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Automobile Sales and Use Taxes in North Dakota

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NOTES

AUTOMOBILE SALES AND USE TAXES IN NORTH DAKOTA

The use tax imposed on motor vehicles in North Dakota produces an unfair competitive advantage in favor of domestic automobile dealers over out-of-state automobile dealers. It is the writer's contention that the tax is arbitrary and discriminatory as well as an attempt to regulate interstate commerce, a power which is expressly granted to Congress by the United States Constitution.[1]

SALES TAX

A sales tax of 2% is imposed on the sale of all motor vehicles in the state of North Dakota.[2] The sales tax base is determined by deducting from the sale price any amount allowed for a trade-in, cash discount, or for any other purpose.[3]

Sales of automobiles directly to purchasers outside of the state, to be delivered outside the state by the seller, are exempt from the provisions of this tax.[4]

USE TAX

The motor vehicle use or excise tax was first adopted in 1937 under the title "Sales Tax Motor Vehicles"; it imposed an excise tax of 2% upon every owner of a motor vehicle, for the privilege of using the streets and highways of this state.[5] The Use Tax Act of 1939, which incorporated this tax, is expressly declared to be supplementary to the retail sales tax laws of this state[6] and exempts motor vehicles upon which a sales tax has been paid.[7] Another exemption or partial exemption, as the case may be, is made when a vehicle has been subjected to a sales or use tax in another state in an amount less than 2%; then the provisions of the North Dakota use tax shall apply, but only at a rate measured by the difference between the two rates. If such tax imposed in another state is 2% or more, then no tax shall be due;[8] however, this credit shall apply only if such other state allows a tax credit with respect to the retail sales and use taxes imposed by North Dakota.[9]

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1. U. S. Const. art. I, § 8 cl. 3.
2. N. D. Rev. Code § 57-3902 (Supp. 1957) The sales tax was first imposed in 1933 as an emergency measure and has been reenacted by every subsequent legislative assembly.
3. N. D. Rev. Code § 57-3901, subs 6 (1943).
4. N. D. Rev. Code § 57-3903, subs 1 (1943).
5. N. D. Sess. Laws 1937, c. 167 at 309.
6. N. D. Sess. Laws 1939, c. 241, § 3, subs. 2 at 411.
7. N. D. Rev. Code § 57-4013 (1943).
8. N. D. Rev. Code § 57-4010 (1943).
9. N. D. Rev. Code § 57-4010 (Supp. 1957).

The use tax base is the purchase price.[10] The term "purchase price" is defined as the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise, but cash discounts allowed and taken on sales shall not be included.[11]

The office of the Attorney General has given its interpretation of the North Dakota Use Tax Act regarding the tax base. The material portion of the opinion is as follows:

> ". . . We, therefore, go to subsection 5 of section 57-4001 to get the definition of 'Purchase Price,' and said term is therein defined as 'the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise, but cash discounts allowed and taken on sales shall not be included'; applying the definition of 'purchase price' to the provisions of section 57-4012, it is our opinion that the use tax must be paid on the full purchase price of the car, for the reason that the statute reads that said tax must be paid whether the purchase price was paid in money or otherwise. Otherwise can be taken to mean a trade-in."[12]

However, it is the writer's contention that if the words "whether paid in money or otherwise",[13] as used in defining "purchase price" under the Use Tax Act, are decisive, then the same result would follow as to the sales tax base. The Sales Tax Act is identical in defining "gross receipts", i. e., "whether received in money or otherwise."[14]

The phrase "whether received in money or otherwise", appears in both the Sales and Use Tax Acts. In the Sales Tax Act this phrase is followed by the words: ". . . but discounts for *any* purposes allowed and taken on sales shall not be included . . ."[15] In the Use Tax Act, this phrase is followed by the words, ". . . but *cash* discounts allowed and taken on sales shall not be included . . ."[16] It would seem from the foregoing that the only basis for making a distinction as to the use tax base is that the words "cash discounts" are used in the Use Tax Act, while the words "discounts for any purposes" are used in the Sales Tax Act.

