OPINION
78-86

December 20, 1978 (OPINION)

Mr. Byron L. Dorgan
Tax Commissioner
State Capitol
Bismarck, ND 58505

Mr. Walter Christensen
State Treasurer
State Capitol
Bismarck, ND 58505

Gentlemen:

This is in response to your letter of November 30, 1978, to me in which you requested my opinion in answer to several questions you asked that relate to Initiated Measure No. 1 which was approved by the people at the November 7, 1978, general election. As you indicated, that initiated measure provides for revenue sharing by the state to counties, cities, city park districts, and townships.

You indicate that most of your questions relate to Section 2 of the initiated measure, which section is as follows:

> "SECTION 2. STATE REVENUE SHARING FUND. Commencing July 1, 1979, and on July 1 of each successive year, there is hereby created in the office of the state treasurer a state revenue sharing fund which shall be administered by the state treasurer. An amount equal to five percent of the net proceeds of the state income taxes for the year prior to the current fiscal year and five percent of the net proceeds of the state sales and use tax for the year prior to the current fiscal year shall be paid over by the state tax commissioner to the state treasurer who shall credit the same to the fund and allocate and transfer such funds on a quarterly basis to cities and county governments in the manner provided by this Act."

In answering your questions we will of course refer to other provisions of the measure that we believe must be considered. Since you submitted several questions to be answered, we will quote each one separately below and follow it with our answer.

QUESTION 1:

> "Which of the following taxes are included in the words 'net proceeds of the state income taxes' that appear in Section 2:
>
> a. The income taxes imposed by N.D.C.C. Sections 57-38-07, 57-38-29 and 57-38-30 on individuals, estate, trusts, and corporations.
>
> b. The business and corporation privilege tax imposed by N.D.C.C. Section 57-38-66, which is measured by a percentage of net income.

c. The privilege taxes imposed by N.D.C.C. Section 57-35-02 on banks and trust companies, by N.D.C.C. Section 57-35.1-02 on building and loan and savings and loan associations, and by N.D.C.C. Section 57-35.2-02 on banks, trust companies, and building and loan and savings and loan association, all of which are measured by a percentage of net income."

ANSWER:

As explained in the paragraphs that follow, it is our opinion that the words "state income taxes" that appear in Section 2 of the measure include the income taxes that are imposed by N.D.C.C. Sections 57-38-07, 57-38-29 and 57-38-30 on individuals, estates, trusts, and corporations that are referred to in part "a." of your question but that those words as used in Section 2 do not include any of the privilege taxes that are referred to in parts "b." and "c." of your question.

The words "state income taxes" in Section 2 of the measure are not defined in that section or anywhere else in the measure. We must therefore apply the rule of interpretation prescribed by N.D.C.C. Section 1-02-02 that words used in any statute are to be understood in their ordinary sense unless a contrary intention plainly appears.

The taxes referred to in part "a." of your question are imposed by the state on the "taxable income" of taxpayers by N.D.C.C. Sections 57-38-07, 57-38-29 and 57-38-30 and therefore must logically be regarded as "state income taxes" within the meaning of the words "net proceeds of the state income taxes" as used in Section 2 of the measure.

The business and corporation privilege tax imposed by N.D.C.C. Section 57-38-66 and referred to in part "b." of your question is imposed on the taxpayer "for the privilege of doing business in this state" and the amount or measure of the tax is a percentage of the taxpayer's net income as defined in that section. Even though the amount of the privilege tax that is to be paid by a taxpayer is measured by the net income of the taxpayer, that does not make the tax an income tax; this is because it is the privilege and not the income that is being taxed. As held in Shivel v. Vidro, 294 N.W. 78 at 82 (Mich. 1940), the fact that income is used as the measure of a tax does not make the tax an "income tax". Also as to the nature of a privilege tax, see Southern Ry. Co. v. Watts, 260 U.S. 519 at 531, 43 S. Ct. 192 at 197, in which the United States Supreme Court said:

> "But a privilege tax is not converted into a property tax because it is measured by the value of the property."

Also see Keasbey & Mattison Co. v. Rathensies, 133 F. 2d. 894, 897.

