**N.D.A.G. Letter to Heitkamp (Sep. 19, 1991)**

September 19, 1991

Honorable Heidi Heitkamp
Tax Commissioner
State Capitol
Bismarck, ND 58505

Dear Commissioner Heitkamp:

Thank you for your June 7, 1991, letter concerning the issue of sales tax treatment of tickets sold by the operator of the Dakota Queen Riverboat. You have requested an informal letter opinion concerning whether this taxpayer's tickets are exempt from sales tax under either subsection 1 or subsection 2 of N.D.C.C. § 57-39.2-04. The taxpayer alleges he is exempt because he is engaged in interstate commerce and the imposition of the sales tax violates the commerce clause of the United States Constitution. Additionally, the taxpayer alleges that he is exempt from the sales tax because he is providing "passenger transportation services" and is not selling tickets for admission to places of amusement or entertainment under N.D.C.C. § 57-39.2-02.1(1)(c).

N.D.C.C. § 57-39.2-02.1(1)(c) requires the imposition of "a tax of five percent upon the gross receipts of retailers from all sales at retail [which occur within the state of North Dakota] of . . . . c. Tickets or admissions to places of amusement or entertainment. . . ." N.D.C.C. § 57-39.2-04(2) exempts "passenger transportation services" from taxation. Neither the phrase "amusement or entertainment" or the phrase "passenger transportation services" have been defined by North Dakota statute, rule, or case law.

The taxpayer has submitted information that Minnesota has concluded, by rule, that "charges made for . . . boat, sightseeing rides, or tours are considered nontaxable as being transportation services." MCAR § 8130.0900 Subp. 6. He also submitted documentation concerning authorization to operate the Dakota Queen from the Interstate Commerce Commission and the United States Department of Transportation.

The issue concerning the alleged violation of the commerce clause is easily disposed of given the current state of the law and the facts presented. Assuming the tax payer is engaged in interstate commerce, the commerce clause does not prohibit all taxation of the tax payer's activity. A tax which "(1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state" does not violate the commerce clause and is permitted. See Heitkamp v. Quill Corporation, 470 N.W.2d 203, 210 (N.D. 1991). The information you provided does not support a conclusion that the imposition of the sales tax upon these ticket sales violates the commerce clause.

The second issue is whether the sales tax may be imposed upon the sale of tickets although the service may be for admission "to places of amusement or entertainment" or "passenger transportation services."

N.D.C.C. § 57-39.2-02.1(1)(c) is not ambiguous; therefore, reference to the legislative history and other extrinsic aids is inappropriate. The statute should be interpreted on its face. Words in a statute are to be given their ordinary meaning. N.D.C.C. § 1-02-02. The legal definition of an amusement is a "[p]asttime; diversion; enjoyment. A pleasurable occupation of the senses, or that which furnishes it." Black's Law Dictionary 6th Edition p. 84 (1990). In a nonlegal context amusement has a similar meaning. Webster's New World Dictionary defines amusement as "something that amuses or entertains; entertainment." Webster's New World Dictionary, 2nd College Edition p. 48 (1982). The legal and lay definition of transportation is the conveyance of passengers or goods. Black's Law Dictionary, supra, p. 1499; Webster's New World Dictionary, supra, p. 1512.

Although the North Dakota courts have not addressed the meaning of the word "amusement" or "transportation" and have not interpreted N.D.C.C. § 57-39.2-02.1(1)(c), other state courts have looked at similar language. In each case the court looked to the purpose of the activities. Thus, when asked to determine whether an amusement tax applied to admission tickets on a gondola and chair lift at the 1982 World's Fair, the Tennessee Supreme Court determined the tax did not apply because "the ostensible purpose" of the gondola and chair lift was to provide transportation, not to provide sightseeing. Sky Transpo, Inc. v. City of Knoxville, 703 S.W.2d 126 (Tenn. 1985). See also Dover International Limited v. Comptroller of the Treasury, 1988 W.L. 18372 (Md. Tax 1988). (Helicopters used for recreational purposes, i.e. sightseeing tours, held subject to the admissions and amusement tax.)

In the present case, the brochure advertising cruises on the Dakota Queen states "Our cruises are known throughout the Midwest as enjoyable, fun filled, and relaxing." (Emphasis supplied.) An amusement is a "[p]asttime; diversion; enjoyment." Black's, supra. Based upon the advertisement for the riverboat cruise I conclude that the "ostensible purpose" of obtaining a ticket to cruise on the Dakota Queen is to engage in amusement and entertainment. Therefore, it is my opinion a sales tax upon the sale of tickets for admission to the Dakota Queen must be collected pursuant to N.D.C.C. § 57-39.2-02.1(1)(c) because the purpose is for "amusement or entertainment."

I note that an activity may be considered an "amusement or entertainment" and may also be transportation. Because the legislature excludes some forms of "transportation" from taxation does not preclude it from taxing a pastime which is considered an "amusement or entertainment." The Legislature is free to single out one aspect of an activity and tax that aspect while leaving other aspects of that activity free from taxation.

> The legislature may select for purposes of taxation a well defined class within any designated category and leave untaxed all other classes comprising the category. The difference between surface and subsurface street railroads . . . and between a street railroad and a steam railroad

> running into the city and along its streets. . . is sufficient to warrant diversity in taxation. So long as there is some rational basis to be discussed in the legislative policy of differentiation, the courts may not interfere.

Weber v. City of New York, 195 N.Y.S. 2d 269 (N.Y. App. Div. 1959) citing Savannah, Thunderbolt & Isle of Hope Railway Co. v. Savannah, 198 S.Ct. 392 (1905) and Metropolitan Street Ry. Co. v. New York Board of State Tax Commissioners, 199 S.Ct. 1 (1905).

Further, when two statutes govern the same subject matter and the general provision conflicts with the special, the two must be construed to give effect to both. If that is not possible, however, the "special provision must prevail." N.D.C.C. § 1-02-07. N.D.C.C. § 57-39.2-04(2) exempts transportation in general from taxation. N.D.C.C. § 57-39.2-02.1(1)(c) imposes a tax on tickets for admission "to places of amusement or entertainment." Because the purpose of the "transportation" in this case is for "amusement or entertainment," N.D.C.C. § 57-39.2-02.1(1)(c), the special provision applies and the sales tax is applicable.

It is therefore my opinion that transportation conducted for the "ostensible purpose" of "amusement or entertainment" is subject to the sales tax imposed by N.D.C.C. § 57-39.2-02(1)(c).

The courts have also addressed the question of when the obligation to pay a tax on an admission fee arises. If the vessel is boarded within the state's taxing jurisdiction, an amusement tax may be imposed. Department of Revenue v. Pellican Ship Corporation, 257 S.2d 56, 57 (Fla. Dist. Ct. App. 1972). cf. Scoville Service, Inc. v. Comptroller of the Treasury, 306 A.2d 534 (Md. 1973) (Parking lot charges were not admission charges within the meaning of the statute because they only conveyed the privilege of parking the automobile and did not convey the privilege of entering the race track.) Thus it is my further opinion that the taxpayer must collect the sales tax imposed by N.D.C.C. § 57-39.2-02.1(1)(c) although the boat may travel across the North Dakota-Minnesota border.

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

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