

**LETTER OPINION
2017-L-05**

December 5, 2017

The Honorable Ryan Rauschenberger
Tax Commissioner
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Rauschenberger:

Thank you for your letter requesting an Attorney General's opinion on whether a record retention requirement for sales and use tax imposed on a retailer under N.D.C.C. § 57-39.2-10 limits the Tax Commissioner's authority to obtain records necessary to provide audits under N.D.C.C. § 57-39.2-15.

For the following reasons, it is my opinion that N.D.C.C. § 57-39.2-10 provides a minimum time period of three years and three months that retailers must preserve records. However, retailers who preserve their records for longer periods must provide those records to the Tax Commissioner, upon request, when the North Dakota Office of State Tax Commissioner (Tax Commissioner) is carrying out his statutory duties to review and ensure compliance with the provisions of N.D.C.C. ch. 57-39.2.

ANALYSIS

This office previously issued an opinion in 1968 finding that a statute regarding the preservation of sales and use tax records by a retailer operated as a statute of limitations on the periods of time for which the Tax Commissioner may audit the retailer.¹ The questions presented in that opinion addressed a situation involving a retailer who was subject to a sales and use tax audit by the Tax Commissioner in March 1966, for a six-year period beginning January 1, 1960, through December 31, 1965.² The retailer under audit, however, refused to provide records for 1960, arguing that the Tax Commissioner lacked authority to audit that year's sales and use activity under the

¹ N.D.A.G. 68-301.

² *Id.*

(then) two-year statutory requirement on the preservation of records.³ There was no corresponding statute of limitation applicable to the Tax Commissioner for auditing purposes at that time.⁴ As such, the Office of Attorney General opined:

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 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 a retailer for the years in question.⁵

Recognizing the challenge for the Tax Commissioner to audit a retailer for a year in which no records were produced by that retailer, the opinion observed that “[w]hile 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.”⁶

³ *Id.* The law in 1966 required retailers to preserve records for six-years, but this law was not implemented until 1963. See 1963 N.D. Sess. Laws ch. 400, §§ 1, 7. Prior to 1963, sales tax records were required to be preserved for two years, and there were no retention requirements for use tax records. Thus, the retailer was required to preserve records from 1961 to 1963 under the 1963 law, and thereafter for six years under the laws in place during the audit in 1966. The retailer therefor challenged the production of the 1960 records.

⁴ See *generally* N.D.C.C. chs. 57-39 and 57-40. The only statute of limitation found in law at that time was a requirement that a proceeding in court for the collection of unpaid taxes must begin within six years after the due date of such taxes. See N.D.C.C. § 57-39-15(2) in place in 1963. Prior to 1963, this time period was fifteen years. See 1963 N.D. Sess. Laws ch. 403, § 1.

⁵ N.D.A.G. 68-301.

⁶ *Id.*, See *also* N.D.A.G. 66-308, which opined that “[t]he provisions relating to the keeping and preserving of the sales tax records [for a portion of the time under review by the Tax Commissioner at that time, records were required to be preserved for only two years], in effect, placed a limitation on the collection of the sales tax.” The opinion further concluded that “[t]he authorization to destroy records or the affirmative provision to preserve the records only for a certain number of years compels a conclusion that the Legislature, in effect, intended the same period to constitute a statutory limitation.”

The laws regarding sales and use tax have undergone many revisions since the 1968 opinion. In order to bring this issue to the present, and address your question, some legislative history is instructive.

In 1967, House Bill 731 was passed, codifying the Sales and Use Tax Act and creating N.D.C.C. ch. 57-39.2.⁷ Under this Act, retailers were required to preserve records for six years pursuant to N.D.C.C. § 57-39.2-10.

