

OFFICIAL OPINION NO. 74-28, Taxability of property used in the business of rentals under Ch. 100, Laws of 1974

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

July 11, 1974

Mr. Lyle Wendell  
Secretary of Revenue  
State of South Dakota  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 74-28

**Taxability of property used in the business of rentals under Ch. 100, Laws of 1974**

Dear Mr. Wendell:

You have requested my official opinion on certain matters relating to Chapter 100, Laws of 1974, which amends SDCL 10-45-5, and adds to the retail occupational sales and service tax certain occupations not therefore covered, namely the rental of tangible personal property, except mobile homes, and cable television. Concerning these two matters, you have raised the following questions. Would the tax apply:

I. To the gross receipts of a person who is engaged in the business of renting or leasing motor vehicles?

(a) In one case, the owner-operator lessor of a motor vehicle contracts to operate the vehicle for the transportation of persons or property or both under a contract with a commercial carrier.

(b) In another case the commercial carrier will lease motor vehicles for the transportation of persons or property or both from a leasing company or direct from the manufacturer of the motor vehicle and operate the vehicle itself.

(c) Car rental companies or dealers renting to the public.

2. Would such motor vehicles be subject to the motor vehicle registration fee provided by SDCL 32-5-31?

3. Is property purchased for rental purposes subject to a sales or use tax when acquired?

4. What gross receipts would be applicable in determining the tax on the business of cable television?

The answer to your question must be preceded by a general discussion of the South Dakota Retail Occupational Sales and Use Tax.

The original South Dakota retail occupational sales tax imposed upon the privilege of engaging in business as a retailer a tax of 3% measured by the gross receipts from retail sales of tangible personal property to consumers or users. SDCL 10-45, 10-46. The retailer was authorized to shift the incidence of the tax to consumers by adding the tax to the sales price or charges. SDCL 10-34-22. Nevertheless, the ultimate burden to pay the tax remained on the retailer. *Vinz v. Nord*, 70 S.D. 304, 17 N.W. 2d 299. *Lowell Lust Chevrolet Company v. Commissioner*, 83 S.D. 285, 158 N.W. 2d 603.

The use tax, SDCL 10-46, had its origin in Chapter 276, Session Laws of 1939. It imposed a tax upon the use in this state of tangible personal property but exempted tangible personal property, the gross receipts from the sale of which are to be included in the measure of the tax imposed by (10-45) and tangible personal property the storage, use or other consumption of which this state is prohibited from taxing under the Constitution or laws of the United States of America. *Northwest National Bank v. Gillis*, 82 S.D. 457. 148 N.W. 2d 293.

The retail occupational sales tax was considerably broadened by the enactment of Chapter 296, Laws of 1965 (10-45-4,5), which among other things, imposed a "tax at the same rate as that imposed upon sales of tangible personal property in this state upon the gross receipts of any person" engaging in certain enumerated businesses. To which was added in 1974, cable television, rental of tangible personal property, and specialty cleaners.

As the South Dakota Supreme Court said in *Servall Supply Company v. Division of Taxation*, 84. S.D. 107, 168 N.W. 2d 365:

Although the 1964 law does not specifically amend the original retail occupational sales tax act its direct kinship is evident in the following provisions: Section 3. The exemptions from sales tax relative to sales of tangible personal property shall apply to services included in this act. Section 4. Those persons whose services are taxed herein may add the tax under this section or the average equivalent thereof to his price or charge. Section 5. All of the persons subject to the tax imposed by this act shall be deemed retailers as defined in South Dakota Code (10-45) and the definitions and applications provided in that chapter and the amendments thereto shall apply to this act ...

As the court further noted at 110:

As a supplement to the original retail occupational sales tax act, the sales tax act of 1965 was clearly intended to apply only to retail oriented services upon which the burden of tax could be shifted to the ultimate consumer or user.

There was originally a tax on retail sales of motor vehicles included in the sales tax act. By Chapter 166, Laws of 1937, this was replaced with a registration fee on the first or initial registration. The payment of this license fee being "in full and lieu of all occupational sales, excise, privilege and franchise taxes levied by this state upon the gross receipts for all *sales* of motor vehicles." (italics supplied for emphasis)

What is involved in this matter then, is the application to two separate and distinct taxes which although complementary and supplementary nevertheless have as their basis different transactions. The sales tax is a privilege tax upon the privilege of engaging in an occupation, it is not a tax upon gross receipts as such, but gross receipts as defined in the law are used as a measure to determine the amount of tax to be paid for the privilege of engaging in an occupation or business. *State ex rel. Sioux Falls Motor Company v. Welch*, 65 S.D. 68, 73, 270 N.W. 852. The use tax is upon the use, storage or consumption of tangible personal property. Use is defined as the exercise of right or power over tangible personal property, incidental to the ownership of that property, except that it shall not include the sale of that property in the regular course of business. The use here involved is the holding of the property for rental in a retail business. (10-46-1 (2))

The constitutionality of both taxes has been consistently upheld, see *Northwestern National Bank, Sioux Falls v. Gillis (supra)* at 468 and cases cited therein.

