

**OPINION
67-305**

July 28, 1967 (OPINION)

Mr. Donald C. Holand

State Senator

Lisbon, North Dakota

RE: Taxation - Sales Tax - Penalty and Revocation of Permits

This is in response to your letter of June 23, 1967, in which you call attention to section 13(4) of House Bill 731, which pertains to the manner and procedure in which sales tax permits may be revoked. You also state that there is a situation where there is no dispute about the amount of tax but only as to the penalty assessed. In connection therewith you ask the following question:

"If the taxpayer believes he has reasonable grounds why the penalty should not be applied and has notified the commissioner to this effect it is possible for the commissioner to enforce payment of the penalty by threat of revocation of the tax permit, or must the assess penalty be collected by civil procedure?"

We are assuming that the tax permit in question continued to full force and effect as the result of section 16(6) of House Bill 731 of the Fortieth Legislative Assembly. On the basis of this assumption, the provisions of House Bill 731, as amended, and other correlated tax acts by the 40th Legislative Assembly would be controlling.

As to the assessment of penalties by administrative agencies and the enforcement of such assessment, this office issued an opinion to Representative R. Fay Brown, on August 22, 1966, and to Mr. Elmer Olson, Secretary of the Public Service Commission, on August 18, 1956. Both of these opinions, in substance, concluded that an administrative agency may assess a penalty if the law so provides but the collection and enforcement if not paid voluntarily by the person against whom the penalty is assessed would have to be through the civil process of a court of competent jurisdiction.

Section 13(4) of House Bill 731 provides as follows:

"Whenever the holder of a permit fails to comply with any of the provisions of sections 2 through 25 or any rules or regulations prescribed by the commissioner and adopted under this Act, or whenever the holder of a permit shall file returns showing no tax due for four consecutive quarters, the commissioner upon hearing after giving ten days' notice of the time and place of the hearing to show cause why his permit should not be revoked, may revoke the permit. The commissioner also shall have the power to restore licenses after such revocation."

The above quoted subsection apparently is designed to give the

administrative body (Tax Commissioner) authority to compel compliance with the tax act and with the rules legally adopted as distinguished from a method of collecting the tax or penalties that may be assessed under the act. But even this requires a notice and hearing, etc. Under section 15 an appeal is authorized which is both anew and in equity.

Section 17(1) of House Bill 731 authorizes the imposition of penalties for the failure to remit the tax within the prescribed time. This section also concludes by providing as follows:

"* * *

"Unpaid penalties may be enforced in the same manner as the tax imposed by section 3 of this act" (is enforced).

Section 3 is merely the imposition of the tax.

Sections 11 and 12 of the Act set forth the manner in which taxes and penalties may be collected. They basically provide for a lien against any property the taxpayer may have, and in subsection 7 of section 12 it provides that the Tax Commissioner may request the Attorney General to bring an action to enforce the payment of taxes and penalties, or to foreclose the lien the state has against any taxpayer.

Section 11 also provides for a bond to insure payment. The reference to the manner of enforcing collection of unpaid penalties must have referred to these provisions. These specific provisions must be given serious consideration over the general provisions of section 13(4).

It is further noted that subsection 8 of section 17 provides that the remedies provided for in the Act shall not be construed as an election on the part of the state officials but as a cumulative remedy. However, as to this portion, we believe that the Legislature intended to provide that if the remedy provided for in the Act is pursued it should not prevent the state from employing some other remedy or criminal prosecution.

A hypertechnical construction of section 13(4) could bring about a conclusion that a permit could be revoked for the failure to pay an assessed penalty. However, such construction would have difficulty in withstanding a constitutional test. It is an established principle of law that where a statute is subject to more than one construction, one which would render it valid and one which would render it invalid, the courts will always adopt the construction which would make it valid. This principle would have full application to the present situation.

The revocation of a tax permit would compel the retailer to cease doing business, or in the alternative, be subjected to criminal prosecution if he continued to do business without the tax permit. Even in situations where a license is required to engage in a certain profession, such license cannot be revoked or suspended except for the grounds enumerated by law. Even there the suspension or revocation cannot be summary but must be only after the due process,

including notice, hearing, etc., has been afforded to the licensee.

The Supreme Court of the State of Utah in *Tite v. State Tax Commissioner*, 57 Pac. 2d. 734, held that an act authorizing the Tax Commissioner to impose a penalty for failure to affix stamps was a function which could not be delegated to an administrative body. In this instance the court actually declared the statute unconstitutional. Before reaching its conclusions, the court reviewed the functions of administrative agencies and on page 738 quoted from the opinion of Chief Justice White of the United States Supreme Court in the case of *Oceanic Steam Navigation Co. v. Stranahan*, 53 L.ed., 10013, as follows:

"But it is argued that even though it be conceded that Congress may, in some cases, impose penalties for the violation of a statutory duty, and provide for their enforcement by civil suit instead of by criminal prosecution, as held in *Hepner v. United States* * * * 53 L.ed. 720, * * * nevertheless that doctrine does not warrant the conclusion that a penalty may be authorized, and its collection committed to an administrative officer without the necessity of resorting to the judicial power. In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. * * *."

If the Tax Commissioner or administrative body were in a position to assess a penalty and enforce the collection thereof by threatening to "put the person out of business", which would be the result if a tax permit were revoked, it would deprive the taxpayer (retailer) from having the matter adjudicated except under severe financial losses and additional penalties, and possibly criminal prosecution. Such procedure would be completely foreign to our concept of jurisprudence. Under such concept the question of whether or not the penalty was properly assessed could, in effect, never be judicially determined, which would result in depriving the individual concerned of due process of law, which is prohibited both by the United States Constitution and the State Constitution.

We recognize a major distinction between assessing a penalty and enforcing it. The legislature by statute provided when the penalty shall apply and the amount of the penalty, but it did not provide when the penalty is due. It did provide for the furnishing of a bond (section 11 of Act). It requires an affirmative action or finding by the commissioner that the conditions or facts which give rise to the penalty existed. The determination that certain facts exist so as to make the penalty applicable is a quasi judicial function. However, the enforcement as stated by the United States Supreme Court, is a judicial function.

It is therefore our opinion in the absence of clear authority that a tax permit may not be revoked because of the failure of the holder of such permit to pay the penalty assessed against him by the Tax Commissioner or an administrative agency. It is our further opinion

that the enforcement and collection of the penalty assessed is to be in the manner provided for in section 11 and subsection 7 of section 12 of House Bill 731.

Failure to post bond or to make the deposit could give rise to revocation of license.

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