OPINION
67-284

October 3, 1967 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Sales Tax - Club Dues

This is in reply to your inquiry of September 8, 1967, with regard to the application of the North Dakota sales tax law to "dues" or "admissions" charged by country clubs, executive clubs, game lodges, and similar organizations. Your opinion request is quoted in part as follows:

> The clubs in question charge yearly 'membership fees' or 'dues' which, when paid, entitle members not only to specific amusement or entertainment facilities of a kind that are subject to sales tax when provided by other establishments that furnish such amusement or entertainment facilities to the public, such as golf, swimming, tennis and other recreational facilities, but also to privileges not subject to sales tax, such as access to dining rooms, card rooms and other facilities. Other clubs or associations, such as executive clubs, civic music clubs, etc., sponsor paid professional speakers or entertainers, and the members are entitled to admissions to a designated number of performances.

"The above clubs or organizations commonly charge their membership on a yearly basis and commonly refer to the charges as 'dues' or 'membership fees' without allocation of the dues or fees to taxable and nontaxable items.

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> I respectfully request your opinion as to the application of the North Dakota sales tax law to 'dues' or 'membership fees' where no allocation of the dues or fees is made to taxable or nontaxable privileges but the payment thereof entitles the member to admission to entertainment or amusements, or entitles the member to the use of amusement or entertainment facilities, such as golf courses, tennis courts, swimming pools, etc. I also request your opinion as to the application of the North Dakota sales tax law to 'dues' or 'fees' which are allocated to taxable and nontaxable privileges.
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> In connection with the above, enclosed please find a copy of an opinion dated July 16, 1942, by C. E. Brace, Assistant Attorney General, to Mr. J. M. Mirand (sic), Secretary, Jamestown Country Club, in which Mr. Brace construes the North Dakota sales tax law with respect to this matter."

Your letter does not give any indications whether or not the opinion referred to above was followed, but by inference it suggests that it was not followed and without any explanation. We are not aware of,

nor have any changes in the sales tax act been brought to our attention which would modify the conclusion reached in the opinion.

Chapter 57-39.2 imposes a sales tax upon the "gross receipts" of "retailers" from designated "retail sales" made by them.

The term "retailer" is defined in subsection 5 of Section 57-39.2-01 as including " * * * every person engaged in the business of * * * furnishing * * * tickets or admissions to places of amusement, entertainment and athletic events * * *."

The term "person" is defined in subsection 1 of Section 57-39.2-01 as follows:

> 1. 'Persons' includes any individual, firm, partnership, joint adventure, association, corporation, estate, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number."

The term "business" is defined in subsection 4 of Section 57-39.2-01, which is quoted as follows:

> 4. 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect."

Subsection 3 of Section 57-39.2-02 of the North Dakota Century Code imposes a sales tax on gross receipts derived from the sale of tickets or admissions to amusements or entertainments, including amounts charged for participation therein. This subsection is quoted as follows:

> 3. Tickets or admissions to places of amusement or entertainment or athletic events, including amounts charged for participation in an amusement, entertainment or athletic activity, and including the playing of any machine for amusement or entertainment in response to the use of a coin."

There are no North Dakota cases construing the taxability of charges made by a particular club or organization of the type in question. However, it would appear that the clubs and organizations referred to by you clearly come within the definition of the term "person" as defined in the sales tax law.

The sales tax law of the State of California defines the term "business" in the same manner as defined for North Dakota sales tax purposes. The Supreme Court of the State of California in Union League Club v. Johnson, 115 P. 2d. 425, in determining whether a nonprofit corporation organized for social purposes was engaged in a "business" in operating a club which furnished club facilities, dining rooms and a bar, held that, although the club operated its facilities at a loss rather than at a profit, the club was operating a business for gain, benefit or advantage. The court reasoned that persons would frequent the club without the facilities, which facilities contributed to the success of the enterprise and, consequently, the club was being operated for a benefit, gain or

advantage. It would therefore appear that the clubs as referred to by you would be retailers operating a "business" within the meaning of the North Dakota sales tax law.

It seems clear that when an organization furnishes to their members the sole privilege to admission to certain particular performances or to some place for a definite number of occasions, the amount paid for such membership is subject to sales tax.

Many of the clubs and organizations referred to by you operate a dual business; that is, sell items of tangible personal property or amusements that are clearly subject to the North Dakota sales tax law as well as furnish clubroom facilities and promote other social affairs which are not subject to tax.

With respect to the dual activities of a retailer, the courts generally hold that, when a person is engaged in the business of selling or furnishing an item that is subject to sales tax and, in conjunction therewith and included in the same transaction, is engaged in selling a service or item which is not subject to tax, the gross receipts derived from the sale or furnishing of the taxable item or service are subject to tax and the retailer, under these circumstances, is required to segregate the selling price of the tangible personal property or amusements subject to tax from the items or amusements not subject to tax on billings made by the seller to the customer. In this connection, see Prentice Hall (State and Local Taxes - Sales Taxes), paragraph 92, 675, Svithiod Singing Club v. Kibbin, 381 Ill. 194, 44 N.E.2d. 904, and Massell v. Daley, 404 Ill. 479, 89 N.E.2d. 361 (both involving sales of nontaxable entertainment and sales of taxable items by night clubs); Snite v. Department of Revenue, 398 Ill. 41, 74 N.E.2d. 877 (involving the operation of a golf course and the sale of tangible personal property in connection therewith); Doby v. State Tax Commission, (Ala.), 174 So. 233, (involving the sale of tangible personal property and services by automobile repair shops); and Ahern et al v. Nudelman, 374 Ill. 237, 29 N.E.2d. 268 (involving sale of tangible personal property and funeral director services).

In addition to the above, many of the North Dakota sales and use tax rules and regulations pertaining to businesses that sell taxable tangible personal property in conjunction with nontaxable services require the retailer to segregate on billings to customers the selling price of tangible personal property from the service aspect of these sales and collect sales tax on that portion of the sale which is subject to the North Dakota sales and use tax laws. In this connection, see the following North Dakota sales and use tax rules which illustrate this principle: Rule No. 28 involving services; Rule No. 47 involving oculists, opticians and optometrists; Rule No. 48 involving physicians and surgeons; Rule No. 49 involving dentists and dental supply houses; Rule No. 52 involving veterinarians; Rule No. 53 involving undertakers and funeral directors; Rule No. 63 involving automobile repair shops and garages; Rule No. 87 involving shoe repair and Rule No. 90 involving photographers, photo finishers and photostaters.

In view of the above, it is our opinion that the letter addressed to Mr. K. M. Moran, written by Mr. C. E. Brace, dated July 16, 1942, in

which Mr. Brace concludes that a country club is required to collect and pay sales tax on all charges for green fees and for any other athletic facilities furnished by them and that if the membership fee is not allocated to taxable and nontaxable facilities, the entire membership fee is subject to tax is a proper interpretation of the sales tax law as it applies to the organizations referred to by you. Consequently, assuming that a club or organization furnishes to its members taxable and nontaxable privileges but does not allocate the dues or fees charged, the entire dues or fees would be subject to sales tax. However, if the club or organization does allocate the dues or fees to taxable items and privileges and to nontaxable items or privileges, only the amount reasonably allocated to the taxable portion would be subject to sales tax.

HELGI JOHANNESON

Attorney General