

**OPINION**  
**66-370**

May 25, 1966 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Income Tax Returns - Confidential

This is in reply to your letter of May 13, 1966, relative to the production of state income tax returns, or copies of them, for examination by the state fire marshal. You state the fire marshal has indicated to you that he may find it necessary in connection with his investigation of a fire to require the production of such records for examination. You note the provisions of sections 18-01-10 and 57-38-57 of the North Dakota Century Code and state the following questions:

Because there is apparently no provision in the law which expressly provides the state fire marshal with authority to subpoena and inspect state income tax returns on file in this office, I would like your opinion on the following questions:

1. If I or anyone in the state tax department is required by the state fire marshal pursuant to section 18-01-10 to produce for his inspection certain state income tax returns on file here, or copies of them, would the production of them violate the secrecy provisions of section 57-38-57 and subject the person who produced them to the penalties prescribed in subsection 2?
2. As to question number 1, does it make any difference whether the taxpayer whose income tax returns are to be produced by the tax department is living or not living at the time production of his returns is required?
3. If the state fire marshal can require production of the returns, do the nondisclosure provisions of section 57-38 57 in any way limit his disclosure of information obtained from the returns?"

Section 18-01-10 of the North Dakota Century Code provides in part:

The state fire marshal and his deputies shall have the power in any county in the state to \* \* \* require the production of any pertinent books, papers, or documents, and a summons to appear before either of such officers shall be served in the same manner and shall have the same effect as a subpoena in the district court.\* \* \*."

Section 57-38-57 of the North Dakota Century Code provides in part, with respect to income tax returns:

1. Except when otherwise directed by judicial order, or as is otherwise provided by law, the tax commissioner, his deputies, agents, clerks, and other officers and employees, shall not divulge nor make known, in any manner, the amount of income, or any particulars set forth or disclosed in any report or return required under this chapter. This provision shall not be construed to prohibit \* \* \* the inspection by the attorney general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or any penalty imposed by this chapter.

\* \* \*

2. Violation of this section shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. If the offender is an officer or employee of the state, he in addition shall be dismissed from office and shall be incapable of holding any public office in this state for a period of five years thereafter.

\* \* \* \* ."

Section 44-04-18 of the North Dakota Century Code making records of public bodies, etc., public records, open and accessible for inspection during reasonable office hours, would not be applicable since, by its own terms, it is applicable only if there is no exception specifically provided by law. In this instance there is an exception specifically provided by law in section 57-38-57.

The basic question to be determined is whether the provisions of section 18-01-10 granting the fire marshal and his deputies the power to require the production of any pertinent books, papers, or documents is sufficient to permit inspection of the income tax returns by the fire marshal under the provision of section 57-38-57(1).

While section 18-01-01 provides that a summons to appear before the fire marshal or his deputies shall have the same effect as a subpoena in the district court, we do not believe such summons is a "judicial order" within the provisions of section 57-38-57(1) since the fire marshal's functions in this regard are primary investigative and do not involve judicial functions or procedures and decisions as such. We would further note that the penalties for refusing to answer the summons are prescribed by section 18-01-11.

We do not believe the provisions of section 18-01-10 constitute an exception which would come within the phrase "or as is otherwise provided by law" as specified by section 57-38-57(1) of the North Dakota Century Code. We are aware of the cases cited in your letter, e.g. Schirock v. Schirock, 128 N.W.2d. 852 (ND 1964), which hold that a statute such as section 57-38-57 makes state income tax returns available in litigation or when ordered by the court where the information contained therein is relevant to the subject matter

involved in a legal action. In this instance, however, no legal action has been instituted at the time the investigation is made. The fire marshal is exercising investigative powers only. The investigation may result in court action in which instance, of course, the Court might direct that income tax returns to be made available. We do not believe the cases holding that income tax returns are to be made available in court actions are applicable to the instances in which the returns are requested for investigative purposes only.

We would further note that to construe section 18-01-10 to apply to income tax returns would place the returns in the same category as any other book, paper or document which is not, by statute, made confidential. Without a more explicit directive from the Legislature, we do not believe section 18-01-10 can be construed as an exception to section 57-38-57(1).

In direct reply to your questions:

1. It is our opinion that if you or members of your department are required by the state fire marshal pursuant to section 18-01-10 to produce for his inspection certain state income returns on file in your office, or copies of them, the production of same would violate the secrecy provisions of section 57-38-57 and might subject the person who produced them to the penalties prescribed in subsection 2. If such summons was accompanied by a Court order your department would, of course, be required to produce the returns. Either party can, of course, seek a Court order to show cause why the records should not be produced or, in the alternative, why the subpoena should not be honored.
2. In our opinion it does not make any difference whether the taxpayer whose income tax returns are requested to be produced is living or not living at the time production of the returns is required since section 57-38-57 makes no such distinction.
3. In view of our answers to the first two questions it is not necessary to reply to the third question presented.

HELGI JOHANNESON

Attorney General