

OPINION
64-392

July 20, 1964 (OPINION)

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City Attorney

Bismarck, North Dakota

RE: Taxation - Proposed Amendment Repealing Personal Property

Tax - Effect

This is in response to your letter in which you ask for an opinion pertaining to the affects of the proposed amendments to Article XI, Section 176 of the North Dakota Constitution. The proposed changes are set out as follows: (The language to be deleted is contained within brackets (()) and the new language is underscored.)

Section 176. Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. ((The Legislature may by law exempt any or all classes of personal property from taxation and within the meaning of this section, fixtures, buildings and improvements of every character, whatsoever, upon land shall be deemed personal property.))) The property of the United States and of the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes, all personal property owned by persons or corporations residing or doing business within the State of North Dakota, and all personal property located within the State of North Dakota shall be exempt from taxation. Except as restricted by this Article, the Legislature may provide for raising revenue and fixing the situs of all property for the purpose of taxation ((Provided that all taxes and exemptions in force when this amendment is adopted shall remain in force until otherwise provided by statute.)))"

Your questions are as follows:

First, the City would like to have your opinion as to whether or not the amendment if adopted on November 6, (3) 1964, - that is, to personal property taxes assessed for 1964 and which would not be finalized on that date and levies actually made or become due and payable until January first of 1965, It does appear that the amendment is self-executing and would become immediately operative and that the tax does not become due or a lien until January first of 1965.

Second, the City does share in motor vehicle registration fees and we would like your opinion as to whether or not the constitutional amendment would exempt such fees and being a

constitutional amendment, would place it beyond the Legislature to even substitute.

Third, the cities also share in the receipts from cigarette tax and we wish to be advised whether or not the proposed constitutional amendment again would completely eliminate such tax and make such taxes constitutional invalid."

The personal property in question is assessed in the various political subdivisions - city, village, township, etc., and are assessed as of April first of each year. (Section 57-02-11 of the North Dakota Century Code.) Thereafter, the assessments are reviewed by the various equalization boards and equalized if necessary. The equalization boards are echeloned according to the composition of the political subdivision. For example, township, county, and state. Each such political subdivision has its own equalization board and equalizes the assessments and valuation of property within its political subdivision. (Sections 57-09-04, 57-09-06, 57-10-03 and 57-11-03 of the North Dakota Century Code,.)

The equalization board of a higher echelon reviews the action of the equalization board in lower political subdivision. For example, the county equalization board reviews the assessments of townships, villages, etc., and equalizes them if necessary. (Chapter 57-12 of the North Dakota Century Code.)

The State Equalization Board in turn reviews the assessments of the county and the county equalization board, and equalizes them if necessary. (Chapter 57-13 of the North Dakota Century Code.) The State Equalization Board meets in August.

The assessment and equalization is in a sense the first step in taxing personal property. The next step is the levying of the tax. Cities and villages levy the taxes on the fourth Wednesday in July or within ten days thereafter. (Section 57-15-07 of the North Dakota Century Code.) The counties levy the taxes on the fourth Tuesday of July or within ten days thereafter. (Section 57-15-05 of the North Dakota Century Code.) School districts levy taxes on or before the last day of July. (Section 57-15-13 of the North Dakota Century Code.) The State levies the taxes as soon as the State Equalization Board meets, which is on the fourth Tuesday of August, and has determined the rate of State tax to be levied and has certified same at the earliest possible time to the county auditors of the several counties. (Section 57-15-04 of the North Dakota Century Code.)

To answer the first question, it is necessary first to determine when the liability of the tax is incurred. The North Dakota Supreme Court in State of North Dakota v. Minneapolis & Northern elevator Company, 6 N.D. 41, in effect, held that the date for assessment is the date on which the liability comes into existence. In this case the date for assessment was May first and wheat held in an elevator but sold prior to may first was not assessable or taxable on May First.

Subsequent to the foregoing case, the Supreme Court in Garr, Scott & Company v. J. A. Sorum, 11 N.D. 164, had under consideration another question dealing with the date on which the liability of taxpayer is incurred. Here the Court held that property brought into the State

after April first was not subject to tax for that year. The statute at the time, as it does now, provided that the date of assessment of personal property was April first. The Court observed and commented that the fact the process of listing and assessing may extend from April first to June first had no significance. The Court further commented that the subsequent actions relate back to the day when the listing and assessing arose, which was April first. The Court concluded by saying that the taxability of personal property depends on its existence and presence in the State on the first day of April of this year.

More directly in point is a recent decision of the North Dakota Supreme Court found in *United Telephone Mutual Aid Corporation v. State*, 87 N.W. 2d. 54, wherein the Court held that the date set for assessment is the date on which the liability of the tax is incurred. The Court approvingly quoted from *Cooley on Taxation*, 4th Ed., Sections 1062, as follows:

'The customary regulation is that the assessment shall be made or completed on a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year. There are some inconveniences and inequalities resulting from this, but some regulation of the kind is indispensable.'

