OPINION
76-181

February 24, 1976 (OPINION)

Mr. Fred A. McKennett
City Attorney
P.O. Box 1306
Williston, ND 58801

Dear Mr. McKennett:

This is in reply to your letter of January 21, 1976, in which you requested my opinion on the question of what constitutes a "project" within the meaning of Section 40-57.1-02, N.D.C.C., insofar as a motel and the ancillary businesses connected with it such as a bar, lounge, restaurant and specialty shops are concerned.

You enclosed with your letter another letter you received from an attorney representing a client who is in the process of planning construction of a new motel in Williston consisting of approximately 100 rooms, plus several small specialty shops, a restaurant, a bar and lounge, all of which will be housed under the same roof and have the same owners. Apparently you are both agreed that the room rental portion of the motel complex would not qualify as a "new industry" for tax exemption purposes under Chapter 40-57.1 N.D.C.C., but your question is whether, under Section 40-57.1-02 of that chapter, the ancillary businesses connected with the motel such as the bar, lounge, restaurant and specialty shops are within the definition of "project" as used in that section so as to qualify for the exemption.

The opinion of August 4, 1975 from this office to you discussed the 1973 amendment to Section 40-57.1-02 which removed subsection 3 from the definition of "project" in that section. The following paragraph is quoted from that opinion:

> "The notes of the committee clerk for the 1973 House Finance and Taxation Committee which heard the bill (Senate Bill No. 2380) amending Section 40-57.1-02 indicates that the elimination of subsection 3 would make such businesses as 'motels, nursing homes, steak houses, etc.,' ineligible for the 'new industry' exemption. In other words, it appears that the purpose of the amendment was to make ineligible for the exemption a class of businesses that might be termed 'service' businesses, as distinguished from the other classes of businesses described in subsections 1 and 2."

While the preceding quotation from our prior opinion is not a direct holding that motels, nursing homes, steak houses, etc., are "service" businesses as distinguished from the other classes of businesses described in subsections 1 and 2 of Section 40-57.1-02 and therefore not eligible for exemption provided in Chapter 40-57.1 N.D.C.C., it is the opinion of this office that a motel is a "service" business and is not eligible for the tax exemptions provided in Chapter 40-57.1. It is also the opinion of this office that a restaurant is a "service" business and is not eligible for the exemptions. In point here is the following statement in Consolidated Timber Co. v.

Womack, 132 F. 2d. 101 at 106:

> "We think it quite generally understood by both lawyer and layman that an ordinary restaurant or eating place 'renders a service' rather than 'makes a sale' and that a restaurant is a 'service' rather than a 'retail' establishment."

To the same effect, see Central Power and Light Co. v. State, 165 S.W.2d. 920 at 925 (Texas), and Goff Co. v. First State Bank, 298 S.W. 884 at 885 (Ark.). It is further our opinion that the business of operating either a bar or a lounge or both is a "service" business and therefore not eligible for the exemption in Chapter 40-57.1 since they render services in the same sense that a restaurant does.

As to specialty shops housed in the motel building, we assume that various types of merchandise, rather than service, would be sold in these shops and that this merchandise would constitute products of manufacturing within the meaning of subsection 2 of Section 40-57.1-02. In such a case, it is our opinion that the part of the motel building that would be occupied by such a shop or shops could be regarded as a "project" within the meaning of Section 40-57.1-02 as to be eligible for the tax exemptions provided in Chapter 40-57.1; but the far greater part of the motel building which would be used for operating the motel, bar, lounge and restaurant businesses would not be part of the project property and would not be eligible for the exemptions. As was stated in the August 4, 1975 opinion to you, whether or not the city commission or the State Board of Equalization should or should not approve the tax exemption for any particular eligible enterprise is, of course, a matter for them to determine after taking into account the other provisions of Chapter 40-57.1, including its intent and purpose that are set out in Section 40-57.1-01.

Sincerely,

ALLEN I. OLSON

Attorney General