

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-14

Date issued: April 15, 1994

Requested by: Kathi Gilmore, State Treasurer

- QUESTION PRESENTED -

Whether the interest and penalties collected on delinquent payments of ad valorem taxes on air transportation company property pursuant to N.D.C.C. ? 57-32-03 must be allocated entirely to the state general fund.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the interest and penalties imposed upon delinquent air carrier transportation company ad valorem taxes pursuant to N.D.C.C. ? 57-32-03 should be deposited in the air transportation fund and subsequently allocated to the cities or municipal airport authorities where the transportation companies make regularly scheduled landings pursuant to N.D.C.C. ? 57-32-04. It is my further opinion that, unless otherwise expressly stated, interest and penalties on taxes are part of the tax and must be apportioned or allocated as the tax itself is apportioned or allocated.

- ANALYSIS -

Ad valorem taxation of air transportation company property is provided by N.D.C.C. ch. 57-32. The taxes imposed by N.D.C.C. ch. 57-32 "must be deposited with the state treasurer, who shall credit the same to the air transportation fund, but within ninety days after receipt thereof, these funds must be allocated and remitted as herein provided by the state treasurer to the cities or municipal airport authorities where such transportation companies make regularly scheduled landings." N.D.C.C. ? 57-32-04. Interest and penalties are automatically charged against such delinquent taxes. N.D.C.C. ? 57-32-03.

This office previously opined "that penalties and interest collected on delinquent payments of ad valorem taxes on air

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transportation company property should be allocated entirely to the state general fund." Letter from Attorney General Nicholas J. Spaeth, to State Treasurer Robert E. Hanson (May 5, 1987). Attorney General Spaeth relied on an analogous prior opinion, 1982 N.D. Op. Att'y Gen. 29, addressing the oil and gas production tax imposed by N.D.C.C. ? 57-51-02. Id. 1982 N.D. Op. Att'y Gen. 29 stated "that penalties and interest collected on delinquent payments of oil and gas production tax imposed by chapter 57-51, N.D.C.C., should not be apportioned in the same way as the oil and gas gross production tax is apportioned but, instead, should be apportioned entirely to the state general fund." That opinion was based on the fact that N.D.C.C. ? 57-51-15 provided for the allocation of oil and gas production tax revenue, but did not prescribe how penalties or interest received under that chapter were to be allocated. Id., See also Letter from Attorney General Nicholas J. Spaeth to State Treasurer Robert E. Hanson (May 5, 1987).

1982 N.D. Op. Att'y Gen. 29 relied upon Burlington County v. Martin, 25 A.2d 17 (N.J. 1942), a New Jersey case, which held that interest collected on a delinquent tax was a penalty, or in the nature of a penalty, not a part of the tax. The court further held that in the absence of an express provision to the contrary, the interest collected could not be apportioned in the same way as the tax. Id. at 18.

Subsequent to Attorney General Spaeth's May 5, 1987, letter to State Treasurer Hanson, the North Dakota Supreme Court held that a "penalty which is created by statute for failure to pay a tax assessment becomes part of the tax itself." Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 137 (N.D. 1987). The court held that the interest and penalty arising upon the delinquency of a statutory tax are not a penalty or forfeiture governed by the two year statute of limitations at N.D.C.C. ? 28-01-18(2) and that the interest and penalty are part of the tax itself, governed by a longer limitations period. Id. The court concluded by holding "that interest on unpaid taxes after their due date does not constitute a penalty or forfeiture within the meaning of the statute [of limitations governing penalties and forfeitures], but is 'intended to compensate the government for the delay in payment of the tax.'" Id. at 137, quoting Owens v. Commissioner of Internal Revenue, 125 F.2d 210, 213 (10th Cir. 1942). The court cited several cases holding similarly and noted as contrary authority State v. American Can Company, 362 P.2d 291 (Alaska

1961) (holding that interest applied to delinquent taxes must be construed as a punitive penalty and therefore distinct from the tax itself). Compare Amerada Hess, 410 N.W.2d at 137, and American Can, 362 P.2d at 298. Therefore, the legal principal supporting the 1982 Attorney General's opinion was not followed by the North Dakota Supreme Court, and the Court instead adopted the principle that interest applied by statute to compensate the government for delay in paying taxes is part of the tax itself and is not a separate penalty.

The 1982 Attorney General's opinion noted that several statutes provide for a penalty to be apportioned to the state general fund, and concluded that the Legislature intended that no apportionment of penalties was allowed where the Legislature apportioned the tax but did not apportion the penalty. The statute relied upon as demonstrating a penalty that is apportioned to the state general fund, N.D.C.C. ? 57-51-17, is not for a penalty upon a tax but instead is a punitive "penalty of twenty-five dollars for each day that [a] person [having a duty to report] fails or refuses to furnish the information or comply with the provisions of this chapter." N.D.C.C. ? 57-51-17. Based upon Burlington County, the 1982 opinion did not distinguish between a punitive penalty and interest or penalties imposed for delinquency in tax payments. The subsequent determination by the North Dakota Supreme Court in Amerada Hess that "a penalty which is created by statute for failure to pay a tax assessment becomes part of the tax itself," is directly contrary to the holding in the Burlington County. Consequently, it is my opinion that the holding in Amerada Hess requires a different conclusion than that reached in 1982 N.D. Op. Att'y Gen. 29 and the May 5, 1987, letter from Attorney General Nicholas Spaeth to State Treasurer Robert Hanson.

Furthermore, allocating interest on delinquent ad valorem air transportation company property tax payments with the tax is consistent with N.D.C.C. ch. 57-32. N.D.C.C. ? 57-32-03 provides, in part, that "[a]ll the provisions of the law respecting delinquency of personal property assessments generally so far as may be consistent with the provisions of this chapter are applicable equally to the assessments and taxes provided for in this chapter." Penalties and interest on personal property assessments are generally allocated to the counties, but an exception provides that penalties and interest collected on taxes due to municipalities or other taxing districts or agencies must be paid to the municipality

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or taxing district or agency which is entitled to the tax. N.D.C.C. ? 57-20-22. Therefore, the interest and penalties provided by N.D.C.C. ? 57-32-03 must be allocated to the cities or municipal airport authorities entitled to the tax under N.D.C.C. ? 57-32-04 because this is a tax which must be paid to a municipality or taxing district or agency under the exception for personal property assessments at N.D.C.C. ? 57-20-22.

Therefore, it is my opinion that the interest and penalties imposed upon delinquent air carrier transportation company ad valorem taxes pursuant to N.D.C.C. ? 57-32-03 should be deposited in the air transportation fund and subsequently allocated to the cities or municipal airport authorities where the transportation companies make regularly scheduled landings pursuant to N.D.C.C. ? 57-32-04. It is my further opinion that, unless otherwise expressly stated, interest and penalties on taxes are part of the tax and must be apportioned or allocated as the tax itself is apportioned or allocated. To the extent that the conclusion reached in this opinion conflicts with that of 1982 N.D. Op. Att'y Gen. 29 and the May 5, 1987, letter opinion from Attorney General Spaeth to State Treasurer Robert E. Hanson, those opinions are overruled as of the effective date of this opinion.

- 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.

Heidi Heitkamp
ATTORNEY GENERAL

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