The privilege taxes referred to in part "c." of your question are all imposed on the taxpayer "for the grant to it of the privilege of transacting, or for the actual transacting, by it, of business within this state" and the amount or measure of each tax is a percentage of the taxpayer's net income. These taxes are similar to the business and corporation privilege tax imposed by Section 57-38-66 in that

they tax a privilege rather than income although income is used to measure the amount of the tax on the privilege; they therefore should not be regarded as "state income taxes" under Section 2 of the measure in the absence of plain language in the measure to the contrary.

In addition, the title to the initiated measure is as follows:

> "An Act to provide for the sharing of the general fund revenues of the State of North Dakota with counties, cities, city park districts, and townships.

In this regard we note that the privilege taxes imposed by N.D.C.C. Section 57-35-02 on banks and trust companies and by N.D.C.C. Section 57-35.1-02 on building and loan and savings and loan associations are required by Sections 57-35-08, 57-35-09 and 57-35.1-04 to be paid to the county treasurer and allocated to the local political subdivisions. Those privilege taxes therefore never become "general fund revenues of the State of North Dakota" within the meaning of the title to the initiated measure and the measure therefore cannot apply to them.

QUESTION 2:

> "Which of the following taxes are included in the words 'net proceeds of the state sales and use tax' that appear in Section 2:
>
> a. Retail sales tax imposed by N.D.C.C. Section 57-39.2-02.1.
>
> b. Use tax imposed by N.D.C.C. Section 57-40.2-02.1.
>
> c. Motor vehicles excise taxes imposed by N.D.C.C. Sections 57-40.3-02 and 57-40.3-03.
>
> d. Taxes imposed on the sale of cigarettes by N.D.C.C. Sections 57-36-06 and 57-36-32 and on the use of cigarettes by N.D.C.C. Section 57-36-27.
>
> e. Special fuel taxes imposed on the sale of special fuels by N.D.C.C. Section 57-52-04 and 57-53-02 and on the sale of motor vehicle fuel (gasoline) by N.D.C.C. Section 57-54-08.
>
> f. Use tax imposed by N.D.C.C. Section 57-54.1-04 on importers for use of special fuels and motor vehicle fuel (gasoline).
>
> g. Aviation fuel taxes imposed on sales of aviation fuels by N.D.C.C. Sections 57-56-01, 57-56-01 and 57-56-01.2."

ANSWER:

It is our opinion that the words "state sales and use tax" as used in Section 2 of the initiated measure include the retail sales tax imposed by N.D.C.C. Section 57-39.2-02.1 and the use tax imposed by N.D.C.C. Section 57-40.2-02.1 that are referred to in parts "a." and "b." of your question but that those words do not include any of the taxes referred to in parts "c." through "g." of your question.

Neither Section 2 of the measure nor any other provision of the measure defines or identifies what the words "state sales and use tax" are intended to mean. As prescribed by N.D.C.C. Section 1-02-02, those words must therefore be interpreted and understood in their ordinary sense.

While each of the taxes referred to in your question can be regarded in a broad sense as a type of sales or use tax, each of those referred to in parts "c." through "g." of your question is a special type of sales or use tax that we do not believe is ordinarily referred to as a sales or use tax but instead is referred to by another name, such as, for example, motor vehicle excise tax or special fuels tax. Each of these taxes is provided for in a separate North Dakota Century Code chapter that has a descriptive name. The only one with a name that describes the tax as a sales tax is the retail sales tax law, Chapter 57-39.2, which carries the name "Sales Tax". The only code chapter with a name that describes the tax as a use tax is the general use tax law, Chapter 57-40.2, which carries the name "Use Tax" and which provides that it complements the retail sales tax law.

None of the Code chapters that provide for the taxes referred to in parts "c." through "g." of your question includes in the name of the chapter any characterization of the tax as a sales tax or a use tax.

All of the proceeds from the retail sales tax law, Chapter 57-39.2, and from the use tax law, Chapter 57-40.2, are required by those laws to be deposited in the state general fund, but only a part or none of the proceeds from the other taxes referred to in parts "c." through "g." of your question are required to be deposited in the state general fund.

For these reasons we conclude that the words "state sales and use tax" as used in Section 2 of the measure includes only the retail sales tax imposed by N.D.C.C. Chapter 57-39.2 and the use tax imposed by N.D.C.C. Chapter 57-40.2.

QUESTION 3:

> "Do the word 'net proceeds' as used in Section 2 in reference to income taxes and sales and use tax include penalties and interest collected on delinquent payments of such taxes?"

