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Minnesota Sales Tax: Retailer Reliance on Administrative Interpretations

I. INTRODUCTION

The Minnesota Attorney General and the State Commissioner of Taxation have historically had the power to interpret state tax laws by official opinion, ruling and regulation. The Minnesota Supreme Court has consistently held that the state cannot be estopped from collecting back taxes even when the failure to pay in the first instance was the result of reliance on administrative interpretations subsequently held erroneous. This result has been justified by the principle that the state cannot generally be estopped when acting in its sovereign capacity.

The enactment of the sales tax by the 1967 session of the Minnesota Legislature has created the need for an exception to this general principle. The reason for this need is that a retailer who has reasonably relied on an erroneous administrative interpretation in not collecting a sales tax, and who is later required to pay a back tax, will have to pay the sum due out of his own funds—a result which is contrary to legislative intent and a misdemeanor if accomplished directly. Thus, reasonable reliance on an erroneous interpretation of a sales tax exemption, in effect, shifts the burden of the tax from the purchaser to the seller. This problem is compounded by the sales tax's numerous ambiguities and uncertainties which have resulted in a large de-

1. See Minn. Stat. §§ 8.05, 8.07, & 270.09 (1967).
5. Minn. Stat. §§ 297A.00-.60 (1967).
6. Minn. Stat. § 297A.03(2) (1967): It shall be unlawful for any retailer to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer. Any person violating this provision shall be guilty of a misdemeanor.
7. This shift would not occur in cases involving other types of taxes since the taxpayer would have paid the tax out of his own funds even if the interpretation had been correct in the first instance. Thus, it is only a question of whether he pays it when originally due or at a later date which may, in effect, give him an interest free loan in the amount of the tax.
8. E.g., Minn. Stat. § 297A.25(1)(b) (1967) (the extent of the
mand for administrative interpretations and a particular need for
the retailer to be able to rely on official opinions. Although it is
clear that courts should not be denied the power to overrule
erroneous interpretations, the peculiar situation presented by
the sales tax should lead them to permit retailers to raise the de-
fense of estoppel to preclude retroactive applications of the
correct interpretation.

The purpose of this Note is to examine the powers of the
Attorney General and Commissioner of Taxation to interpret the
Minnesota Sales Tax and to point up the present dangers of
relying on their official interpretations. In addition, it will be
urged that the bench allow assertion of the defense of estoppel in
sales tax cases, or alternatively, that the legislature make it clear
that changes in official administrative interpretations—which in-
clude Attorney General opinions—only be applied prospectively
when retroactive application would substantially prejudice re-
tail sellers who reasonably relied upon them. In this connection,
an amendment to the present statute will be proposed which
would solve the problems posed by a seller's reasonable reliance
on sales tax rules or regulations and Attorney General opinions.

II. ADMINISTRATIVE INTERPRETATIONS

A. THE POWER TO INTERPRET THE SALES TAX

1. The Attorney General

Although the sales tax act does not explicitly grant the Min-
nesota Attorney General interpretive powers, it is clear that he
possesses and can exercise such powers when requested to do so

9. The sales tax is silent about the transitional period and the
status of goods purchased pursuant to contracts entered into prior to the
effective date of the tax. That question is covered in Op. Minn. Att'y. Gen., July

by proper persons. The statutes establishing the office of Attorney General require him to give legal advice to state officials, boards, and commissions on all matters within their purview and on all questions of law submitted by either house of the legislature. He is also required to issue written opinions on questions of public importance submitted by the attorney for any state political subdivision and on questions arising under laws relating to the public schools when submitted by the commissioner of education. These duties obviously include answering any questions concerning the sales tax submitted by the persons or entities listed above.

In addition, the statutes creating the office of Minnesota Commissioner of Taxation provide that the commissioner may request an Attorney General’s opinion on any matter within the scope of his functions—which obviously includes administration of the sales tax—and that any written opinion in response to such a request “shall have the force and effect of law unless and until overruled by a decision of the board of tax appeals or a court of competent jurisdiction.”

2. The Commissioner of Taxation

The Minnesota Commissioner of Taxation, unlike the Attorney General, is expressly granted interpretive authority in the Sales Tax Act itself. He is charged with administering and enforcing the sales tax and is directed to “promulgate all needful rules and regulations . . . not inconsistent with its provisions. . . .” These rules and regulations are given the force and effect of law. At first glance, the latter provision seems to protect sellers who rely on erroneous rules or regulations in not collecting a sales tax since the Act provides that the seller is not required to remit any more tax than “he is authorized and required

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11. See Minn. Stat. §§ 8.05, 8.07, & 270.09 (1967).
13. Id. § 8.07.
16. Id. § 270.09.
17. Id. § 297A.37: “The commissioner shall administer and enforce the assessment and collection of the taxes imposed by sections . . . .”
18. Id. § 297A.29.
19. Id.
by law to collect from the purchaser."\textsuperscript{20} This apparent protection is illusory, however, since the Commissioner is only authorized to promulgate rules and regulations \textit{not inconsistent} with the statute and only \textit{those} have the force and effect of law.\textsuperscript{21} Until a rule or regulation is declared inconsistent by a court, it will have the apparent force and effect of law, thereby carrying with it the likelihood that sellers will feel compelled to rely on it.\textsuperscript{22} Presumably, if the Commissioner himself changed a rule or regulation without a judicial determination of inconsistency, he would have to show that it was "inconsistent" with the statute before he could hold the seller for back sales taxes.\textsuperscript{23}

In two instances the statutory language indicates that the commissioner, in promulgating rules and regulations on the sales tax, is bound by opinions of the Attorney General. The first is when the opinion is issued in response to a written request by the Commissioner himself,\textsuperscript{24} and the second is when it is issued to the Commissioner of Education on sales tax questions involving the public schools.\textsuperscript{25} Since these are the only two instances expressly provided for by statute, it seems that the Commissioner is free to disregard all other opinions of the Attorney General on the sales tax.\textsuperscript{26}

\textsuperscript{20} Id. \textsection 297A.02.
\textsuperscript{21} Id. \textsection 297A.29.
Whether or not the former regulation was within the scope of the regulatory power given to him by the ordinance, the fact is that he did promulgate it under color of an assumed authority, and by doing so he expressly invited defendant and similarly situated employers not to deduct and return the tax.
\textsuperscript{23} See MINN. STAT. \textsection\textsection 297A.29 & 297A.21 (1967). Since the rules and regulations of the commissioner have the force and effect of law unless inconsistent with the statute, and since the retailer is not required to submit any more tax to the state than he is authorized and required by law to collect from the purchaser, it is clear that before the commissioner could change a ruling, without a judicial determination of inconsistency, and hold a retailer for a back tax, he would have to show that the ruling had actually been inconsistent with the statute.
\textsuperscript{24} See Id. \textsection 270.09: "... [A]ny written opinion of the attorney general upon any such matter rendered in response to such request shall have the force and effect of law unless and until overruled by a decision of the tax court or a court of competent jurisdiction."
\textsuperscript{25} Id. \textsection 8.07: "... and on all [such] school matters such opinion shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction."
\textsuperscript{26} See, e.g., Crown Concrete Co. v. Conkling, 247 Iowa 609, 75 N.W.2d 351 (1956); Village of Blaine v. Independent School Dist. No. 12, 272 Minn. 343, 138 N.W.2d 32 (1965).
It seems obvious, since opinions of the Attorney General are not
3. An Outside Limit on Interpretive Powers

The power of the Attorney General and Commissioner of Taxation to interpret the sales tax is, of course, limited by the Act itself. Thus, interpretations adding provisions clearly beyond the coverage of the statute are prohibited. While the issue of whether administrators have abused their interpretive powers is normally one of statutory construction, rather than constitutionality, an outside limit on the exercise of these powers is available in the constitutional doctrine that a legislature cannot delegate what the Minnesota Supreme Court has referred to as pure legislative power. If a legislature cannot constitutionally delegate a certain degree of legislative power, it is elementary that an administrator cannot assume that degree of power under his statutory authority. However, when an administrator does attempt to wield such powers, it is neither necessary nor desirable for a court to strike down the delegation as unconstitutional. It is sufficient to use the doctrine as an aid to statutory construction, thereby construing the delegation as constitutional while holding that the administrator has exceeded his authority under the statute.

binding upon a court when interpreting a law, that absent express statutory language to the contrary they would not be binding upon state officials.


