OPINION
65-366

May 5, 1965 (OPINION)

The Honorable R. Fay Brown

State Representative

RE: Taxation - Income Tax Deductions - Motor Vehicle Registration Fe

This is in regard to your request for an opinion relative to House Bill No. 615 passed by the Thirty-ninth Legislative Assembly.

In requesting the opinion, you stated that the accounting firm which completed your 1964 tax return did not deduct the motor vehicle license fee which you paid, and when you questioned the matter you were told that Mr. Hausauer of the Income Tax Division of the State Tax Department notified the accounting firm that the recent Legislature had passed House Bill No. 615 which disallowed this particular deduction.

Your letter of April 14, 1964, is quoted in part as follows:

> First, it is my belief that the Legislature can not pass legislation that would impose a retroactive tax. Secondly, my declared taxable period is the calendar year (which, in this case, was January 1, 1964, to December 31, 1964.) I paid my license fee in December, 1964; therefore, it would be a deductible tax item. Thirdly, if you will read the instruction pamphlet issued by Tax Commissioner Omdahl for filing tax returns on 1964 income, you will find that he lists Motor Vehicles fees as a deductible item.
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> I, therefore, respectfully request an official opinion relative to H.B. 615 and the ruling of the Tax Commissioner at your earliest possible convenience."

House Bill No. 615 was passed as an emergency measure and was signed by the Governor on February 25, 1965. The bill updates the reference in the North Dakota income tax laws to the Internal Revenue Code by adopting all amendments thereto to December 31, 1964. The bill specifically provides that all amendments to the Internal Revenue Code applicable to federal returns for the calendar year 1964 and for the fiscal year ending during 1964 shall apply to returns required to be filed for state income tax purposes for the same periods.

House Bill No. 615, amongst other things, revises the deductions and exclusions available to a taxpayer by allowing some not allowed heretofore, and by removing or restricting some which were previously allowed. For example, under House Bill No. 615, the dividend exclusion, child care deductions, moving expenses, travel expenses, capital loss carryovers and capital gain treatment on certain sales of houses are allowed, whereas the motor vehicle license fee deduction is excluded and restrictions are placed on sick pay

exclusions and casualty losses.

In discussing with Mr. Hausauer the rulings which have been issued by the State Tax Department in connection with House Bill No. 615, it is his recollection that a general ruling has not been issued regarding the retroactive effect of House Bill No. 615. However, he does recall having a number of telephone conversations with several tax practitioners in the State of North Dakota regarding the application of the bill. It is his understanding that House Bill No. 615 disallows the license fee as an itemized deduction on the 1964 individual income tax return. Mr. Hausauer also stated that as the income tax instructions for the calendar year 1964, which were prepared and issued prior to the recent legislative session, provided that license fees are deductible on the 1964 returns, and as House Bill No. 829, which was passed by the recent legislative assembly, provides that no income tax refund shall be made by the tax commissioner to any taxpayer unless the amount to be refunded shall exceed one dollar and that no remittance of income tax need be made nor any assessment nor collection of tax should be made unless the amount exceeds one dollar, it is the position of the Tax Department that, although the license fee deduction is not technically allowable as an itemized deductible item on the 1964 individual income tax return, the State Tax Department will accept 1964 returns as correctly filed even though automobile license fees are included as an itemized deduction. In other words, it apparently is not economical for the state to set up an assessment of additional income tax if the additional tax is one dollar or less.

There appears to be some question as to whether House Bill No. 615 changes the income tax law in a retroactive manner even thought he bill specifically states that the provisions of the Internal Revenue Code, as amended to December 31, 1964, applied to state income tax returns required to be filed for the year 1964. Some courts have taken the position that if a return is to be filed on a certain day - for example, April 15, 1965 - which return is based upon 1964 income tax, the tax due is a 1965 tax although based upon or measured upon 1964 income, and consequently, a law passed in 1965, before the due date of the return, would not be regarded as a retroactive law. See Anderson Bros., Inc. v. Commonwealth, 120 S.E. 860 (Virginia), and 85 C.J.S. 800.