ANSWER:

We believe the words "net proceeds" as used in Section 2 do include penalties and interest collected on delinquent payments of such taxes.

Those words are not defined anywhere in the measure and apparently do not have a generally accepted meaning when used in reference to proceeds of taxes. An examination of the relevant statutes shows that the sales an use tax laws provide in Sections 57-39.2-26 and 57-40.2-13 that all moneys collected under those laws shall be credited to the state general fund; this obviously includes any penalties or interest. The income tax law provides in Section

57-38-55 that "all income taxes collected" under that law shall be credited to the state general fund; although disposition of penalties and interest collected on income taxes is not expressly provided for, they are credited to the state general fund along with the tax under the rule of interpretation that penalties and interest follow the tax unless the law directs otherwise - see 85 C.J.S. Taxation, Section 1064.

We therefore believe that the word "proceeds" as used in the term "net proceeds" in Section 2 was intended to include the amount collected as taxes, penalties and interest under those laws. We believe also that the word "net" in the term "net proceeds" was intended to have its ordinary meaning of indicating something that is deducted - see 66 C.J.S. page 7. Since the income tax law and the sales and use tax laws include provisions for refunding erroneous collections received under those laws, "net proceeds" of those taxes we believe was intended to mean the total amount of those taxes and penalties and interest collected less any part thereof that was refunded.

QUESTION 4:

> "In the second sentence of Section 2 of the measure, reference is made to 'the net proceeds of the state income taxes for the year prior to the current fiscal year' and to 'the net proceeds of the state sales and use tax for the year prior to the current fiscal year.' Does the word 'year' in the phrases 'for the year prior to the current fiscal year' mean (a) the calendar year or (b) the fiscal year that is 'prior to the current fiscal year'? (Section 54-27-01 defines the State's fiscal year as July 1 through the next June 30th.)"

ANSWER:

N.D.C.C. Section 54-27-01 provides that the fiscal year for the State of North Dakota shall commence on the first day of July and end on the thirtieth day of June of the following year, that annual and biennial reports required of any state officer unless otherwise provided "shall be made to and shall include the thirtieth day of June preceding", and that all accounts of such offices shall be closed and balanced to that date.

Since the initiated measure does not purport to define what is meant by the word "year" or the term "current fiscal year" as used in Section 2, it is our opinion, in view of Section 54-27-01, that the word "year" was intended to mean the fiscal year that ends on June thirtieth prior to the "current fiscal year" and that "current fiscal year" means the fiscal year that begins immediately thereafter on the following July first and which will end on June thirtieth of the next year.

QUESTION 5:

> "Do the words 'net proceeds for the year' used in Section 2 in reference to the net proceeds of income taxes and sales and use taxes mean the amount of collections by the tax commissioner of income taxes imposed on income received in that year and the

amount of collections by the tax commissioner of sales and use taxes on sales and purchases (use) made in that year, or do those words mean the amounts of collections by the tax commissioner of those taxes in that year regardless of when the income was received for income tax purposes or the sales or purchase (use) were made for sales and use tax purposes?"

ANSWER:

The words, "net proceeds . . . for the year" to which this question relates are used in the second sentence of Section 2 of the measure. Section 2 is quoted on page 1 of this opinion. The meaning of that sentence when considered alone is not clear and its provisions therefore must be interpreted and harmonized with the other provisions of the measure.

The second sentence of Section 2 of the measure provides that "An amount equal to five percent of the net proceeds of" the state income taxes and state sales and use taxes "for the year prior to the current fiscal year shall be paid over by the state tax commissioner to the state treasurer who shall credit the same to the fund . . . ." The word "fund" obviously has reference to the state revenue sharing fund established by the first sentence of Section 2, which sentence provides: "Commencing July 1, 1979, and on July 1 of each successive year, there is hereby created in the office of the state treasurer a state revenue sharing fund which shall be administered by the state treasurer."

These two sentences of Section 2 of the measure seem, on first impression, to contemplate the payment of a single amount on July first of each year by the state tax commissioner to the state treasurer for crediting to the state revenue sharing fund, which amount would then be available for allocation and transfer during the current fiscal year by the state treasurer to the cities and county governments on a quarterly basis. But a careful analysis of the entire measure and of applicable requirements of the state Constitution demonstrate clearly that Section 2 cannot be validly interpreted that way.