In any event, the liability for the payment of taxes, and the determination of the amount thereof, depend on the statute. Such liability may not be imposed by the rules and regulations of the department. . . . By the same process of reasoning, liability for a tax imposed by statute may not be obviated by administrative action on the part of those charged with enforcing the law.

28. M/N. Const. art. III. § 1:
The powers of government shall be divided into three distinct departments—legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution.

29. E.g., Lee v. Delmont, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949): "It is elementary that the legislature—except where expressly authorized by the constitution as in the case of municipalities—cannot delegate purely legislative power to any other body, person, board, or commission."

30. See Id. at 115, 36 N.W.2d at 539: "The law provides an ample remedy for the abuse of a power without attacking the validity of its delegation. See State ex rel. Krausman v. Streeter, 26 Minn. 458, 33 N.W.2d 56." In the Krausman case, plaintiff obtained a writ of mandamus requiring the board of barber examiners to issue him a license which they had arbitrarily withheld.

31. See M/N. Stat. § 645.16 (1967): "The object of all interpre-
While the legislature may not constitutionally delegate purely legislative power, it may confer on state officials a certain type of discretion which is in most respects indistinguishable from legislative power. This discretion has been defined as the power to determine the facts or circumstances which automatically bring a statute into play by virtue of its own terms or intent.\(^2\) Even this delegation, however, must be accompanied by reasonably clear policies or standards, so that the law will take effect by virtue of its own terms, rather than because the administrator feels it desirable or expedient. The power to determine when and upon whom a law shall take effect or the desirability of having it do so can neither be constitutionally delegated by the legislature\(^3\) nor assumed by an administrator.\(^4\)


The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. . . . These substantial constitutional doubts do not, of course, lead to the conclusion that the Project Act must be held invalid. Rather, they buttress the conviction, already firmly grounded in the Act and its history, that no such authority was vested in the Secretary by Congress (emphasis added).

\(^3\) 228 Minn. at 113, 36 N.W.2d at 538.

\(^4\) Considering the above mentioned limitations, it is quite possible that the Attorney General has already made an attempt to wield
Therefore, whenever the interpretive authority of the Attorney General or Commissioner of Taxation is called into question, the outside limit on their authority must be set within the boundaries described above.

This limitation is important in the sales tax context for a number of reasons. First, it provides a ground for challenging an administrative interpretation which asserts the taxability of certain sales. Second, even if the defense of estoppel were made
available against the state in sales tax cases, the seller would still have to show that his reliance on the official interpretation was reasonable. An unsympathetic court might easily find that reliance on an interpretation which constituted an exercise of pure legislative power was not reasonable. Third, the limitation might render unnecessary the words “not inconsistent with its provisions” in the Commissioner’s grant of authority to promulgate sales tax rules and regulations. There is a significant difference between an administrative official’s reasonable mistake in interpreting an ambiguous exemption and the case where his ruling clearly contradicts an express command of the statute. An example of the latter would be a statement that the sales tax rate is two rather than three per cent. A seller’s reliance on the first type warrants protection while reliance on the second type does not. If the words “not inconsistent with its provisions” were intended to protect the state from a ruling of the second type, they could be legislatively stricken since the limitation discussed in this section seems to cover such instances. Thus, a real protection of a seller’s reasonable reliance would be substituted for the present illusory one.

4. Effect of Attorney General Opinions on the Courts

When interpreting statutes, courts are willing to give opinions of the Attorney General careful consideration, and even great weight when accompanied by longstanding administrative reliance. In no event, however, are they considered binding.

35. Of course, if the defense of estoppel is not made available to the retailer, the reasonableness of his reliance will be irrelevant since the courts will not even reach that issue.
36. E.g., Grier v. Estate of Grier, 252 Minn. 143, 89 N.W.2d 398 (1959); Roberts v. Friedell, 218 Minn. 88, 15 N.W.2d 496 (1944).
38. Id.
39. Id. § 297A.02.
40. Id. § 297A.29.
41. See notes 17–22 supra, and accompanying text.
42. E.g., Leddy v. Cornell, 52 Colo. 189, 120 P. 153 (1912); Brundage v. Peters, 305 Ill. 223, 137 N.E. 118 (1922); Crown Concrete Co. v. Conkling, 277 Iowa 609, 75 N.W.2d 351 (1956); Village of Blaine v. Independent School Dist. No. 12, 272 Minn. 343, 138 N.W.2d 32 (1965); Kerby v. Collin County, 212 S.W.2d 494 (Tex. Civ. App. 1948).
43. E.g., Carter v. Commission of Qualification of Judicial Appointments, 14 Cal. 2d 179, 99 P.2d 140 (1939); Mitchell v. Register of Wills, 227 Md. 305, 176 A.2d 763 (1962) (holding that even though opinions of the Attorney General are not binding on a court, an administrative construction by Attorneys General for over 25 years was a persuasive influence in construing a statute—the court ultimately agreed
In *Lindquist v. Abbett*, the Minnesota Supreme Court held that even where a statute said an Attorney General's opinion shall be binding until overruled, it did not mean to foreclose judicial construction of the law. The court said that while the statute may protect persons acting under the opinion from charges of breach of duty, it could not preclude a court from correctly interpreting the law and applying it to such persons.

While the courts appear to give great weight to those opinions with which they agree, they have no qualms about disregarding those with which they disagree. No case has been found in which a court rejected an opinion of the Attorney General and at the same time gave its own interpretation only prospective effect. Thus, if the defense of estoppel, based upon reliance on an Attorney General’s opinion, cannot be asserted against the state

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when it attempts to collect a back sales tax, sellers will simply have to hope that the courts will ultimately agree with the Attorney General. This reliance problem, caused by the inability to predict the weight a court will eventually give an Attorney General's opinion, is enlarged by the fact that in two instances the Commissioner of Taxation is bound by the Attorney General's opinions when promulgating rules and regulations on the sales tax. In these two instances, both the likelihood and the reasonableness of reliance by sellers is increased, thereby making a denial of estoppel even more glaringly inequitable.

In light of the inadequacy of the present situation, it is necessary to examine the possibility of estopping the state from collecting past sales taxes. Since Minnesota's sales tax is a recent enactment, there are no Minnesota cases on the availability of the defense of estoppel against the state in the sales tax area. It will therefore be necessary to examine the general availability of the defense against the state in Minnesota and to make analogies to the sales tax. While these cases are helpful in predicting whether the state can be estopped in this area, they should not be considered determinative because of the special problem created by the sales tax. The case law of states which have ruled on the issue will also be examined with a view towards finding the best approach to the problem.

B. ESTOPPEL AGAINST THE STATE

The general rule in Minnesota is that the state is subject to the law of estoppel when it acts in a contractual or proprietary capacity. Conversely, when it acts in its sovereign or governmental capacity, it is generally not subject to estoppel, and

48. Id. § 297A.29.
49. Youngstown Mines v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963) (state estopped from denying the power to make a certain lease); State v. Gardiner, 181 Minn. 513, 233 N.W. 16 (1930) (state estopped from challenging 11 year old settlement on a timber lease even though the official making the settlement had no authority to do so); State v. Horr, 165 Minn. 1, 205 N.W. 444 (1925) (state estopped from collecting amount compromised on a timber lease even though it received and held the lands in its sovereign capacity).
51. Spratt v. Hatfield, 267 Minn. 535, 127 N.W.2d 545 (1964);
when the state exercises its taxing power it acts in its sovereign capacity. Thus, in the non-sales tax context, the Minnesota courts have held that the state cannot be estopped from collecting a tax either because of the failure of its officials to bring an action to collect it, because its officials have made a mistaken computation, because the Commissioner of Taxation changed a long standing method of computing a tax, or because of reliance on the ruling of a former Commissioner that certain expenses were deductible.

