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STATE OF NEBRASKA
OFFICIAL
DEC 20 1991
DEPT. OF JUSTICE

DATE: December 16, 1991

SUBJECT: Amendment of the Definition of Consummation of Sale Under Neb.Rev.Stat. § 77-27,147 (Reissue 1990).

REQUESTED BY: Senator Lowell C. Johnson
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on two questions pertaining to a proposed amendment to Neb.Rev.Stat. § 77-27,147 (Reissue 1990), establishing the definition of when a retail sale is "consummated" for purposes of determining application of the Local Option Revenue Act [the "Act"]. Currently, § 77-27,147(1)(a) provides that, for purposes of the Act, a retail sale is generally consummated "[a]t the place where title, possession, or segregation takes place. . . regardless of the business location of the Nebraska retailer. . . ." You state that your proposed legislation seeks "to establish that all sales are subject to local sales tax, if any, in effect at the business location of the retailer unless documented to have occurred at a location where a local sales tax is not applicable."

Your initial question is whether § 77-27,147, amended as you propose, "on its face violate[s] the injunction imposed in City of Lincoln v. McNeil, Docket 259, Page 228 (Dec. 31, 1969, Lancaster County District Court) against requiring businesses to collect a local option sales tax where a sale has taken place outside of the incorporated municipality?" In order to address this question, it is necessary to analyze the precise holding of the court in McNeil, as well as the apparent basis for the court's decision in that case.

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McNeil was an action brought by the City of Lincoln [the "City"] against the State Tax Commissioner seeking a declaration that 1969 Neb. Laws, LB 504, § 9, was unconstitutional and requesting that the Tax Commissioner be enjoined from enforcing the provisions of Section 9 of LB 504 and certain regulations promulgated to implement the law. Section 9 of LB 504 amended section 6 of 1969 Neb. Laws, LB 578, establishing the Local Option Revenue Act, to provide as follows:

> For the purposes of the Local Option Revenue Act, all retail sales, rentals and leases, except sales of utility services, as defined in section 77-2702, are consummated at the place of business of the retailer unless the tangible personal property sold, leased, or rented is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination. In the event the retailer has no permanent place of business in the state, the place or places at which the retail sales, leases, or rentals are consummated for the purposes of the tax imposed by this act shall be determined under rules and regulations prescribed by the Tax Commissioner. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing.

The City challenged the validity of section 9 of LB 504, as well as the regulations promulgated by the Tax Commissioner to implement this section, on various grounds. The City alleged, in part, that section 9 of LB 504 and the Tax Commissioner's regulations were "contradictory and in violation with the provisions of the Local Option Revenue Act limiting the imposition of said tax to transactions within such incorporated municipality," and requested that the court declare that "for purposes of the Local Option Revenue Act, the sale is consummated at that place where, in fact and in law, said sale is consummated, . . . and that a local sales or use tax be imposed where said sale is made and consummated within the incorporated municipality having elected to impose a sales and use tax pursuant to the provisions of the Local Option Revenue Act. . . ." The City further prayed that the Tax Commissioner be permanently enjoined from attempting to enforce the provisions of section 9 of LB 504 and the regulations promulgated to implement its provisions.

The District Court of Lancaster County, in its Journal Entry of Judgment entered on December 31, 1969, sustained the City's

motion for summary judgment and declared the provisions of section 9 of LB 504 and the Tax Commissioner's regulations to be "contrary to the Constitution of the State of Nebraska and void and unenforceable." The court further permanently enjoined the Tax Commissioner and his agents and subordinates from enforcing section 9 of LB 504 and the regulations promulgated to implement the statute. The judgment further ordered that

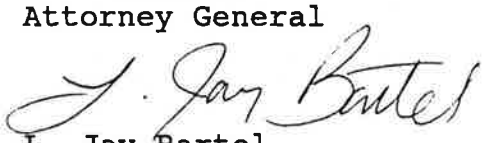
> the Tax Commissioner, his agents and subordinates are permanently enjoined from requiring a retailer maintaining a principal place of business within an incorporated municipality having adopted by ordinance the provisions of LB 578 . . . from collecting a tax pursuant to the Local Option Revenue Act adopted by such incorporated municipality on transactions made to consumers outside of the incorporated municipality adopting such Local Option Revenue Act where such sale as determined by the provisions of the Nebraska Revenue Act of 1967 as amended has taken place outside of the incorporated municipality.

The injunction entered in McNeil, prohibiting the Tax Commissioner from requiring a retailer within an incorporated municipality adopting by ordinance a local sales and use tax on transactions consummated outside the incorporated municipality, was based on the court's determination that imposition of the tax under such circumstances was contrary to the provisions of the Local Option Revenue Act and the Nebraska Revenue Act of 1967, as amended. Specifically, the Local Option Revenue Act provided (and still provides) that an incorporated municipality may by ordinance impose a sales and use tax "upon the same transactions within such incorporated municipality on which the State of Nebraska is authorized to impose a tax pursuant to the Nebraska Revenue Act of 1967, as amended from time to time." 1969 Neb. Laws, LB 578, § 1, and Neb.Rev.Stat. § 77-27,142(1) (Reissue 1990) (emphasis added). Pursuant to Neb.Rev.Stat. § 77-2703(1), a tax is imposed "upon the gross receipts from all sales of tangible personal property sold at retail in this state. . . ." (emphasis added). "Sale" is defined to mean "any transfer of title or possession or segregation in contemplation of transfer of title or possession, . . . of tangible personal property for a consideration." Neb.Rev.Stat. § 77-2702(13). Thus, as the Local Option Revenue Act contemplates application of local sales and use tax only to transactions occurring within an incorporated municipality imposing the tax, as determined by reference to the Nebraska Revenue Act of 1967, as amended, the court in McNeil concluded that it was impermissible to impose local sales and use tax on transactions which, under the

to collect a particular tax would constitute an impermissible delegation of the taxing power of the state. Accordingly, to the extent you have asked us to consider whether your proposed amendment may be construed to permit businesses to "elect" whether to collect and remit local option sales tax under the circumstances described, we conclude that any legislation of this nature would be unconstitutional.

Very truly yours,

DON STENBERG
Attorney General



L. Jay Bartel
Assistant Attorney General

cc: Patrick O'Donnell
Clerk of Legislature

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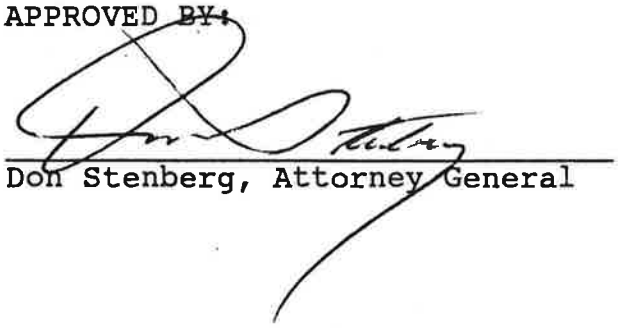
APPROVED BY:



Don Stenberg, Attorney General