

November 22, 1971

TAXATION - MULTISTATE COMPACT - EFFECT

Mr. Byron L. Dorgan
Tax Commissioner

This is in response to your letter in which you state that as a result of the enactment of Chapter 57-59 (Multistate Tax Compact) the state of North Dakota has become a member of the Multistate Tax Commission. The requisite number of states (minimum of seven) as provided for in Article X of the Compact having enacted the same law, the provisions of the Multistate Tax Compact are now in full force and effect. In reality, twenty-two states have now enacted the same law.

Article VIII of the Compact provides for interstate audits if the party states have laws specifically providing for such audits. Section 57-59-08 of the North Dakota Century Code specifically puts Article VIII into operation and, as such, it is in full force and effect in the state of North Dakota.

You have informed us that when you use the term "taxpayer" in the questions, you mean a taxpayer as defined in Paragraph 3 of Article II of Section 57-59-01 of the Multistate Tax Compact. You also advise that when you use the term "multistate tax commission" you mean the executive director and the personnel appointed by him. In our responses, we will follow the same concept of such terms unless we have occasion to mention otherwise.

The questions are as follows:

- "1. Where an income tax audit of a taxpayer's records is conducted by North Dakota Tax Department auditors only, would the secrecy provision of section 57-38-57 be violate if I furnished to the Multistate Tax Commission information obtained from the audit?
- "2. Would the secrecy provision of Section 57-38-57 be violated if the North Dakota Tax Department and the Multistate Tax Commission together conducted an audit of a taxpayer's records?
- "3. If the Multistate Tax Commission furnishes to the appropriate tax official of another state that is a party to the Compact any information obtained from an audit of a taxpayer's records that is conducted as described in question 1 or question 2, would the furnishing of that information to the official of the other state constitute a violation of Section 57-38-57 if that other state --
 - a. Does not have an income tax law?

- b. Has an income tax law but does not have a statute authorizing the proper officer of that state to supply the North Dakota Tax Commissioner with information 'disclosed by the report of any investigation of the income, or return of income, of any taxpayer***' as is referred to in Subsection 3 of section 57-38-57?
 - c. Has an income tax law and also has a statute which, as provided in subsection 3 of section 57-38-57, authorizes the proper officer of that state to furnish to the North Dakota Tax Commissioner information obtained by it from an audit of a taxpayer's records?
- "4.
- a. If the Multistate Tax Commission at the request of various member states of the Compact, including North Dakota through me as Tax Commissioner, conducts an audit of the records of a particular taxpayer and furnishes the results of the audit to each state that requested the audit, would this constitute a violation by me of the provisions of Section 57-38-57?
 - b. Under the same facts as in part "a" of this question if I furnished to the Multistate Tax Commission a copy of a North Dakota income tax return filed by the taxpayer with this office, would I have violated the provisions of Section 57-38-57?
 - c. Under the same facts as in part "a" of this question if the Multistate Tax Commission, after completing the audit of the taxpayer's records, furnishes information obtained from the audit to another state, whether or not a member of the compact but which did not join in the request for audit, would the furnishing of the information to that state constitute a violation by me of the provision of section 57-38-57?
- "5. Is Chapter 57-59 NDCC, the Multistate Tax Compact, valid in view of that part of Section 10 of Article I of the United States Constitution which provides that no state shall, without the consent of Congress, enter into any agreement or compact with another state.

In this connection, your attention is called to McHenry County vs. Brady (1917), 37 N.D. 59, 163 N.W.540, and to a number of enclosures herewith, including a copy of the opinion of the Attorney General of the state of Washington issued in the spring of 1968 and a twenty pager paper entitled 'Joint Auditing and Exchange of

Information' recently prepared by the Multistate Tax Commission staff. This last mentioned enclosure will be of interest also in considering the preceding four questions.

- “6. If in your written opinion to me you advised that I would not be in violation of the provisions of Section 57-38-57 if I furnished information to the Multistate Tax Commission that was obtained from an income tax audit of a taxpayer's records but it is thereafter determined by the courts that I did not have authority to furnish such information, would your written opinion to me prevent the penalties provide for in Subsection 2 of Section 57-38-57 from being applied to me? In this connection, I refer you to such decision as the one in State ex rel. Johnson vs. Baker, 74 ND 244, 21 N.W.2d 355.”