Section 186 of the state Constitution requires the state tax commissioner to pay over monthly all collections of income, sales and use taxes to the state treasurer. All of the proceeds from those taxes received by the state tax commissioner during the fiscal year prior to any July first would already have been paid over by him to the state treasurer pursuant to Section 186 and would therefore be beyond his control on the following July first - see Oesterle v. Lavik, 78 N.D. 888, 52 N.W.2d. 297 (1952).

Ordinarily, at least, it does not appear that the state tax commissioner would every have under his control on any July first an amount equal to 5 percent of the net proceeds of state income, sales and use taxes "for the year prior to the current fiscal year" that he could pay over to the state treasurer for crediting to the state revenue sharing fund. He obviously could not pay over for crediting to the state revenue sharing fund the collections of any other kinds of taxes that might still be under his control on July first and which are required by law to be credited to other funds.

In our answers to Questions 8 and 9, below, we have concluded that this initiated measure does not amend the existing sections of the income, sales and use tax laws which provide that all revenues collected from those taxes shall be credited to the general fund of the state. We also concluded that 5 percent of net proceeds collected from those taxes which Section 2 of the measure provides shall be allocated and transferred by the state treasurer to the cities and county governments are therefore "public moneys" of the state under Section 186 of the Constitution which can be paid out and disbursed from the general fund of the state only pursuant to appropriations made by the Legislature.

Accordingly, the Legislature must first appropriate money from the general fund of the state in order to make funds available for the state revenue sharing fund created by Section 2 of the measure. Presumably, the amounts that will be appropriated by the Legislature for the state revenue sharing fund will be made available on July 1, 1979, and on each July first thereafter unless otherwise provided in the appropriation acts. Presumably, also, the amount appropriated for any year will be the maximum amount that can be allocated and transferred by the state treasurer to the cities and county governments during the fiscal year to which the appropriation applies.

We therefore believe the answer to your question regarding the meaning of the words "net proceeds . . . for the year" as used in the second sentence of Section 2 of the measure must be interpreted to harmonize them with the answers given below to Questions 8 and 9. It is our opinion that the most reasonable interpretation that will accomplish this is an interpretation that on July 1, 1979, and on July 1 of each successive year, or as soon after July 1 as he reasonably can, the state tax commissioner shall notify the state treasurer of the amount that is equal to 5 percent of the net proceeds of the state income, sales and use taxes collected for any year, that were transferred by him to the state treasurer during the prior fiscal year for crediting to the state general fund. That 5 percent amount "for the year prior to the current fiscal year" would then operate as a limitation on the amount that the state treasurer could allocate and transfer to the cities and county governments out of the appropriation the Legislature makes for the "current fiscal year" if that 5 percent amount is less than the amount appropriated, unless the Legislature provides otherwise.

In other words, the amount appropriated by the Legislature for allocation and transfer by the state treasurer to cities and county governments during the "current fiscal year" would be the maximum that would be available for that purpose during that year but if 5 percent of the net proceeds of the state income, sales and use taxes collected and transferred by the tax commissioner to the state treasurer during the "year prior to the current fiscal year" were less than the appropriation made by the Legislature for the "current fiscal year", only that lessor amount could be allocated and transferred during the current fiscal year by the state treasurer to cities and county governments, unless the appropriation by the Legislature provided otherwise. When there is doubt as to the meaning that was intended for language used in a statute, some

reasonable meaning must, if possible, be given to the language in order to avoid holding that it has no affect at all. It is out opinion that the interpretation set out above for the language used in the second sentence of Section 2 is the most reasonable interpretation that can be given to it which will avoid a holding that it cannot be given any meaning at all.

QUESTION 6:

> "This initiated measure was approved at the November 7, 1978, general election and therefore will go into effect thirty days after that date (since it prescribes no effective date - see the fifth paragraph of the present Section 25 of the North Dakota Constitution), although the fund created by Section 2 will not be established until July 1, 1979.
>
> "Would Section 175 of the North Dakota Constitution as interpreted in City of Bismarck v. Kleinschmidt, 145 N.W.2d. 333 (1966), be violated (a) if the measure were applied to any collections of income taxes imposed on income received before the December 7, 1978, effective date of the measure, and (b) if it were applied to any collections of sales and use taxes imposed on sales and purchases (use) made prior to the December 7, 1978, effective date of the measure?"

