale certificate" on a form prescribed by the Tax Commissioner.<sup>10</sup> The certificate is to be retained by the seller as a permanent part of his records to document the resale status of the transaction and, when accepted by the seller in good faith, it relieves him from tax liability on that sale. If the certificate is in fact false, but is accepted in good faith, the tax liability must be borne by the buyer who has executed the false certificate. The law is silent as to whether the resale certificate may be of the blanket type, that is, a certificate issued to encompass all purchases made within a specified period of time or whether a certificate must be furnished with each individual purchase. This has been administratively solved by the establishment of an administrative policy providing that blanket certificates are acceptable if accepted in good faith and renewed periodically to insure current application.

The second exclusion involves property purchased for processing. The term "processing" is specifically defined in the law<sup>11</sup> and requires no explanation.

It is unnecessary to discuss in detail the twenty-one exemptions contained in the law as they are basically self-explanatory.<sup>12</sup> The exemptions fall into two basic categories. Eight of the exemptions relate to the specific nature of the commodity being purchased, that is, the exemptions are granted by virtue of the nature of the subject matter involved in the sale, such as the sale of motor vehicles, gasoline, newsprint, prescription drugs, etc.<sup>13</sup> The other category of exemptions relate to the status of either the buyer or the seller, such as certain sales to agricultural producers, to governments, banks, etc.<sup>14</sup>

The North Dakota sales tax law is a hybrid vendor-consumer type law<sup>15</sup> although it does place the liability for the tax on the seller. The law requires that the seller collect the tax from the customer by adding the tax to the selling price in accordance with a statutory bracket system, and when so added, the tax becomes a part of the purchase price and is recoverable at law in the same

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10. N.D. CENT. CODE § 57-39.2-10(2) (Supp. 1969); N.D. Sales and Use Tax Laws, Rules and Regulations, Rule No. 34 (a) (July 1, 1970).

11. N.D. CENT. CODE § 57-39.2-01(3) (Supp. 1969). This section provides: "By the term 'processing' is meant any tangible personal property including containers which it is intended, by means of fabrication, compounding, manufacturing, producing or germination shall become an integral or an ingredient or component part of other tangible personal property intended to be sold ultimately at retail. The sale of an item of tangible personal property for the purpose of incorporating it in or attaching it to real property shall be considered as a sale of tangible personal property for a purpose other than for processing . . . ."

12. N.D. CENT. CODE § 57-39.2-03.3 to -04.1 (Supp. 1969).

13. N.D. CENT. CODE § 57-39.2-04 to -04.1 (Supp. 1969). Motor vehicles are subject to tax under N.D. CENT. CODE Ch. 57-40.3 (Supp. 1969).

14. N.D. CENT. CODE § 57-39.2-03.3 to -04 (Supp. 1969).

15. J. DUE, STATE SALES TAX ADMINISTRATION 138 (1963).

manner as other debts.<sup>16</sup> The tax liability of a retailer is measured by a percentage of the retailer's gross receipts, exclusive of actual discounts allowed and taken from all retail sales, even though the retailer has not collected the full amount of the tax from the customer and even though the tax could not have been collected in accordance with the statutory bracket system.<sup>17</sup>

The liability for the tax applies to both credit as well as cash sales occurring within the tax reporting period, irrespective of whether the vendor is on the cash or accrual basis for other tax purposes. The sole exception being that the gross receipts derived from sales made under conditional sales contracts or other similar forms of sale wherein the purchase price is extended over a period of more than sixty days from the date of the sale, is not entirely taxable in the quarterly period in which the sale is made. In this event, any portion of the sales price actually collected by the vendor during the reporting period must be included within the gross receipts for that reporting period.<sup>18</sup>

To facilitate administration and vendor compliance, the law requires vendors to obtain tax permits from the office of the State Tax Commissioner prior to engaging in any taxable activity.<sup>19</sup> The vendor must maintain adequate records of all sales, which records are open to inspection and audit for a six year period.<sup>20</sup> The vendor must report the tax due to the office of the State Tax Commissioner on a quarterly basis unless a different basis has been requested by the retailer and has been specifically granted by the Tax Commissioner.<sup>21</sup>