The questions involved the provisions of several state statutes. Section 57-38-56 provides as follows:

“POWERS OF TAX COMMISSIONER.--The tax commissioner is charged with the administration of this chapter, and shall enforce the assessment, levy, and collection of taxes herein imposed. He shall have power to examine or cause to be examined by any agent or representative designated by him for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in any return or report under this chapter, and may require the attendance of the taxpayer or of any other person having knowledge in the premises, and may take testimony and require proof material for his information. He may prescribe all rules and regulations, not inconsistent with the provisions of this chapter, necessary and advisable for its detailed and efficient administration, and may enter into reciprocal agreements with the authorized tax officials of other states to assist in the enforcement of such chapter and to avoid injustice to taxpayers from double taxation.

Section 57-38-57 provides as follows:

SECURITY AS TO RETURNS - PENALTY.

The secrecy of returns must be guarded except as follows:

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 publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof, or 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. Reports and returns shall be preserved for three years and thereafter until the tax commissioner orders them to be destroyed.

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 the office and shall be incapable of holding any public office in this state for a period of five years thereafter.
3. The tax commissioner, however, may permit the commissioner of internal revenue of the United States or the proper officer of any state imposing an income tax similar to that imposed by this chapter, or the authorized representative of either such officer, to inspect the income tax returns of any taxpayer, or may furnish to such officer or his authorized representative an abstract of the return of income of any taxpayer, or supply him with information concerning any item contained in any return, or disclosed by the report of any investigation of the income, or return of income, of any taxpayer, but such permission shall be granted, or such information furnished, to such officers or representatives only if the statutes of the United States, or of such other state, as the case may be, granted substantially similar privilege to the proper officer of this state charged with the administration of this chapter.
4. The tax commissioner is hereby authorized to furnish to the workmen's compensation bureau or to the unemployment compensation division of the employment security bureau upon the request of either a list or lists of employers showing only the names, addresses and the tax department file identification numbers of such employers, provided that any such list shall be used by the bureau to which it is furnished only for the purpose of administering the duties of such bureau.

For purposes of brevity and clarity in the answers and discussion, whenever we use the term "director" we mean the executive director of the Multistate Tax Commission unless otherwise stated. Whenever we use the term "taxpayer" we are referring to a taxpayer as defined in Paragraph 3 of Article II of the Multistate Tax Compact unless it is otherwise stated.

Subsection 1 of section 57-38-57 prohibits divulging any information on an income tax return except as otherwise provided for by law or judicial order. The penalty for such violation is contained in Subsection 2 of the same section and includes a dismissal from office and prohibits such person from holding any public office in the state for a period of five years.

The "otherwise provided for by law" is found in Subsections 3 and 4 of Section 57-38-57. Subsection 3, on a reciprocal basis, permits a proper officer of any state imposing an income tax similar to that of this state to inspect income tax returns or in the alternative it permits the tax commissioner to furnish such officer or his authorized representative an abstract of the income tax return or provide him with information contained in the return. It also on a reciprocal basis permits him to disclose information received through his investigation of the income and tax return of taxpayers. These things may be accomplished only if the state or the United States, as the case may be, grants substantially the same privileges to officials of the tax department.

In this respect we must also consider "as otherwise provided for by law" Paragraph 6 of Article VIII of Section 57-59-01 of the Multistate Tax Compact, which provides as follows:

- "6. Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law."

This section in reality contemplates exchange of information or audits with those states on whose account the audit is performed. It contemplates that the commission performs the audit as an agent of the state. We are not aware of any law nor does Paragraph 6 contemplate otherwise that would prevent one or more states from designating the same person as its agent for purposes of conducting a tax audit.

With reference to the state of North Dakota the tax commissioner under the provisions of Section 57-38-56 (another "otherwise provided for by law") may enter into reciprocal agreements with the authorized tax officials of other states to assist in the enforcement of income tax laws and to avoid double taxation. This same section also authorizes the commissioner to designate agents or representatives to examine books and records for enforcing the common tax laws.

Under this provision of law, the tax commissioner may designate the director as his agent to conduct specific audits or examinations in the same manner as the tax commissioner could conduct such investigation, audit or examination of a taxpayer's return or business for purposes of enforcing the income tax laws.

A composite of the statutes referred to would indicate that each tax commissioner would have to specify to the director as his agent which taxpayer is to be audited and examined. It does not appear that the Multistate Tax Commission may on its own determine which taxpayers should be audited, examined or investigated and then make such information available to the members of the Multistate Tax Compact. The Multistate Tax Commission is only a vehicle which may be employed in this respect.

Under the Multistate Compact, the position of the director of the commission, as an agent, is that of a dual agency. As a dual agent, his authority or freedom of actions is curtailed to the extent that he must inform his principal before he may act. As a dual agent, his loyalty, objectives and purposes may be divided and as such would not necessarily be in harmony with his principal or principals. The difference in tax rates among the state could make one state more attractive than the other to the taxpayer. Similarly, the allocation of taxes could be a bone of contention. The director as a dual agent out of necessity and as a matter of law will require more specific direction or approval, as the case may be, from his principal or principals. Consent to dual transactions is required.

