

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 67-68 pg. 42

Compensation Plates. Compensation Plates.

You have requested an official opinion of this office based upon the following factual situation:

"A merchant engaged in retail sales business, and licensed under SDC 57.31 operates a truck in course of such business for hauling of materials not previously sold and also of previously sold merchandise. Said merchant applies for, and obtains, a compensation certificate for such truck for Class 4 operations. After issuance of such compensation certificate and plates, the merchant uses such truck in transporting, in separate hauling operations, materials not previously sold (compensated hauls) and merchandise previously sold (exempt hauls.)"

You have then presented the following specific questions for consideration:

"1. If such compensated truck is used for hauling previously sold merchandise with gross weight under 26,000 lbs. but over 8 tons (Class 4), is such operation in violation of SDC 1960 Supp. 44.0431 and 44.9927?

"2. Is such merchant's application for compensation certificate in respect to such truck considered to be a definite election to operate such truck as a compensated motor carrier under SDC 44.04 and acts amendatory thereto, regardless of any exempt use thereof under SDC 1960 Supp. 44.0422 and acts amendatory thereto?

"3. Is operator of such truck entitled to remove from such truck the compensation plates issued when engaged in transporting previously sold merchandise under SDC 1960 Supp. 44.0422 (6) as amended by 1961 Session Laws, Chapter 235? If so, where should compensation plates be kept during such period of removal?

"4. Is a law enforcement officer entitled to rely upon the displayed compensation plates as evidence of lawful and authorized compensated weight when such truck is found transporting goods on the public highway, even if the particular operator of said truck

claims the transported merchandise is previously sold merchandise and also claims the said truck is therefore exempt under SDC 1960 Supp. 44.0422 (6), amended?

"5. Can such merchant legally transport on such truck a load of materials consisting of 8 tons of compensated load and 10,000 pounds of previously sold merchandise?"

The controlling statutes for this situation are those statutes which require compensation for the unusual use of the highways (SDC 44.0420 to 44.0431) and more specifically SDC 1960 Supp. 44.0422 as amended.

This is a broad statute setting forth conditions which require the purchase of compensation plates followed by twelve exceptions. The pertinent portions of this section are as follows:

"The term 'motor carrier', when used in Sections 44.0420 to 44.0432 of SDC 44.04 and amendments thereto shall mean any person, copartnership or corporation owning, controlling, operating, or managing any motor vehicle, trailer, semitrailer, or motor propelled or trailed vehicle chassis for the transportation of persons or property over the public highways of this state.

"Provided, however, the following shall not be considered within the definition of 'motor carriers', to-wit:

"(6) when operating a motor vehicle of less than 26,000 pounds gross weight owned by a merchant licensed under SDC 57.31 and amendments thereto or his commissioned paid employee and used in transporting his employer's previously sold merchandise to a purchaser outside the limits of a municipality and in returning exchanged property."

SDC 44.0426 1960 Supp., as amended, provides:

"Every person or corporation except as otherwise provided in this section, desiring to operate a motor vehicle, trailer, or semitrailer, upon the public highways of this state as a motor carrier, in consideration of the unusual use of such public highways by such person or corporation and in addition to the regular license fee or taxes imposed upon motor vehicles in this state, shall, if a carrier of property, pay to the county treasurer of the county of which the applicant is a resident, or to the Department of Motor Vehicles, if applicant is not a resident of this state, the compensation provided for herein annually.

"Class 4—Gross weight seven tons or under, one hundred twenty-five dollars per year."

And SDC 44.0431 1960 Supp. provides:

"Any motor carrier who shall operate upon the public highway any motor vehicle the weight of which together with its load shall exceed the gross weight of such vehicle specified in his application and authorized in the compensation certificate, shall be thereby

deemed to have specified such greater weight and to have agreed to pay compensation accordingly, and shall forthwith pay the amount by which the correct compensation therefor, for the full term of the authorized operation of such motor vehicle under his certificate, or permit, exceeds the amount of compensation actually paid. Such additional amount shall be compensation and not a penalty or fine, and the payment thereof shall not constitute a defense or bar to conviction for such, or any other violation of this chapter. The obligation to pay such compensation shall be calculated and incorporated in the judgment of any court wherein a motor carrier has been convicted of any crime involving the overweight operation of any motor vehicle upon the highways of this state, and failure to obtain the compensation and present the court with a receipt indicating payment therefor within a time specified by the court shall be punishable by contempt proceedings for the purpose of this chapter, in determining the gross weight of vehicles or vehicle, the load combined, a variation of five percent, but not to exceed one thousand pounds in excess of the maximum weights herein provided, is hereby allowed, without such variation constituting a violation of this chapter."