In the event of noncompliance the law imposes civil penalties,<sup>22</sup> including authority for revocation of vendor's permit for failure to file a return or remit the tax due within the prescribed time, provides for liens on the taxpayer's property for security for taxes that are due and unpaid<sup>23</sup> and imposes criminal penalties for violation of any of the provisions of the law.<sup>24</sup>

Under circumstances involving a taxpayer's failure to file a return or if, upon audit, it is determined that a return filed is incorrect or insufficient, the State Tax Commissioner is authorized to make a

16. *F. W. Woolworth Co. v. Gray*, 77 N.D. 757, 46 N.W.2d 295 (1951); N.D. CENT. CODE § 57-39.2-08.1 (Supp. 1969).

17. *F. W. Woolworth Co. v. Gray*, 77 N.D. 757, 46 N.W.2d 295 (1951). However, a statutory exception to this principle is that sales made through coin operated vending machines are taxable only if the selling price exceeds fifteen cents. Sales of fifteen cents or less are expressly exempted from tax. N.D. CENT. CODE § 57-39.2-03.3 (Supp. 1969).

18. N.D. CENT. CODE § 57-39.2-01(6) (Supp. 1969).

19. N.D. CENT. CODE § 57-39.2-14 (Supp. 1969).

20. N.D. CENT. CODE § 57-39.2-10 (Supp. 1969).

21. N.D. CENT. CODE § 57-39.2-11(2) (Supp. 1969).

22. N.D. CENT. CODE § 57-39.2-18(1) to -18(2) (Supp. 1969).

23. N.D. CENT. CODE § 57-39.2-13 (Supp. 1969).

24. N.D. CENT. CODE § 57-39.2-18(3), -18(5) (Supp. 1969).

determination of the tax due and notify the taxpayer of the amount determined to be due. This tax determination "finally and irrevocably" fixes the tax liability unless the taxpayer applies to the Tax Commissioner pursuant to the North Dakota Administrative Agencies Practice Act within fifteen days after notice of the tax determination. If a hearing is requested by the taxpayer, the Tax Commissioner must grant same. The provisions of the Administrative Agencies Practice Act are applicable to and govern the rules of procedure, evidence to be considered, record to be made, etc. at the hearing.<sup>25</sup> An appeal from the administrative agency's decision may be taken to the District Court within thirty days after notice of the decision. The appeal is taken in accordance with the provisions of the Administrative Agencies Practice Act.<sup>26</sup>

### NORTH DAKOTA USE TAX LAW

The North Dakota use tax law was enacted in 1939.<sup>27</sup> The retail sales and use tax law complement each other and together provide a uniform rate of tax upon either the sale, storage, use or consumption of tangible personal property sold at retail in North Dakota or purchased outside of the state of North Dakota for use, storage or consumption in this state.<sup>28</sup> The basic difference between the operation of the sales tax law and the use tax law is that the sales tax law imposes a tax on the incident termed a "sale" which must necessarily occur within the state in order to constitutionally impose a tax.<sup>29</sup> The use tax law, in contrast, imposes a tax on the storage, use or consumption in the state of North Dakota of tangible personal property, irrespective of where purchased.<sup>30</sup>

The imposition section of the use tax law imposes a tax on purchases (commonly made outside of the state although this requirement is not necessary for imposition of the use tax) for storage, use or consumption in this state. The basis of the tax is presently 4% of the purchase price. In addition, the law imposes a tax on the use, storage or consumption of tangible personal property not originally purchased for storage, use or consumption in this state but which is subsequently brought into the state of North Dakota for use, storage or consumption in the state of North Dakota. The basis for this tax is 4% of the fair market value of the property

25. N.D. CENT. CODE § 57-39.2-15 (Supp. 1969); N.D. CENT. CODE Ch. 28-32 (1960).

26. N.D. CENT. CODE § 57-39.2-16 (Supp. 1969); N.D. CENT. CODE Ch. 28-32 (1960); *Heasley v. Engen*, 124 N.W.2d 398 (N.D. 1963); *Langer v. Gray*, 73 N.D. 437, 15 N.W.2d 732 (1944).

