

N.D.A.G. Letter to Alexander (March 31, 1992)

March 31, 1992

Mr. Robert E. Alexander
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P.O. Box 249
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Dear Mr. Alexander:

Thank you for your February 19, 1992, letter written on behalf of the city of Beulah regarding the effect of the enactment of a city restaurant tax under N.D.C.C. § 40-57.3-01.1. Your three questions and my answers to them follow.

1. Does N.D.C.C. § 40-57.3-01.1 permit the city to tax alcoholic beverages only?

A city may impose a tax under N.D.C.C. § 40-57.3-01.1 only on beverages subject to the state sales tax, except for alcoholic beverages sold for consumption off the premises. N.D.C.C. § 40-57.3-01.1 provides, in pertinent part:

40-57.3-01.1. City lodging and restaurant tax - Imposition - Amount - Disposition - Referral. In addition to the tax under section 40-57.3-01, the governing body of any city may, by ordinance, impose a city tax, at a rate not to exceed one percent, upon the gross receipts of retailers on the leasing or renting of hotel, motel, or tourist court accommodations within the city for periods of less than thirty consecutive calendar days or one month and upon the gross receipts of a restaurant from any sales of prepared food or beverages, not including alcoholic beverages for consumption off the premises where purchased, which are subject to state sales taxes. For purposes of this section, "restaurant" means any place where food is prepared and intended for individual portion service for consumption on or off the premises and "prepared" includes heating prepackaged food. Accommodations, food, and beverages may all, each, or in any combination be subjected to the tax under this section, if all items in any category which are taxable under state law are taxable, except as otherwise provided in this section.

(Emphasis supplied.) It is therefore my opinion that a city may not tax only alcoholic beverages under N.D.C.C. § 40-57.3-01.1. If any tax on beverages is enacted under this section, it must cover nonalcoholic as well as alcoholic beverages.

2. Does N.D.C.C. § 40-57.3-01.1 permit the city to tax any fraction up to 1%, if it chooses?

A city may impose a tax under N.D.C.C. § 40-57.3-01.1 at any rate that does not exceed one percent of the taxable gross receipts.

3. Does N.D.C.C. § 40-57.3-01.1 allow a city to adopt an ordinance establishing the tax which would apply to "restaurants" and apply it only to those bars who would otherwise qualify and who elect to pay the tax and therefore be defined as restaurants, as well as bars?

N.D.C.C. § 40-57.3-01.1 states that "the governing body of any city may by ordinance impose a city tax . . . upon the gross receipts of a restaurant from any sales of prepared food or beverages, not including alcoholic beverages for consumption off the premises. . . ." The statute also defines "restaurant" as "any place where food is prepared and intended for individual portion service for consumption on or off the premises. . . ." The statute does not authorize the city to choose which restaurants will be subject to the tax and which restaurants will not be subject to the tax. If the city enacts a tax it must be imposed upon all establishments qualifying as a restaurant.

I hope this information adequately answers your questions.

Sincerely,

Nicholas J. Spaeth

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