

**OPINION
73-523**

January 22, 1973 (OPINION)

The Honorable Wayne G. Sanstead
Lieutenant Governor
State Capitol
Bismarck, ND 58501

Dear Lieutenant Governor Sanstead:

This is in response to your letter of January 17, 1973, wherein you ask for my opinion on the question of whether the tax that is provided for in Senate Bill No. 2096 which has been introduced in the 1973 Legislature would be constitutional if the bill is enacted into law. You are particularly concerned with charges that the tax would be an unconstitutional restoration of the tax on personal property that was repealed by the 1969 Legislature. You submit the following facts and inquiry in your letter:

"Senator Frank Wenstrom, one of the sponsors of Senate Bill 2096 which provides for the creation of a statewide educational television broadcasting system for North Dakota, has visited with me about the bill and requested that I seek an attorney general's opinion to clarify the method of financing outlined in the bill. Senate Bill 2096 gives authority to the North Dakota Educational Broadcasting Council to form a nonprofit corporation. This corporation is permitted to own, lease and operate such educational broadcasting facilities as may become necessary or desirable. The issuance of bonds for construction and operation is permitted by the bill. An annual tax is levied on persons residing within the service area of an educational broadcasting station, with certain exemptions provided which generally serve to make the tax applicable only to one person in each household who owns or uses a television set and who files a North Dakota income tax return. Certain penalties are provided in the event the taxpayer fails to file a return or to pay the tax.

"This bill has received considerable attention in the press in the past few days, and it is the result of some of the comments that have been voiced that causes Senator Wenstrom to seek this opinion. Recently a prominent Bismarck businessman issued a news release stating that Senate Bill 2096 is an attempt to reenact a tax based on personal property and was, in his words, an 'unconstitutional' tax. In this context, you are referred to page 1 of the December 28, 1972, issue of the Bismarck Tribune, a copy of which is enclosed for your information.

"Members of the Educational Broadcasting Council and several of the sponsors of the bill are concerned about these charges and feel that the question of constitutionality as to the tax imposed by the bill should be cleared up before this bill is heard before the Senate Education Committee, to which it has been assigned. Consequently, I am hereby requesting that you give me your opinion accordingly. Your determination will

greatly facilitate the handling of this bill by the Legislative Assembly. An early response to this inquiry will be deeply appreciated."

For the reasons hereinafter set forth, it is my opinion that the tax that is provided for in Senate Bill 2096 would not be an unconstitutional tax if that bill is enacted into law. Such tax would not violate either the equal protection clause of the Fourteenth Amendment to the United States Constitution or the requirements of Section 175 of the North Dakota Constitution. The equal protection clause will be considered first.

Senate Bill 2096 would amend Chapter 15-65 of the North Dakota Century Code relating to the North Dakota Educational Broadcasting Council established by the 1969 Legislature. It would add several new provisions to that chapter and would repeal Section 15-65-04 which provides as follows:

"15-65-04. PROHIBITIONS. Nothing in this chapter shall imply or express the intent of the council to license or operate educational broadcasting stations, nor to request the appropriation of state funds for the council's operation of such stations."

The bill would vest the Educational Broadcasting Council with additional powers and duties by adding subsections 10, 11, 12, and 13 to Section 15-65-03, which subsections would authorize the Council to own, lease, and operate educational broadcasting facilities; to form a nonprofit corporation for the purpose of operating educational broadcasting facilities; to borrow money and issue bonds; and to accept and expend federal and state moneys and any other moneys, public or private, made available to it.

The bill by creating and enacting Sections 15-65-05, 15-65-06, 15-65-07 and 15-65-08 would provide for an annual tax of \$5.00 levied upon certain designated persons who reside or are located within and who own or use one or more television sets within a service area to which educational broadcasting service is furnished. The tax would be due and payable with the state income tax return of any such person required to file a state income tax return. The tax would be administered by the Tax Commissioner and proceeds of the tax would be deposited in a special fund and used by the Educational Broadcasting Council "for the purpose of liquidating bonds sold by the council, to cover the financing of the purchase, construction, leasing, operation, and interconnection of North Dakota educational broadcasting stations, and for such other purposes as set forth in this chapter". (Lines 12-16 on page 5 of the bill).