We are also mindful that responsibilities under law may not be abrogated through delegation. While the principal may delegate duties and hold the agent responsible to him, nevertheless, the principal is still ultimately held responsible. The legal concept of ratification has limited application to the dual agency relationship.

We must further observe that an agent is not comparable to an employee who performs his duties pursuant to specific direction of the employer even though it is through the echelons of management. Consequently, the same legal concepts do not apply to both agents and employees. We cannot view the Multistate Commission as a political entity such as another state or agency of the U. S. government. It is basically an organization to render mutual assistance.

Under North Dakota law, and under the concept of agency as discussed earlier, the director of the commission would only be permitted to operate and function with reference to audits and investigations of a taxpayer's return pursuant to directions received from the North Dakota Tax Commissioner. This actually contemplates a specific appointment as agent for each taxpayer to be audited and examined. The director on his own or his staff may make information available only to states or to the United States if they have reciprocal statutes making the same information available to this state. The director as an agent would be in the same position as the tax commissioner. However, where an agreement was entered into between states to audit a taxpayer's return, such information is available to the states entering into the agreement.

The director, as an agent of the state tax commissioner, is limited to the authority of his principal. Likewise, the tax commissioner is responsible for the authority delegated to the director as his agent. The net result of such relationship is that the exchange of information is permitted only where the laws of each state so permit on a reciprocal basis. If certain states have entered into an agreement as permitted by law to conduct a joint audit or examination of a certain taxpayer, then the director may exchange information with those states only and only on such taxpayer. Any other state or the United States would have to qualify under the reciprocal statutes. The director would not have authority to extend such agreement to other states. We also recognize a distinction between the Multistate Commission and its director. We do not envision the commission as an agency of this state.

Basically, the transaction is between states. Any state wishing to obtain or exchange information as permitted by the laws of such state would have to contact the state tax commissioner first. He may then enter into an agreement with and designate the director as his agent for such purposes.

The information accumulated by the director on taxpayers returns as an agent does not constitute an open repository library or reservoir to which states may go and obtain such information. Such information may only be obtained or exchanged in accordance with the reciprocal laws or where an agreement between the states was entered into to conduct audits, etc.

The answers to the questions must be tempered with the discussion above. The discussion constitutes the legal basis for the answers. Consequently, the language of the answers must be viewed in light of this discussion.

As to question number 1, the secrecy provision of Section 57-38-57 would be violated if you furnished to the Multistate Tax Commission (director) information obtained from an audit conducted by your office on a taxpayer, if no agreement has been entered into between you and the director of the Multistate Tax Commission establishing an agency relationship. The Multistate Tax Commission is not in the same position as the United States Government or another state. As to the United States Government or another state, a reciprocal law must exist granting substantially similar privileges to this state before information may be made available to them, whereas as to the director of the Multistate Tax Commission an actual agreement must exist establishing the relationship of agency.

As to question number 2, the secrecy provision of Section 57-38-57 would not be violated if you and the director of the Multistate Tax Commission, pursuant to an agreement establishing an agency relationship or pursuant to Paragraph 6 of Article VIII, conducted a joint audit of a taxpayer's records. However, if you in this instance mean the Multistate Tax Commission, as distinguished from the director of the Multistate Commission, such party

states would have to be a party to the joint audit, but otherwise the party states would not be entitled to this information unless the individual states have laws providing for reciprocal exchange of information on substantially the same basis that North Dakota permits the giving of the information.

As to question number 3, this question has been subdivided into questions a, b and c, each of which is premised on the basis of questions 1 or 2. To facilitate matters, we will designate our answers in the following manner.

3a1 will refer to question "a" as it relates to question 1; 3a2 will refer to question "a" as it relates to question number 2.

As to 3a1, it would constitute a violation unless the director of the Multistate Tax Commission has been designated your agent. However, if you mean the Multistate Tax Commission, as distinguished from the director, it would be a violation, because such state or members of the commission would not have a law granting substantially similar privileges to this state.

As to question number a2, no information can be given to the director of the Multistate Tax Commission without being in violation of law unless the director has been designated as your agent. If you refer to the Multistate Tax Commission as distinguished from the director, the answer to a1 would apply.

