OPINION
67-312

July 7, 1967 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Sales Tax - Shoe Repair Materials

This is in reply to your inquiry of June 27, 1967, with regard to the possibility of sales and use tax collection responsibility of an out-of-state organization selling materials and supplies to shoe repairmen in this state. You include a statement from the company as an enclosure with your letter. You also include a copy of rule no. 87.

Your rule no. 87 provides as follows:

> "Persons engaged in the business of repairing shoes are deemed to be engaged in rendering service, the gross receipts from which are not subject to the sales tax. Such repairman is deemed to be the final user or consumer of tangible personal property purchased by him for use in rendering such service, and such sales to him are subject to the sales tax.
>
> "If, however, the repairman in addition to rendering such services, also sells tangible personal property at retail, then he must collect the sales tax on such sales and remit to the state."

We presume that the current authority for such rule is section 18 and subsection 8 of section 32 of chapter 459 of the 1967 Session Laws, as follows:

> "TAX COMMISSIONER TO ADMINISTER ACT. The tax commissioner is hereby charged with the administration of this Act and the taxes imposed thereby. Such commissioner may prescribe all rules and regulations not inconsistent with the provisions of this Act, necessary and advisable for its detailed administration and to effectuate the purposes, including the right to provide for the issuance and sale by the state of coupons covering the amount of tax or taxes to be paid under this Act, if such method is deemed advisable by said commissioner."

Section 32, subsection 8, provides as follows:

> "COLLECTION OF USE TAX. The tax imposed by section 28 shall be collected in the following manner:
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> * * *
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> 8. The commissioner may adopt and promulgate rules and regulations for adding such tax, or the average equivalent thereof, by providing different methods applying uniformly

> to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax."

No itemization of articles is included in either your letter, your rule, or the letter from the company. We would tentatively assume that such items as "bends" of leather are obviously materials that will be changed in passing through the hands of the shoe repairman whereas such items as individually packaged shoestrings in trademarked units may well be transferred over the repairman's counter "with no service of any kind." On such basis we will assume that on items obviously simply resold without attachment to shoes, other processing, or repackaging there is no problem, and that the problem exists with regard to other materials and items.

We do not find North Dakota cases squarely in point. We do note the statement in 47 Am.Jur. 240, SALES AND USE TAXES, section 32, that:

> "SALES OF LEATHER AND FINDINGS. Under statutes defining sales at retail is substantially similar terms, it has been held that sales of leather and shoe findings to shoemakers and shoe repairmen are and are not retail sales within the meaning of such enactments."

From an examination of the authorities cited, it appears that some states have held one way on the problem whereas others have arrived at an opposite conclusion. The analogy to automobile repair parts brought up by the company involved has, we believe, been almost completely answered by the Supreme Court of the State of Iowa in W.J. Sandberg Co. v. Iowa State Board of Assessment & Review (1938), 225 Iowa 103, 278 N.W. 643, mod. on reh. 225 Iowa 111, 281 N.W. 197. To quote from the 11 ALR 2d. 926 Annotation on that case (found at page 931 ALR 2d. 931):

> "* * * The court commented that the shoe repairman was the user or consumer of the tangible personal property rather than the person who ultimately wore the shoes after they were repaired (recognizing that its holding was contrary to Western Leather & Finding Co. v. State Tax Com. (1935) 87 Utah 227, 48 P2d. 526, set out supra). The taxpayer attempted to place shoe repairmen in the same classification as automobile dealers in repairing cars, so as to make the repairmen rather than the seller of parts (in this case, leather and shoe findings) subject to the tax as a seller at retail. However, the court said that the analogy was very remote, since the items used by shoe repairmen became an integral part of customers' shoes, and the customer sought service rather than a particular brand of material, whereas in the case of repairing an automobile a new part was ordinarily installed at a fixed price for the part, a separate charge being made for the service, and then stated that the repairing of shoes was more analogous to the tire and battery service where new parts were used in repairing an inner tube or in vulcanizing a tire and where apparently no separate charge was made for the parts and for the service. The court also commented that if shoe repairmen were in the business of selling secondhand shoes, buying, repairing, and reselling them, the items used in making the repairs would become a part

> of the repairman's own property, and when he sold the shoes he would be selling the items used in making the repairs and would then be subject to the tax because he would be in a sense a processor and that he would be making new shoes out of old ones, but that when he repaired the customer's shoes, he was not selling leather but was selling services as a repairman."

The question, we admit, is not without difficulty as is illustrated by the fact that courts of different states have expressed contrary viewpoints. However, after examining the information submitted, the statutes of this state and the decided case law, it is that repair materials sold to shoe repairmen are taxable at the point they are sold to the shoe repairman.

HELGI JOHANNESON

Attorney General