

OPINION
69-415

July 29, 1969 (OPINION)

Mr. Bruce L. Bartch, Director

North Dakota Business and Industrial

Development Department

RE: Taxation - Exemption for New Industries - Property and Income In

This is in reply to your request for an opinion of this office with regard to the interpretation of Chapter 385 of the 1969 Session Laws, Chapter 40-57.1 of the 1969 Supplement to the North Dakota Century Code.

The first question you are apparently interested in is with regard to "* * * whether the legislature intended to exempt, for these industrial development purposes, land, as distinguished from improvements thereon, that is used by a revenue producing enterprise for which the exemption may be granted." You state that there is apparently some doubt as to whether the legislature has authority under Section 176 of the North Dakota Constitution to grant a real estate tax exemption for land for this purpose. Your letter states further that, "If the land itself cannot be exempted under this law, what is included in the terms 'buildings and improvements' that can be exempted?"

The full text of Section 176 of the North Dakota Constitution as presently constituted is:

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 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."

We note particularly that the second sentence of this section specifically gives the legislative assembly authority to exempt any or all classes of personal property from taxation. No similar provision is made with regard to real property, though we note the definition of "personal property" used in this section includes some types of articles which in another context might be considered "real property."

We note that in arriving at its decision in *Westland v. Stalnecker*, 76 N.D. 294, 35 N.W.2d. 567, to the effect that a county believing it had taken lands by tax deed, and in the processes relating thereto attempted to cancel the taxes thereon, where the tax deed was held to be void did not succeed in canceling such taxes, our Supreme Court, at Page 295 of the North Dakota Report, states:

* * * That the Legislature did not intend the counties to cancel taxes upon lands owned by private individuals is a proposition that should need no demonstration. There must be some basis approved by the constitution (Section 176 North Dakota Constitution) for exempting property from taxation."

We note that this decision is cited as authority for the proposition that: (84 C.J.S. 426, TAXATION, Section 220.)

"IMPLIED RESTRICTIONS: Generally, where the grant of authority or power to exempt is defined and limited the legislature cannot enlarge or broaden the exemptions permitted, and the exemptions granted must be such only as are authorized by the constitution."

We note generally in this same regard the principles set forth in 84 C.J.S., Pages 418 to 427, Taxation, Sections 218-220, and in 51 Am. Jur., 506 to 510, Taxation, Sections 500-504, and current supplements thereto, that might well lead to the ultimate conclusion that the North Dakota Legislative Assembly under the provisions of the above quoted Section 176 of the North Dakota Constitution does not have authority to exempt land as opposed to personal property as defined therein from taxation.

In the context of the language used in Chapter 385 of the 1969 Session Laws, (Chapter 40-57.1 of the 1969 Supplement to the North Dakota Century Code), particularly when considered in light of the provisions of the preexisting Chapter 40-57 of the North Dakota Century Code, we would assume that the legislature did intend to exempt all that it could constitutionally exempt in this enactment. We do note a very interesting example of judicial construction of a somewhat similar statutory amendment in the light of a constitutional provision very positively prohibiting exempting any property within the state for taxation, except as otherwise provided in this constitution by the court of another state in *Nesbitt v. Ford*, (Okl. 1968), 434 P. 2d., 934, where the court examined an amendment of a statutory provision, which in language appeared to extend an exemption of agricultural land to industrial and commercial projects but limited it to instances where the city furnished municipal services such as were ordinarily furnished to city residents, and ultimately concluded that the only effect of the amendments was to add the modification "unless the city furnishes municipal services as ordinarily furnished to city residents" to the preexisting constitutionally valid exemption of the class of agricultural lands previously exempted. Assuming that the Supreme Court of this state did find that the Legislative Assembly of the state of North Dakota, by reason of the "implied restriction" of Section 176 of the North Dakota Constitution, could not constitutionally grant an exemption of lands as opposed to personal property, as defined in said Section

176, it seems quite probable that they would find said Chapter 40-57.1 of the 1969 Supplement to the North Dakota Century Code would necessarily authorize exemption of "fixtures, buildings and improvements of every character, whatsoever, upon land."

As to the second part of your first question, we might state generally that all tangible property used in or necessary to the operation of the project as set forth in Section 40-57.1-03 of the 1969 Supplement to the North Dakota Century Code, excepting only the land itself would be eligible for the tax exemption. In the language used in Section 176 it would appear that all fixtures and buildings would be classified as personal property and so exempted. Additionally, it seems possible that the word "improvements" could be construed as including things additional to fixtures and buildings. Thus, we note in WORDS AND PHRASES, Permanent Edition, Volume 20, Pages 498 through 537, such things considered to be improvements under varying statutes as canals, dams, clearing of land of brush, drainage, irrigation, embankments along canals, planting of vineyards, sewers, wells, levees, grading, paving, sprinkling of streets, etc.

We would assume that the application of Section 176 of the North Dakota Constitution to such improvements as these might well depend on surrounding facts in particular situations, as would the further question of whether they were tangible property within the meaning of Chapter 40-57.1 of the 1969 Supplement to the North Dakota Century Code. We do note in this context that the State Tax Department has taken the position that an improvement made by the special assessment method was considered such an improvement as could be exempted by legislative action by the State Tax Department of this state. (See Xerox copy of correspondence with regard thereto attached hereto.)

In conclusion on this first point of your letter, we might state that municipalities and industries providing for tax exemptions under said Chapter 40-57.1 might well consider the possibilities of a land exemption being subsequently declared unconstitutional in view of the provisions of Section 176 of the North Dakota Constitution, construe said Chapter 40-57.1 as not applying to land, and providing any land exemption under the provisions of Chapter 40-57 of the North Dakota Century Code, as amended to date.

