

**OPINION
68-301**

February 6, 1968 (OPINION)

Honorable Edwin Sjaastad

Tax Commissioner

RE: Taxation - Sales Tax - Limitation on Collection

This is in response to your letter in which you recite the following:

"The audit division of the office of the State Tax Commissioner performed a sales and use tax audit of the books and records of a North Dakota retailer during the month of March, 1966. At the time of the commencement of the audit, the retailer was informed that the audit would cover a six-year period beginning January 1, 1960 through December 31, 1965. The records for the year 1961 through 1965 were made available for audit and these records were actually examined by the Tax Department auditors. The retailer, however, refused to make available for audit purposes the books and records for the year 1960 and, therefore, no actual examination of those records was made. Only July 29, 1966, after the completion of the audit of the books and records of the retailer for the years 1961 through 1965, this office formally assessed additional sales and use tax for the year 1960. As the records for the year 1960 had not been made available for audit purposes, the basis for the assessment for the year 1960 was the application of a percentage of error which was established as a result of the actual examination of the books and records of the retailer for the period beginning January 1, 1961 through December 31, 1965. This percentage of error was applied to the total gross receipts reported by the retailer on the quarterly sales and use tax returns filed by the retailer for the year 1960.

"The retailer in his refusal to present the records for the year 1960 contended that the statute of limitation barred the inspection of the records, and during hearings on the matter he has cited as authority for his position an opinion issued by you on August 22, 1966 to the Honorable R. Fay Brown. In your letter to Representative Brown you referred to the statutory provisions pertaining to the sales and use tax record keeping requirement and, on page 2 of the opinion, you state that those statutory provisions, in effect, place a limitation on the collection of the tax. However, as a direct holding on Mr. Brown's particular question, you stated:

"'In direct response to question (a) under paragraph 1 of your letter, it is our opinion that the Tax Commissioner is limited to the tax records on use tax and sales tax audits retroactive only to June 30, 1961. Also in direct response to question (b) under paragraph no. 1 of your letter, it is our opinion that the retailer is not required to produce any records pertaining to sales or use tax period to June 30, 1961.'

"* * * .

"Assuming that the legality of the sales and use tax assessment can be established through an acceptable percentage of error method, I respectfully request your opinion as to the following:

1. Does the statutory record keeping requirement referred to by you in your opinion to Representative Brown constitute a state of limitations which would bar the assessment and collection of any tax for the year 1960 when the Tax Commissioner was refused access to the books and records of the retailer covering that year?

"If your answer to question no. 1 is 'No' then

2. Did the Tax Commissioner on July 29, 1966, have the authority to assess a tax for the year 1960 when access to the records for 1960 was refused by the retailer."

The sales tax act initially was enacted every two years with a self-expiration date until approximately 1957, at which time the body of the act became permanent. Only the imposition statute or section had a self-expiration date and was enacted every two years. This probably accounts for the two-year limitation on the preservation of records, until it was extended to a period of six years by recent legislation. It was initially designed to keep in step with the basic act. The present sales tax act is on a permanent basis. The question under the prior act was not raised, but there would have been some doubt about collecting any tax after the two-year period expired if the act had not been reenacted, because the administration of the act expired on its own which left no legal machinery to enforce the collection. To enforce the collection, it would have had to be based upon some other provision.

In the opinion to the late Honorable R. Fay Brown, dated August 22, 1966, we stated that "the provisions relating to the keeping and preserving of the sales tax records, in effect, placed a limitation on the collection of the sales tax * * * and * * * constitute a statutory limitation."

Invariably the sales tax records serve as the basis for determining the sales tax due. It is difficult to envision, if not impossible, how the tax due can be determined without these records, unless information is obtained from some other source such as records of the purchaser or inventory comparisons for the years involved, or some other outside information. The absence of the records makes the task of determining the tax due nearly impossible as a practical matter. While there are statutory provisions as to the methods that may be employed by the Tax Commissioner in making assessments where records are not available, they, we presume, must refer to the years during which the retailer by law is required to preserve records.

While percentage of error method might be used in some instances it must first be sufficiently founded on reliable criteria.

We also observe that if a distinction is permitted to be made as to

those retailers which retained records beyond the statutory time and those who do not retain them beyond the statutory time, it would amount to discrimination, which is prohibited by both the federal and state constitution, where the one who keeps the records is subject to an assessment and the one who does not retain the records beyond the statutory time is not subjected to any further assessments.

We have examined the case of Walgreen v. State Board of Equalization, 166, Pac. 2d. 960, but it does not appear to be pertinent to the specific question involved here. Other elements were involved which are not pertinent here. We have also examined the case of Langer v. State, 75 N.D. 1, 28 N.W. 89, but we do not find this case to be pertinent either. It is concerned with income tax.

As in everything, there must be a finality to certain things, including taxation. By removing the source by which a tax is predicated, the net result is a statutory limitation having the same practical effect of a statute of limitations.

In response to your first question, in the absence of fraud, deception or concealment, the net effect of the statute on preservation of records is that it constitutes a statute of limitations if a return with payments was made by the retailer for the years in question.

Question no. 2 need not be answered because of the answer given to question no. 1.

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Attorney General