Opinion No. 58-184

September 10, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P Whittaker, Assistant Attorney General

TO: Mr. F. F. Weddington, State Bank Examiner, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does Ch. 209, Laws of 1957, entitled, "An Act Relating to Usury", apply to so-called time sales of automobiles and appliances, wherein a charge is made, over and above the purchase price, for extension of credit on a time basis?

2. Does Ch. 209, Laws of 1957, apply to so-called "revolving credit plans" employed by department and dry-goods stores in financing various purchases by the customers, including, but not limited to, appliances?

CONCLUSIONS

1. No.

2. No.

OPINION

ANALYSIS

You request an opinion as to the scope and thrust of Chapter 209 of the Laws of 1957, which enacted new usury legislation and superseded various usury provisions formerly in effect. The heart of the new legislation, found in Section 1 of the Act (Sec. 50-6-15, N.M.S.A., 1953 Comp., 1957 P.S.), follows:

"EXCESSIVE CHARGES PROHIBITED. -- No person, corporation or association, directly or indirectly, shall take, reserve, receive or charge any interest, discount or other advantage for the loan of money or credit or the forbearance or postponement of the right to receive money or credit except at the rates permitted in this Act."

Each of your questions, then, resolves into this. Does the financing charge - whether called a handling charge, service charge, time price differential, or other euphemism - constitute an ". . . advantage for the loan of money or credit or the forbearance or postponement of the right to receive money or credit . . ."?

If this office were to deal with your inquiry as a matter of first impression, untrammeled by the weight of legal history, we would readily conclude that affirmative answers are required, on two grounds. First, it is apparent that if a time-sale transaction is viewed with reference to its substance, ignoring differences in the form of the transaction, any time-sale transaction consists of two parts: one, the sale of merchandise at a stated (cash) price; and two, the loan of the amount of such price (or the differed balance thereof) by the vendor to the purchaser who is unable, or unwilling, to pay the cash price. The consideration for this loan - which cannot honestly be characterized as anything but a forbearance or postponement of the right to receive money - is the financing charge, which may, and in many cases does, exceed the legal rate of interest. As a matter of first impression, we would find virtually inescapable the conclusion that the difference between the "cash price" and the "time price" represented the price of the money which the vendor (or his financing company) advanced to the purchaser. Second, we take notice that perhaps the vast bulk of sale transactions involving substantial amounts, such as automobile and appliance sales, are credit transactions, in our current economy, and that such credit transactions now constitute a significant portion of all financing. In practical consequences, these transactions clearly involve loans. If the vendor has paid cash for his stock of merchandise, and finances his sales as time sales, it will soon become clear to him that his capital has become invested, not in the merchandise business, but in the financing (or lending) business - and to recapture his capital, he will have to await the repayment of the loans made, or borrow money - by rediscounting his customers' paper, or otherwise. Again, if the purchaser borrows money from his bank, pays cash for the appliance purchased, and repays the bank, it is clear that the usury laws apply. To follow the trite admonition of the courts in these cases, we would look to substance, and not form, and thus find it immaterial whether the loan was made by the bank, the finance company with which the vendor deals, or the vendor directly.

Unfortunately, the proper construction of Ch. 209, Laws of 1957, must give consideration and weight to the state of the law at the time of its enactment, and to the language used as construed in numerous cases over a long span of years. The rationale of these cases, almost without exception, is that the owner of property may sell it at whatever price and on whatever terms he may determine. Accordingly, he may sell it at a stated "cash price", or at stated "time price" - and the fact that the difference exceeds the rate of interest permitted by the usury laws is immaterial. Obviously, the time price differential must take account of factors not present in making a loan to a prime rate borrower - heavier handling charges, heavier collection charges, and so forth. Possibly book-keeping costs, for example, should be viewed separately from interest charges (although this is not done on ordinary loans, to our knowledge). And it would seem more correct to view these factors, as well as the greater risk involved, as going to determine the rate of interest to be charged, interest being the compensation allowed by law or fixed by the parties for the use or forbearance of money (see 47 C.J.S., Interest, § 1, p. 8).

We deem the question foreclosed by the vast weight of authority, however. In order not to extend this opinion unduly, we make brief reference only to various collections of

