

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-29

Date issued: September 13, 1994

Requested by: Bob Hanson, Tax Commissioner

- QUESTION PRESENTED -

Whether the North Dakota tax on controlled substances under N.D.C.C. ch. 57-36.1 is unconstitutional in light of the decision of the United States Supreme Court in Department of Revenue of Montana v. Kurth Ranch.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the North Dakota tax on controlled substances under N.D.C.C. ch. 57-36.1 is not unconstitutional under the decision of the United States Supreme Court in Department of Revenue of Montana v. Kurth Ranch.

- ANALYSIS -

Every legislative enactment is presumed valid. First American Bank & Trust Company v. Ellwein, 198 N.W.2d 84, 95 (N.D. 1972). "[I]n passing on the validity of a legislative enactment every reasonable presumption is in favor of its constitutionality unless it clearly violates some provision of our State Constitution or the Federal Constitution." Id. With the presumption of constitutionality in mind, this office has generally refrained from making determinations as to the constitutionality of statutes unless, for example, the statute is clearly and patently unconstitutional. See Letter from Attorney General Allen Olson to Dennis Schulz, Secretary, North Dakota Real Estate Commission (November 6, 1978). N.D.C.C. ch. 57-36.1 imposes a tax upon marijuana and other controlled substances. N.D.C.C. ? 57-36.1-08. "No dealer may possess any marijuana or other controlled substance upon which a tax is imposed by this chapter unless the tax has been paid on the marijuana or other controlled substance as evidenced by a stamp or other official indicia." N.D.C.C. ? 57-36.1-04. Dealers are not required to give any identifying information when they pay this tax. N.D.C.C. ? 57-36.1-02. This chapter

also states "[n]otwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a dealer; nor can any information contained in such a report or return obtained from a dealer be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes or penalties due under this chapter from the dealer." N.D.C.C. ? 57-36.1-14(1).

In Department of Revenue of Montana v. Kurth Ranch, ____ U.S. ____, 114 S.Ct. 1937 (1994), the United States Supreme Court examined a tax imposed on the possession and storage of dangerous drugs by the state of Montana. Montana Code Annotated (Mont. Code Ann.) ? 15-25-11(1). The Kurth family operated a mixed grain and livestock farm, and began to cultivate and sell marijuana in 1986. Kurth, 114 S.Ct. at 1942. The Kurth Ranch was raided approximately two weeks after Montana's Dangerous Drug Tax Act went into effect. Id. Plea agreements to criminal charges were entered, with one family member pleading guilty to possession of drugs with intent to sell and five other family members pleading guilty to conspiracy to possess drugs with the intent to sell. Id. A civil forfeiture action was brought seeking recovery of cash and equipment used in the marijuana operation. Id. Subsequently, the Montana Department of Revenue attempted to collect almost \$900,000 in taxes, interest, and penalties regarding the drug operation. Id. The Kurths filed for bankruptcy before the administrative proceedings concerning the drug tax were complete. The Supreme Court decision stems from the bankruptcy case. Id. at 1943.

The Supreme Court examined Montana's dangerous drug tax under a double jeopardy analysis.⁴ The specific question addressed was whether the Montana dangerous drug tax constituted a permissible tax or an impermissible second punishment. Significant factors, no one of which alone necessarily

⁴The double jeopardy clause of the Federal Constitution states: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., Amendment V. The double jeopardy prohibition of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1965).

determined the question, included that the tax rate was remarkably high;⁵ that the Montana Legislature had an obvious deterrent intent; that the tax is conditioned on the commission of a crime; that the tax assessment "is exacted only after the tax payer has been arrested for the precise conduct that gives rise to the tax obligation in the first place;"⁶ that the tax is imposed upon an activity which is completely forbidden; and that it is imposed on goods that the taxpayer does not own or possess when the tax is imposed. 114 S.Ct. 1946-1948. The court concluded "[t]aken as a whole, this drug tax is a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id. at 1948.

It should be emphasized that the Supreme Court's analysis in Kurth concerns the applicability of the double jeopardy clause to Montana's Dangerous Drug Tax Act as it was applied after a criminal proceeding and a forfeiture proceeding. The Court's finding that it was a second punishment was limited to this context. The Court specifically stated:

Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction.

Kurth, 114 S.Ct. at 1945. The Court's conclusion was that:

This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead, it is a second punishment within the contemplation of a constitutional protection

⁵"A significant part of the assessment was more than eight times the drug's market value - a remarkably high tax." Kurth, 114 S.Ct. 1946.