The Court also approvingly quoted section 546 from the same authority as follows:

"* * * There must be some day of the year as of which the power to tax property at all, or the power to tax it to a certain person, is to be determined. That day will fix the power to tax with reference (1) to whether the property was in existence on that date, (2) whether the property was within the jurisdiction so as to have taxable situs on that day, (3) whether the property was exempt from taxation on that day and (4) whether the property should be taxed to one person or another as dependent on its ownership on that day.'

The Court, in effect, without mentioning the case re-affirmed its holding in *Garr, Scott v. Sorum*, supra. It thus appears firmly settled in this State, particularly where there has been no substantive change in the statutes relating to this matter that the tax liability is incurred on April first, the date on which the assessment is made. The subsequent actions in determining the levy to be made against such property or any equalization action taken thereafter would all relate back to the date on which the assessment was made.

We must therefore conclude that the personal property tax liability in the State of North Dakota is incurred on April first, the date the property is assessed. It is common knowledge that all the property cannot be assessed on April first, nevertheless, the property is assessed as of April first, whether it be on that date or sometime shortly thereafter.

The constitutional amendment as proposed will amend Section 176 of Article 11 of the North Dakota Constitution if adopted on November 3, 1964. The proposed amendment, if approved, will go into effect

thirty days after the election pursuant to the provisions of Section 25 of the North Dakota Constitution. Thus, the Act, if approved, would become effective on December 3, 1964. Up until such date the provisions of Section 176 of the North Dakota Constitution as existing would be in full force and effect. The provisions of Section 176 would be in full force and effect. The provisions of Section 176 would continue to be in effect until December 3, 1964, even though the proposed constitutional amendment would be approved at the November 3rd election.

Any liability incurred under State law and under the present constitution prior to December 3, 1964, would continue to be a liability. This principle or rule of law is supported by the rule of law announced in *Cuthbert v. Smutz*, 68 N.D. 575. (282 N.S. 494.) If the proposed constitutional amendment becomes law it will, in effect, repeal some of the provisions of the now existing constitutional provisions. In this respect the fact that it is an initiated measure makes no difference - it is a legislative process and carries legally the same effect as if the measure were proposed by the Legislature.

The law with reference to repeals and the effect is found in Section 1-02-17 of the North Dakota Century Code and provides as follows:

REPEAL - EFFECT. The repeal of any statute by the legislative assembly, or by the people through an initiated law, shall not have the effect of releasing or extinguishing any penalty, fine, liability, or forfeiture incurred under such statute, but as to cases tried before, or subsequent to, repeal of such statute, it shall have the effect of extinguishing any jail or prison sentence that may be, or that has been, imposed by reason of said law, unless the repealing Act shall provide expressly that the penalties of imprisonment shall remain in force as to crimes committed in violation of such law prior to its repeal. In other respects, such Act shall remain in force only for the purpose of the enforcement of such fine, penalty, or forfeiture."

On the basis of the foregoing and in direct response to your first question, it is our opinion that the personal property taxes resulting from the assessment made as of April 1, 1964, remain a liability against the taxpayer or property and are due and collectible in 1965, even though the proposed constitutional amendment might be approved in the General Election of November third and become law on December 3, 1964.

As to the second question pertaining to motor vehicle registration fees, it is observed that Section 39-04-38 of the North Dakota Century Code, as amended, provides as follows:

TAXES OR FEES PROVIDED FOR TO BE IN LIEU OF OTHER STATE OR LOCAL PERSONAL PROPERTY TAXES. The taxes or fees provided for in this chapter shall be in lieu of all other personal property taxes, either state or local, upon such motor vehicles and upon any trailer or semitrailer for which a certificate of title is required to be issued and has been issued pursuant to the provisions of chapter 39-05."

It is also to be observed that the taxes or fees in the form of motor vehicle registration fees shall be in lieu of all other personal property taxes. This provision has been part of our law for a considerable number of years. Its effect was considered by the North Dakota Supreme Court in State ex rel Fargo v. Wetz, 40 N.D. 299. At that time, 1918, the North Dakota Constitution contained a provision that "* * * the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, charitable or other public purposes, and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation; * * *."

