

Date Issued: June 5, 1981 (AGO 81-56)

Requested by: State Tax Commissioner Kent Conrad

- QUESTIONS PRESENTED -

I.

Whether the 1981 amendment of section 57-50-01 of the North Dakota Century Code requires the one cent per gallon tax to be withheld from motor fuel tax refunds made only for motor fuel purchased by the user during the period of July 1, 1981, through June 30, 1983, even though some refunds would be made after June 30, 1983.

II.

Whether the 1981 amendment of section 57-50-01, N.D.C.C., requires the one cent per gallon to be charged to, and collected from, the user of motor fuel who assigns his claim for refund to the seller as provided in sections 57-50-11 and 57-50-11.1, N.D.C.C.

III.

Whether the 1981 amendment of subsection 1 of section 57-51-15, N.D.C.C., applies only to oil and gas production taxes received for oil and gas produced during the period of July 1, 1981, through June 30, 1983.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the 1981 amendment to section 57-50-01, N.D.C.C., requires that the one cent per gallon tax shall be withheld by the Tax Commissioner only on refunds made for motor fuel that was purchased by the user during the period of July 1, 1981, through June 30, 1983, even though some of the refunds may have to be made after June 30, 1983.

II.

It is my further opinion that the 1981 amendment of section 57-50-01, N.D.C.C., requires the one cent per gallon to be charged to, and collected from, the user of motor fuel who assigns his claim for refund to the seller as provided in sections 57-50-11 and 57-50-11.1, N.D.C.C.

III.

It is my further opinion that the 1981 amendment of subsection 1 of section 57-51-15, N.D.C.C., applies only to the oil and gas gross production taxes received by the Tax

Commissioner for oil and gas produced during the period of July 1, 1981, through June 30, 1983, and does not apply to taxes received during that period for oil and gas produced before or after that period.

- ANALYSIS -

I.

Section 57-50-01, N.D.C.C., was amended by House Bill No. 1365 enacted by the 1981 session of the Legislative Assembly. Both before and after its amendment, section 57-50-01, N.D.C.C., provides for the refund of motor fuel taxes paid by purchasers of gasoline who use it for off-highway agricultural or industrial purposes. Section 57-52-04, N.D.C.C., which imposes a similar per gallon tax on the sale of special fuel to users, also provides in some instances for the refund of the tax pursuant to section 57-50-01, N.D.C.C., and other sections of chapter 57-50, N.D.C.C.

The amendment added a new paragraph, the pertinent part of which reads as follows:

The refunds provided under this section from July 1, 1981, through June 30, 1983, for all fuels taxed under chapters 57-52 and 57-54, except those fuels used in aircraft or with respect to refunds claimed under section 57-50-05, shall be reduced by one cent per gallon. This one cent per gallon not refunded during the period July 1, 1981, through June 30, 1983, shall be transferred to township road and bridge funds or to the appropriate county fund in the case of unorganized townships . . . .

Sections 57-54-14 and 57-52-20, N.D.C.C., allocate the gasoline and special fuels taxes to the state highway tax distribution fund which is then distributed as provided in section 54-27-19, N.D.C.C., to the State Highway Department, counties and cities; none is distributed under that section to townships. One of the amendments to section 57-50-01, N.D.C.C., however, requires that one cent per gallon (of the amount that would otherwise be refunded) be retained and transferred to township road and bridge funds or to the appropriate county fund in the case of unorganized townships.

Gasoline taxes imposed by section 57-54-08, N.D.C.C., and special fuels taxes imposed by section 57-52-04, N.D.C.C., that are refundable pursuant to section 57-50-01, N.D.C.C., are imposed on the sale or delivery of the fuel to the user or consumer of the fuel. Article X, Section 3, of the North Dakota Constitution, formerly Section 175, provides in part 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.

This constitutional provision as construed in City of Bismarck v. Kleinschmidt, 145 N.W.2d. 335 (N.D. 1966), has the effect of requiring that the allocation provisions that are in effect

on the day of the sale or delivery of those fuels to the users shall control the distribution of those taxes. Therefore, because the amendment of section 57-50-01, N.D.C.C., does not become effective until July 1, 1981, it is my opinion that the requirement in the amendment for reducing the refunds by one cent per gallon can be applied only on refunds made for taxes collected on gasoline or special fuel that is sold or delivered to users during the period beginning July 1, 1981, through June 30, 1983, even though refunds for some of those purchases will not be made until after June 30, 1983.

This interpretation results in similar fuel tax treatment for all gasoline and special fuel purchases made by users during the two-year period and harmonizes the amendment with the constitutional requirement in Article X, Section 3, thereby avoiding serious questions of constitutionality that would arise if the amendment were literally construed to apply only to collections of the taxes made during the two-year period. The Analysis for Question III that follows is also relevant to this question.