The provisions for levying the tax are set out in section 2 of the bill, which section would create and enact Section 15-65-05 to read as follows: (from page 3 of the bill)

"15-65-05. TAX LEVIED. An annual tax is hereby levied upon each person, as defined in chapter 57-38, residing or located (from page 4 of the bill) within the service area of a North Dakota educational broadcasting station who owns or uses or has owned or used one or more television sets for all or any

portion of a taxable year, and who is required to file a North Dakota state income tax return. Each such person is hereby assessed and shall pay annually for such ownership or use to the state of North Dakota the sum of five dollars in the manner prescribed, unless exempted therefrom by this chapter. The tax shall not be levied upon the spouse or dependent of a person who has paid the tax, regardless of whether joint or separate state income tax returns are filed. The tax shall be levied annually upon a person only when educational broadcasting service is furnished for at least a part of the year to the service area in which such person resides or is located. The question of whether a person is within a service area and liable for payment of the tax shall be determined by rules and regulations promulgated by the state tax commissioner. Such rules and regulations shall be established by the state tax commissioner by reference to the 100-200 microvolt service contours as defined by the Federal Communications Commission. The tax shall be payable each year with the North Dakota state income tax return as provided in chapter 57-38 of this Code, and shall be due and payable regardless of whether income tax is due and payable by the person filing the return."

In *Souris River Mutual Telephone Aid Corporation v. State of North Dakota* 1962 N.W.2d. 685 (1968), our State Supreme Court, in discussing the power of the legislature to tax said that the particular method of taxation is:

". . .one of legislative discretion to classify subjects, including property and persons, for tax purposes. This legislative authority is subject only to the limitation precluding arbitrary classification as prohibited by the Fourteenth Amendment of the United States Constitution." (Page 688, last paragraph.)

This constitutional test of whether the tax imposed by section 2 of Senate Bill No. 2096 is therefore whether the tax classification established by that section is so arbitrary or invidiously discriminatory as to be prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution or whether the classification, even though discriminatory, is a reasonable classification and therefore not prohibited by the equal protection clause (162 N.W.2d. at 689).

The annual tax of \$5.00 provided for in Senate Bill No. 2096 is, by the express provisions of section 2, a tax on persons and is not a tax on personal property (television sets). This is further evident from the fact that a person who uses but does not own a television set would be subject to the tax if the other conditions for liability for the tax are present as to that person; also, a person who is subject to the tax is liable for only one annual tax of \$5.00 regardless of the number of television sets owned by the person.

The class of persons that would be subject to the tax is described in section 2 of the bill as:

". . .each person, as defined in chapter 57-38, residing or located within the service area of a North Dakota educational

broadcasting station who owns or uses or has owned or used one or more television sets for all or any portion of a taxable year, and who is required to file a North Dakota state income tax return." (Lines 34 and 35 on page 3 and lines 1-5 on page 4 of the bill.)

but

". . . only when educational broadcasting service is furnished for at least a part of the year to the service area in which such person resides or is located." (Lines 11-14 on page 4 of the bill.)

except that

"The tax shall not be levied upon the spouse or dependent of a person who has paid the tax, regardless of whether joint or separate state income tax returns are filed." (Lines 8-10 on page 4 of the bill.)

Persons who would be subject to this annual \$5.00 tax would include not only individuals but also estates, trusts and corporations who are required to file a state income tax return. This is because section 2 of the bill levies the tax upon "each person, as defined in chapter 57-38, . . . who is required to file a North Dakota state income tax return." Section 57-38-01(1) defines "persons" as including individuals, fiduciaries, partnerships and corporations but, of these persons, only individuals, estates, trusts and corporations are required to file state income tax returns (see Sections 57-38-31 and 57-38-32). Partnerships are not required under Chapter 57-38 to file an income tax return but are required by Section 57-38-42(2) to file an information return.

The class of persons on whom the tax would be levied by section 2 of Senate Bill 2096 is therefore a clearly defined class. The question then is whether this is a reasonable classification of persons, and thus constitutional, or an arbitrary classification, and thus unconstitutional. In the Souris River Telephone Mutual Aid Corporation case, quoted from above, the Court said:

"For an excellent discussion of the rules governing the reasonableness of classification for taxation purposes, see 1 Cooley, Taxation (4th Ed.) Section 334-337. Succinctly stated, any classification must be reasonable and the subjects can be segregated into classes only by different treatment with reference to taxation. A basis for classification must be such as naturally inheres in the subject matter. 5 Am. Jur., Taxation Section 175, 177, p. 234-238. State v. Gamble Skogmo, Incorporated, 144 N.W.2d. 749 (N.D. 1966)." 162 N.W.2d. at 689.

Following the quotation from the Souris case, the Court quoted paragraph 3 of its Syllabus in the Gamble Skogmo case as follows:

"3. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The discussion in *Cooley, Taxation*, to which the Court referred in the *Souris* case includes among its summary of rules to be considered in determining the reasonableness of classification the following: There must be a reason for the classification as distinguished from mere accident, whim, caprice or vindictiveness; a discrimination is not arbitrary where based on sound reasons of public policy; the reasonableness of the classification cannot be determined by any fixed rule; in taxation there is a broader power of classification than in some other exercises of legislation; and, a classification having some reasonable basis is not invalid merely because it is not made with mathematical nicety nor because in practice it results in some inequality.