One of the questions raised in the Wetz case above was that the exemption of motor vehicles from personal property tax was, in a sense, a violation of motor vehicles from personal property tax was, in a sense, a violation of the constitutional provisions. The Court said that the fee was in reality both a tax on the property and a fee. The Court said of page 318:

* * * If the Legislature deems it appropriate to single out a given class of property and to require that the owners of that property who, as a class, derive most benefit from the proper performance of a given governmental duty, must contribute most to the legitimate cost of its maintenance, and that they may be favored by a corresponding reduction of other burdens, it cannot be said that the property subject to the particular burden is exempt from taxation. The most that can be said is that it is singled out for special treatment and taxed according to a method that is thought to be more appropriate for measuring the relative burden than would be the case if it were taxed according to valuation. There is no particular magic in a name, or even in a legislative designation of a particular form of taxation. Though the Legislature may call that which is distinctly a tax by some other name, it nevertheless remains a tax. * * *"

The Court on page 319 said:

* * * Viewed in the light of the ample powers of classification given to the Legislature, of the known limitation upon the right to exempt personal property, of the declared intention to make the tax in question one in lieu of all other taxes, and of the evident attempt to make the new tax one that should approximately equal both the original tax and the license fee, we are impressed that the law in question imposes both a property tax levied according to a permissible standard and a reasonable license fee. The Act consequently does not violate Section 176 of the Constitution, concerning exemptions. * * *"

The Court further observed that if the Legislature should see fit to adopt an Act licensing automobiles and make the charge one in addition to property tax upon vehicles, such as done in a number of states, it would have the right to base the property tax upon a percentage of valuation that would be so low comparatively as to amount practically to an exemption, and its action in so doing would be justified principally by the fact that a major burden had been

placed upon the property by way of a license charge or its use.

On the same subject, we find that 84 C.J.S., section 86, page 201, states the following:

Statutes taxing motor vehicles using the highways have been construed as imposing a personal property tax on them, combined with a privilege tax, as discussed infra section 122. Where the statute specifically taxing motor vehicles provides for their exemption from other tax, motor vehicles coming within the purview of such statute are not subject to a general ad valorem property tax, although motor vehicles not coming within the purview of such specific provisions are subject to general tax, as in the case of new cars still unsold in the dealer's hands."

The North Dakota Supreme Court in *State of North Dakota v. Kromarek*, 78 N.D. 769, in effect, held that the State had a right to impose a license or tax upon vehicles that used the public highways, and that the motor vehicle registration Act was valid. The registration fee or license for a vehicle can be imposed regardless whether said vehicle is subject to a personal property tax or some other tax. It is an independent tax.

Under section 39-04-38 of the North Dakota Century Code, the Legislature in effect exempted motor vehicles from personal property taxes if the registration fee or license fee was paid for such vehicle. The Legislature under its plenary authority could impose a personal property tax and a license or registration fee in addition thereto. However, if the proposed amendments to Section 176 of the North Dakota Constitution are approved, personal property tax could not be imposed upon said vehicle from and after December 3, 1964. This would not prevent or prohibit the Legislature from continuing to impose a registration or license fee.

Thus, in direct response to your second question, it is our opinion that the registration fees and license fees would not be affected by the approval of the proposed amendments to Section 176 of the Constitution, and that upon approval of such proposed amendments, it would not put motor vehicles as a prerequisite to be permitted to use the public highways and streets of this state.

As to the third question, the tax on cigarettes is not an ad valorem or personal property tax but is an excise tax imposed for the privilege of selling cigarettes in the State of North Dakota. It is to be observed that under chapter 57-36 of the North Dakota Century Code that the tax is imposed on cigarettes which are to be sold or intended to be sold. This is borne out by section 57-36-07, subsection 3, of the North Dakota Century Code, which amongst other things, provides that:

Each package of snuff or cigarettes displayed, exhibited, stored, or possessed in original cartons or containers or otherwise, within or upon the premises from which sale thereof may be made to consumers shall be presumed conclusively to be intended for sale to consumers and to be displayed, exhibited, stored, or possessed for such purpose, * * * and each package

* * * shall have affixed thereto securely a suitable stamp, or stamps, denoting the tax thereon. * * *"

In addition to subsection 3 of section 57-36-07, sections 57-36-22 and 57-36-23 of the North Dakota Century Code provide for an additional tax on cigarettes to be collected as existing taxes on cigarettes sold. It is also a tax on the sale of cigarettes. Finally, section 57-36-24 of the North Dakota Century Code provides as follows:

CIGARETTES GIVEN SOLDIERS' HOME EXEMPT. All gift cigarettes, not for resale, which are given to the North Dakota soldiers' home for distribution to the occupants thereof, and which are exempt from the cigarettes excise taxes of the United States, shall also be exempt from all cigarette excise taxes levied by the State of North Dakota."

The language here conclusively shows that the Legislature intended the taxes on cigarettes to be an excise tax. An excise tax is defined in 84 C.J.S., section 121, page 224, to be as follows:

An excise tax is any tax not falling within the classification of a poll or property tax, and embraces every form of burden or taxation not laid directly on persons or property, and every form of charge imposed by public authorities for the purpose of raising revenue on the performance of an Act, enjoyment of a privilege, or the engaging in an occupation."

The performance of an Act includes the sale of certain items. In this particular instance the sale of cigarettes.

It is therefore our opinion that the cigarette taxes presently imposed would not be affected or eliminated by the adoption of the proposed constitutional amendments to Section 176 of the North Dakota Constitution.

HELGI JOHANNESON

Attorney General