⁶Although the tax as enacted into the Montana Code does not appear to depend upon the arrest of the taxpayer, see Mont. Code Ann. ? 15-25-111, the administrative code interpreting this law specifically contemplates that a return would not be filed until after the taxpayer has been arrested, Montana Administrative Rule 42.34.102.

that has "deep roots in our history and jurisprudence," Halper, 490 U.S. at 440, and therefore must be imposed during the first prosecution or not at all.

Id. at 1948. Montana's proceeding to collect its tax on possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time "for the same offense." Id. Therefore, even if Kurth applied to North Dakota's controlled substances tax, it would only affect such tax as has been collected in a separate proceeding following a criminal prosecution.

North Dakota's controlled substances tax differs in many significant instances from the Montana dangerous drug tax. North Dakota's controlled substances tax requires each person who is defined as a dealer to purchase a stamp or other official identifying information upon possession of marijuana or other controlled substances. N.D.C.C. ?? 57-36.1-04 and 57-36.1-10. The taxes are due and payable upon possession of marijuana or other controlled substances, and the tax stamp must be immediately affixed to the marijuana or other controlled substances. N.D.C.C. ? 57-36.1-11. Assessment and enforcement of the controlled substances tax does not depend upon or relate to an arrest or conviction concerning the same activity. N.D.C.C. ? 57-36.1-12. Although payment of the tax does not provide immunity from criminal prosecution, N.D.C.C. ? 57-36.1-05, neither the Tax Commissioner nor any other employee may reveal any facts contained in a report or return required under N.D.C.C. ch. 57-36.1, nor can any information contained in such a report or return be used against the dealer in any criminal proceeding unless it has been independently obtained, excluding proceedings involving taxes or penalties due under chapter 57-36.1. N.D.C.C. ? 57-36.1-14(1).⁷ Further, the controlled substances tax is not a substitute for criminal prosecution because illegally seized controlled substances are not taxed if they could not be introduced into evidence at a criminal trial. N.D.C.C. ? 57-36.1-16.

⁷Therefore, North Dakota's controlled substances tax does not create a risk of self-incrimination, which would be unconstitutional. Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988). See also State v. Roberts, 384 N.W.2d 688 (S.D. 1980).

However, there are also similarities between the Montana and North Dakota drug taxes. The tax rates imposed by the North Dakota and Montana acts are substantially similar. Compare N.D.C.C. ? 57-36.1-08 with Mont. Code Ann. ? 15-25-111(2).⁸ Further, possession of these substances is generally forbidden. See N.D.C.C. ch. 19-03.1. Criminal penalties are provided. N.D.C.C. ? 19-03.1-23. Also, the substances are subject to forfeiture. N.D.C.C. ? 19-03.1-36.

As mentioned above, state statutes are presumed to be valid. Gitlow v. New York, 268 U.S. 652, 668 (1925). "Whenever possible, statutes must be interpreted in accordance with constitutional principles." American Power Co. v. S.F.C., 329 U.S. 90, 108 (1946). State police powers enacted into law "are to be presumed constitutional in default of a showing to the contrary, or unless, on their face, they are arbitrary and unreasonable." Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 82 (6th Cir. 1943). A person attacking the constitutionality of a statute must rebut the presumption of the constitutionality of that statute and clearly show that the statute violates the state or federal constitution. State v. Tweed, 491 N.W.2d 412, 418 (N.D. 1992).

The Supreme Court's opinion in Kurth relies substantially on the fact that the drug tax is only assessed after the taxpayer has been arrested for the possession of the drugs. The North Dakota controlled substances tax does not depend upon such an arrest, and instead is due and payable immediately upon possession. Therefore, it is my opinion that the United States Supreme Court opinion in Department of Revenue of Montana v. Kurth Ranch does not render the North Dakota Controlled Substance Tax, N.D.C.C. ch. 57-36.1 unconstitutional. Accordingly, the Tax Department need not refund any moneys previously collected.

- EFFECT -

⁸For example, the North Dakota tax rate for each gram or portion of a gram of marijuana is \$3.50. N.D.C.C. ? 57-36.1-08(1). Montana taxed marijuana at a minimum of \$100 per ounce. Mont. Code Ann. ? 15-25-111(2). As there are 28.350 grams in an ounce, The American Heritage Dictionary, 778 (2d coll. ed. 1991), the North Dakota tax rate on marijuana is \$99.23 per ounce.

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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.

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