However, assuming that House Bill No. 615 is regarded as applying retroactively, it appears that the bill would not be constitutionally objectionable. In the absence of an express constitutional provision on retroactive laws, income tax statutes are regarded as being constitutional even though they have some retroactive effect. The retroactive income tax statute must be based on the income of a year sufficiently recent to the legislative enactment that such income may reasonably be supposed to have some bearing on the ability of the taxpayer to pay the tax. There is no definite or fixed period beyond which the income tax statute cannot be given a retroactive effect. In this connection, see 27 Am. Jur. 324, 325 and 326; Section 27, Income Taxes; 51 Am. Jur. 143 and 144, Section 109, Taxation; 109 A.L.R. 508-534, and 118 A.L.R. 1101-1156.

In connection with the foregoing, the following is quoted from 27 Am. Jur., pages 325 and 326:

> A tax may be imposed on the income of the entire current year, although part of the year has elapsed when the statute is passed. And an income tax statute may be constitutional although it measures the tax by the income of the year preceding its enactment, or by the income of the year of the last legislative session preceding that of its enactment, or by the income of the most recent year for which returns are available furnishing data upon which to estimate the total amount to be collected from the tax, or by the income of a year sufficiently recent so that the income of that year may reasonably be supposed to have some bearing upon the present ability of the taxpayer to pay the tax.
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> Various provisions of income tax statutes have been held constitutional as applied retroactively. Thus, provisions recognizing taxable gain on sales or exchanges of a type not previously taxes, or changing the the method of computing the amount of the gain or the time of payment of the tax on account of it, have been held constitutional as applied to sales or exchanges consummated before their enactment * * * * Likewise, provisions relating to a change in the taxpayer's accounting period and those changing deductions previously allowable have been held constitutionally as applied retroactively."

The landmark case regarding the constitutionality of income tax statutes applied retroactively is Welch v. Henry, et al, 305 U.S. 134, 59 S. Ct. 121. In that case, the United States Supreme Court had before it the question of whether an income tax statute passed by the Wisconsin Legislature on March 27, 1935, imposing a tax on corporate dividends received by the appellant in 1933 at rates different from those applicable in that year to other taxable income and without deductions which were allowed in computing the tax on other income violates the equal protection and due process clauses of the United States Constitution.

In upholding the constitutionality of the Wisconsin statute, the Court stated:

> Nor is the tax any more a denial of equal protection because retroactive * * * *."
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> The bare fact that the present tax is imposed at different rates and with different deductions from those applied to other types of income does not establish unconstitutionality. It is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition. (Citations omitted.)
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> * * * *."
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> Second. The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it

> imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. (Citation omitted.) Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."
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> * * * * For more than seventy-five years it as been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. (Citations omitted.) These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preexisting laws. This was notably the case with the 'Revenue Act of 1918,' enacted February 24, 1919, 40 Stat. at L. 1057, chap. 18, and made applicable to the calendar year 1918, which cut down exemptions and deductions, increased, in varying degrees, income, excess profits and capital stock taxes, altered the basis of surtaxes, and increased in progressive ratio the rate applicable to the higher brackets * * * *. The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the Fifth Amendment has been uniformly rejected."
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> * * * * And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, Cooper v. United States, 280 U.S. 409, 411, 74 L. Ed. 516, 517, 50 S. Ct. 164, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment."

The Circuit Court Appeals, Second Circuit, in Manhattan General Equipment Company v. Commissioner of Internal Revenue (1935), 76 F.2d. 892, affirmed in (1936) 297 U.S. 129, 80 L. Ed. 528, 556 S. Ct. 397, which case involved the computation of a loss on the sales securities, said:

> There can be no doubt that Congress has power to make income tax laws retroactive. (Citation omitted.) This is especially true where they only affect deductions that may be taken from income, which are always matters of legislative favor."

A legislative enactment is presumed to be constitutional, and this presumption is regarded as conclusive by the courts unless it is clearly shown that the statute violates a constitutional provision. See State v. Wentz, 40 N.D. 299, 168 N.W. 835; O'Laughlin v. Carlson, 30 N.D. 213, 152 N.W. 675; and State ex rel. Linde v. Taylor, 33 N.D. 76, 156 N.W. 561.

In view of the above, it is our opinion that House Bill No. 615 would

not be regarded as constitutionally objectionable by reason of any retroactive effect that it may have on 1964 individual income tax returns.

HELGI JOHANNESON

Attorney General