

**OPINION
68-491**

December 5, 1968 (OPINION)

The Honorable Curtis Olson

State Auditor

RE: Taxation - Special Fuels Tax - Banks Exempt

This is in reply to your letter of November 27, 1968, relative to refunds of special fuels excise tax. You state the following facts and questions:

"Several North Dakota banks have applied for refunds of the two percent special fuels excise tax charged to them under chapter 57-53 of the North Dakota Century Code. They base their request on chapter 57-53 (sic) of the North Dakota Century Code which established the taxation of banks and trust companies in North Dakota.

"Section 57-35-06 states:

"'LIEU TAX. The tax provided in this chapter shall be in lieu of all other taxes or impositions, state, county, and local, except taxes upon the real property of each such bank and trust company.'

"The banks argue that they are exempt from payment of the two percent excise tax on special fuels as this tax is covered by section 57-35-06 under 'all other taxes or impositions.'

"Chapter 57-52 of the North Dakota Century Code governing our special fuels tax does not exempt banks using special fuels. Therefore, in view of the language used in section 57-35-06 and in chapter 57-35 of the North Dakota Century Code, are North Dakota banks exempt from paying a two percent excise tax on special fuels purchased by them?

"In addition, the state tax department has indicated that a national bank need not pay a two percent special fuels tax because of a recent Supreme Court case involving the extent to which states may tax national banks. In First Agricultural National Bank of Berkshire County v. State Tax Commissioner, 88 S. Ct. 2173 the Court points out that the states are without power, unless authorized by Congress, to tax national banks.

"Federal law (12 U.S.C. s 548) allows state taxation of national banks in only one of four specified ways in addition to taxes on real estate. In view of this recent decision cited above, should national banks in North Dakota be subject to a tax on special fuels purchased by them?"

In the first instance we would note that your letter implies two questions.

The first is whether the banks are subject to the special fuels excise tax and the second, whether, if the banks are not subject to the tax, they are entitled to a refund. With regard to your second question, we do not believe the state auditor may permit a refund since the refund statutes (chapter 57-50 of the North Dakota Century Code, as amended) do not establish any procedure whereby such a refund would be authorized.

With respect to your first question, this office has previously indicated that banks are not subject to sales tax under the provisions of section 57-35-06 of the North Dakota Century Code. Thus on May 14, 1968, this office approved Rules and Regulations of the Tax Commissioner which, in Rule 99, exempted state and national banks, among other financial institutions, from the sales tax by virtue of the provisions of section 57-35-06. A similar rule submitted by the tax commissioner had been approved by this office on January 31, 1966. The subsequent Legislative Assembly made no alteration in the law governing this matter and we can therefore presume they have acquiesced in the interpretation of the law on this subject as contained in the Rules and Regulations promulgated by the tax commissioner.

The United States Supreme Court decision in First Agricultural National Bank v. State Tax Comm., 20 L.Ed 2d 1138 (June 1968) leaves no doubt but that a national bank is immune from state sales and use taxes imposed upon it as a purchaser of intangible personal property for its own use.

We can see no basis for distinguishing between the sales and use tax and the special fuels excise tax insofar as the matter of exemption for banks is concerned. It is therefore our opinion that state and national banks are exempt from the special fuels excise tax. In the case of national banks this exemption is predicated on federal law, as cited in your letter, as well as on the provisions of section 57-35-06.

We also realize, however, that the matter of application of the exemption in this instance is somewhat more difficult. In the case of the sales and use tax the tax commissioner had promulgated Rules and Regulations which the retailers must follow and, in sales to state or national banks, the retailer need not charge the sales or use tax. Unless such rules and regulations are enacted or unless some legislation authorizing a refund to the banks is enacted we can envision serious problems with regard to this matter which might well cause a state of indecision which could only be clarified by the courts.

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