In contrast, State ex rel. Douglas v. School District Number 108 held that the state was estopped from denying the proper incorporation of a school district because its officials had dealt with it as properly organized and had accepted its bonds. While this is not a tax case, it seems clear that the state is operating in its sovereign capacity when incorporating school districts. This case has never been expressly overruled, and two of the Minnesota Supreme Court's more recent decisions on estoppel against the state have stated the following rule:

While the state and its political subdivisions may be estopped in certain cases the same as an individual, the application of estoppel is strictly limited to purely proprietary matters and generally is not applied to matters involving questions of governmental power or the exercise thereof.

The court thus left itself free to allow the defense of estoppel


52. Spratt v. Hatfield, 267 Minn. 535, 539, 127 N.W.2d 545, 548 (1964): "In the levy and imposition of taxes, the state acts in its sovereign capacity, and hence . . . cannot be subjected to an equitable estoppel." See State v. Illinois Cent. R.R., 200 Minn. 583, 274 N.W. 828 (1937); State v. Brooks, 183 Minn. 251, 236 N.W. 316 (1931); State v. Horr, 165 Minn. 1, 205 N.W. 444 (1925).


The delay [13 years] of the state for so long a time in bringing the suit is no defense. The collection of taxes is a governmental or sovereign function of the state, and procrastination or delay on the part of its officers in the discharge of such function is not permitted to prejudice the state's rights.


56. In re Abbott's Estate, 213 Minn. 289, 289, 6 N.W.2d 468 (1942).

57. 85 Minn. 230, 88 N.W. 751 (1902).


against the state acting in its sovereign capacity. This is entirely consistent with the pronouncement of an earlier Minnesota case to the effect that it is neither necessary nor desirable to make a concrete statement in advance as to when the defense of estoppel is available against the state, since it is far better to have each case controlled by its own facts.60

C. ESTOPPEL IN SALES TAX CASES OUTSIDE MINNESOTA

It has been held that the mere failure of a tax official to issue a ruling or regulation asserting liability, or to attempt to collect a sales tax, will not estop the state from later doing so61 even when the seller had actively attempted to obtain a ruling.62 It has also been held that reliance on the informal or unauthorized opinion of an administrative official is not grounds for estopping the state from collecting a back sales tax,63 even when the official twice

60. State v. Horr, 165 Minn. 1, 6, 205 N.W. 444, 445-46 (1925): The courts hold that this defense applies to the state “in a proper case” without making a more concrete declaration. “What is a proper case no court seems yet to have attempted to define. . . .” Nor is there any necessity for any such attempt. It is far better that each case be controlled by its own facts.

61. Merriwether v. State, 252 Ala. 590, 42 So. 2d 465 (1949) (nine year failure to promulgate any regulation asserting the taxability of certain sales did not estop the state from collecting back taxes); A.H. Benoit & Co. v. Johnson, 160 Me. 201, 202 A.2d 1 (1964) (failure of administrative officials to attempt to collect a sales tax on certain sales did not estop the state from collecting it within the time limitations of the act—12 year acquiescence); Rockower Bros. v. Comptroller of Treasury, 240 Md. 379, 214 A.2d 581 (1965) (the fact that the comptroller knowingly accepted sales tax returns and payments from agent of vendor did not estop him from later asserting the vendor’s liability for taxes collected by the agent but not remitted to the state); Comptroller of Treasury v. Atlas Gen. Indus., 234 Md. 77, 198 A.2d 86 (1964) (failure of previous administrations to collect a sales tax on certain sales did not estop a subsequent one from collecting back taxes); Wasem’s, Inc. v. State, 63 Wash. 2d 67, 385 P.2d 530 (1963) (failure of commissioner to rule on plaintiff’s tax avoidance plan after repeated requests did not estop him from later ruling that it was unsuccessful and collecting a sales tax on sales made pursuant to the plan).

62. Wasem’s, Inc. v. State, 63 Wash. 2d 67, 70, 385 P.2d 530, 531 (1963). Appellant contended that even if its plan for avoiding a tax on sales to nonresidents was ineffective, the tax commissioner was estopped from collecting back taxes by his failure so to rule after repeated requests for a ruling. The court said:

While it is likely and understandable that the continuing inaction on the part of the Tax Commission may have been frustrating for appellant’s officers; nevertheless, the courts must be, and are, most reluctant to find an estoppel where the State is acting in its taxing capacity. . . . (emphasis added).

63. E.g., C.E. Weaver Co. v. Comptroller of Treasury, 235 Md. 15, 200 A.2d 53 (1964). Advice that certain sales were not subject to the sales tax had been obtained by plaintiff’s accountant in an informal conversation with an employee of the department of taxation who had
refused to issue the seller a sales tax certificate which would have allowed him to collect a tax.64

Although no cases have been found which estopped the state from collecting back sales taxes when sellers relied on administrative inaction or informal and unauthorized legal opinions, the courts are more sympathetic to sellers who reasonably relied on authorized rules and regulations of the state's tax department.65 In Hoffman v. City of Syracuse66 the plaintiffs had relied on an erroneous regulation of the Commissioner in computing the sales tax on their liquor sales. The court held that the city was estopped from claiming an additional tax on past sales. But even in such a jurisdiction, the state cannot be estopped by reliance on an official ruling which the seller has merely misinterpreted.67 Although reasonable and detrimental reliance on an official ruling

been expressly ordered not to give legal opinions. It had earlier been held in Comptroller of Treasury v. Atlas Gen. Indus., 234 Md. 77, 198 A.2d 66 (1964), that the state could not be estopped from collecting back sales taxes by the actions of its agents; but even if the defense had been available it seems unlikely that this would have been reasonable reliance.

64. Claiborne Sales Co. v. Collector of Revenue, 233 La. 1061, 99 So. 2d 345 (1957). Although this seems a harsh result, it is undesirable for a state to have its valuable tax rights frittered away by unauthorized employees. A rule which would allow estoppel based upon official rules and regulations of the commissioner of taxation would offer the retailer a means of protection by applying for a ruling on his particular case, while still offering a fair degree of protection to the state.

65. See Wasem's, Inc. v. State, 63 Wash. 2d 67, 69, 385 P.2d 530, 531 (1963), where the court held that administrative inaction could not estop the state from collecting back sales taxes, but the court would not rule out the possibility that the published rules of the commission might: "We need not consider whether the published rules of the Commission could work an estoppel in a proper case, because the plan put into effect by the appellant does not qualify for the exemption or deduction provided in Rule 193."

66. 2 N.Y.2d 484, 491, 141 N.E.2d 605, 609 (1957): And it hardly needs statement that the city is not entitled to hold the liquor dealers liable for the higher sales tax which they could have charged and collected, had the commissioner not directed a contrary course during that period. Since ... the vendors were actually prohibited from charging their customers a sales tax based on inclusion of the excise taxes, it would be unthinkable to hold them responsible for the larger amounts they would have collected had they, contrary to the city's direction, included excise taxes. ... In other words, since the city required plaintiffs to charge and collect sales taxes on the selling price of the liquor, less excise taxes, between 1952 and October 1, 1955, it would be estopped from asserting any claim for additional taxes that might otherwise have accrued against them during that period.

or regulation has not led to similar results in all or even many jurisdictions, it has made the denial of the defense's availability more difficult for the courts that have faced it.