In that same Act, the Legislative Assembly did not impose any statute of limitations on Tax Commissioner's audits, but codified the consequences of a failure by a retailer to file a return or provide correct information to the Tax Commissioner, creating N.D.C.C. § 57-39.2-15:

If a return required by this Act is not filed, or if a return when filed is incorrect or insufficient the commissioner shall determine the amount of tax due from such information as he may be able to obtain, and, if necessary, may estimate the tax on the basis of external indices. . . . The commissioner shall give notice of such determination to the person liable for the tax. Such determination shall fix the tax finally and irrevocably unless the person against whom it is assessed, within fifteen days after the giving of notice of such determination, shall apply to the commissioner for a hearing or unless the commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the commissioner shall give notice of his decision to the person liable for the tax.⁸

In 1971, N.D.C.C. § 57-39.2-10 was amended, reducing the time period for preservation of records by retailers to three years.⁹

Section 57-39.2-10, N.D.C.C., was again amended in 1973 requiring a retailer to preserve records for three years and three months.¹⁰ The Legislature also significantly amended N.D.C.C. § 57-39.2-15, providing specific time limitations for instances where a retailer incorrectly filed a return, failed to file a return, or engaged in a fraudulent act or willful intent not to file a return, as follows:

⁷ 1967 N.D. Sess. Laws. ch. 459.

⁸ *Id.*, at Section 14.

⁹ 1971 N.D. Sess. Laws ch. 573, §1.

¹⁰ 1973 N.D. Sess. Laws ch. 480 § 2.

If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient the commissioner shall determine the amount of tax due from such information as he may be able to obtain, and, if necessary, may estimate the tax on the basis of external indices. . . . The commissioner shall give notice of such determination to the person liable for the tax. *If the determination of tax due relates to an incorrect or insufficient return filed by the taxpayer, notice of such determination shall be given not later than three years after the last day on which the return was due or three years after the return was filed, whichever period expires later; notice of determination of tax due for any reporting period for which a taxpayer failed to file a return shall be given not later than six years after the due date of the return; where fraudulent information is given in a return or where the failure to file a return is due to the fraudulent intent or willful attempt of the taxpayer in any manner to evade the tax, the time limitation herein provided for giving notice of the determination of tax due shall not apply.* Such determination shall fix the tax finally and irrevocably unless the person against whom it is assessed, within fifteen days after the giving of notice of such determination, shall apply to the commissioner for a hearing or unless the commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the commissioner shall give notice of his decision to the person liable for the tax.¹¹ (Amended language emphasized).

Finally, in 1983, N.D.C.C. § 57-39.2-15 was amended specifying that in instances where an audit discovers underreporting of tax due by *twenty-five percent or more* on a return by a retailer, the statutory notice of determination required from the Tax Commissioner was extended to six years after the date the return was due, or six years after the return was filed, whichever is later.¹²

The contrast between these sections of law illustrates the conundrum for both retailers and the Tax Commissioner: Retailers are required to preserve their records for *three*

¹¹ *Id.*, at § 3. Adding the three year time period limitation for incorrect or insufficient returns, six year time limitation period for instances of a failure to file, and a limitless time period for instances of fraudulent information or willful evasion of the requirement to file.

¹² 1983 Sess. Laws. ch. 649, § 1. “[i]f it is determined upon audit that the tax due was twenty-five percent or more above the amount reported on a return, notice of determination of tax due shall be given not later than six years after the last day on which the return was due or six years after the return was filed, whichever is later. . . .”

years and three months,¹³ while, under specified circumstances, the Tax Commissioner may assess (and, presumably, audit to ensure the assessments are accurate) up to *six years* after a return is filed or should have been filed in the cases of underreporting of taxes by twenty-five percent or more, or, in the case of fraudulent information provided by the retailer. In the event of a willful intent of that retailer to evade reporting any tax at all, there is *no limit* on the time when the Tax Commissioner may assess for taxes determined to be due.¹⁴

Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears.¹⁵ Further, “[b]oth the North Dakota Supreme Court and this office on a number of occasions have said that ‘[t]he Legislature’s intent must be sought initially from the statutory language.’ ‘If a statute’s language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute.’ Usually, when the plain meaning of a statute is apparent, it is unwise and unnecessary to delve further.”¹⁶

However, if there is discord between two interrelated statutes, and adherence to the strict letter of one statute may lead to an absurd or ludicrous result when compared to the plain meaning of the other statute, “we are guided by the common-sense principle that a statute is to be read to give effect to each of its provisions, whenever fairly possible.”¹⁷ It is doubtful the Legislative Assembly would enact a statutory scheme¹⁸ that would intentionally constrain the Tax Commissioner to a shorter time period of access to “any information as the commissioner may be able to obtain,”¹⁹ while, concurrently *charging* the Tax Commissioner with a *duty* to issue a notice of determination of unpaid, underpaid, unreported, or underreported taxes due and owing from a retailer upon discovery of the same for periods of up to six years, absent

¹³ N.D.C.C. § 57-39.2-10(1)

¹⁴ N.D.C.C. § 57-39.2-15.