27. N.D. Sess. Laws 1939 Ch. 241.

28. N.D. CENT. CODE § 57-39.2-03.1 (Supp. 1969); N.D. CENT. CODE 57-40.2-02 (Supp. 1969).

29. *MoLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944).

30. N.D. CENT. CODE § 57-40.2-02 (Supp. 1969).

at the time it is brought into the state of North Dakota rather than a percentage of the purchase price.<sup>31</sup>

In dealing with a use tax law, because the property frequently flows in interstate commerce under the typical use tax situation, one is immediately confronted with the question does the tax violate the interstate commerce clause of the United States Constitution? The Courts have upheld the typical use tax law as not contravening this constitutional provision because the tax is imposed on the incident of use, storage or consumption which must necessarily occur after the property has come to rest within a taxing state and, thus, the tax is imposed after interstate commerce has ended.<sup>32</sup>

As the North Dakota use tax law is complementary to the sales tax law, and as the use tax law cannot be imposed on a broader base than that on which the state imposes its sales tax in order to withstand constitutional tests,<sup>33</sup> the North Dakota use tax law necessarily contains the identical exclusions and exemptions contained in the sales tax law, even though the particular exclusion or exemption is not specifically set out in the use tax law. In addition to the exemptions expressly set out in the sales tax law, which must be incorporated to meet constitutional tests, the use tax law has three additional exemptions which are peculiar to the operation of a use tax law. These exemptions are:<sup>34</sup>

1. Tangible personal property or services, the sale of which has been subjected to a North Dakota sales tax. This exemption eliminates duplication of a North Dakota sales and a North Dakota use tax being imposed on the same transaction;
2. Property brought into the state by a nonresident of the state of North Dakota for his own use, storage or consumption in this state while temporarily within the state provided that the storage, use or consumption does not occur in the conduct of a trade, business or profession in the state of North Dakota; and
3. Railroad cars and locomotives used in interstate commerce, including any tangible personal property which becomes a component part thereof.

The use tax law provides that the sale of property by a person for delivery into the state of North Dakota constitutes prima facie evidence that the property was sold for use in this state.<sup>35</sup>

31. N.D. CENT. CODE § 57-40.2-02 to -03.1 (Supp. 1969).

32. *Felt & Tarrant Manufacturing Co. v. Gallagher*, 306 U.S. 62 (1939); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

33. *Halliburton Oil Well Cementing Co. v. Rely*, 373 U.S. 64 (1963).

34. N.D. CENT. CODE § 57-40.2-04 (Supp. 1969).

35. N.D. CENT. CODE § 57-40.2-05 (Supp. 1969).

A use tax collection responsibility is placed upon all out of state retailers who sell property for use, storage or consumption in this state provided that the seller maintains in this state, directly or by subsidiary, an office, distribution house, sales house, warehouse or other place of business or has a salesman or agent operating within the state, either permanently or temporarily, or delivers goods on a systematic basis in this state.<sup>36</sup> Thus, if a seller has subjected himself to a collection responsibility of this state by engaging in any of these activities, he must obtain a North Dakota sales and use tax permit, collect tax on all sales made for use in this state, and remit the tax which is measured by a percentage of his gross receipts on a quarterly basis to the state of North Dakota in the same manner as sales tax is remitted by a North Dakota retailer. If a seller has not subjected himself to a collection responsibility, then the buyer of the property in question is required to remit the tax in the quarter in which purchased directly to the state of North Dakota. Likewise, a purchaser who purchases property outside of the state for use outside the state and who subsequently brings the property into this state for storage, use or consumption here in the conduct of a trade, business or profession, must report and pay the tax due to the state of North Dakota in the quarterly period in which the property was brought into this state.<sup>37</sup>