Ohio is an example of a state which has been unwilling to treat the issue of reliance in sales tax cases the same way as reliance in other types of tax cases. In *Recording Devices Incorporated v. Bowers*, the court held that even though certain leases were subject to the sales tax, the state could not hold a lessor liable for a sales tax on leases executed prior to the written rescission of a long-standing tax department letter establishing their nontaxability. The court said the state could not be estopped and that it was merely giving persuasive weight to a long-standing administrative practice. But in order for the court to aid the

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69. Henderson v. Gill, 229 N.C. 313, 316, 49 S.E.2d 754, 756 (1948), where the court said:

The case of plaintiffs has an appeal stronger than that which usually supports a plea of estoppel. The official representations made to them are now conceded to have been incorrect and misleading and because of the multitude of the transactions and want of any record of the purchasers they were thus deprived of the opportunity to collect the three per cent tax on sales made on products they were advised were exempt. Moreover, it must be noted that these plaintiff merchants were statutory agents for the collection of the tax on sales which were definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect.

Nevertheless, the court concluded that since the state was exercising a sovereign right, it could not be estopped even under these circumstances. It felt that even though the result might seem unjust, it was the majority rule and was considered necessary to prevent chaotic and endless disputes in the collection of taxes.

70. 174 Ohio 518, 190 N.E.2d 258 (1963). Even though the court canceled the Commissioner's assessment, it did rule that the leases in question were taxable under the statute.

71. Id. at 520, 190 N.E.2d at 260, where the court said:

... we are of the opinion that, although the equitable principle of estoppel cannot operate against the state of Ohio, and that the Tax Commissioner cannot be bound in all cases by acts or opinions of employees, yet where a long-established practice has been followed, such administrative practice does have much persuasive weight especially where the practice has gone on unchallenged for a quarter of a century [actually 21.5 years].

72. Lutheran Mut. Life Ins. Co. v. Robinson, 117 Ohio App. 9, 11, 189 N.E.2d 449, 450 (1962) where the court said:

Considerable stress also is laid upon supposed estoppel which arises due to the fact that the Superintendent of Insurance from 1938 to 1954 acquiesced in the nonpayment of the total amount due, and it is even claimed that this was knowingly done by the various occupants of the office, beginning in 1938. The law is clearly settled in cases such as this that no estoppel can be recognized nor may it be asserted against the state of Ohio. If
lesser on the theory of giving persuasive weight to a long-standing administrative practice, it would have to construe the act as being consistent with the administrative practice. Thus, since the court actually construed the act contrary to the tax department letter, it clearly reached an estoppel result when it protected the lessor's reliance. Similar long-standing administrative practices in Ohio have not aided taxpayers in non-sales tax cases decided before and after Bowers.

The California case of La Société Française De Bienfaisance Mutuelle v. California Employment Commission is also a useful precedent, even though it is not a sales tax case. Relying on a formal tax agency ruling that it was not subject to the unemployment tax, the Société refunded to its employees the amounts it had deducted from their pay. Two years later the tax agency reversed its position and collected the full amount for the two years plus penalties and interest. The court recognized the general rule that estoppel is not available against the state in tax matters, but added that under certain circumstances public policy demanded amelioration of the rule's harshness. It held that the state was estopped from collecting all penalties, interest, and that portion of the tax which, absent the ruling, would have been withheld from the employees' salaries. Thus, the Société paid no more of the tax out of its own funds than the statute contemplated. A similar result was reached in another non-sales tax case.

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If it were otherwise, public officials for a great variety of reasons could fritter away valuable tax rights of the state of Ohio. Even though the court would not recognize an estoppel against the state in those terms, it could easily have reached the same result by applying the rule of long standing administrative practice promulgated in the Bowers case a few months later. Apparently the court recognized some inherent difference—between a sales tax and a tax meant to be borne by the taxpayer—which makes a certain result just in one case and unjust in the other.

75. Id. at 552, 133 P.2d at 56:
As to such part of the tax, the burden of which the act contemplates will be borne by the employees...we are of the view that the state may not belatedly hold the employer to payment where he has failed to pay, or to make the necessary deductions from his employees' wages, in reliance on an express ruling that he is not liable for the tax. As between the state and the employer, the state may not in good conscience thus place on the employer a burden which the act itself did not intend that he should bear. We are further of the view that the employer cannot be held to pay interest on contributions which were not paid when due solely in reliance on the official ruling of nonliability. On the other hand, the state should not lose its right to taxes which the employer should have paid from its
where the person required to remit the tax was not the person upon whom the burden of the tax was intended to fall.

In Market Street Railway v. California State Board of Equalization,77 the court recognized but limited the principles of La Société.78 It said that reliance on an official ruling could not estop the state from collecting a back tax which the legislature intended the complaining taxpayer to bear, but that the state could be estopped if the complainant were merely a collecting agent for the state.79 The court went on, however, to hold that the state could not be estopped from collecting the California sales tax since it was imposed on the seller for the privilege of selling at retail with the mere option to pass it on to the purchaser.80 This result is unduly restrictive since La Société did not

own funds to discharge its own tax obligation. That is, the state is entitled to retain that portion of the tax collected under protest which represents the plaintiff's contribution as employer, notwithstanding that plaintiff failed to make payment when due in reliance on the erroneous ruling of non-liability.

With respect to the taxes that defendant did not collect at the source prior to July 12, 1945, when the present regulation went into effect, we think it is clear that the plaintiff is not entitled to an accounting. Whether or not the former regulation was within the scope of the regulatory power given to him by the ordinance, the fact is that he did promulgate it under color of an assumed authority, and by doing so he expressly invited defendant and similarly situated employers not to deduct and return the tax. When, therefore, in reliance upon what amounted to an official instruction not to collect it, defendant in good faith paid its employees their full wages without deducting the tax, obvious principles of estoppel prevent the city from demanding that defendant pay the amount of the tax a second time to it. As to those taxes the action of defendant in paying them over to the employees who earned them as part of their wages was induced by the receiver of taxes, and the city cannot justly complain that defendant obeyed the instructions to the effect of its own official.

78. Id. at 100-01, 290 P.2d at 28-29, where the court said:
The state board cites many cases from this and other jurisdictions to the effect that an estoppel based on reliance upon an erroneous construction of the statute by an administrative ruling will not lie against the government, particularly in tax matters. As a general proposition this is sound law. Obviously, a tax administrator should not be permitted by an erroneous ruling to exempt a taxpayer from the obligation to pay taxes. But that is as far as the rule goes. The proper limitations on that rule were pointed out by this court in La Société .
79. Id. at 103, 290 P.2d at 30. Contra, Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754, (1948) (state could not be estopped from collecting a back sales tax even though the seller was merely a collecting agent for the state).
not turn on whether the Société was deemed a taxpayer or a collecting agent, but rather on how much of the tax the legislature intended the Société to bear out of its own funds. While it is true that the California sales tax is imposed on the retailer for the privilege of selling at retail, there are numerous provisions in the act which imply that the legislature did not intend the retailer to pay the tax out of his own funds. But despite its restrictive effect on the holding of La Société, the Market Street court did estop the state from collecting penalties for late payment caused by the reliance.

III. THE RELIANCE PROBLEM IN MINNESOTA

When the legislature intends a tax to be borne solely by the person required to remit it, it is not unreasonable to deny him the defense of estoppel as long as he is not penalized for late payment, and it is unlikely that a Minnesota taxpayer would be

(Supp. 1967): "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers. . . ." § 6052: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done." The Code Commission Notes after § 6052 provide: "This section merely allows a retailer to reimburse himself for payment of the tax. He is limited in so doing where the consumer's contractual or constitutional rights are infringed." In Clary v. Basalt Rock Co., 99 Cal. App. 2d 458, 222 P.2d 24 (1950), the court said that the provision in the sales tax act that the tax shall be collected by the retailer from the consumer did not give the retailer a right of action against the consumer unless the consumer had agreed to pay the tax and failed to do so. Thus, when the retailer and consumer had agreed on a price and said nothing about a sales tax there was no implied obligation on the part of the consumer to pay the tax in addition to the agreed price.