As to question b1, unless the director has been designated as your agent, you could not provide him with any information without being in violation of law (57-38-57). If however, you refer to the Multistate Tax Commission, we do not know of any law except the Multistate Tax Compact which governs the operation of the Multistate Tax Commission, and it does not contain the reciprocal privilege and as such no information could be given to the commission as such without being in violation of law. However, the individual states, if they meet the requirements of law by having the reciprocal provision, could be given information without violating the law.

As to b2, it would be a violation for the director to furnish such audit information to a state that does not have the required statutory reciprocal provision.

As to question c1, again if the director has been designated as your agent, you may give him tax information. If, however, you are referring to the Multistate Tax Commission, we again fail to see where the commission has a reciprocal statute or law which would put the reciprocal provisions into effect. Thus, the giving of information, unless the requirements of law are met, would constitute a violation.

If no agreement has been entered into between the tax commissioner and the Multistate Tax Commission, the Multistate Tax Commission is not in the same

position as the United States Government or another state. As to the United States Government or another state, a reciprocal law must exist granting substantially similar privileges to this state before information may be made available to them, whereas as to the Multistate Commission -an actual agreement must exist.

As to question c2, if the director is your agent, no violation would exist if he furnished such audit information to another state having the required reciprocal provision if there was an agreement existing between that state and North Dakota as to that taxpayer. If you are specifically referring to the Multistate Tax Commission, we again fail to find any reciprocal provision comparable to that found in Subsection 3 of Section 57-38-57 and thus any exchange with the member states of the Multistate Tax Commission would be in violation unless the individual states have the reciprocal provision, comparable to that found in Subsection 3 of Section 57-38-57. In this respect the individual states must be taken into consideration rather than the Multistate Tax Commission. However, if an agreement is reached to conduct a joint audit, under Article VIII of the Multistate Tax Compact, the very nature of the agreement to conduct an audit implies that the results of the audit can be given to the joint members individually.

If the other state or states have substantially the same statutory provisions as North Dakota, and if such states have in fact entered into a reciprocal agreement to obtain and exchange information and if such states have designated the director as their agent, in accordance with their laws, and if there are agreements existing between the states on a certain taxpayer, the information thus obtained could be exchanged without violating the law.

As to question 4a, if the various states on a reciprocal basis as permitted by the laws of the respective states and the state of North Dakota entered into an agreement to conduct an audit of a particular taxpayer, the result of such audit may be exchanged between the states which entered into the agreement without violating the provisions of Section 37-58-37.

As to question 4b, the literal language of Subsection 3 of Section 57-38-57, North Dakota Century Code, permits inspection of returns and permits the tax commissioner to furnish abstracts or supply information on certain items on a true reciprocal basis on tax returns filed with him. While it may be advisable to actually have a written reciprocal agreement, it is not necessary or required. The essential requirement is that the requesting state has a reciprocal statute granting substantially similar privileges to North Dakota as set out in Section 57-38-57(3). The purpose of this law is to permit the exchange of information needed. It would seem

that not all of the information on a return is needed to resolve a question. Some information would serve no useful purpose, while other information would be deemed vital to the question. The Legislature could as easily have used the language "furnish a copy of a return" as the language it did. We are constrained to ascribe any other than the normal and natural meaning to the terms and phrases used. In so doing, we cannot conclude that the tax commissioner may furnish copies of tax: returns for the mere asking. We conclude that under certain given situations where the entire return is needed to resolve a question, that at such time all of the information given on a return may be exchanged or made available to the party state having a need for such information. Thus, in direct response to your question, the furnishing of a copy of a taxpayer's return could be in violation of Section 57-38-57. The law authorizes and contemplates only the furnishing of needed information, which seems to preclude the furnishing of a copy of a return. However, inspection of return is permitted.

As to question number 4c, furnishing information as outlined therein would constitute a violation of Section 57-38-57. However, if the states in question qualify on a reciprocal basis, the information could be given without committing a violation. Merely being a member of the Multistate Tax Commission does not entitle or qualify a state to either give or receive tax return information of a taxpayer. Each state would be governed by its laws.

As to question number 5, the multistate compact and the reciprocal statutes of North Dakota set forth the conditions, the circumstances and the manner in which the state tax commissioner may cooperate with other tax collecting agencies of the United States and other states. By this agreement (compact) the state is not surrendering any of its sovereignty, nor is it impinging, encroaching or interfering with the sovereignty of the United States. Neither are the states committing themselves to an irrevocable action.

The tax commissioner may employ the mechanics set up, or he may decline to engage in such activity. The compact merely provides that if a state tax commissioner is to engage in a certain cooperative activity, he must follow the procedures outlined and must conform to certain standards. It grants authority to the state tax commissioner.