Almost all of the administrative procedures applicable to the sales tax law are equally applicable to the use tax law.<sup>38</sup> The use tax law contains lien provisions<sup>39</sup> and imposes criminal and civil liabilities.<sup>40</sup>

As the law of the state in which the property is purchased frequently subjects the purchase to the sales or use tax law of that state and, as the North Dakota use tax law again subjects the item purchased to a tax, a duplicated tax would be imposed. To avoid duplication of tax in this situation, the North Dakota use tax law provides that if the tangible personal property has already been subjected to a sales or use tax by any other state, or political subdivision thereof, in an amount less than the tax imposed under North Dakota law, the North Dakota use tax law is applicable only at a rate measured by a difference between the North Dakota rate and the out-of-state rate which was paid. The law further provides that if the rate of tax imposed by the other state is the same or more than the rate imposed in the state of North Dakota, no North Dakota tax is due on the purchase. This credit is allowed only if

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36. N.D. CENT. CODE § 57-40.2-07 (Supp. 1969).

37. N.D. CENT. CODE § 57-40.2-06 (Supp. 1969).

38. N.D. CENT. CODE § 57-40.2-13 (Supp. 1969).

39. N.D. CENT. CODE § 57-40.2-16 (Supp. 1969).

40. N.D. CENT. CODE § 57-40.2-15 (Supp. 1969).



the state or political subdivision in which the tax was paid allows similar tax credit with respect to sales or use taxes paid to the state of North Dakota.<sup>41</sup>

### SERVICES

Gross receipts derived from the furnishing of service, other than the taxable services specifically enumerated in the law, when rendered separate and apart from the sale of tangible personal property are not subject to tax. Thus, personal services, such as services rendered by a doctor or lawyer, are not subject to tax. However, services rendered in the fabrication or manufacturing of tangible personal property may not be excluded from the selling price on which the tax is computed when the fabricated or manufactured tangible personal property is sold to a final user and consumer. In addition, a person engaged in the rendition of a nontaxable personal service is regarded as the final user and consumer of all tangible personal property purchased by him for use in the performance of such service. Thus, while a doctor's or a lawyer's personal services are not subject to tax, items of tangible personal property, such as paper and supplies used by a lawyer or, dressings, bandages, and like items used by a doctor, are subject to sales or use tax at the time they are purchased.

A problem arises when persons are engaged in the dual business of selling tangible personal property and are also engaged in the business of rendering personal service. Typical examples of such

41. N.D. CENT. CODE § 57-40.2-11 (Supp. 1969).

The following states grant reciprocity to the state of North Dakota:

STATE	SALES & USE TAX RATE	STATE	SALES & USE TAX RATE
Alabama .....	4%	Missouri .....	3%
Arizona .....	3%	Nebraska .....	2.5%
Arkansas .....	3%	Nevada .....	3%
California .....	4%	New Jersey .....	5%
	(Reciprocity applies to motor vehicles only)	New Mexico .....	4%
Colorado .....	3%	New York .....	3%
Connecticut .....	5%	North Carolina .....	3%
District of Columbia .....	4%	Ohio .....	4%
Florida .....	4%	Oklahoma .....	2%
Georgia .....	3%	Pennsylvania .....	6%
Hawaii .....	4%	Rhode Island .....	5%
Idaho .....	3%	South Carolina .....	4%
Illinois .....	4%	South Dakota .....	4%
Indiana .....	2%		(Grants reciprocity admini- stratively and does not ex- tend same to contractors)
Iowa .....	3%	Tennessee .....	3%
Kansas .....	3%	Texas .....	3.25%
Kentucky .....	5%	Utah .....	4%
Louisiana .....	2%	Vermont .....	3%
Maine .....	5%	Virginia .....	3%
Maryland .....	4%	Washington .....	4.5%
Massachusetts .....	3%	West Virginia .....	3%
Michigan .....	4%	Wisconsin .....	4%
Minnesota .....	3%	Wyoming .....	8%
Mississippi .....	5%		

businesses are automobile repair shops and optometrists. Under these circumstances, the sales tax law imposes a tax on the sale of tangible personal property, that is, the automobile part or the sale of glasses but does not impose a tax on labor or services rendered in the repair of the automobile or the examination of eyes provided that the customer or patient is billed in such a manner as to show separately the charges for the tangible personal property being sold and the labor or services performed. If the charges are not set out separately in this manner the entire sale of the service of the tangible personal property becomes subject to sales tax.

