

OPINION
67-273

February 21, 1967 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Income Tax - Filing and Exemptions

This is in regard to your letter of December 27, 1966, requesting my opinion on several questions relating to the North Dakota income tax filing requirements and exemptions allowed to nonresidents deriving income from North Dakota sources.

Your questions relate to a factual situation wherein a nonresident has income from North Dakota source, is married, and his spouse has no income from North Dakota sources. Your questions are quoted as follows:

1. Must the nonresident and his spouse file a joint North Dakota income tax return, and, if so, must they report, that is, disclose, all income from sources outside of North Dakota, as well as North Dakota income?
2. Must the nonresident prorate his personal exemptions in the ratio that his North Dakota income bears to his total income?
 - a. Can a nonresident deduct on his North Dakota return the total of all of his personal deductions as provided in section 57-38-22.1 regardless of the amount of his income that is not taxable by North Dakota or can he deduct only the amount that is proportionate to the ratio that his North Dakota income bears to his total income or can he deduct any? Can any of the allowable deductions be changed by the Tax commissioner pursuant to subsection 4 of section 57-38-22.1?
3. If a proration of exemptions is not permitted, is the nonresident taxpayer permitted a \$1,500 personal exemption by reason of his marital status plus a \$600 exemption for each dependent?
4. If the wife of a nonresident has an income from the state of her residence and if a joint return is not required to be filed in North Dakota, would the nonresident husband having income from North Dakota sources be entitled to the \$1,500 exemption by reason of his marital status?
5. Does the residence of the wife follow the residence of the husband for North Dakota income tax purposes?
6. What are the filing requirements of a nonresident having income from a North Dakota source, that is, if the nonresident has North Dakota income of less than \$600 net,

if single, or \$1,500 net, if married, and has less than \$5,000 gross income, must the nonresident file a North Dakota income tax return?"

The income tax imposed pursuant to Chapter 57-38 of the North Dakota Century Code is applicable to "natural" nonresident persons. In this connection see section 57-38-03 of the North Dakota Century Code.

Section 57-38-06 deals specifically with deductions and personal exemptions applicable to nonresidents and is quoted as follows:

GENERAL PROVISIONS APPLICABLE TO NONRESIDENTS. The provisions of law applicable to the assessment, levy, and collection of income taxes from resident individuals, as to gross income, deductions allowed, items not deductible, personal provisions of this chapter especially made applicable to nonresidents, shall govern the levy and collection of income taxes from nonresident individuals."

In addition to the above statutes, section 57-38-04 sets out the method for allocation and apportionment of gross income of residents as well as nonresident individuals, subsection 3 of section 57-38-22 and section 57-33-22.1 set out the deductions allowed to individuals in computing taxable income, section 57-38-26 deals with exemptions applicable to individuals and section 57-38-31 prescribes the duty of individuals to file North Dakota income tax return.

With respect to your first question, it is noted that section 57-38-03 imposes a tax only on nonresident individuals who derive income from designated sources in this state. It is further noted that section 57-38-31 of the North Dakota Century Code, which sets out the duty to file a return, requires only those individual "subject to taxation under the provisions of this chapter" to file. In addition, subsection 2 of section 57-39-31 requires the filing of separate returns by a husband and wife unless "the income of each is included in a single joint return", this section, therefore, implies that if a spouse does not have income, the spouse is not required to file an individual return or file a single joint return with his or her spouse. In view of the above, it is our opinion that the spouse, under the factual situation presented by you, by reason of the fact that she has no filing requirement in this state and the spouse would not, therefore, be required to file a joint return. The husband, however, because he has income from North Dakota sources, must file an individual income tax return, reporting all North Dakota taxable income to this state, and, in addition thereto, must disclose all other income from out-of-state sources. See subsection 7 of section 57-38-31 of the North Dakota Century Code.

In answer to your second, third and fourth questions, it is our opinion that the personal exemptions set out in section 57-38-26 are the allowable exemptions without proration and, consequently, a nonresident married taxpayer would be entitled to a \$1,500 personal exemption plus a \$600 exemption for each qualifying dependent other than his spouse. The \$1,500 exemption for the married taxpayer is applicable only if the person is living with his spouse. It is our further opinion that the husband would be entitled to a \$1,500 personal exemption even if his wife has income from sources within

the state of her residence. In this connection, see section 57-38-06 of the North Dakota Century Code. If the taxpayer under the above circumstances is affected by the income allocation provisions of Chapter 57-38, only these deductions, personal or business, as distinguished from personal exemptions, are allowed to the extent they are fair and equitable to North Dakota. It would appear that the ratio of North Dakota income to total income would be an equitable basis for allocation of deductions, and these deductions may be changed by the Tax commissioner pursuant to subsection 4 of section 57-38-22.1 so long as the ratio arrived at by the Tax Commissioner is fairly and equitably applied to all individuals under the factual situation.

With respect to your fifth question, section 54-01-26 of the North Dakota Century Code sets out the rule for determining residence. This section provides that a residence is determined by a union of act and intent. Subsection 5 of the section creates a presumption that the residence of the husband is presumptively the residence of the wife. However, as this is a statutory presumption, it is rebuttable. In this connection, see *Schillerstrom vs. Schillerstrom*, 75 ND 667.

As the North Dakota income tax law does not specifically provide that the residence of the wife is that of the husband, it would appear that the above question would control and therefore the residence of the husband would presumptively be the residence of the wife unless the presumption was rebutted.

There is no provision in the income tax law which sets out specifically the filing requirements of nonresidents. However, section 57-38-06 provides that the provisions of the income tax law which are applicable to the assessment, levy and collection of income taxes from resident individuals and which are not inconsistent with the provisions of Chapter 57-38 governing the levy and collection of income taxes from nonresident individuals; it, therefore, is our opinion that the duty of individuals to make returns as prescribed by section 57-38-38 of the North Dakota Century Code is applicable to nonresident individuals.

HELGI JOHANNESON

Attorney General