

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-12

Date issued: September 19, 1991

Requested by: Heidi Heitkamp, State Tax Commissioner

- QUESTION PRESENTED -

Whether the words "agricultural commodities grown in this state" as used in N. D. C. C. ' 40-57.1-03 of the new and expanding business tax exemption chapter mean only agricultural commodities actually grown in North Dakota or mean agricultural commodities which can be grown in North Dakota.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the words "agricultural commodities grown in this state" as used in N. D. C. C. ' 40-57.1-03 of the new and expanding business tax exemption chapter mean agricultural commodities which can be grown in North Dakota.

- ANALYSIS -

N. D. C. C. ch. 40-57.1 provides ad valorem and income tax exemptions for new and expanding businesses. The 1991 Legislative Assembly enacted House Bill No. 1534 which extensively amended the provisions of this chapter. 1991 N.D. Sess. Laws ch. 447.

N. D. C. C. ' 40-57.1-03, as amended provides:

40-57.1-03. Municipalities' authority to grant tax exemption - Notice to competitors - Limitations. Municipalities are hereby authorized and empowered, in their discretion, as limited hereafter, to grant, after negotiation with a potential project operator, partial or complete exemption from ad valorem taxation on all tangible property used in or necessary to the operation of a project for a period not exceeding five years from the date of commencement of project operations. A municipality may also grant a partial exemption from ad valorem taxation on tangible property used in or necessary to the operation of a project that produces or manufactures a product from agricultural commodities grown in this state of up to one hundred percent in the sixth year from the date of commencement of project operations, eighty percent in the seventh year from the date of commencement of project operations, sixty percent in the eighth year from the date of commencement of project operations, forty percent in the ninth year from the date of commencement of project operations, and twenty percent in the tenth year from the date of commencement of project operations. An exemption granted under

this chapter applies only to the buildings, structures, and improvements on the property. Negotiations with potential project operators for tax exemption must be carried on by the city council or commission if the project is proposed to be located within the boundaries of a city, and by the board of county commissioners if such project is proposed to be located outside the corporate limits of any city. A partial exemption must be stated as a percentage of the total ad valorem taxes assessed against the property. The potential project operator shall publish two notices, the form of which must be prescribed by the tax commissioner, to competitors of the application for tax exemption in the official newspaper of the municipality at least one week apart. The publications must be completed not less than fifteen nor more than thirty days before the governing body of the municipality is to consider the application. The municipality shall determine whether the granting of the exemption is in the best interest of the municipality, and if it so determines, shall give its approval.

In addition to the already allowed five year ad valorem exemption, the 1991 amendment made available an extended ad valorem exemption for property needed for "a project that produces or manufactures a product from agricultural commodities grown in this state."

In enacting a statute the Legislative Assembly is deemed to have considered pertinent court rulings. 1990 N. D. Op. Att'y Gen. 4.

In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the Supreme Court held that the economic protectionism created by a Hawaii wholesale liquor excise tax exemption for certain liquor products produced from the ti plant and pineapple grown in Hawaii violated the Commerce Clause of the United States Constitution, U.S. Const. art. I, ' 8, cl.3. In reaching its decision, the Supreme Court observed:

No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to insure . . . against discriminating State legislation. Welton v. Missouri, 91 U.S. 275, 280, 23 L. Ed. 347 (1876). In Welton, the Court struck down a Missouri statute that "discriminat[ed] in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other states or countries . . . ." Id. 91 U.S., at 277. Similarly, in Walling v. Michigan, 116 U.S. 446, 455, 6 S.Ct. 454, 457, 29 L. Ed. 691 (1886), the Court struck down a law imposing a tax on the sale of alcoholic beverages produced outside the State, declaring:

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced

into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is usurpation of the power conferred by the Constitution upon the Congress of the United States.

468 U. S. 271.

New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 108 S.Ct. 1803 (1988); McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div., 496 U.S. \_\_\_\_, 110 S.Ct. 2238 (1990). "All legislative enactments are imbued with a strong presumption of constitutionality." Heitkamp v. Quill Corp., 470 N.W.2d 203, 215 (N.D. 1991). Courts, if possible, will construe statutes so they pass constitutional muster. Grand Forks Trail Water Users, Inc. v. Hjelle, 413 N.W.2d 344 (N.D. 1987).

In enacting a statute the Legislative Assembly is presumed to have intended a result which is constitutional. N.D.C.C. '1-02-38(1). Consequently, even a strained construction is desirable if it is the only construction that will save constitutionality. Kottsick v. Carlson, 241 N.W.2d 842, (N.D. 1976) citing 2 A Sands, Sutherland Statutory Construction, (4th Ed. 1972), '45.11, page 33. When there are two possible interpretations of a statute, the interpretation that produces an unconstitutional application should be rejected in favor of the one that produces a constitutional application to a particular fact situation." Caldis v. Bd. of City Com'rs., 279 N.W.2d 665, 669 (N.D. 1979).

Based upon the holding in Bacchus and the appropriate rules of construction, it is my opinion that the words "agricultural commodities grown in this state" as used in N.D.C.C. '40-57.1-03 of the new and expanding business tax exemption chapter mean agricultural commodities which can be grown in North Dakota. Therefore, the extended exemption may apply to property needed for a project that produces or manufactures a product from agricultural commodities grown in any state if those commodities can be grown in this state. To construe the words otherwise would produce an unconstitutional result.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. '54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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