81. La Société Française De Bienfaisance Mutuelle v. California Employment Comm'n, 56 Cal. App. 2d 534, 555, 133 P.2d 47, 57 (1943) where the court said:

It is our view that in the present case a proper regard for the protection of the interests of the government in its revenues, with recognition of a degree of responsibility on the part of the government to a taxpayer who has relied to his prejudice on an official ruling, is achieved by requiring the taxpayer to discharge that part of the tax burden which it was contemplated it should bear by the statute imposing the tax, while relieving it from liability for employees' contributions and interest on delayed payments. The taxpayer will pay from his own funds as much as it would have paid originally but for the erroneous administrative ruling, but it will not pay more.

82. CAL. REV. & TAX. CODE § 6051 (Supp. 1967).

83. CAL. REV. & TAX. CODE § 6052 (1956) (authorization to collect from the consumer); CAL. REV. & TAX. CODE § 6053 (1956) (it is a misdemeanor to advertise, state, or hold out to the public or any customer that any part of the sales tax will be absorbed, assumed or refunded).

penalized for a late payment caused by reasonable reliance on an official administrative interpretation. Such a taxpayer could not seriously claim to have been substantially prejudiced by a subsequent order to pay a back tax. In fact, his position may have been improved by the erroneous interpretation, since he will have received an interest-free loan from the state if he is not required to pay interest on the late payment. In the sales tax context, however, the retailer will not find himself in such a beneficial position if he is forced to pay a back tax. Despite the fact that he will not be penalized for late payment, he will have to pay the tax out of his own funds since the opportunity to collect from his purchasers will have passed.

Although the Minnesota statute, unlike some sales tax acts, does not explicitly deny any intent to have the seller bear the incidence of the tax, a number of its provisions do implicitly deny any such intent. Despite the fact that one provision imposes the sales tax on the retail seller’s gross receipts, other provisions imply that the tax is actually imposed on the consumer, and is merely measured by the seller’s gross receipts and collected by him for administrative convenience. The amount the seller is required to remit can never exceed the amount “he is authorized and required by law to collect from the purchaser.” Also, if the seller takes an exemption certificate from a purchaser, he is relieved of the duty of collecting and remitting the tax to the state. If the tax were intended to be borne by the seller, it is

85. See In re Estate of Abbott, 213 Minn. 289, 296, 6 N.W.2d 466, 470 (1942):
In view of the fact that decedent justifiably relied upon the ruling of a former tax commissioner that like expenditures were deductible, we believe that it would be unjust and inequitable to enforce the payment of penalties and that they should be abated.

Lindquist v. Abbott, 196 Minn. 233, 265 N.W. 54 (1936); MINN. STAT. § 297A.39 (1967):
The commissioner shall have the power to abate penalties when in his opinion their enforcement would be unjust and inequitable. The exercise of this power shall be subject to the approval of the attorney general.

86. E.g., N.C. GEN. STAT. § 105.164.7 (1965):
It is the purpose and intent of this article that the tax herein levied and imposed shall be added to the sales price of tangible personal property when sold at retail and thereby be borne and passed on to the customer, instead of being borne by the retailer.

87. MINN. STAT. § 297A.02 (1967): “There is hereby imposed an excise tax of three percent of the gross receipts of any person from sales at retail, as hereinbefore defined, made in this state after July 31, 1967. . . .”

88. See Id. §§ 297A.02-.03 (2); §§ 297A.09-.10.

89. Id. § 297A.02 (emphasis added).

90. Id. § 297A.10: “The exemption certificate will conclusively
unlikely that the legislature would have used this language in setting limits on his liability. Furthermore, if such had been the legislature's intent there would have been no reason to require that the tax be separately stated and charged, to require that it be collected from the purchaser, or to call it a debt owed by the purchaser to the seller. If such had been the legislature's intent there would have been no reason for making it a misdemeanor for the seller to attempt to assume the tax. Moreover, there certainly would have been no reason for requiring that the tax be collected from the purchaser, or to call it a debt owed by the purchaser to the seller.81 Moreover, there certainly would have been no reason for making it a misdemeanor for the seller to attempt to assume the tax.82 The imposition of the sales tax on the gross receipts of the retailer should be recognized as merely an administrative necessity for efficient collection, and there should be no argument that the legislature intended him to bear the incidence of the tax.83

It would, therefore, be highly inequitable to deny the defense of estoppel to a retail seller who had not collected a sales tax in reliance on an official administrative interpretation.84 If the interpretation had been correct in the first instance, the purchaser would have borne the tax; but if it had been erroneous in the first instance and the seller were denied the defense of estoppel, he would probably have to pay the tax with his own funds—a result which the legislature could not have intended.

IV. POSSIBLE SOLUTIONS

A. UNSATISFACTORY ALTERNATIVES TO ESTOPPEL

In the absence of estoppel, the alternative methods available to protect a seller against potential back sales tax liability are generally unsatisfactory. The retailer has no way of knowing whether the Commissioner of Taxation will enter into a liability agreement85 in the event that an administrative interpre-

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91. Id. § 297A.03(1):
The tax shall be stated and charged separately from the sales price or charge for service and shall be collected by the seller from the purchaser insofar as practicable and shall be a debt from the purchaser to the seller recoverable at law in the same manner as other debts.
92. Id. § 297A.03(2).
93. In deciding on whom the legislature intended the burden of the tax to fall, the courts should not become overly concerned with labels and automatically conclude that if the retailer cannot be literally deemed a collecting agent, then the legislature must have intended the seller to bear the tax. See notes 79-82 supra, and accompanying text.
94. Query whether the retailer could even collect the sales tax on transactions which the Commissioner had ruled exempt if the courts had not yet rejected the exception.
tation is ruled erroneous. While it is true that the retailer could gain some protection by periodically entering into liability agreements, there is no assurance that the Commissioner would cooperate since the statute fails to establish criteria which would force him to do so.

Another equally unsatisfactory solution would be for the seller to bring a declaratory judgment action contesting the validity of the exemption granted by the official interpretation. Even if available, the declaratory judgment action is not an

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96. Id.
97. Id.
98. Id. § 555.01:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

99. The purpose of the declaratory judgment act is to provide a means of clarifying uncertainties and insecurities by settling a person's rights, status and other legal relations in advance. The statute is to be liberally construed, MINN. STAT. § 555.12 (1967), and it is expressly made available to anyone whose rights, status or other legal relations are affected by a statute to have such determined under it. MINN. STAT. § 555.02 (1967). The court's authority comes into play whenever a decree would terminate a controversy or remove an uncertainty. MINN. STAT. § 555.05 (1967). Although all these prerequisites seem to be met by the problem the sales tax causes for the retail seller, there are additional requirements imposed by the courts which may stand in the way of a declaratory judgment action by the seller.

The courts require a justiciable controversy—an actual controversy between adversaries who have a tangible legal interest in obtaining a judgment. Without such tangible legal interests, the case would merely be an academic one for an advisory opinion and will not be entertained. Port Authority v. Fisher, 269 Minn. 276, 132 N.W.2d 183 (1964); Hassler v. Engberg, 233 Minn. 487, 48 N.W.2d 343 (1951); County Bd. of Educ. v. Borgen, 192 Minn. 512, 257 N.W. 92 (1934). Thus, if the action is not adversary in nature it will be dismissed as in County Bd. of Educ. v. Borgen, 192 Minn. 512, 257 N.W. 92 (1934), where defendants sought to have a decree in favor of plaintiffs affirmed.