In the case of *Mitchell Produce co v. Morrison*, 63 SD 127, 257 NW 47, our Supreme Court has stated in the following language how the exemptions of 44.0422 are to be interpreted.

"The machinery adopted by the Legislature to accomplish its objects was to provide for the payment of compensation by motor carriers as defined in the act; to establish a broad and comprehensive definition of the term 'motor carriers'; and then to exempt out from the definition and operation of the act certain specific transportations. Respondent, being admittedly a motor carrier within the broad definition of the act, but claiming the protection of one of the exceptions, must show itself clearly within the terms of the exception. *Paddock v. Balgord* (1891) 2 SD 100, 48 NW 840. The canons of statutory construction with reference to exceptions from a general provision are well understood, and to cite authorities in relation to that point seems unnecessary. The applicable principle is well stated in . 59 CJ 1092, as follows: 'Exceptions, as a general rule, should be strictly, but reasonably, construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception.' "

Exemption of No. 6 of SDC 1960 Supp. 44.0422 or the similar provision in the SDC of 1939 has been the subject of previous Attorney General opinions.

In 1945-46 AGR 92 this office interpreted the provision exempting from compensation plates, vehicles "exclusively used by a person who delivers in his own vehicle goods and merchandise in pursuance to bona fide sales at retail to the consumers thereof, residing outside the limits of cities and towns" (SDC 44.0422, as amended by Chapter 160, Session Laws of 1943) and held that such exemption did not include a vehicle which not only delivered sold goods but also carried goods to be sold directly from the vehicle. This holding was based upon the word "exclusively" in the above statute.

Again, in 1951, the above statute was the subject of an opinion of this office and again because it was not stated that the vehicle was used in the "exclusive" manner, it was held that the vehicle was not exempt. (1951-52 AGR 240)

In 1957, SDC 44.0422 was amended and exemption No. 6 was set out as it is presently, and since then has been subjected to interpretation only once from this office in which opinion it was held not applicable to the situation presented. (1959-60 AGR 55). The Supreme Court subsequent to this amendment had another occasion to interpret an exemption of SDC 44.0422 and although the exemption was not the one involved in the situation you presented, the language of the Court provides reasoning upon which this opinion can be predicated. The Court stated:

"An amendment is usually designed either to alter the operation and effect of earlier provisions or to clarify their meaning. 82 CJS Statutes S 384. There are in the 1957 amendment changes in substance, but they are not here material. It would also appear that the legislature intended a clarification of the prior statute. It sets out each of the eleven exceptions in a subsection beginning with the words 'when operating', which indicates a purpose to exempt motor vehicles primarily on the basis of their use."

Thus it can be reasoned -that it is not the vehicle, but the use to which the vehicle is put that determines whether or not it comes within the exemptions.

Therefore, the requirements that must be met before a use can qualify under exemption No. 6 must be:

1. A motor vehicle of less than 26,000 pounds gross weight;

Owned by a merchant licensed under SDC 57.31 or his . . . employee;

Transporting employer's previously sold merchandise (and in returning exchanged merchandise);

To a purchaser;

Outside the limits of a municipality.

If a vehicle complies with the requirements and is used in the above manner it is exempt from compensation. The fact that at other times the same vehicle is used for purposes which are not exempt and for which compensation plates are purchased and displayed on the vehicle does not remove it from the exempt status when used as above.

Upon the above reasoning your question No. 1 would be answered in the NEGATIVE.

Question No. 2 is also answered in the NEGATIVE.

For the reason that the first two questions are answered in the negative, it is unnecessary for the compensation plates to be removed when the vehicle is used for an exempt haul and question No. 3, therefore, need not be answered.

In answer to question No. 4 it is my opinion that a law enforcement officer cannot rely upon the displayed plates, but must determine if the use to which the vehicle is being put is exempt, or if not exempt, within the limits allowed by the compensation plates.

Question No. 5 is answered in the NEGATIVE for the reason that such a use, (hauling a load that requires compensation along with a load that would otherwise be exempt) removes the use from the strict interpretation to be given to the exception.