OPERATIONAL EFFECT

The consequence of the use tax is that domestic retail automobile dealers are given an unfair competitive advantage over neigh-

10. N. D. Rev. Code § 57-4002 (Supp. 1957).
11. N. D. Rev. Code § 57-4001, subs. 5 (Supp. 1957).
12. 1948-50 Ops. Att'y Gen. 183 (1949).
13. N. D. Rev. Code § 57-4001, subs. 5 (Supp. 1957).
14. N. D. Rev. Code § 57-3901, subs. 6 (Supp. 1957).
15. *Ibid.*
16. N. D. Rev. Code § 57-4001, subs. 5 (Supp. 1957).

boring foreign competitors. To illustrate the discriminatory effect of the use tax, the following hypothetical example is offered: John Smith is a life-time resident of Willison, North Dakota. In 1955, Mr. Smith purchased a 1955 Ford in Williston for $3,300.00, paying 2% sales tax amounting to $66.00. In 1957 Mr. Smith decides to trade his car for a 1957 model Ford. The new car at which Mr. Smith is looking is priced at $3,400.00; his old car is valued at $2,000.00. If Mr. Smith trades in North Dakota, he will pay a sales tax of 2% on the difference which will amount to $28.00 tax. If Mr. Smith trades out-of-state he will pay a 2% use tax on the full list price, despite any trade-in which will be 2% of $3,400.00 or $68.00 tax, a net difference in tax of $40.00.

CONSTITUTIONALITY

The "commerce clause" of the United States Constitution[17] does not expressly forbid state taxation of interstate commerce, but merely provides that Congress shall have the power to regulate commerce among the several states.[18] This section of the Constitution, as interpreted, gives Congress the exclusive power to regulate commerce between the states.[19] Taxation of such commerce, being a form of regulation, is therefore forbidden to the states if the effect of the tax is to regulate interstate commerce.[20]

Further, it is well established that a state is prohibited, under the "commerce clause" of the United States Constitution, from placing a tax on interstate commerce that causes it to be operated at a disadvantage, as compared to, or in competition with, intrastate commerce.[21] In other words, a state tax which discriminates against interstate commerce violates constitutional rights.[22]

The constitutionality of this statute has never been tested in North Dakota, nor are there reports of a similar discriminatory situation having existed in any other state.

The practice of levying a use tax or sales tax, based on the sale price, without allowance for a trade-in, is constitutional so long as the same tax base is used on purchases within the taxing state, which are subject to sales tax, as is used on out-of-state purchases, which are subject to use tax.[23] This practice is in effect in several

17. U. S. Const. art. I, § 8, cl. 3.
18. See 20 Minn. L. Rev. 466 (1936).
19. *Ibid.*
20. *Ibid.*
21. Department of Revenue v. Jennison-Wright Corp., 393 Ill. 401; 66 N.E.2d 395 (1946).
22. *Ibid.*
23. Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P.2d 14 (1935).

states including Washington[24] and California.[25] In other words, the use tax rate must not exceed the rate imposed on sales within the state.[26]

The validity of the use tax is well settled where the purpose and effect of the tax is to place the retailer of the taxing state on an equal footing with retailers in other states, as well as to prevent the revenues of the taxing state from being depleted by the placing of orders in other states to escape the tax on local sales.[27] When employed for this purpose, use taxes are constitutional in so far as the tax does not constitute a discrimination against interstate commerce, but *only* prevents discrimination against local sales.[28]

Tax schemes that have been held discriminatory and, therefore, unconstitutional, include: A tax which was levied on the gross proceeds of a railroad from the transportation of freight from points within the state to points outside the state and vice versa, but not on the gross proceeds from the transportation of freight passing through the state;[29] a $50.00 tax imposed on non-resident commercial fishermen as compared with a $5.00 tax for resident fishermen;[30] a tax on solicitors of $50.00 and one half of one per centum of the gross earnings, receipts, or fees or commissions for the preceding license year in excess of $1,000.00;[31] a tax imposed on wholesale activities of those engaged in interstate commerce, but not on those who performed the same taxable act, but who manufactured, within the state.[32] In determining whether or not a state tax is discriminatory, the United States Supreme Court has said that their decision must depend, not on the form of the taxing scheme alone, but rather on the practical operation and effect of the tax as applied and enforced.[33]