When tangible personal property is sold at a fixed price and there is added thereto additional fees or charges whether termed services or handling charges such fees or charges constitute a part of the selling price for sales and use tax purposes. However, finance, carrying or interest charges are not subject to tax if separately agreed upon by the buyer and seller and if separately billed by the seller to the buyer.<sup>42</sup>

### CONTRACTORS

It has been almost universally established throughout the United States and certainly has been established in the state of North Dakota, that a contractor who buys tangible personal property which he is required to attach to the real property of another, either under a lump-sum, cost-plus or time and material contract, is regarded as the final user and consumer of the tangible personal property and, thus, is liable for sales or use tax on the tangible personal property purchased by him and used in the completion of the contract.<sup>43</sup> The contractor, under these circumstances, is required to pay the tax on the material purchased for use on the construction project, even though the contract is being performed for the United States of America, the state of North Dakota or any other agency or person expressly exempt from sales or use tax.

There are two principal methods by which a contractor satisfies this tax liability. If the contractor at the time of purchase does not furnish to the supplier a certificate containing a contractor's account number issued to him by the Secretary of State of the State of North Dakota and a use tax account number issued to him by the office of the State Tax Commissioner, the supplier is required to collect the tax from the contractor at the time of the sale of the property and the payment of the tax by the contractor to the

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42. N.D. Sales and Use Tax Laws, Rules and Regulations, Rule Nos. 28,47,48, 57, 63 and 82 (July 1, 1970).

43. Boeing Co. v. Omdahl, 169 N.W.2d 696 (N.D. 1969); Northern Improvement Co. v. Engen, 68 N.W.2d 463 (N.D. 1954).

seller relieves the contractor from further liability for the tax. If the above referred to certificate is not furnished to the supplier by the contractor or, if the purchase is made from an out of state supplier who has not subjected himself to a collection responsibility under the laws of the state of North Dakota, then the contractor has a direct liability to the state of North Dakota for the sales or use tax due on the taxable items purchased. Thus, the contractor has a tax reporting requirement as well as a requirement that he pay the tax directly to the state of North Dakota. Failure to assume this liability subjects the contractor to civil as well as the criminal provisions set out in the sales and use tax law.<sup>44</sup>

### FREIGHT AND DELIVERY CHARGES

Freight, delivery and other transportation charges are involved in almost all types of transactions and, thus, difficulties always exist in this area. Under the North Dakota sales and use tax law, freight delivery or other transportation charges paid by a retailer for transporting the property from the source of supply to the retailer's place of business are not exempt from sales tax as the law requires that when the property is sold by the retailer, the charges may not be deducted from the sales price upon which sales tax is to be computed.

When tangible personal property is sold and quoted by the seller at a delivered price, no charges for freight, delivery or transportation can be deducted from the gross receipts upon which sales tax is computed irrespective of the manner of delivery and irrespective of who pays for those charges. However, when tangible personal property is sold f.o.b., source of supply, freight, delivery and other charges involved in delivering the property to the purchaser do not become a part of the selling price, provided that this service is not rendered by the seller and the charges are paid by the consumer or user or are paid by the seller and are billed separately from the charge for the property sold. When, however, the transportation or delivery service is rendered by the seller and a charge is made for the service, the charge becomes subject to sales tax even though billed separately from the charge for the property sold.<sup>45</sup>

### NORTH DAKOTA CASES

The North Dakota sales and use tax law has been construed

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44. N.D. CENT. CODE § 57-39.2-18 (Supp. 1969); N.D. Sales and Use Tax Laws, Rules and Regulations, Rule Nos. 55(a), 55(b) and 56 (July 1, 1970).