ANSWER:

In view of the answer given above to Question 5 and the answers given below to Questions 8 an 9, it is our opinion that the provisions of this initiated measure do not become effective Until July 1, 1979. In our answer to Question 5 we concluded that the provisions in the second sentence of Section 2 relating to 5 percent of the net proceeds of state income, sales and use taxes "for the year prior to the current fiscal year" simply establishes a method for determining a lesser amount to be allocated and transferred by the state treasurer out of revenue sharing fund to cities and county governments in any fiscal year if the amount of 5 percent of the net proceeds from state income, sales and use taxes collected and transferred in the prior fiscal year to the state treasurer is less than the amount appropriated by the Legislature for allocation and transfer during the next (or current) fiscal year to the cities and county governments.

Since the maximum amount to be available in any one fiscal year (the current fiscal year) for allocation and transfer to the cities and county governments will be established by the Legislature, it is our opinion that, regardless of when the liability to the state for any income, sales or use tax may have accrued, Section 175 of the Constitution does not prevent the taking into account of all of those collections in the prior fiscal year for the purpose of determining if 5 percent of that amount will limit the amount that can be allocated and transferred out of the appropriation for the current fiscal year to cities and county governments.

QUESTION 7:

> "When must the first quarterly allocation and transfer of funds

from the state revenue sharing fund be made by the state treasurer to cities and counties?"

ANSWER:

It is our opinion that the first quarterly allocation and transfer can be made by the state treasurer to the cities and county governments on July 1, 1979, or as soon thereafter as he can reasonably do so, assuming of course that the Legislature makes the appropriation to the state revenue sharing fund available for disbursement on that date.

QUESITON 8:

> "This initiated state revenue sharing measure does not expressly amend any of the provisions of the tax laws cited in questions 1 and 2 which no provide that the revenue collections under those laws shall be credited to the state general fund or to special funds in the state treasury as designated in N.D.C.C. Sections 57-35-13, 57-35.1-06, 57-35.2-06, 57-36-31, 57-36-32, 57-38-55, 57-39.2-26, 57-40.2-13, 57-40.3-10, 57-52-11, 57-53-09, 57-54-14, 57-54.1-15, and 57-56-03.
>
> "Does Section 2 of the state revenue sharing measure impliedly amend any of the Code sections cited immediately above and, if so, which ones?"

ANSWER:

In the answer to Questions 1 and 2 above, we concluded that this initiated measure applies only to the net proceeds of the state income taxes imposed by N.D.C.C. Sections 57-38-07, 57-38-29 and 57-38-30 and to sales and use taxes imposed by N.D.C.C. Sections 57-39.2-02.1 and 57-40.2-02.1. Section 57-38-55 of the income tax law and Sections 57-39.2-26 and 57-40.2-13 of the sales and use tax laws provide that the revenues from those taxes shall be credited to the state general fund. For purposes of answering your question it therefore is necessary to determine only whether Sections 57-38-55, 57-39.2-26 and 57-40.2-13 cited in your question have been amended by the initiated measure in any way. It is our opinion that they have not been amended by the initiated measure; therefore, the requirement in those sections that all of the proceeds from those taxes must be deposited in the state treasury and be credited to the state general fund continues to apply for the reasons that follow.

If our consideration of this question could be limited only to an examination of the four sections of the initiated measure, we might possibly conclude that the measure does amend Sections 57-38-55, 57-39.2-26 and 57-40.2-13 with the result that 5 percent of the net proceeds of the state income, sales and use taxes (which Section 2 of the measure provides shall be allocated and transferred on a quarterly basis to cities and county governments) would then never become a part of the state general fund; but we must also give consideration to the title of the initiated measure.

This initiated measure was enacted pursuant to Section 25 of the North Dakota constitution. Our state supreme court in State ex rel.

Gammons v. Schafer, 63 N.D. 128, 246 N.W. 874 (1933) held that:

1. The provisions of Section 25 of the Constitution, relating to initiated and referred legislation, are a part of article 2 of the Constitution, relating to the legislative department, and initiated and referred legislation is subject to all constitutional restrictions the same as laws passed by the legislative assembly."

