OPINION
67-281

October 13, 1967 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Sales Tax - Alcoholic Beverages

This is in response to your request for an opinion whether or not mixed drinks (alcoholic) are subject to the North Dakota Sales Tax Act as enacted by the 1967 Legislature, and other action taken by the Legislature as discussed herein.

The North Dakota Supreme Court in Isackson v. State and John Gray, Tax Commissioner, 70 N.D. 505, 296 N.W. 192, ruled that the sales tax as provided for the 1937 Sales Tax Act applied to the full sale price on all mixed drinks. Pursuant to such decision, the Tax Department adopted Rule No. 68, which is as follows:

> RULE NO. 68
>
> MIXED DRINKS
>
> In accordance with the decision of the North Dakota Supreme Court in the case of Isackson v. State, and John Gray, Tax Commissioner, 70 N.D. 505, 296 N.W. 192, it is hereby declared and established that the 2 percent sales tax applies to the full sale price on all 'mixed drinks' which are composed of alcoholic beverages and nonalcoholic beverages, and ingredients such as sugar, ice, flavoring syrups, soda-water, pop, malt, and other commodities of a like nature.
>
> The sales tax on 'mixed drinks' is to be collected and accounted for the same as on the sale of any other tangible personal property sold at retail.
>
> The retailers should keep their books in a manner that will clearly segregate the sales of mixed drinks and other taxable items from the sales of nontaxable items."

Such tax was collected until July 1, 1963.

In 1963, by Chapter 91, Section 5-03-26 was enacted which imposed an excise tax on nonalcoholic commodities used for mixing drinks or which were incorporated into alcoholic drinks. Such tax was imposed when the commodity was sold by a wholesaler to a retail dealer of alcoholic beverages. Chapter 91 (1963) also provided that commodities subject to the excise tax as provided for in such Act were exempt from the tax under Chapters 57-39 and 57-40, which were the sales and use tax, respectively.

In 1967, the Legislature by Chapter 80 (H.B. No. 596) repealed Title 5 of the North Dakota Century Code which, of course, included Section 5-03-26, and by Chapter 81 (S.B. No. 330) specifically repealed

Section 5-03-26 of the 1963 Supplement to the North Dakota Century Code. The Senate Committee Minutes state that a member of the Tax Department appeared and testified substantially as follows:

> * * * This bill would repeal the 3 percent excise tax on nonalcoholic commodities. 920 people in the state remit under this law. Most of these same people are required to file sales tax returns also and some of them mix these taxes. No penalty. Unable to prosecute if they do not pay."

Chapter 80 of the 1967 Session Laws contains no provision relating to a tax on nonalcoholic commodities.

The 1967 Sales Tax Act (Chapter 459), while in some instances is more elaborate, but as affecting the question at hand, is substantially the same as the 1937 Act. The 1967 Act defines a retail sale or a sale at retail (Section 57-39.2-01(3). It defines the term "processing" in the following manner:

> * * * By 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 other real or personal property otherwise exempt from the sales tax shall be considered as a sale of tangible personal property for a purpose other than for processing; * * *."

The same subsection also defines a consumer to include hospitals, infirmaries, etc., or similar institutions which, in effect, rules out a retailer of alcoholic beverages as being a consumer.

The exceptions of the 1967 Act, Section 57-39.2-04, do not pertain to nonalcoholic commodities either directly or when incorporated into an alcoholic drink. Subsection 10 thereof merely provides as follows:

> 0. Gross receipts from the sale of gasoline, cigarettes, snuff, insurance premiums, or any other article or product upon which the state of North Dakota imposes a special tax."

No special tax is imposed on any nonalcoholic commodities by any other act. The discussion and holding by the North Dakota Supreme Court in Isackson v. State, supra, particularly as pertaining to the effect of mixing a nonalcoholic commodity with an alcoholic beverage, and its conclusion that the mixed drink resulting from such incorporation is a tangible personal property either taxable or nontaxable as an indivisible item, and its ruling that a mixed drink is subject to the tax imposed by the Sales Tax Act predisposes of questions in that direction.

It is a general rule of statutory construction that when a special statute on a particular subject matter is enacted it does not repeal the general statute involving, amongst other things, the same subject

matter of the special statute but rather the special statute will be regarded as creating an exception to the provisions of the general statute. In this instance the Sales Tax Act is the general statute and Section 5-03-26, which was enacted in 1963 imposing a special tax on nonalcoholic commodities and exempting same from the sales tax, was the special statute.

It is also a general rule of statutory construction that the repeal of the special statute will reinstate the general law on the subject matter which was inoperative during the existence of the special law. (See Sutherland Statutory Construction, Third Edition, Volume 1, Section 2022, P. 488 through 490.) By applying this rule of construction the repeal of Section 5-03-26 reinstated the general provisions of the Sales Tax Act.

It is therefore our opinion that mixed drinks are subject to the tax imposed by the 1967 Sales Tax Act.

We have also examined the decisions of the North Dakota Supreme Court in the case of Bismarck Tribune v. Lloyd Omdahl, 147 N.W.2d. 903, and the discussions and conclusions reached therein do not change the result of the earlier case directly in point, namely Isackson V. State, supra.

HELGI JOHANNESON

Attorney General