## II.

Although the 1981 amendment of section 57-50-01, N.D.C.C., that is quoted above in the Analysis for Question I provides for deduction of one cent per gallon from fuel tax refunds, it does not make express reference to assignments of motor fuel tax refund claims that are authorized by sections 57-50-11 and 57-50-11.1, N.D.C.C.

Under section 57-50-11, N.D.C.C., a purchaser of motor fuel for agricultural purposes may assign his claim for tax refund to the seller who, after paying the tax, may have it refunded to him by attaching the assignment to his refund claim.

Under section 57-50-11.1, N.D.C.C., an agricultural purchaser of motor fuel during the period beginning April first through September thirtieth may assign his claim for tax refund to the seller who then "may forward it to the State Tax Commissioner for credit on his fuel tax return in the amount of the refund owing on the assigned sales receipt." The effect of this procedure is that the seller pays the tax to the state by submitting the assignment and then receives a refund of it in the form of a credit without the money for the tax being transferred to the state and then back to the seller. Because the tax is actually imposed and then is in effect collected and refunded, it must be regarded as public money even though never actually collected and transmitted to the state. See State ex rel. Strutz v. Nelson, 7 N.W.2d. 735 (N.D. 1943), and Campbell v. Towner County, 3 N.W.2d. 822 (N.D. 1941).

If the refund assignment claims for which the seller is allowed credit against the amount of motor fuel tax owed were not regarded as subject to the refund reduction of one cent per gallon pursuant to 1981 amendment of section 57-50-01, N.D.C.C., the result would be grossly inequitable and discriminatory and would call into serious the constitutionality of that amendment. The Legislature could not reasonably have intended that the one cent per gallon not collected and retained by the state for township road and bridge purposes on assignments of refund claims made pursuant to section 57-50-11.1, N.D.C.C. Therefore, the amendment must be regarded as amending by implication the provisions of

section 57-50-11.1, N.D.C.C., so that the one cent per gallon will actually be collected by the state from the motor fuel seller and not refunded but will be allocated for township roads and bridges as intended by this amendment.

### III.

Subsection 1 of section 57-51-15, N.D.C.C., as amended in 1981, provides, in Subdivision a, for a change in the apportionment of the five percent oil and gas gross production tax "For taxes received between July 1, 1981, and June 30, 1983," and, in subdivision b that "For any taxes received after June 30, 1983, all revenues shall be credited to the state general fund."

If the reference in subdivisions a and b of subsection 1, above, to "taxes received" between July 1, 1981, and June 30, 1983, or after June 30, 1983, were regarded as applying only to actual collections received by the Tax Commissioner, or by the State Treasurer, during that two-year period, then "taxes received" would include taxes collected on or after July 1, 1981, that had actually attached to oil and gas produced before July 1, 1981, particularly oil and gas produced and taxed during the April, May, and June 1981, quarterly period which will not be paid to the state until after June 30, 1981. The tax attaches at the time the oil and gas is produced because section 57-51-02, N.D.C.C., provides that: "A tax of five percentum of the gross value at the well is hereby levied upon all oil and gas produced. . . ."

This 1981 amendment of subsection 1 of section 57-51-15, N.D.C.C., does not become effective until July 1, 1981. Therefore, if it were construed as applying to production taxes levied on oil and gas produced before July 1, 1981, that construction would have the effect of changing the object or purpose of those taxes that were levied before July 1, 1981, but collected after that date and would be contrary to the constitutional requirement in Article X, Section 3, as interpreted in City of Bismarck v. Kleinschmidt, 145 N.W.2d. 335 (N.D. 1966), cited in the Analysis above for Question I.

If this 1981 amendment of subsection 1 of the section 57-51-15, N.D.C.C., is construed as applying to oil and gas gross production taxes levied on or after July 1, 1981, but limited to production taxes levied on oil and gas produced only during the designated period of July 1, 1981, through June 30, 1983, then there is no constitutional problem under Article X, Section 3. It is clear that the Legislature intended by this amendment to change the apportionment of part of the gross production taxes for a two-year period and that it intended to enact a constitutional act.

By construing this 1981 amendment of subsection 1 of section 57-51-15, N.D.C.C., as applying to production taxes levied on only oil and gas produced during the period of July 1, 1981, through June 30, 1983, a reasonable construction that does not conflict with the constitutional provision is given to the act. See State ex rel. Eckroth v. Borge, 283 N.W. 521 (N.D. 1939).

Accordingly, the 1981 amendment of subsection 1 of section 57-51-15, N.D.C.C., should be construed to apply only to gross production taxes levied on oil and gas that is actually produced during the period of July 1, 1981, through June 30, 1983.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the action of public officials until such time as the questions presented are decided by the courts.

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