There could be a serious question whether an attempt by a retail seller to have an interpretation exempting certain of his sales declared void is an adversary proceeding. While a valid exemption would be welcomed by the seller, since it would lessen the expense of collecting the tax, it is more important to him to have any tax actually required to be paid collected from the purchaser rather than being paid
adequate alternative to estoppel. It is unreasonable to expect a seller to assert in court that all of his sales are subject to the sales tax. Moreover, few sellers are in a position to avail themselves of this type of protection. The seller would need a very high potential back sales tax liability and a high probability that the interpretation was incorrect in order to justify the time and expense of bringing such an action. Yet, he would be substantially prejudiced by having to pay a back sales tax out of his own funds. A relatively inexpensive method must be devised which protects the seller from this substantial prejudice without severely threatening the state’s interest in guarding its revenues. The answer is to make available the defense of estoppel.100

B. ESTOPPEL AS A JUDICIAL SOLUTION

Estoppel is the only adequate judicial solution to the special reliance problem created by the sales tax. It is a flexible doctrine founded in justice, good conscience and fair dealing, which has as its object the prevention of injury caused by the assertion of a state of facts inconsistent with those represented from his own funds. Thus, it is in his own interest to attack the interpretation with the utmost vigor since if it survives a strong court attack he could feel relatively safe in relying on it, and if it is declared void he avoids the risk of a back sales tax liability.

One further hurdle to the availability of the declaratory judgment action remains. In State ex rel. Smith v. Haveland, 223 Minn. 89, 25 N.W.2d 474 (1946), the court held that the plaintiff could not challenge the constitutionality of a statute exempting him from the money and credits tax since the right to pay a tax was not a protectible legal interest. But in Arens v. Village of Rogers, 240 Minn. 386, 393, 61 N.W.2d 508, 514 (1953), the court said the plaintiff's interest in Haveland was merely an academic one as to whether the particular exemption was constitutionally feasible. In the sales tax context the retail seller would have an interest in need of protection—the right to collect from the purchaser any sales tax which he is required to remit to the state. Minn. Stat. § 297A.03 (1) (1967). He would not be seeking mere information or the opinion of the court. He would be seeking a final determination of his rights and obligations under the sales tax. See County Bd. of Educ. v. Borgen, 192 Minn. 512, 518, 257 N.W. 92, 95 (1934), where the court said:

The court must merely be alert to distinguish the fictitious or collusive suit, where only information or opinion is sought, from those in which rights are placed in issue with the purpose of a binding determination.

100. The declaratory judgment could be of value, however, in determining the validity of administrative interpretations which are so suspect that it may be unreasonable to rely on them. See notes 35 & 36 supra, and accompanying text. With the number of declaratory judgments necessary being thus limited, the expense would no longer be totally prohibitive.

101. E.g., Frye v. Anderson, 248 Minn. 478, 494, 80 N.W.2d 593, 603 (1957); Roberts v. Friedell, 218 Minn. 88, 96, 15 N.W.2d 496, 500 (1944).
and relied upon.\textsuperscript{102} The application of estoppel against the state in the sales tax context can be supported by the doctrine that when one of two innocent persons must suffer from the act of another, it should be he who made the third person's act possible.\textsuperscript{103}

While it is readily admitted that the state has a valid interest in protecting its revenues, a court merely turns its back on the sales tax problem when it enunciates a black letter rule that estoppel is not available against the state when exercising its taxing authority. If a court did make estoppel available against the state in sales tax cases, it could both avoid substantial prejudice to the retailer and protect the state's interest.\textsuperscript{104} The state's interest is protected because the retailer, in order to prevail on the defense, would have to make out a valid case of estoppel.\textsuperscript{105} In cases involving administrative inaction\textsuperscript{106} or casual

\textsuperscript{102} E.g., Poksyla v. Sundholm, 259 Minn. 125, 127, 106 N.W.2d 202, 204 (1960); Village of Wells v. Layne-Minnesota Co., 240 Minn. 132, 141, 60 N.W.2d 621, 627 (1953); Roberts v. Friedell, 218 Minn. 88, 96, 15 N.W.2d 496, 500 (1944).

\textsuperscript{103} See, e.g., Nehring v. Bast, 258 Minn. 193, 202, 103 N.W.2d 368, 375 (1960): "It is well recognized that 'whenever one of two innocent persons must suffer by the act of a third, he who by his conduct, act, or omission has enabled such third person to occasion the loss must sustain it'; Frye v. Anderson, 246 Minn. 478, 494, 80 N.W.2d 593, 603 (1957); Hernland v. Town & Country Motors, Inc., 159 Minn. 125, 127, 198 N.W. 662, 662 (1924); Burgess v. Bragow, 49 Minn. 462, 468, 52 N.W. 45, 46 (1892): "The plaintiff also stands within the rule that where one of two innocent persons must suffer from the fraudulent act of a third, he by whose act the third person was enabled to perpetrate the fraud must bear the loss."

\textsuperscript{104} New York serves as an example. In Hoffman v. City of Syracuse, 2 N.Y.2d 484, 141 N.E.2d 605 (1957), the court held that the city was estopped by a sales tax regulation from collecting a back sales tax. In Colgate-Palmolive-Peet Co. v. Joseph, 308 N.Y. 333, 125 N.E.2d 857 (1955), the court would not allow the petitioner to estop the state from collecting a back sales tax because the regulation relied on did not cover the situation at bar and thus the petitioner had failed to show the reasonable reliance necessary to make out a valid case of estoppel.

\textsuperscript{105} To establish a valid case of estoppel it would not be necessary to prove any actual intent to mislead, e.g., Browning v. Browning, 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1956); Macomber v. Kinney, 114 Minn. 146, 154, 128 N.W. 1001, 1003 (1910); Beebe v. Wilkinson, 30 Minn. 548, 549-50, 16 N.W. 450, 451 (1883), but it would be necessary to show a representation of fact rather than mere opinion, Bremer v. Commissioner of Tax., 246 Minn. 446, 454-55, 75 N.W.2d 470, 475 (1956), and circumstances indicating that it was natural and probable that it would be acted upon. E.g., Browning v. Browning, 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1956); Macomber v. Kinney, 114 Minn. 146, 154, 128 N.W. 1001, 1003 (1910). In order to estop the state on the ground of acquiescence in a course of conduct of the tax department, it would be necessary to show that under the circumstances the department had a
or unauthorized advice of tax department employees, the re-
duty to speak or act. See Browning v. Browning, 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1956); Village of Wells v. Layne-Minnesota Co., 240 Minn. 132, 141, 60 N.W.2d 621, 627 (1953); Macomber v. Kinney, 114 Minn. 146, 154, 128 N.W. 1001, 1003 (1910). It would also be necessary to show reasonable and good faith reliance on the representation and the fact that the party would be injured if the state were not estopped from denying the representation. E.g., Niaze v. St. Paul Mercury Ins. Co., 265 Minn. 222, 228 n.5, 121 N.W.2d 349, 354 n.5 (1963); Grier v. Estate of Grier, 252 Minn. 143, 150, 69 N.W.2d 398, 404 (1958); Roberts v. Friedell, 218 Minn. 88, 96, 15 N.W.2d 496, 500 (1944); Exsted v. Exsted, 202 Minn. 521, 526, 279 N.W. 554, 558 (1939); Macomber v. Kinney, 114 Minn. 146, 154–55, 128 N.W. 1001, 1003 (1910).