   (Paragraph 1 of the syllabus by the Court.)

One of the constitutional restrictions to which this initiated measure and any other legislation is subject is Section 61 of the North Dakota Constitution, which provides that:

> "Section 61. No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to do so much thereof as shall not be so expressed."

It is therefore necessary to consider the title of this initiated measure for revenue sharing. That title reads as follows:

> "An Act to provide for the sharing of the general fund revenues of the State of North Dakota with counties, cities, city park districts, and townships."

We believe this title to the measure clearly provides that the revenues which are to be shared by the State of North Dakota with counties, cities, city park districts, and townships are revenues in the general fund of the State of North Dakota rather than revenues that never become a part of the state general fund or any other state fund. The function of the title of an Act under Section 61 of the Constitution is described in In Re Estate of Jensen, 162 N.W.2d. 861 at 868 (N.D. 1968) as follows:

> "The title of an act may limit the scope of the Act, but it cannot broaden or extend its effects as expressed in the body."

Also see North American Coal Corporation v. Huber, 268 N.W.2d. 593 at 596 (N.D. 1978).

If the provisions in Section 2 and the other sections of the measure are interpreted as amending Section 57-38-55 of the income tax law and Sections 57-39.2-26 and 57-40.2-13 of the sales and tax laws to provide that 5 percent of the net proceeds of those taxes never become a part of the state general fund, then those provisions as so interpreted would provide for something that is not within the scope of the measure's title and therefore would be invalid. If it is possible to do so, the courts will avoid interpretations of a statute which place the statute in disharmony with the Constitution and instead will, if possible, give it a construction that makes in constitutional. See State v. Burleigh County, 55 N.D. 1 at 15, 212 N.W. 217 at 223 (1927), and North American Coal Corporation v. Huber, 268 N.W. 2d. 593 at 596 (N.D. 1978). We are bound by the same rule of interpretation.

In order to harmonize the provisions in the body of this initiated measure with its title so that the measure will not be invalid under Section 61 of the Constitution, we believe those provisions reasonably can be, and must be, interpreted as not amending Section 57-38-55 of the state income tax law and Sections 57-39.2-26 and 57-40.2-13 of the sales and use tax laws. Those sections therefore continue to require that all taxes collected under those laws must be credited to the state general fund.

QUESTION 9:

a. Does Section 186 of the North Dakota Constitution require that an appropriation or appropriations be made for allocation and transfer of funds in the state revenue sharing fund to the cities and counties?

b. If the answer to 'a' immediately above is 'yes', do the provisions of the initiated measure itself make the required appropriation or appropriations?"

ANSWER:

In answer to part "a." of this question, it is our opinion that Section 186 of the North Dakota Constitution does require an appropriation to be made out of the state general fund to the state revenue sharing fund for allocation and transfer to the cities and county governments as provided in Section 2 of the initiated measure.

In our answer to Question 8 we concluded that the title of the measure compelled the interpretation that all income, sales and use tax revenues must be credited to the general fund of the state, including the 5 percent of the net proceeds from those taxes which Section 2 of the measure provides shall be transferred to the cities and county governments. Those revenues, including the 5 percent portion, are without a doubt public moneys of the state within the meaning of Section 186 of the Constitution, which provides in pertinent part as follows:

> "Section 186. (1) All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the State receiving the same, to the State Treasurer, and deposited by him to the credit of the State, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature; 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, ..."

This requirement of Section 186 that public moneys "shall be paid out and disbursed only pursuant to appropriation first made by the Legislature" applies to all public moneys of the state, whether in the general fund or a special fund of the state. See Langer v. State of North Dakota, 69 N.D. 129, 284 N.W. 238 (1939); Claim of S. A. Healy Company, 109 N.W.2d. 249 (N.D. 1960); Menz v. Coyle, 117 N.W.2d. 290 (N.D. 1962); and City of Fargo, Cass County v. State of North Dakota, 260 N.W.2d. 333 (N.D. 1977).

In answer to part "b." of this question, it is our opinion that the initiated measure should not be construed as making any appropriation necessary to carry out its purpose. To hold that it does would raise grave and doubtful constitutional questions that can be avoided by a holding that only the Legislature can make the intended appropriations. As stated in Murray v. Mutschelknaus, 70 N.D. 1 at 12-13. 201 N.W. 118 at 124 (1940), quoting from State v. Burleigh County, 55 N.D. 1 at 15 212 N.W. 217 at 223 (1927):

> "It is a sound rule of statutory construction, said to be elementary, that where a statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided it is the duty of the courts to adopt the latter construction."

