

**LETTER OPINION**  
**94-L-302**

November 3, 1994

The Honorable Bob Hanson  
Office of State Tax Commissioner  
State Capitol  
Bismarck, ND 58505-0599

Dear Mr. Hanson:

Thank you for your October 18, 1994, letter regarding tangible personal property forfeited to the Tax Department by a trustee in bankruptcy in partial satisfaction of a lien for unpaid sales and use taxes owned by the bankrupt estate.

You first ask whether property voluntarily forfeited to satisfy state tax liens is "surplus property" under North Dakota Century Code (N.D.C.C.) ? 54-44-04.6. The Office of Management and Budget (OMB) must be informed whenever a state department, agency, or institution "possesses property surplus to its needs, whether originally obtained with state or other funds." N.D.C.C. ? 54-44-04.6(1) (emphasis added). In addition, the proceeds of surplus property sold by OMB must be "deposited into the fund from which the property was purchased." N.D.C.C. ? 54-44-04.6(4) (emphasis added).

The plain language of the statute applies only to property "purchased" or "obtained with . . . funds." Therefore, because property forfeited to satisfy state tax liens is not purchased by the Tax Department, it is my opinion that such forfeited property is not "surplus property" under N.D.C.C. ? 54-44-04.6.

If the forfeited property is not statutory "surplus property," you ask whether the Tax Commissioner has the authority to dispose of the property and what the proper procedure is for doing so. Through an action brought by the Attorney General, the Tax Commissioner has the express authority to foreclose on sales and use tax liens "in the manner provided for mortgages on real or personal property." N.D.C.C. ?? 57-39.2-13(7), 57-40.2-16(7); see also N.D.C.C. ? 35-01-29

(foreclosure of statutory lien on personal property).

N.D.C.C. ch. 32-30 provides the procedure for foreclosing mortgages or liens on personal property. A judgment under this chapter "must specify the amount due on the lien and must direct a sale of the property to satisfy the same and the costs . . . in the manner provided for the sale of personal property under execution, and the application . . . of the proceeds of the sale . . . to the payment of the judgment and costs." N.D.C.C. ? 32-20-05. Thus, foreclosure of a tax lien on a debtor's personal property is not completed until the amount of the lien is specified, the property is sold, and the proceeds of the sale are applied to the lien.

I agree with your observation that a foreclosure proceeding is unnecessary when the amount of taxes due under a lien has been specified in a judgment or acknowledged by the taxpayer, and the personal property subject to a tax lien has been forfeited. The result of a judgment of foreclosure under those circumstances would be to direct the sale of property the Tax Commissioner already possesses.

As creatures of legislative action, administrative agencies have the authority and power as granted to them or that necessarily implied from the grant, First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584 (N.D. 1984). In addition to the Tax Commissioner's collection and enforcement authority contained in N.D.C.C. ch.s 57-39.2 and 57-40.2, the Commissioner "generally shall enforce all tax proceedings and revenue laws of the state in the proper courts." N.D.C.C. ? 57-01-02(3).

In the instance you cite, the Tax Commissioner duly followed procedures for filing and enforcing the sales and use tax lien. Bankruptcy proceedings intervened in the collection process and the Tax Commissioner continued collection efforts by filing a claim in the bankruptcy court. The procedures of that court resulted in tangible personal property rather than money being forfeited to the Commissioner.

Therefore, by the operation of federal law, the tax

The Honorable Bob Hanson  
November 3, 1994  
Page 3

lien procedures ended up in federal bankruptcy court which, also by operation of law, became the proper court in which to pursue collection. Therefore, it may be necessarily implied from the stated powers and authority of the Tax Commissioner to enforce and collect sales and use taxes that if that process results in obtaining tangible personal property of the taxpayer, other than money, the Tax Commissioner is empowered to sell the property to obtain its proceeds in money because no other public official is empowered to do so under the circumstances.

In my opinion, therefore, the authority to sell forfeited property and apply the proceeds to liens for unpaid state sales and use taxes can be implied from the Tax Commissioner's express authority to enforce collection of those taxes.

The Tax Commissioner should sell forfeited personal property in a similar manner to that provided for sales under execution in N.D.C.C. ch. 28-23. See Lang v. Barrios, 472 N.W.2d 464 (N.D. 1991). After giving public notice of the time and place of the sale, the Tax Department should sell the property at public auction to the highest bidder. N.D.C.C. ?? 28-23-01, 28-23-07. As owner of the property, the Tax Department can choose the location of the sale. Compare N.D.C.C. ? 28-23-06.

"When the sale is of personal property capable of manual delivery, it must be within view of those who attend the sale and must be sold in such parcels as are likely to bring the highest price . . . ." N.D.C.C. ? 28-23-07. If the taxpayer is present at the sale and remains responsible for unpaid taxes exceeding the net sales price of the forfeited property, the taxpayer may direct the order and lots in which the property is sold to obtain the highest sales price. Id.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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