Your second question relates to the first sentence of Section 40-57.1-03 of the 1969 Supplement to the North Dakota Century Code and the provision therein relating to an exemption from ad valorem taxation "for a period of five years from the date of commencement of project operations", which date shall be determined by the Tax Commissioner.

Your question is stated as: "What date is meant by 'the date of commencement of project operations.'" As further defined, your question appears to relate to whether such date is the date of construction of plant facilities or in the case of a manufacturing plant whether it is the date of commencement of manufacturing its products.

This question is not without difficulty. We do find the term "project operations" further defined in the Act. The term "project"

is defined in Section 40-57.1-02 with relation to the physical equipment of the industry. The parallel exemption granted under Section 40-57-17 of the North Dakota Century Code refers to commencement of the period of exemption from the granting of the leasehold and execution of any instrument evidencing such grant, which might well be after the municipality has completed the erection and equipping of the plant, and turns it over to the private operator for business operations.

Looking to Chapter 40-57.1 as a whole and its purposes, "date of commencement of project operations" would be the date the plant actually goes into its planned operations. To use the example you cite, if a manufacturing plant actually begins manufacturing of its products in December, 1970, that would be the date of commencement of project operations. The Act does not purport to authorize granting of tax exemptions for the time of construction of plants.

Your third question relates to Section 4 of Senate Bill No. 39, and Chapter 385 of the 1969 Session Laws, Section 40-57.1-04 of the 1969 Supplement to the North Dakota Century Code and Section 2 of Senate Bill No. 137, and Chapter 528 of the 1969 Session Laws, Section 57-38-66 of the 1969 Supplement to the North Dakota Century Code. You call our attention to the provision of said Section 40-57.1-04 that "the net income of any project granted an exemption from ad valorem taxation may be exempt from state income tax for a like period, * * *, and the new tax, a business and corporation privilege tax, at the rate of one per cent of the 'net income' of the business, trade, or profession, * * *" contained in Section 57-38-66 of the 1969 Supplement to the North Dakota Century Code, mentioning that this enactment is the personal property tax repeal and revenue replacement provision.

Your question is, in effect, whether the net income exemption from state income tax is provided for in said Section 40-57.1-04 exempts the business from the business or corporation privilege tax that is provided for in said Section 57-38-66.

We note the bill enacting said Section 40-57.1-04 was approved on March 21, 1969, and that said Section 57-38-66 was approved on March 29, 1969. Neither enactment was an emergency measure, thus both became effective on the first day of July, 1969. The tax provided in said Section 57-38-66 is denominated as a "business and corporation privilege tax" and is stated to be a "separate tax" that is levied in addition to the taxes provided in Chapter 57-38, that it utilizes some of the same bases as the federal income taxes in its computation, and structurally it does appear to operate on much the same basis as the basic state income tax, and adopts most of the administrative provisions relating to the state income tax law. We would assume that corporations subject to same would in practical effect treat it for most purposes as part of their regular state income tax.

Said Section 57-38-66 does not appear to actually provide for additional regulation of corporate business or privileges. While additional paperwork may be required to comply with this section, it does not actually provide for any new registration measures with regard to the corporations concerned therein. While conceivably

considering the title and purposes of said Section 57-38-66 it might be possible to suspend a corporation's privileges with regard to doing business and exercising corporate prerogatives, it would appear that the usual remedies for collection of state income tax are available for enforcement of this tax. On such basis and only for the purposes of said Chapter 40-57.1, it is our opinion that the tax imposed under said Section 57-38-66 is a state income tax. Considering the purposes of the two enactments as a whole it is our further opinion that the tax imposed under said Section 57-38-66 is a part of the state income tax for purposes of the exemption provided for in said Section 40-57.1-04 and to the extent therein limited to corporate entity may be exempted from the tax imposed by said Section 57-38-66.

Your fourth question relates to Section 40-57.1-02 of the 1969 Supplement to the North Dakota Century Code which, in effect, defines the term "project" as used in that chapter and to Subsection 25 of Section 57-02-08 of the 1969 Supplement to the North Dakota Century Code, which you state exempts practically all locally assessed personal property from assessment and taxation beginning in the year 1970. Your letter indicates further that "It appears 'project' as defined in said section 40-57.1-02 includes property which is personal property and for which an exemption from personal property taxes for five years can be granted under that statute." Your question is stated as whether this personal property would continue to be exempt after the five year period because of the provisions of said Subsection 25 of Section 57-02-08.

In reply to this question, personal property which is actually personal property would continue to be exempt from taxation pursuant to the provisions of said Subsection 25 of said Section 57-02-08. However, we might at this juncture note that certain items "deemed" to be "personal property" under the provisions of the second sentence of Section 176 of the North Dakota Constitution are not necessarily "personal property" within the usual meaning of that term or within the meaning of such terms as used generally in our taxing statutes. Thus, pursuant to said Section 176 and Sections 40-57.1-02 and 40-57.1-03, "fixtures, buildings and improvements of every character, whatsoever, upon land," are deemed personal property, and where a part of a "project", a personal property tax exemption may be granted for them for the five year period. Under our general laws, however, fixtures, buildings and improvements are in many instances real property rather than personal property. Once the five year period of exemption has expired, fixtures, buildings and improvements that are actually real property would no longer be entitled to be classed as personal property and thus exempt under Section 40-57.1-03, but would actually be considered as real property and thus subject to real property taxation. Property, of course, that was actually personal property rather than being real property deemed to be personal property would continue to be personal property and would be entitled to the personal property tax exemption provided by Subsection 25 of Section 57-02-08 of the 1969 Supplement to the North Dakota Century Code.

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