

**OPINION
71-448**

December 31, 1971 (OPINION)

Mr. Byron L. Dorgan

Tax Commissioner

RE: Taxation - Sales Tax - Newspaper or Magazine

This is in response to your letter in which you ask for an opinion whether or not the official publication of the Farmers Educational and Cooperative Union of America, North Dakota Division, which is circulated monthly and entitled, "North Dakota Union Farmer" is, for sales and use tax purposes, a newspaper rather than a magazine or other periodical.

You also submitted the following for our information in resolving the question:

1. A copy of the North Dakota Union Farmer for October 1969 which is the last issue of this publication in that particular form.
2. A copy of the North Dakota Union Farmer for each of the months from November 1969 through October 1971 in the form in which it will apparently continue to be published in the future.
3. A two-page copy of the 'Statement of Ownership, Management and Circulation, for the North Dakota Union Farmer' showing a September 21, 1971 date of filing.
4. A one-page copy of the 'Statement of the Ownership, Management, Circulation, Etc.' required by the Act of Congress of August 24, 1912, of the 'Union Farmer' dated September 21, 1971.
5. A copy of the Bylaws (see Section 7) of the Farmers Educational and Cooperative Union of America, North Dakota Division, as well as a sample membership card for said organization for your perusal."

You further advise that Mr. Lynn Clancy of the Farmers Union head office in Jamestown, North Dakota, stated to you in a telephone conversation of November 2, 1971, that subscriptions to the publication are paid through membership dues. A sample membership card has been furnished for examination. You also advise that Mr. Clancy indicated that the publication is available to nonmembers at a \$2 rate. To resolve the question, it is necessary to examine the appropriate provisions of the sales and use tax.

Section 57-39.2-01(2) defines a sale as follows:

2. 'Sale' means any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by

any means whatsoever, for a consideration, and includes the furnishing of service of steam, gas, electricity, water, or communication, the furnishing of hotel, motel or tourist court accommodations, the furnishing of tickets or admissions to any place of amusement, athletic event or place of entertainment including the playing of any machine or entertainment in response to the use of a coin, and sales of subscriptions to magazines and other periodicals regardless of whether or not such magazines or periodicals are to be delivered in the future and regardless of whether or not they are in existence at the time of the sale of any subscription; provides that the words 'magazines and other periodicals' as used herein shall not include newspapers nor shall they include magazines or periodicals that are furnished free by a nonprofit corporation or organization to its members or because of payment by its members of membership fees or dues." (Emphasis ours)

By reason of Section 57-40.2-01 the definition of a sale as set forth in Section 57-39.2-01 also applies to the use tax. Subsection 1 of Section 57-40.2-01 provides as follows:

1. 'Persons,' 'sale,' 'retail sale,' 'business,' 'gross receipts,' 'relief agency,' 'commissioner,' 'local governmental unit,' each shall have the meaning given to it is in section 57-39.2-01."

The provisions of subsection 2 of Section 57-39.2-01 were considered by the North Dakota Supreme Court in Bismarck Tribune Company v. Omdahl, 147 N.W.2d. 903. The court said:

"It is true that the definition of a 'sale' in the sales tax law specifically exempts newspapers from that tax. The fact that no sales tax is paid on newspapers does not necessarily mean that a use tax is imposed on the items which are used in the processing of the newspapers, if such items are exempt from such tax by the provisions of the use tax law."

The court continued by saying:

"Are the newsprint and the ink tangible personal property used in the manufacture or production of other tangible property intended to be sold at retail, under Section 57-40-01(3), North Dakota Century Code, as amended? We believe it cannot be denied that the newsprint and the ink purchased by the plaintiffs are combined by the process of printing and publishing into tangible personal property, the newspaper. The newsprint and the ink become ingredient or component parts of the newspaper, the product produced."

A newspaper has been defined for various purposes. Each definition had a direct relation to the specific problem involved. We believe that the Legislature intended the term "newspaper" to have the meaning that is normally and generally ascribed to such term and did not intend a technical meaning to be applied to the term. Black's Law Dictionary defines newspaper as follows:

"A publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest."

Webster's New Twentieth Century, Unabridged, Second Edition, Dictionary, defines newspaper as follows:

"A publication regularly printed and distributed, usually daily or weekly, containing news, opinions, advertisements, and other items of general interest."

From the facts submitted, we find that the publication is published at regular intervals, contains intelligence of current events and does contain news of general interest, as well as news of particular interest to farmers. In some respects the publication fits generally into the definition of a newspaper, but in other respects depending on weight given to each item, it would not qualify as a newspaper. Be that as it may, by examining the definition of a sale, as to membership subscriptions, it is not necessary at this time to determine whether or not the publication is a newspaper or other periodical to determine whether same is subject to the sales or use tax. The next important question is whether or not the publication is furnished free by a nonprofit corporation or organization to its members or because of payment by its members of membership fees or dues.

The Articles of Incorporation of the Farmers Educational and Cooperative Union of America, North Dakota Division, state that it is for the purpose of forming a nonprofit cooperative association. The material furnished to us all indicates that the subject cooperation is a nonprofit organization. Our answers will be predicated on this assumption. If this assumption is erroneous, then the answer will no longer be valid.

Under Section 7 of Article II of the Bylaws, it is provided that \$1 shall be for a year's subscription to the North Dakota Union Farmer, official organ of the association. If the payment of the dues includes a subscription to the publication without offering to the member a choice of paying a lesser fee and not subscribing to the publication, then the aforementioned provisions of Section 57-39.2-01(2) would have application. If, however, the member can elect to pay \$1 less for membership and not receive the publication, then the publication is no longer a part of the membership fee or dues. The publication would then not qualify as an exemption or an exclusion to the sales and use tax. Based, however, on the membership card, the Bylaws and the Articles of Incorporation, we conclude that the membership fees and dues are fixed and include the official publication. We would also note that Section 57-39.2-02(4) provides as follows:

"SALES TAX IMPOSED. Except as otherwise expressly provided by this chapter, there is hereby imposed a tax of two and one-quarter percent upon the gross receipts of retailers from all sales at retail including the leasing or renting of tangible personal property as hereinafter provided in this section, within the state of North Dakota of the following to

consumers or users:

* * *

4. Magazines and other periodicals, including subscriptions thereto.

* * *"

Section 57-39.2-01(2) is "an otherwise expressly provided provision" and excludes those magazines and periodicals which are part of a membership fee or dues of a nonprofit organization.

The provisions of the sales and use tax are compatible to each other, and the provisions of each have great similarity. In addition to this, Section 57-40.2-13 specifically provides that "The provisions of Chapter 57-39.2, pertaining to the administration of the retail sales tax, including provisions for refunds or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter."

The North Dakota Supreme Court in the Bismarck Tribune case also held that the newsprint and ink used by the publisher in manufacturing newspapers were used in processing, and therefore the use of such purchases were exempt from the use tax because processing was excluded from the definition of "use" in Section 57-40-02(2). If the newsprint and ink are purchased in North Dakota, there still seems to be little doubt that this would be a sale to the publisher for processing and would therefore not be within the definition of a retail sale. If the publication is printed by someone else for a certain price, the sales to the Farmers Union would be a sale for resale and as such it would be excluded from the definition of retail sale and would not be subject to the tax.

It is our opinion that the official publication of the Farmers Educational and Cooperative Unit of America is, for the reasons explained earlier herein, not subject to the sales or use tax in instances where the publication is furnished to its members as a part of the fees or dues.

HELGI JOHANNESON

Attorney General