45. N.D. Sales and Use Tax Laws, Rules and Regulations, Rule No. 81 (July 1, 1970).

by the North Dakota Supreme Court in a number of cases. These cases are briefly summarized as follows.

The Court in the *Jewel Tea Co. v. State Tax Commissioner of the State of North Dakota*,<sup>46</sup> had before it a situation involving a foreign corporation which maintained "route managers" in the state of North Dakota. These managers were residents of North Dakota, solicited orders from final users and consumers in this state and, upon receipt of a sufficient number of orders, ordered the merchandise from the Jewel Tea Co., a company located outside North Dakota. The Jewel Tea Co. filled the orders by delivering the merchandise directly to its local manager who in turn delivered the merchandise to the North Dakota customers. The managers also maintain stocks of merchandise in their homes. The taxpayer in this case challenged the constitutionality of the sales tax law alleging that the application of the law under the presented factual situation violated the interstate commerce clause of the Federal Constitution. The Court, in this case, concluded that the fact that the plaintiff had failed to collect tax on its North Dakota sales, did not absolve it from its duty to pay tax to the State of North Dakota and that the tax liability under the sales tax law is placed upon the retailer who may pass the burden of the tax along to the consumer. Thus, the tax was imposed on an in-state incident (a sale) and the imposition of the tax did not impose an unconstitutional burden upon interstate commerce.<sup>47</sup>

The Court in *Voss v. Gray*,<sup>48</sup> concluded that photographs made by a photographer for customers who sat for the photographs to be made on the order of the customer, constituted a sale of tangible personal property and was subject to the North Dakota sales tax. This is a far-reaching decision because the Court arrived at the result even though it was established in the factual situation that the greater amount of the charge made was for personal service and skill rendered by the photographer. In this connection, the Court concluded that even though personal services are not subjected to tax under the North Dakota sales tax law, when tangible personal property is produced and sold even though the expenditure of personal services represents a large portion of the selling price of the property, the property is nevertheless subject to North Dakota sales tax.<sup>49</sup> This basic principle was reaffirmed by the Court in *Bismarck Tribune Co. v. Omdahl*,<sup>50</sup> wherein the Court held that a newspaper constitutes tangible personal property even though purchased

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46. *Jewel Tea Co. v. State Tax Comm'r.*, 70 N.D. 229, 293 N.W. 386 (1940).

47. *Id.*, at 389-91.

48. *Voss v. Gray*, 70 N.D. 727, 298 N.W. 1 (1941).

49. *Id.* at 4.

50. *The Bismarck Tribune Co. v. Omdahl*, 147 N.W.2d 903 (N.D. 1966).

primarily by customers for its news content and most often destroyed when the customer has completed reading the newspaper.<sup>51</sup>

The Court in *F. W. Woolworth Co. v. Gray*<sup>52</sup> had before it a situation wherein a taxpayer collected tax from its customers and remitted the exact amount of tax collected from its customers to the State of North Dakota but refused to remit tax on the taxpayer's total gross receipts from all sales contending that it was not liable for any tax that it could not in turn collect from its customers. Under the statutory bracket system in effect at that time, a retailer was not permitted to collect a tax from the customer if the sale price was less than 25 cents. The Court concluded that the legislature did not intend to exempt the gross receipts on sales of less than 25 cents but, rather the tax is imposed upon the entire gross receipts of the retailer, even though under the statutory bracket system, the burden of the tax could not be passed on to the customer.<sup>53</sup> The Court further concluded that this situation did not violate the due process clause of the United States Constitution.<sup>54</sup>

In *Isakson v. State of North Dakota*,<sup>55</sup> the Court held that a mixed drink containing alcoholic beverages and nonalcoholic beverages constituted tangible personal property which was subject to sales tax even though the sales tax law expressly exempted any product which was subjected to a special tax. In this case the taxpayer argued because alcoholic beverages were taxable under the North Dakota Liquor Control Act and, as the liquor ingredients in a mixed drink was subjected to a special tax, that this exemption extended to mixed drinks. The Court in concluding that a mixed drink was subject to sales tax, reasoned that a mixed drink, although containing alcoholic beverages, constituted a new beverage not previously taxed in this state.