See also *State v. Welch*, 61 S.D. 593, 251 N.W. 189 at 641, 251 N.S. 210:

It is well agreed that the legislature may select some occupations for taxation and not others, and may classify for the purpose provided that the classification is reasonable and not arbitrary and bears some relation to the subject in hand.

and at page 211 our court quoted from the United States Supreme Court in part as follows:

A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation of taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference in policy there is no denial of equal protection of the law ...

Present law provides for either a sales or use tax on sales when such sales are made under a conditional sales contract or other form of sale where the payment of the principal sum is extended over a period of longer than sixty days from the date of sale (10-45-1 (2», and similarly under 10-46-31 the use tax is applicable on the same basis.

It is obvious all of the businesses enumerated in 10-45-4 and 5 involve the use of some tangible property carrying out that business, whether it be by barbers who must own barbering equipment, soaps, shampoos and towels; repair services which must also own tools to carry out their business or whether professional people covered, who own libraries or other equipment. They are for the purpose of carrying on their business, considered the consumer of such goods where those goods are themselves not being sold to the public, but merely used by them in their business or occupation, the gross receipts of which are subject to tax.

In the *Servall case (supra)* the towel and linen supply company was included in the broadened sales tax of 1965. The court, at page 110 noted:

Servall is obligated to pay a sales tax on all linens and towels which it owns and uses because it is the ultimate consumer of these items.

It was also obligated to pay a privilege tax based upon its gross receipts from engaging in a towel and linen supply business. The same line of reasoning must be extended to persons engaged in the rental of tangible personal property. That is, for the purpose of their business they are the consumers of the articles in their rental inventory and therefore are subject to a sales or use tax on the purchase of such articles. Their gross receipts from

engaging in the rental business are also subject to tax by virtue of Chapter 100, Laws of 1974.

The Legislature could well have exempted the purchase of such retail rentals from the sales and use tax. As a matter of fact, under certain conditions for certain retailers it has done this. In 1937, by Chapter 63, SDCL 10-46-17.1, farm machinery which is leased in this state for agricultural purposes *without an option to purchase*, that is, a straight lease or rental such as is contemplated by Chapter 100, is specifically exempted from the tax imposed by 10-46, while the gross receipts from the lease are subject to tax. The Legislature there clearly exempted from the use tax those articles being used in the performance of a rental business. There is no similar exemption connected with Chapter 100, Laws of 1974, and it is therefore my opinion that the answer to question No.3 relating to the gross receipts from renting of tangible personal property must be that such property is subject to sales tax on the purchase or the use tax on the use, storage or consumption by the renters or such property when it is to be used in their taxable retail business. This includes the in lieu of tax imposed as a registration fee on motor vehicles by SDCL 32-5-31.

It is my further opinion that SDCL 10-45-12 exempts from the imposition of the tax under Chapter 100, gross receipts which by its terms are derived from the sale, furnishing or service of transportation. This would include in the instances you have cited the case where the owner-operator lessee of a motor vehicle contracts to operate the vehicle for the transportation of persons or property or both made under a contract with a commercial carrier. This is the furnishing of transportation and it is not the supplying to the ultimate consumer but to the business which makes use of such transportation in conducting both intra and interstate commerce. The service here is by the owner-operator lessor and comes under 10-45-12.

The example of the leased vehicle is not a situation where the furnishing of transportation is involved, but merely the rental of tangible personal property, automobiles, etc., thereafter to be used by the *lessee* in whatever business he might be engaged. Present examples of exemptions under 10-45-12 are taxicabs, airlines, buses, and freight haulers; these people would pay a registration tax on the motor vehicle but their gross receipts would not be subject to the sales tax. Contrary, the vehicles which are leased without an operator and are not themselves performing a transportation service, per se, are subject both to the tax imposed by 32-5-51 and the gross receipts from such business from the tax imposed by Chapter 100.

As discussed above, the specific answers to your questions are as follows:

1. (a) not taxable

(b) taxable

(c) taxable

2. Yes

3. Yes

Your final question having to do with the gross receipts from cable television must be answered from the definition of gross receipts which is "the amount received in money, credits, property or other money's worth in consideration of sales at retail in this state." This was extended to include the gross receipts for services as above noted and as our court said in *State v. Welch, supra*, at 625:

It must appear that he acquired it as a result of a transaction in the course of or necessarily incident to one of the taxed occupations.

In answer to question No.4, it would be my opinion that the *total* gross receipts of cable television companies derived from and necessarily incident to their operation as a cable television company would be subject to the rental receipts tax to become effective on July 1, 1974.

Respectfully submitted,

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Attorney General

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