

**OPINION
71-434**

July 22, 1971 (OPINION)

Mr. Ralph Dewing

Director

Department of Accounts and Purchases

RE: Taxation - Refunds - Business Privilege Tax

This is in response to your letter in which you state as follows:

"The 1971 session of the Legislature created a reserve for income tax refunds by Chapter 563 of the Session Laws.

"All refunds for overpayment of income taxes are to be paid from this reserve and the question has been raised whether business privilege tax refunds can also be paid from this special fund.

"The State Tax Commissioner has informed me that he has several refunds to make at this time. Therefore, an early opinion in reply to this request will be appreciated."

Chapter 563 of the 1971 Legislative Assembly created Section 57-38-40.1 and is as follows:

"INCOME TAX REFUND RESERVE. A reserve for income tax refunds is hereby created as a special fund in the state treasury. The state tax commissioner shall deposit in such fund such amounts from income tax collections as he may deem necessary to pay refunds to which taxpayers may be entitled under the provisions of this chapter and appropriated pursuant to section 186 of the Constitution of North Dakota."

The Business Privilege Tax came into being by Chapter 528 of the 1969 Session Laws. It was codified by the Legislative Council staff and assigned section number 57-38-66 in the North Dakota Century Code and was not assigned such section number by the Legislature.

Subsection 4 of Section 57-38-66 provides as follows:

4. For the purposes of administering the provisions of this section, the provisions of Chapter 57-38, pertaining to the administration of the income tax law, not in conflict with the provisions of this section and including but not limited to the provisions relating to the filing of returns, the withholding of income taxes, the payment of income taxes and interest and penalties thereon, refunds, attachment of liens for failure to pay such taxes, and civil and criminal penalties for failure to comply with the provisions of that chapter, shall govern the administration of taxes levied in this section."

It is noted that this subsection refers to refunds and in substance provides that the administration, including the refund provision, be made in the same manner as the income tax refunds are made. It also provides that the administration of the Business Privilege Tax be conducted under the same provisions which apply to the administration of the income tax.

We have examined the committee reports and the Legislative Council staff study on House Bill 1049, by which Section 57-38-40.1 was enacted. Such reports do not reveal what specifically was intended to be covered by the reserve fund for income tax refunds.

It is noted that the act in question makes specific reference to Section 186 of the North Dakota Constitution. As is material here, Section 186 of the North Dakota Constitution provides as follows:

" * * * provided, however, that there is hereby appropriated the necessary funds * * * required for refunds made under the provisions of the Retail Sales Tax Act, and the State Income Tax Law * * *."

We believe the term "income tax law" was used in a descriptive rather than a specific sense. It describes the type of tax rather than the specific tax. While the Business Privilege Tax has many characteristics of the income tax and can be generally classified as a form of income tax, it is not the same as an income tax for all purposes. It does, however, fall in the general classification of an income tax. The mere nomenclature is not what governs, but rather the type of tax itself. We might borrow and paraphrase Shakespeare as follows:

"rose by any other name smelleth the same."

The Business Privilege Tax and the income tax have many things in common. The major difference is that the Business Privilege Tax has a floor, a minimum tax, whereas the income tax does not.

We would further note for purposes of comparison that Section 186 of the North Dakota Constitution provides for refund under the Sales Tax Act. Under Section 57-39.2-25 sales tax refunds are authorized. Under Chapter 57-40.2, a use tax has been established. Under Section 57-40.2-13, use taxes are to be refunded under the same provisions as the sales tax by the following language:

"PROVISIONS OF SALES TAX LAW APPLICABLE. The provisions of Chapter 57-39.2, pertaining to the administration of the retail sales tax, including provisions for refund or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter."

We do not believe that anyone has seriously questioned that refunds under the Use Tax Act cannot be made as provided for in Chapter 57-39.2 under the provisions governing the refund of the sales tax.

The use tax and sales tax have many things in common and in many respects it is a tax based upon the sale price of an article and as

such, it is a sales tax even though it is technically imposed for the use of the article. The amount of the tax is based on the sale price of the item. In this respect, we have the two names for identification purposes, the sales tax and use tax, with many similar or same provisions.

Administratively, the refunds have been made without questioning whether or not the constitutional provisions relating to the Sales Tax Act had application to the Use Tax Act.

It is our understanding that refunds under the Business Privilege Tax have been made the same as income tax refunds prior to the enactment of Section 57-38-40.1.

When the Legislature enacted Section 57-38-40.1, it must be presumed that it was aware that Section 2 of Chapter 528 of the 1969 Session Laws was assigned section number 57-38-66 in the North Dakota Century Code by the codifier. At least it leaves an implication that the Legislature was aware of this and that it should be governed by the enactment of Chapter 563 of the 1971 Legislative Assembly which created Section 57-38-40.1.

It is therefore our opinion that the reserve fund for income tax refunds as created by Chapter 563 of the 1971 Session Laws (Section 57-38-40.1) is available for making refunds under the Business Privilege Tax Act. By arriving at this conclusion, we are not stating that the Business Privilege Tax and the income tax are identical or are the same. We are concluding that the Business Privilege Tax has sufficient characteristics of an income tax to be designated as such so as to come within the provisions of Section 57-38-40.1.

HELGI JOHANNESON

Attorney General