The Minnesota court has also held that the party asserting the estoppel must have been ignorant of the true state of facts, the theory apparently being that if he possessed equal knowledge of the facts he could not claim that he had relied on the representation. Froslee v. Sonju, 209 Minn. 522, 524, 297 N.W. 1, 3 (1941); Darelius v. Commonwealth Mortgage Co., 152 Minn. 128, 136, 188 N.W. 208, 211 (1922); Macomber v. Kinney, 114 Minn. 146, 154, 128 N.W. 1001, 1003 (1910); Western Land Ass'n v. Banks, 80 Minn. 317, 320, 83 N.W. 192, 193 (1900). In addition, the party against whom the estoppel is asserted must have full knowledge (imputed or actual) of the facts or be negligent in not having such knowledge, since an estoppel cannot be based on an innocent mistake caused by ignorance of the facts. Browning v. Browning, 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1956); Johnson v. Giese, 231 Minn. 288, 285, 42 N.W.2d 712, 716 (1950); Froslee v. Sonju, 209 Minn. 522, 526, 297 N.W. 1, 4 (1941); Macomber v. Kinney, 114 Minn. 146, 154, 128 N.W. 1001, 1003 (1910). Under a literal reading of these decisions a court could hold that the retail seller had equal knowledge of all the facts surrounding the sales tax, and thus that he could not make out a valid case of estoppel even if the defense were available. But such a result need not be necessary when the reasoning behind the rule is examined. When a person is completely apprised of the facts he can make his own independent determination and need not rely on the representation of another. Under the sales tax, however, the seller would not be completely free to follow his own determination based upon his knowledge of the facts because any rule or regulation promulgated by the commissioner of taxation carries with it an apparent force and effect of law. Minn. Stat. § 297A.29 (1967). See also Philadelphia v. Westinghouse Elec. & Mfg. Co., 55 Pa. D. & C. 343, 358 (1945). In those states which have estopped the state from collecting a back sales or similar tax, the courts have not even mentioned the possibility that the taxpayer had equal knowledge of all the facts. La Société Française De Bienfaisance Mutuelle v. California Employment Comm’n, 56 Cal. App. 2d 534, 133 P.2d 47 (1943); Hoffman v. City of Syracuse, 2 N.Y.2d 484, 161 N.Y.S.2d 111, 141 N.E.2d 605 (1957); Philadelphia v. Westinghouse Elec. & Mfg. Co., 55 Pa. D. & C. 343 (1945).


tailer would usually be unable to make out such a valid case; his reliance would probably be found unreasonable. The state's interest in guarding its revenues is certainly important enough to prevent the application of estoppel in cases where there has been no communication between the retailer and the tax department or where the seller has relied on what is merely the personal opinion of a tax department employee. On the other hand, when the state has authorized certain administrative officials to interpret the sales tax, the equities turn to the side of the retailer.

Thus, the availability of estoppel would have its greatest and most legitimate impact in cases where the retailer relied on an official rule or regulation of the Commissioner of Taxation or an opinion of the Attorney General. In this situation a number of


110. The Commissioner of Taxation has as yet only issued unpublished Department Rulings which are used by department employees in administering the sales tax. Minn. Stat. § 15.0412(4) (1967) provides that "[n]o rule shall be adopted by any agency subsequent to the effective date of sections 15.0411 to 15.0422" unless the procedures of § 15.0412 (4) are followed. These procedures include holding a hearing on 30 days written notice to interested persons, after which the proposed rule is submitted to the Attorney General for his approval. If approved, the Attorney General promptly files the rule in the office of the Secretary of State. Thereafter, the rule is given "the force and effect of law upon its further filing in the office of the commissioner of administration." Minn. Stat. § 15.0413(1) (1967). Arguably, the Commissioner is not justified in promulgating these Department Rulings without following the Administrative Procedure Act, since they are clearly included in the definition of "Rules" in Minn. Stat. § 15.0411(3) (1967). But even if the Commissioner had strictly followed the procedures of § 15.0412(4), his rules would still only have the force and effect of law to the extent not inconsistent with the sales tax act as provided by Minn. Stat. § 297A.29 (1967), since Minn. Stat. § 15.0412(1) (1967) provides that in adopting rules pursuant to §§ 15.0411–0422 an agency may not exceed the powers vested in it by statute.

This is not to say, however, that these Department Rulings should not have any reliance value for the purpose of estopping the state from collecting back sales taxes. These rulings represent the official position of the tax department in administering the sales tax, and in effect have been promulgated pursuant to the procedural safeguards and formalities of Minn. Stat. § 15.0412(4) (1967). Typically, the Commissioner requests an Attorney General's opinion which he adopts in his Department Ruling. The approval of the Attorney General is received in advance, without benefit of formal hearing. Yet Minn. Stat. § 270.09 (1967) still requires the Commissioner to follow the opinion of the Attorney General, rendering the fact of the hearing moot. Thus, reliance by the taxpayer seems equally justified in both situations.
foreign jurisdictions would agree with the equities if not the result.\textsuperscript{111} It is unlikely that the seller's reliance would be found unreasonable unless the Commissioner's or the Attorney General's interpretation was obviously wrong or unless the seller had misconstrued it. But the seller would still have to show that he had suffered detrimental reliance in order to make out a case of estoppel.\textsuperscript{112} In many instances the seller will have records of his purchasers and the sales tax act would apparently allow him to recover the tax from them.\textsuperscript{113} If the seller does have such records and can collect the tax from the purchasers, he should be unable to show detrimental reliance unless the expense of collecting the back tax plus the amount which proved uncollectible would be disproportionately high in comparison to the total back tax. There will, however, be instances where the seller does not have such records and will, therefore, be forced to pay the back tax out of his own funds. This is the situation where it would be highly inequitable to deny the availability of the estoppel defense. Thus, estoppel does provide room for achieving substantial justice in sales tax cases while protecting the state's interest in guarding its revenues.

Even though the Minnesota Supreme Court has never estopped the state from collecting a tax in the past,\textsuperscript{114} a major break with precedent would not be required to make the defense available in sales tax cases. The mere fact that an activity of

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\item \textsuperscript{111} Hoffman v. City of Syracuse, 2 N.Y.2d 484, 161 N.Y.S.2d 111, 141 N.E.2d 605 (1957) (city estopped by reliance on an official ruling); \textit{see} Duhamel v. State Tax Comm'n, 65 Ariz. 268, 179 P.2d 252 (1947) (reliance on an official ruling did not lead to an estoppel but the case dealt with the sales tax liability of a purchaser rather than a seller); Market St. Ry. v. California State Bd. of Equalization, 137 Cal. App. 2d 87, 290 P.2d 20 (1955) (although reliance on an official ruling did not lead to an estoppel, the court said it would have if the retailer had been a collecting agent of the state); Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948) (reliance on an official representation did not lead to an estoppel but the court felt it was an unjust result); Wasem's, Inc. v. State, 63 Wash. 2d 67, 385 P.2d 530 (1963) (court intimated that the state could be estopped from collecting back sales taxes in a proper case of reliance on the published rulings of the tax commission).
\item \textsuperscript{112} E.g., Niaze v. St. Paul Mercury Ins. Co., 265 Minn. 222, 228 n.5, 121 N.W.2d 349, 354 n.5 (1963); Grier v. Estate of Grier, 252 Minn. 143, 150, 89 N.W.2d 398, 404 (1959).
\item \textsuperscript{113} Minn. Stat. § 297A.03 (1) (1967): "The tax... shall be a debt from the purchaser to the seller recoverable at law in the same manner as other debts."
\item \textsuperscript{114} Spratt v. Hatfield, 267 Minn. 535, 127 N.W.2d 545 (1964); \textit{In re} Estate of Abbott, 213 Minn. 289, 6 N.W.2d 466 (1942); State v. Illinois Cent. R.R., 200 Minn. 583, 274 N.W. 828 (1937); State v. Brooks, 183 Minn. 251, 236 N.W. 316 (1931).
\end{itemize}
the state is deemed an exercise of sovereign power in one instance
does not require that all activities in the same area be deemed
exercises of sovereign power. In State v. Horrow the state
claimed it could not be estopped from challenging a timber lease
compromise because the lands involved were school lands, re-
ceived and held in its sovereign capacity. The court held the
state estopped, saying that even though the state held the lands
in its sovereign capacity it did not follow that its capacity in
executing and bringing an action on the lease was not propri-
etary in nature. The court reached the same conclusion five years
later in State v. Gardiner.

These cases open the way for the conclusion that the state
acts in its sovereign capacity when it adds a sales tax to the price
the consumer pays for retail goods, but that it acts in its con-
tractual capacity when it requires the retail seller to collect the
tax from the purchaser. Once this conclusion is reached, the
defense of estoppel is available under what the Minnesota
courts have enunciated as the general rule.