Such does not create a governmental agency which may exercise the sovereign powers of any of the member states. The exercise of any authority rests with the state tax commissioner. The Multistate Tax Commission (director) may not exercise any authority except on a limited basis as an agent of the principal the state tax commissioner.

Article I Section 10 Clause 3 of the United States Constitution provides as follows:

***No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (emphasis ours)

The terms "agreement" or "compact" are sufficiently broad enough to include all kinds and forms of stipulations written or verbal relating to any kind of subject. Standing alone, this language would include a compact or an agreement under discussion.

However, the North Dakota Supreme Court in McHenry County vs. Brady, 163 NW 540, 37 ND 59, held that not all compacts or agreements come within the provisions of Article I Section 10 Clause 3 of the United States Constitution. Here the court had under consideration a compact or an agreement involving a drainage system running between North Dakota and Canada. The court held that such agreement arising out of the drainage system was not violative of the United States Constitution and did not require the consent of Congress. In disposing of the question, the North Dakota Supreme Court relied heavily upon the decision of the United States Supreme Court in the case of State of Virginia vs. the State of Tennessee, 148 US 503, 37 L.Ed. 537, and other related cases. It also quoted from 36 CYC 838 as follows:

"This provision, however, does not apply to every possible agreement or compact between two states, but only to such as might tend to increase the political power of the states affected, and thus encroach upon or interfere with the supremacy of the United States; agreements which can in no respect concern the United States may be made by the states without the consent of Congress.**"

The Courts in both the United States case and in the North Dakota case observed that the language in Clause 3 of Section 10 of Article I of the United States Constitution must be read in conjunction with Clause 1 and 2 of same section. The courts further observed that by so doing, not every agreement or compact comes within the prohibited provision. The courts observed that the types of agreements or compacts under the (noscitur a sociis) rule of interpretation applied "to treaties of a political character; such as treaties of alliance for the purpose of peace and war; and treaties of confederation in which the parties are leagued for mutual government, political cooperation and the exercise of political sovereignty, and treaties of cession of sovereignty or conferring internal political jurisdiction or external political dependenee, or general commercial privileges."

The Supreme Court of Kentucky in the case of Dixie Wholesale Grocery vs. Martin, 129 SW 2d, 181, had under consideration the question whether or not a reciprocal exchange of information on the exports of cigarettes for tax purposes came within the prohibition of Clause 3 Section 10 Article 1 of the United States Constitution. It held that it did not. Certiorari by the United States Supreme Court was denied on this case.

The compact and the North Dakota statutes are only a mere extension of the same philosophy and legal concept.

In direct response to the question, the multistate compact and the reciprocal statutes of North Dakota are not violative of Article I Section 10 Clause 3 of the United States Constitution.

As to question number 6, the decision of the North Dakota Supreme Court in State ex rel. Johnson vs. Baker, 21 NW 2d 355, 74 ND 244, in effect held that if a state officer asks for an opinion and receives same from the attorney general and acts in accordance with the opinion, he will have acted in accordance with law, but if he disregards the opinion, such officer acts on his own peril. This rule of law pertained to a civil question and obviously referred to civil liability. We believe the same rule of law would apply to criminal statutes pertaining to matters which are not malum in se, but are malum prohibitum. To apply the same concept in a criminal matter, the opinion would necessarily have to be on a law which is subject to interpretation or construction. We would, of course, assume that the opinion of the attorney general would not be idiotic or without any foundation. We do not believe that we can state that an attorney general's opinion, regardless of its value, will at all times constitute a shield from criminal prosecution for the violation of law. By way of illustration, assuming an attorney general were to say that a state official may dispose of all persons with red hair and in so doing would not be guilty of any crime, such opinion would be ridiculous on the surface and, of course, would afford no protection to the individual following such opinion.

The laws in question and under consideration in the instant matter are subject to interpretation by taking into account other laws relating to the same subject matter.

Therefore, in direct response to your question, if you were to follow the legal concepts outlined in this opinion, you would not be guilty of having violated the provisions of Section 57-38-57 and if a court were subsequently to determine that authority to furnish such information did not exist, you would still not be subject to the penalties provided for by such law. However, any information furnished after such decision by the court would subject you to the full penalties of the law in question.

We have used a cautious approach in answering the questions. Not having the benefit of any previous judicial determination or discussion on the issues involved and recognizing some of the complications that may arise, particularly in the disclosure of confidential information, we deemed it advisable to use a cautious approach in our answers. With the development of greater expertise resulting in possible modifications of both the multistate compact and state law, any undue hardship that may result from the current construction could be remedied. We also recognize the difficulty of adequately disposing of every question in an abstract manner.