authorities to this effect. See 91 C.J.S., Usury, § 18; **Commercial Credit Company** v. **E. W. Tarwater,** 110 So. 39, 48 A.L. R. 1437 (Ala., 1926) and annotation, 48 A.L.R. 1442; **Standard Motors Finance Co** v. **Mitchell Auto Co.,** 293 S.W. 1026, 57 A.L.R. 877 (Ark., 1927) and annotation, 57 A.L.R. 880; **Oil City Motor Company** v. **C.I.T. Corporation,** 76 F.2d 589, 104 A.L.R 240 (CCA 10, 1935), and annotation, 104 A.L.R. 245; **Harper** v. **Futrell,** 164 S.W. 2d 995, 143 A.L.R. 235 (Ark., 1942), and annotation, 143 A.L.R. 238. Compare **Hare** v. **General Contract Purchase Corp., 249 S.W. 2d 973** (Ark., 1952), overruling previous Arkansas cases and establishing the rule that the transfer of title documents by the vendor to a finance company at a price enabling the transferee to obtain a return of more than the legal rate of interest on its investment constitutes a loan in substance, if the vendor had reasonable assurance that he could so discount the paper. This case was followed in **Sloan** v. **Sears, Roebuck and Co.,** 308 S.W. 2d 802 (Ark., 1958), holding void as usurious a sale of merchandise on credit in which the time sale price exceeded the cash price by more than the legal rate of interest. Illustrative of the rule that the question whether a transaction is usurious is a question of fact are **Seebold** v. **Eustermann,** 13 N.W. 2d 739, 152 A.L.R. 585 (Minn., 1944); **Spence** v. **Erwin,** 30 S.E. 2d 50, 154 A.L.R. 1057 (Ga., 1944); and **General Motors Acceptance Corporation** v. **Mid-West Chevrolet Co.,** 66 F.2d 1 (CCA 10, 1933). And see **London** v. **Toney,** 189 N.E. 485, 91 A.L.R. 1100 (N.Y., 1934), wherein the court refused to extend the classical rule to a situation involving an agreement to extend the time for payment of a purchase money real estate mortgage, in consideration of an agreement to assume the payment of such mortgage and the payment of a bonus deemed usurious. The court there held the transaction void for usury.

We find no New Mexico cases passing upon the applicability, or non-applicability, of our usury laws to time-sale transactions. In **City of Clovis** v. **Southwestern Public Service Co.,** 49 N.M. 270 (1945), in discussing the question whether a contract construed bore interest or not, the Court did say, at p. 279:

"It will not be disputed that it remained for the utilities company and the City to agree upon the price for which the properties would, with the consent of the electorate, be sold. To omit the item of interest would not amount to a donation, if, it could be said, as it can be that **in fixing the price the parties to the contract could determine the ultimate sale price as it would be influenced by the fact the deferred payments would, or would not, bear interest."** (Emphasis added)

Although the question considered is not directly related to the question here discussed, the language is quoted to indicate the consistency of the view expressed with the principle upon which the weight of authority rests the conclusion that usury laws do not apply to time-sale transactions.

Of incidental interest is the fact that the United States Internal Revenue Code of 1954, in Sec. 163, recognized the validity of the proposition that time-sale transactions involve the payment of interest, even if no charge separately stated is expressed as interest, by providing in effect that installment payments might be treated as if they included

interest, to be computed at six per cent of the average unpaid balance under the contract during the taxable year.

The vast weight of authority, then, refuses to apply usury laws to time-sale transactions. Does Chapter 209 of the Laws of 1957 express any legislative intention to expand the scope of the usury law to encompass such transactions? After careful study, we conclude that there is no evidence of such legislative intention Section 50-6-6, repealed by the 1957 act, formerly referred in effect to charges ". . . for the loan or forbearance of any money, goods or things in action . . ." Section 1 of the new act (§ 50-6-15) now refers to charges "for the loan of money or credit or the forbearance or postponement of the right to receive money or credit . . ." True, this language may be viewed as broader than the previous provision in clarifying the application of the usury law to a loan of credit as well as a loan of money. Presumably, transactions such as that considered in **Oil City Motor Company** v. **C.I.T. Corporation,** supra, would now be subject to the usury laws. This question is not presented, and so not decided. Does the language relating to postponement of the right to receive money or credit include the time-sale situation? We think not. Historically, "forbearance" is defined as "a contractual obligation of a creditor to forbear during a given period to require of a debtor payment of an existing debt then due and payable." 91 C.J.S., Usury, § 23, p. 598. The new definition indicates no intention to depart from this customary definition and, whatever the intent indicated by the use of the word "credit" in this phrase the provision is not susceptible, in our view, of construction to include the time-sale situation.

In fact, good argument might be made that the scope of the earlier provision, in referring to the ". . . rate of interest . . . agreed to by the parties to the contract . . ." was broader than the provision of the 1957 act. However that may be, this office concludes that no legislative intention is discernible to expand the scope of the usury law to include time-sale transactions. Chapter 209 apparently was designed to clarify and simplify, not to expand the scope of the law.

The foregoing discussion disposes of your first question. The discussion is equally applicable to your second question, referring to "revolving credit plans". By a revolving credit plan, we understand you mean a type of "charge account" which permits the buyer of merchandise to pay for goods bought either in full, as in the case of ordinary charge accounts, or in several payments. Additional purchases may be added to the account, and a "credit service charge" is applied by the vendor to the unpaid monthly balance of the account. We note that the Arkansas court, in **Sloan** v. **Sears, Roebuck and Co.,** supra, applied the usury laws to a time-sale transaction and the decision in that case apparently would compel a holding that such laws apply to revolving credit plans, also. However in the absence of a reasonably clear expression of legislative intent to cover such transactions this office is not disposed to follow the present Arkansas view, in the face of the vast weight of authority contra.

If the regulation of time-sale transactions with respect to financing charges should be deemed advisable in the protection of the public interest, we respectfully suggest that this can be done effectively by legislation which fully recognizes the actual costs of the

vendors conducting such business, and the actual costs of those who finance such business, and on that basis, regulates such financing charges in a way fair to the consumer and to the other parties concerned.