In *Northern Improvement Co. v. Engen*,<sup>56</sup> the Court concluded that if a person purchases tangible personal property for the purpose of incorporating it into or attaching it to realty, the purchase of the property is not excluded under the "processing" or "resale" exclusion but rather the purchase is one for final use and consumption and is taxable. The Court reasoned that the act of attachment of tangible personal property to realty is an act of final use and consumption.<sup>57</sup> The Court further concluded that purchases of tangible personal property made by a contractor which are incorporated into realty by the contractor, are subject to sales tax, irrespective

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51. *Id.* at 906.

52. *F. W. Woolworth Co. v. Gray*, 77 N.D. 757, 46 N.W.2d 295 (1951).

53. *Id.* at 301-02.

54. *Id.* at 309.

55. *Isakson v. North Dakota*, 70 N.D. 505, 296 N.W. 192 (1941).

56. *Northern Improvement Co. v. Engen*, 68 N.W.2d 463 (N.D. 1954).

57. *Id.* at 466.

of whether the construction contract was with a tax exempt political subdivision.<sup>58</sup>

The North Dakota Supreme Court in *Boeing Co. v. Omdahl*,<sup>59</sup> reaffirmed the position taken by the Court in the *Northern Improvement Co.* case and extended the principle to a use tax situation wherein property was purchased outside of the state for use on a federal project in the state of North Dakota by a contractor. The Court held that a contractor is liable for tax on the purchase price of the goods even though the economic burden of the tax is passed on to the federal government through increased contract prices.<sup>60</sup>

The North Dakota Supreme Court in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*,<sup>61</sup> held that as the application of sales tax to purchases made by the Federal Land Bank for use in the repair of farm buildings and improvements did not obstruct a governmental function, the tax constituted a valid imposition.<sup>62</sup> This case was appealed to the United States Supreme Court<sup>63</sup> and reversed by that Court. In reversing the decision of the North Dakota Supreme Court, the United States Supreme Court concluded that a Federal Land Bank constituted an instrumentality of the federal government and the repair and maintenance of its property constituted a governmental function. Thus, the bank enjoyed a constitutional exemption from sales tax under Section 8 of Article 1 of the United States Constitution as well as a federal statutory exemption under the Federal Farm Loan Act of July 17, 1916.<sup>64</sup>

The Court in *Standard Oil Co. of Indiana v. State Tax Commissioner*,<sup>65</sup> faced the issue of whether the federal excise tax on gasoline is to be included in the base for sales tax purposes. The Court in concluding that this federal tax is to be excluded from the price of gasoline prior to the computation of sales tax, reasoned that the federal excise tax is imposed on the sale of gasoline and attaches at the exact time that the sales tax applies.<sup>66</sup> Thus, the federal tax could not be regarded as a part of the purchase price for sales tax purposes. This decision has no application at the present time as gasoline sales are now exempt from the North Dakota sales and use tax. However, the decision is applicable to the sale of other commodities that are subject to both a federal retailers excise tax and a North Dakota sales tax, such as jewelry, furs, luggage, etc. It is

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58. *Id.* at 468.

59. *Boeing Co. v. Omdahl*, 169 N.W.2d 696 (N.D. 1969).

60. *Id.* at 702.

61. *Federal Land Bank v. Bismarck Lumber Co.*, 70 N.D. 607, 297 N.W. 42 (1941).

62. *Id.* at 52.

63. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941).

64. *Id.* at 103.

65. *Standard Oil Co. v. State Tax Comm'r.*, 71 N.D. 146, 299 N.W. 447 (1941).

66. *Id.* at 449-50.

also important to note in connection with this case that the Court had before it a situation involving a federal retailers excise tax. When a product is sold at retail and is subject to a federal manufacturer's excise tax and a sales tax, the federal manufacturers tax becomes a part of the sales tax base.<sup>67</sup>

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67. N.D. Sales and Use Tax Laws, Rules and Regulations, Rule No. 35 (July 1, 1970).