If the initiated measure is construed as making the necessary appropriations of public moneys in the state treasury to carry out its purpose, then such a construction would raise constitutional questions of the most grave and doubtful nature because Section 186 provides that public moneys belonging to the state "shall be paid out and disbursed only pursuant to appropriations first made by the Legislature".

Section 25 of our state Constitution vests the Legislature power of the state in the Legislature but it also reserves to the people the power to propose measures and to enact or reject them at the polls, which reserved power is the initiative. The second paragraph of that section provides that: "Ten thousand electors at large may propose any measure by initiative petition". While this power to propose any measure by initiative petition and enact it at the polls appears to authorize the appropriation by initiated measure of public moneys belonging to the state, Section 186 provides that such moneys can be paid out and disbursed only pursuant to appropriation made by the Legislature. Thus there appears to be little doubt that these two provisions of the Constitution are to that extent in conflict. In State ex rel. Walker v. Link, 232 N.W. 2d. 823 at 825 (N.D. 1975), our supreme court referred to the following basic guidelines for determining the rules applicable when two constitutional provisions are incompatible:

> "Generally speaking principles of construction applicable to statutes are also applicable to Constitution." Quoted by the Court from Syllabus 5 of Egbert v. City of Dunseith, 74 N.D. 1, 24 N.W. 2d. 907 (1946).

In the Walker case, the court applied to the incompatible provisions of the Constitution involved where two applicable rules of construction: first, where provisions of two statutes are in conflict, the one enacted last prevails if the two cannot be harmonized; and, second, special statutes in case of an irreconcilable conflict prevail over general provisions of law and constitute a special exception thereto. We believe both of these rules of construction are applicable here.

At the time this initiated measure for revenue sharing was enacted at

the polls on November 7 of this year, the provisions of Section 25 of the Constitution, which include the provision for initiated measures, were the same as when that section was last amended on November 5, 1918. Section 186 of the Constitution, however, was last amended on June 28, 1938, and one of the provision added to that section at that time was the requirement that public moneys belonging to the state "shall be paid out and disbursed only pursuant to appropriation first made by the Legislature." This provision in Section 186 appears to be in clear conflict with the provision in Section 25 authorizing the proposal of any measure by initiative petition of the electors and enactment of it by them. But if the initiated measure for revenue sharing under consideration here were construed as authorizing the appropriation of public moneys belonging to the state, its constitutionality as so construed would be in very grave and serious doubt because Section 186 "is the latest expression of the will of the people with respect to matters embraced therein and prevails over all preexisting inconsistent constitutional provisions" - see State ex rel. Walker v. Link, 232 N.W.2d. at 286, quoting from State v. Sathre, 113 N.W.2d. 679 at 683 (N.D. 1962). If the revenue sharing measure is construed as not appropriating any public moneys belonging to the state, then the question of its constitutionality is avoided. We must therefore apply the rule applied by the courts and avoid the constitutional question by holding that the revenue sharing measure does not appropriate any state moneys; as so construed, the matter of appropriating state funds necessary to carry out the purpose of the measure is left to the Legislature as provided in Section 186.

In addition, the same result would be reached by applying the other rule of construction applied in State ex rel. Walker v. Link, above, that a special provision in the Constitution prevails when it is in irreconcilable conflict with a general provision in the Constitution. Here, the provision of Section 186 which provides that public moneys of the state "shall be paid out and disbursed only pursuant to appropriations first made by the Legislature" is a special provision since it deals with the specific manner for paying out and disbursing public moneys of the state, whereas the provision in Section 25 authorizing any measure to be proposed by initiative petition and enacted by the people is a general provision of the Constitution since it does not deal with any specific kind of measure. Section 186 must therefore be regarded as controlling over Section 25 in this matter of appropriation of public moneys of the state, from which it must follow that this initiated measure for revenue sharing should not be construed as appropriating any public moneys of of the state to carry out the purpose of the measure; instead, any appropriations for that purpose is a matter for the Legislature.

Sincerely,

ALLEN I. OLSON

Attorney General