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115. 165 Minn. 1, 5, 205 N.W. 444, 445 (1925):
If the state . . . received these lands in its sovereign capacity
to hold in trust for the school fund, it does not follow that it
does not act in its proprietary capacity in making contracts and
conducting litigation in reference thereto. . . . What it is re-
quired to do with the money received is not the question.
The prosecution of this suit is not an attribute of sovereignty.
116. 181 Minn. 513, 233 N.W. 16 (1930).
117. By way of analogy, it would not be an unusual arrangement
between a principal and his agent for the principal to presume that
any merchandise missing from the agent's stock had been sold for cash
and to require a remittance unless the agent could show that it was
sold on authorized credit. Such an arrangement would not transform
the agent into an independent businessman who buys the stock and
bears the risk of resale himself. A principal would certainly be es-
topped from holding his agent liable for the price of goods which he
had directed the agent to deliver free of charge. Cf. Towle v. Norbest
Turkey Growers Ass'n, 275 F.2d 196, 201 (9th Cir. 1960); Inland Empire
Refineries v. Jones, 206 P.2d 519 (Idaho 1949). Likewise, if the state is
not acting in its sovereign capacity when giving directions to the re-
tailer on how to collect the tax, and the seller relies on an official rule or
regulation in not collecting it, the defense of estoppel should be available
to him even without an exception to the general rule.
118. The above rationale is even more compelling in the case of a
retail seller required to collect the state's use tax. It is obvious he is
nothing more than a collecting agent for the state. The use tax not only
has provisions making it illegal to assume the tax, Minn. Stat. § 297A.18
(1967), and stating that the tax is a debt owed by the purchaser to the
seller, Minn. Stat. § 297A.17 (1967), but the language of the act even
imposes the tax on the person who will use the item in Minnesota.
119. E.g., Spratt v. Hatfield, 267 Minn. 535, 127 N.W.2d 545 (1964);
Youngstown Mines Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963);
Even if the Minnesota courts refuse to accept the contention that the retail seller is in substance a mere collecting agent under the sales tax and that the state deals with him in its contractual capacity, it does not necessarily follow that the defense of estoppel will be unavailable. As previously stated, the Minnesota Supreme Court has recently said that estoppel is only generally unavailable when the state acts in its sovereign capacity. Indeed, on one occasion the court has estopped the state when acting in its sovereign, although nontaxing, capacity. It has abated penalties for late payment of taxes caused by justifiable reliance on the tax department, and has also stated that the availability of estoppel should be controlled by the facts of each case. Thus, a holding that the state can be estopped by a proper showing in a sales tax case would not be entirely inconsistent with past decisions. Such an exception to the general rule that the state cannot be estopped from collecting taxes would be entirely justified since the legislature did not intend the retailer to pay the sales tax out of his own funds.

B. THE LEGISLATIVE SOLUTIONS

Even if estoppel were made available to the retailer in sales tax cases, difficulties might arise in establishing the defense. A court, for example, could hold either that the seller's reliance on the administrative interpretation was unjustified because he had equal knowledge of all relevant facts or that reliance on opinions of the Attorney General cannot support a case of estoppel.

State v. Gardiner, 181 Minn. 513, 233 N.W. 16 (1930); State v. Horr, 165 Minn. 205, 205 N.W. 444 (1925).
120. See note 59 supra, and accompanying text.
121. Spratt v. Hatfield, 267 Minn. 535, 539, 127 N.W.2d 545, 548 (1964); Board of Educ. v. Sand, 227 Minn. 202, 211, 34 N.W.2d 689, 695 (1948).
123. In re Estate of Abbott, 213 Minn. 289, 6 N.W.2d 466 (1942); Lindquist v. Abbett, 196 Minn. 233, 265 N.W. 54 (1936).
125. Spratt v. Hatfield, 267 Minn. 535, 127 N.W.2d 545 (1964); In re Estate of Abbott, 213 Minn. 289, 6 N.W.2d 466 (1942); State v. Illinois Cent. R.R., 200 Minn. 583, 274 N.W. 828 (1937); State v. Brooks, 183 Minn. 251, 236 N.W. 316 (1931).
127. E.g., Browning v. Browning, 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1950); Johnson v. Giese, 231 Minn. 258, 264, 42 N.W.2d 712, 716 (1950).
because they are merely his personal opinions. Thus, the best solution would be an amendment to the statute itself.

The legislature could merely strike the words "not inconsistent with its provisions" from the act. Such an approach, however, would not provide as much protection for the state as the following suggested amendment which would also insure ample protection for the retailer:

Minnesota Statutes section 297A.29(2) (a)-(d) (1967):

(a) No person shall suffer substantial prejudice due to his reasonable and good faith reliance on an opinion of the attorney general or a rule or regulation of the commissioner of taxation interpreting sections 297A.01-297A.44.

(b) Substantial prejudice shall not include the necessity of collecting a back sales tax from known purchasers unless the cost of collection (plus the amounts which prove uncollectible) exceeds 25 per cent of the tax, but it shall include the payment of any back sales tax out of the seller's own funds which the law (as interpreted by the opinions of the attorney general or rules and regulations of the commissioner of taxation, issued in a valid exercise of their powers) did not require him to collect.

(c) Whether the seller has suffered substantial prejudice by a reasonable and good faith reliance shall be determined by a court of competent jurisdiction in an action brought by the seller for abatement of an assessment or for a refund.

(d) The commissioner shall rule on all questions submitted to him by retail sellers on their liability to collect a tax under sections 297A.01-297A.44.

At first impression, this may seem too great a concession since every seller would be able to rely on a single rule or regulation of the Commissioner of Taxation or a single opinion of the Attorney General. It is clear, however, that the seller would still have to show that his circumstances were sufficiently similar to those of the rule, regulation or opinion to make his reliance reasonable, as required by the amendment. Furthermore, it seems unlikely that the Internal Revenue Service's approach of issuing letter rulings which can be relied on only by the taxpayer who requested the ruling would be a better solution. For ex-

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128. The seller who has relied on an official opinion of the Attorney General which had not been incorporated into a rule or regulation of the Commissioner of Taxation may run afoul of the requirement that an estoppel be based on a representation of fact rather than opinion. Bremer v. Commissioner, 246 Minn. 446, 454-55, 75 N.W.2d 470, 475 (1956). It is doubtful, however, that this is the way in which the courts use the word "opinion" since the Attorney General's opinions are phrased so as to state facts, and certain of his opinions are even given a binding effect by statute. Minn. Stat. §§ 8.02, 270.09 (1967).


ample, once the tax department has decided that certain sales are exempt from the sales tax, the only appreciable difference between a single ruling on which every seller can rely and a series of separate rulings on which only one seller can rely is the inefficiency of the latter method. The same is true if the tax department subsequently changes its view since it is obviously more efficient to issue a single ruling applicable to all sellers than to change its position in all future rulings and also advise each seller who had received an earlier ruling of the change.

In any event, there is no excuse for the legislature to give the Attorney General and Commissioner of Taxation broad powers to interpret the sales tax without also providing meaningful protection for sellers who rely on their interpretations. The granting of such powers without at the same time protecting the seller's reliance not only lulls the retailer who complies with the interpretations into a false sense of security but also tends to undermine the integrity of the administrative process. Thus, whether the legislature chooses to protect the retail seller's reliance by the suggested amendment or by the more restrictive approach of requiring separate rulings, it is clear that some degree of protection is warranted.

V. CONCLUSION

Considering the state's interest in protecting its revenues, a general rule forbidding assertion of the defense of estoppel against the state when exercising its taxing power may be tolerable. It becomes intolerable, however, if applied to a sales tax situation where the so-called taxpayer merely collects the tax for the state and is not himself meant to pay the tax out of his own funds. Thus, estoppel should be made available to the retailer in sales tax cases, either by the courts or the legislature. It is by no means unreasonable for the state to bear the risk of mistaken interpretations by its own authorized officials when the consequences of the risk, if borne by the retailer, would range from paying no tax with personal funds when the interpretation is correct, to being saddled with the full tax when the interpretation is wrong.