Measuring the tax provisions of Senate Bill No. 2096 against these various rules governing reasonableness of classification it is clear that:

1. The reason for the classification of the persons that would be taxed is to levy a tax on those persons who own or use a television set that is within the service area of a North Dakota educational broadcasting station and who therefore have access to the broadcasts of such a station so as to be able to receive the benefit of those broadcasts.
2. The purpose of the tax is to provide funds for "liquidating bonds sold by the council, to cover the financing of the purchase, construction, leasing, operation, and interconnection of North Dakota educational broadcasting stations, and for such other purposes as set forth in this chapter." (Lines 12-16 on page 5 of Senate Bill No. 2096.)
3. The purpose of the tax is in furtherance of the purpose or public policy of the legislature that it expressed in Section 15-65-01 when it created the North Dakota educational broadcasting council in 1969 "for the purpose of encouraging and directing the creation of educational radio and television facilities within the state of North Dakota."
4. While not every person who owns or uses a television set in the service area of an educational broadcasting station would be taxed, the tax would be levied on every person who resides or is located in the service area of a North Dakota educational broadcasting station who is required to file a North Dakota state income tax return and who owns or uses one or more television sets during all or part of the taxable year, except that in the case of individuals such a person would not be taxed if he or she was the spouse or dependent of another individual who had paid the tax.

Considering the class of persons described who would be subject to the tax, the purpose of the tax, the administration of it with the income tax law, and, as to individuals, the levying of only one tax with respect to the persons in what might be regarded as one household (except where that household includes an individual who is required to file an income tax return but who is not a spouse or dependent of someone in the household who also is required to and

does pay the tax), the class of persons who would be taxed appears to be a natural and reasonable classification and not one that is purely arbitrary or lacking in common sense.

It is therefore my opinion that the classification of persons who would be taxed under Senate Bill No. 2096 is a reasonable classification and is not one that would be prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution or by any provision of the North Dakota Constitution.

Section 175 of the North Dakota Constitution also establishes requirements for tax laws. It provides that:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

It is necessary first to determine whether this tax if enacted into law would be levied pursuant to law within the meaning of that requirement in Section 175 or whether it confers powers that constitute a delegation of legislative power that is contrary to Section 175. In this regard, that provision of section 2 of Senate Bill No. 2096 which provides for determining the service area of an educational broadcasting station will be examined. That provision reads as follows:

"The question of whether a person is within a service area and liable for payment of the tax shall be determined by rules and regulations promulgated by the state tax commissioner. Such rules and regulations shall be established by the state tax commissioner by reference to the 100-200 microvolt service contours as defined by the Federal Communications Commission."
(Lines 14-19 on page 4 of the bill.)

In *Ralston Purina Company v. Hagemeister* 188 N.W.2d. 405, 411, the Court said in paragraph 2 of its Syllabus:

"While purely legislative powers cannot be delegated, the Legislature may authorize others to do certain things and to exercise certain powers which are not exclusively legislative and which the Legislature itself might do but cannot because of the detailed nature of the things to be done."

The question here is whether the provision in section 2 of the bill requiring the Tax Commissioner to determine by rules and regulations whether a person is in the service area (and thus subject to the tax) is an unconstitutional delegation of purely legislative power, or whether it validly authorizes the Tax Commissioner to ascertain facts from which it can be determined whether a person is in the service area and therefore subject to the tax.

It is my opinion that the authority in the Tax Commissioner to make rules and regulations from which it can be determined if a person is in the service area would be a valid authority, particularly since the bill requires that those rules and regulations be established by reference to the 100-200 microvolt service contours as defined by the Federal Communications Commission. This provision of the bill sets

forth reasonably clear guidelines for the Tax Commissioner and therefore it does not violate Section 175. See Ralston Purina Company supra, page 410.

Section 175 of the North Dakota Constitution also provides "that every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Section 3 of the bill would create and enact Section 15-65-07 relating to use of the proceeds of the tax and would require that those proceeds be deposited in a special fund in the state treasury for use "for the purpose of liquidating bonds sold by the council, to cover the financing of the purchase, construction, leasing, operation, and interconnection of North Dakota educational broadcasting stations, and for such other purposes as set forth in this chapter." (Lines 12-16 on page 5 of the bill.) This provision distinctly states the object of the tax and therefore the requirement in Section 175 of the Constitution is satisfied. Boeing Company v. State of North Dakota 169 N.W.2d. 696 at 710, 712; and City of Bismarck v. Kleinschmidt 145 N.W.2d. 333.

Accordingly, it is my opinion that the tax provisions of Senate Bill No. 2096 would not, if enacted into law, be in conflict with any constitutional provision and therefore would be a valid and constitutional levy of the tax involved. This opinion is limited to the extent that it reflects current case law on the subject.

Sincerely yours,

ALLEN I. OLSON

Attorney General