

**OPINION
49-102**

February 15, 1949 (OPINION)

LEGISLATURE

RE: Gas Tax Increase Must Have Two-Thirds Vote

You have requested the opinion of this office as to whether or not House Bill 306 is an amendment of the initiated law of 1926 known as the gasoline tax law and if so, whether it requires a two-thirds majority for enactment.

The initiated measure of 1926 defines dealer as including any person or persons, firm, association or corporation who imports or causes to be imported from any other state or county any motor vehicle fuel for operating or propelling motor vehicles for use, distribution or sale in and after it reaches the State of North Dakota.

It further provides that said dealer shall pay a license tax of two cents per gallon on all motor vehicle fuel used and sold by him other than such fuel sold by him or them in the original package.

In 1929 this law was amended by increasing the license tax from two cents to three cents.

The legislative assembly in 1943 enacted chapter 262 which levied a tax of four cents on the use of fuel by any person within this state. All these measures were enacted by a two-thirds majority of all members elect in both houses.

You will note that the initiated measure of 1926 provides that all dealers shall pay a license tax of two cents per gallon. You will also note that House Bill 306 referring to section 1 thereof provides for a tax on all dealers in motor vehicle fuel of a special motor fuel license tax used and sold in the state of North Dakota. The language in House Bill 306 is almost identical with the language in the initiated measure of 1926. Section 1 of House Bill 306 also provides that such tax shall be separate and apart from and in addition to any license tax or other taxes imposed upon or applicable to motor vehicle fuels or dealers therein under the laws of this state, and said two cents per gallon tax shall be in addition to and over and above the three cent tax imposed by chapter 57-41 of the North Dakota Revised Code of 1943, as amended, and in addition to the one cent tax imposed by chapter 57-48 of the 1947 Supplement to the North Dakota Revised Code of 1943.

Section 2 of House Bill 306 provides that said additional two cents per gallon tax shall be paid by each dealer in motor vehicle fuels as defined and provided by chapter 57-41 of the North Dakota Revised Code of 1943, as amended, and said additional two cents per gallon tax shall be paid in the manner, at the time, and to the officer specified in said chapter 57-41 of the North Dakota Revised Code of 1943, as amended, and all definitions of terms and methods of procedure for assessment and collection and other general provisions by context applicable thereto contained and provided in said chapter

57-41 of the North Dakota Revised Code of 1943, as amended, shall apply to this special motor vehicle fuel tax imposed under the terms and provisions of this Act.

I call your attention to section 1-0226 of the North Dakota Revised Code of 1943 which is a legislative declaration with reference to the requirements for amendments of an initiated measure and which reads as follows:

"EFFECT OF REVISION UPON INITIATED MEASURES. Any provision of this code which was enacted as an initiated measure, or as a part of such a measure, notwithstanding the revisions, shall remain in effect as an initiated provision and shall be subject to amendment, reenactment, or repeal only as provided by section 25 of the constitution of this state."

Also section 1-0225 provides as follows:

"CONTINUATIONS OF EXISTING STATUTES. The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

The fact that the initiated measure may have been subsequently amended does not change its character as an initiated measure.

In the case of State Ex Rel. Strutz vs. Baker, 71 N.D. 153 the Supreme Court of this state passed squarely upon this question. It was there held that "Where the Legislature amends and reenacts such an initiated measure, the initiated character of the measure is not destroyed but remains in force, and any subsequent amendment of the initiated measure or of an amended or reenacted portion thereof is subject to the constitutional limitation placed upon the Legislature."

In the same opinion the court quoted with approval from the case of De Motte v. De Motte, 364 Ill. 421, 4. N.E. (2d) 960.

"The court was construing a statute which on its face appeared to be independent, but in fact merely introduced new features into the old act, and held such change to be an amendment, quoting with approval this rule set forth in Galpin v. Chicago, 269 Ill. 27, 36, 109 N.E. 713, 716, LRA 1917B, 176; 'even though an act professes to be an independent act and does not purport to amend any prior act, still if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject so as to make of the old and the new a connected piece of legislation covering the same subject, the latter act must be considered an amendment of the former'."

I desire to call your attention to the fact that the source of chapter 57-41 of the North Dakota Revised Code of 1943, as amended, is the initiated measure of June 30, 1926, known as the gasoline tax law. It clearly appears therefore, from the language of House Bill 306 that it is an amendment of an initiated measure, namely, the initiated measure of 1926, and, therefore, as an amendment of said

initiated measure, it would require a two-thirds majority of all members elect in both houses to effect its passage.

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