The North Dakota Constitution provides that taxes shall be uni-

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24. Wash. Rev. Code c. 82.08 and c. 82.12 (1951).
25. Cal. Code Ann. §§ 6003, 6004 (1956).
26. See note 23 *supra*.
27. Henneford v. Silas Mason Co., 300 U. S. 577 (1936).
28. Herman v. Mayor and City Council of Baltimore, 189 Md. 191 55 A.2d 491, 493 (1947) (dictum). See Gregg Dyeing Co. v. Query, 286 U. S. 472 (1931).
29. Fargo v. Michigan, 121 U. S. 230 (1886). A Washington statute provided for a 2% tax on all sales of tangible personal property within the state based on the selling price and a complementary tax on purchases made outside of the state. In upholding the statute, the court said, "What Washington is saying to sellers beyond her borders is in substance this: you may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here."
30. Mullaney, Comm'r of Taxation of the Ter. of Alaska v. Anderson, 342 U. S. 415 (1952).
31. Nippert v. City of Richmond, 327 U. S. 416 (1945).
32. Columbia Steel v. State, 30 Wash. 2d 658, 192 P.2d 976 (1948).
33. Wagner v. Covington, 251 U. S. 95 (1919).

form upon the same class of property, including franchises, within the territorial limits of the authority levying the tax.[34] The taxes levied under the Use Tax Act, therefore appear to be arbitrary, non-uniform, illegal, and in contravention of and prohibited by the North Dakota Constitution.

LEGISLATIVE INTENT

The question of the intent of the legislature as to how the use tax should operate remains open. The Attorney General of Iowa, which state North Dakota apparently patterned its sales and Use Tax Acts after, in one of his opinions said that the use tax is imposed as a complement to the sales tax and is intended to require the buyer of goods purchased outside the state to pay an amount *equal* to the sales tax that he would have paid had he purchased the goods within the state.[35] The Supreme Court of Iowa has held that the use tax law is supplementary to the sales tax law and serves, not only to produce revenue, but also to protect dealers within the state by placing them on tax *equality* with out-of-state vendors whose sales are not subject to sales tax.[36]

It is submitted that the legislature be urged to pass appropriate legislation, during the next general assembly, to remedy our use tax law.

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INCOME TAX SAVING VIA THE SHORT TERM TRUST

The short-term intervivos trust has become of increasing importance to counteract the present day graduated income tax.[1] The trust is doubly advantageous when it can accomplish its ultimate goals in the form of gifts to one whom the grantor is morally obligated to support, and at the same time split the taxpayer's income into two or more separately taxable entities.[2] For example an out-

34. N. D. Const. art XI, § 176.

35. Iowa Op. Att'y Gen. at 536 (1938).

36. Peoples Gas and Elec. Co. v. State Tax Comm'n, 238 Iowa 1369, 28 N.W.2d 799 (1947). See Nelson v. Sears Roebuck & Co., 312 U. S. 359 (1941). A New York Corporation, with retail establishments in Iowa, was required by Iowa statute to collect a tax on orders placed by residents of Iowa at the corporation's office outside the state. The Iowa statute was upheld, the court saying ". . . The use tax and sales tax are complementary. Sales made wholly within Iowa carry the same burden as those mail order sales. A tax or other burden does not discriminate against interstate commerce where equality is its theme."

1. General references include: Murphy, *Clifford-Type Trusts and the 1954 Code*, 29 N.Y.S. Bull. 55 (1957); Alexander, *A Case Method Restatement of the New Clifford Regulations*, 3 Tax L. Rev. 189 (1947).

2. But one must use care. See Paster v. Commissioner, 245 F.2d 381 (8th Cir. 1957) (A trust transaction within a family group is subjected to special scrutiny so that what is in reality one economic unit may not be broken up into two or more units); Edison v. Commissioner, 148 F.2d 810 (8th Cir. 1945) (The grantor is taxable if he retains in economic substance what he previously enjoyed).