¹⁵ N.D.C.C. § 1-02-02.

¹⁶ N.D.A.G. 2014-L-15. See also N.D.A.G. 2015-L-09 (“The Legislature’s intent must be sought initially from the statutory language.”); *W. Gas Res., Inc. v. Heitkamp*, 489 N.W.2d 869 (N.D. 1992) (“The Legislature’s intent must be sought initially from the language of the statute ... If the language of a statute is clear and unambiguous, we cannot ignore that language under the pretext of pursuing its spirit because the legislative intent is presumed clear.”) (citations omitted); *Rocky Mountain Oil & Gas Ass’n v. Conrad*, 405 N.W.2d 279 (N.D. 1987) (“In determining the meaning of statutes, the primary objective is to ascertain the objective of the Legislature.”) (citations omitted).

¹⁷ *Stutsman Cnty v. State Historical Soc. of N.D.*, 371 N.W.2d 321 (N.D. 1985).

¹⁸ N.D.C.C. § 57-39.2-10(1).

¹⁹ N.D.C.C. § 57-39.2-15.

fraudulent intent or willful evasion.²⁰ Such a construction of the two statutes at issue here would lead to absurd or ludicrous results if adhered to strictly.²¹

When two statutes relating to the same subject matter appear to be in conflict, they should, whenever possible, be construed to give effect to both statutes if this can be done without doing violence to either.²² Even though both statutes, when read independently, seem unambiguous, it is reasonable to consider laws upon the same or similar subjects, the consequences of a particular construction, and the administrative construction of the statute to attempt some harmonization between them.²³

However, if an irreconcilable conflict exists, the latest enactment will control or will be regarded as an exception to or qualification of the prior statute.²⁴ It is noteworthy that a portion of the 1983 amendment to N.D.C.C. § 57-39.2-15, -- the addition of the twenty-five percent underreporting threshold triggering a duty upon the Tax Commissioner to issue a notice of determination of tax due -- was the last substantive amendment in time to that statute.²⁵

In order to harmonize these conflicting statutes, and to avoid an absurd or ludicrous result, namely, the issuance of a notice of determination to retailers by the Tax Commissioner of unreported or underreported taxes based on missing, incomplete, or unsubstantiated information, it is reasonable to conclude that retailers who maintain records for periods beyond three years and three months must produce those records to the Tax Commissioner upon request.

Consequently, it is my opinion that retailers must preserve their records for a minimum of three years and three months under N.D.C.C. § 57-39.2-10 . Retailers who preserve

²⁰ *Id.*

²¹ See *Smith v. N.D. Workers Comp. Bureau*, 447 N.W.2d 250 (N.D. 1989) (“We have said that the practical construction of a statute by the agency administering the law is entitled to some weight in construing the statute. . . .”); *Clapp v. Cass Cnty.*, 236 N.W.2d 850 (N.D. 1975) (“Among the factors to consider in interpreting a statute are the actual language, its connection with other clauses,”) (citation omitted).

²² See *City of Fargo v. State*, 260 N.W.2d 333, 338 (N.D. 1977) (citations omitted).

²³ N.D.A.G. 2009-L-14. See also N.D.A.G. 95-L-208 (“The object sought to be obtained, the statute's connection to other related statutes and the consequences of a particular construction may be considered.”) (citation omitted).

²⁴ *City of Fargo*, 260 N.W.2d at 338. See also N.D.A.G. 96-F-08 (“[S]tatutes relating to the same subject matter must be construed together and should be harmonized if possible to give meaningful effect to each without rendering one or the other useless.”) (citation omitted).

²⁵ See fn. 9, *supra*.

LETTER OPINION 2017-L-05
December 5, 2017
Page 7

their records for longer periods must provide those records to the Tax Commissioner upon request, when the Tax Commissioner is carrying out its statutory duties to review and ensure retailer compliance with the provisions of N.D.C.C. ch. 57-39.2.

To the extent this opinion reaches conclusions contrary to the opinion of this office in N.D.A.G. 68-301, and N.D.A.G. 66-308, those opinions are overruled.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁶

²⁶ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).