OPINION
76-191

September 24, 1976 (OPINION)

Mr. Byron L. Dorgan

North Dakota State Tax Commissioner

State Capitol

Bismarck, North Dakota 58501

Dear Mr. Dorgan:

This is in response to your letter of September 10, 1976, wherein you request an official opinion of this office relative to Section 54-03-20 of the North Dakota Century Code, as amended. You submit the following facts and considerations together with your inquiry:

> "This is a request for an Attorney General's opinion.
>
> A question has arisen as to the treatment for state income tax purposes of the allowance for living and other expenses of members of the Legislative Assembly provided for in Section 54-03-20 N.D.C.C.
>
> In 1959 (S.L. 1959, Ch. 368) Section 54-03-20 N.D.C.C. was amended so as to provide for the first time:
>
> > 'Attendance at the biennial session of the legislative assembly by any member thereof shall be a conclusive presumption of the expenditures of such expense allowance for the purposes set forth in this section and shall be excluded from gross income for income tax purposes.'
>
> When filing federal income tax returns, a legislator-taxpayer is required to include the allowance for living and other expenses which he receives pursuant to the provisions of Section 54-03-20 in federal gross income, and then permitted to deduct therefrom the actual expenses incurred in arriving at federal taxable income. Therefore, federal taxable income, in effect, includes only the excess, if any, of the amount received as allowance for living and other expenses over the actual expenses incurred.
>
> It is this federal taxable income figure that then becomes the starting point for the computation of North Dakota state income tax (Section 57-38-01.1 N.D.C.C.). It is the Tax Department's position that the legislator-taxpayer may make an adjustment to federal taxable income by subtracting therefrom the excess of the amount received as allowance for living and other expenses over and above the actual expenses incurred, as reported and included in federal taxable income.
>
> It should be noted here that in situations where expenses incurred exceed the allowance for living and other expenses, a

deduction of those excess deductions is permitted under certain circumstances for both federal and state income tax purposes.

The Tax Department's position was first prescribed in 1959 and has been followed and advocated by succeeding Tax Commissioners. Subsequent legislative sessions have not given any indication that the Tax Department's position did not correctly interpret the spirit of the statute and its legislative intent.

Notwithstanding this long-standing interpretation and procedure, it is the contention of a legislator-taxpayer, through his tax consultant, that Section 54-03-20 should be interpreted so as to provide an adjustment to federal taxable income, permitting to be deducted therefrom the total amount of the allowance for living and other expenses received and included in federal gross income. No offsetting adjustments to add back to income the expenses already deducted in arriving at federal taxable income would be made by the legislator-taxpayer, the argument being that the legislator should be permitted to deduct the expenses incurred as well as being permitted to exclude the allowance received from income for state income tax purposes.

It is the Tax Department's position and contention that such an interpretation and procedure would, in effect, grant the legislator-taxpayer a double deduction. One for the expenses he incurred, and a second when the allowance is subtracted from federal taxable income.

A few days ago a member from the Tax Department's legal division and a member of its income tax division discussed this same question with a member of your staff. Indications by the tax consultant involved were that he would follow the results of such a conference. Nevertheless, it is apparently the desire of the legislator-taxpayer that a formal Attorney General's opinion be requested.

Therefore this request. Is the Tax Department's position and contention, first prescribed in 1959 and followed consistently ever since, the correct interpretation and application of Section 54-03-20 (when considered with the provisions of Chapter 57-38 N.D.C.C. before the 1959 federalizing, the 1959 federalizing and the 1967 federalizing) to the effect that a legislator-taxpayer is permitted to exclude from income for North Dakota income tax purposes an amount equal to the allowance for living and other expenses received, the mechanics of preparing an income tax return showing this as being the total of the actual expenses incurred plus the excess of the allowance for living and other expenses over actual expenses incurred. Or is it the legislator-taxpayer's contention that is correct, that the exclusion for North Dakota income tax purposes should be an amount equal to the total amount received as an allowance for living and other expenses, plus, and in addition to, a deduction of the actual expenses incurred during the legislative session; this latter interpretation, in effect, permitting the legislator-taxpayer to receive the benefit of a

double deduction?

In addition, it is my understanding that generally speaking, considerable weight is given to administrative interpretations when the construction of a particular statute is at issue and ambiguities exist. Some cases in point are State v. Equitable Life Assurance Society, 282 N.W. 411 (1938), In re Black, 23 N.W.2d. (1946) and State Tax Commissioner v. Tuchscherer, 130 N.W.2d. (1964)."

We are of the opinion that the interpretation and contention of the State Tax Department is correct. We fail to recognize any concept which would allow a legislator-taxpayer a double deduction such as would result should we adopt the interpretation and contentions of the individual submitting the inquiry to your department. The statute grants a presumption that the entire amounts payable for expenditures, whether actually incurred or not, are to be excluded from gross income for income tax purposes. To go beyond this can only result in effecting a double deduction since the same is based upon income which is excluded from gross income on the basis of expenditures related to expenses incurred by reason of attendance at the biennial session of the legislative assembly. We also concur with the determination of the State Tax Department as to the treatment given such payments as far as reporting on both federal and state returns is concerned.

We trust the foregoing observations and statements will adequately set forth the opinion of this office upon the matters submitted.

Sincerely,

ALLEN I. OLSON

Attorney General