

LETTER OPINION
99-L-68

August 6, 1999

The Honorable John Dorso
House of Representatives
1121 26th Ave S
Fargo, ND 58103-5728

Dear Representative Dorso:

Thank you for your letter asking three questions relating to the recent decision of the State Board of Equalization (Board) that internet service providers are not included within the statutory definition of "telecommunications carrier" in N.D.C.C. § 57-34-01(4) for the purpose of the telecommunications gross receipts tax imposed under N.D.C.C. ch. 57-34. I can answer your first two questions regarding the general authority of the Board. However, I am unable to answer your third question regarding internet service providers because it is an issue in pending litigation.

You first ask whether determining the activity which is taxable under N.D.C.C. ch. 57-34 is a legal question on which this office can issue an opinion or a policy question for the Board to answer. As you know, this office will not issue an opinion when the issues presented are questions of fact rather than questions of law. See N.D.C.C. § 54-12-01(6), (8) (opinions issued to state agencies and legislators on "legal questions"). This distinction between questions of law and fact frequently arises on tax matters. See, e.g., 1998 N.D. Op. Att'y Gen. L-131 (Sep. 2 letter to Stewart) (whether a speculative building is a "revenue-producing enterprise" is a question of fact); 1995 N.D. Op. Att'y Gen. L-222 (Sep. 21 letter to McBeth) (whether an individual is a "farmer" for purposes of the farm residence exception is a question of fact); Letter from Attorney General Nicholas Spaeth to Terry Elhard (July 23, 1991) (whether a barn is used for an exempt purpose is a question of fact); Letter from Attorney General Nicholas Spaeth to Barry Hasti (Nov. 29, 1985) (whether applicant is a "new business" is question of fact for the Board to decide). As these opinions indicate, the question whether property or an activity is taxable frequently depends on findings of fact and cannot be conclusively answered by this office as a matter of law.

It would be accurate to describe the determination whether an activity is taxable under N.D.C.C. ch. 57-34 as a mixed question of

The Honorable John Dorso
August 6, 1999
Page 2

law and fact. In my opinion, this office can identify the appropriate legal standard to apply to determine whether an activity is taxable, but it is the responsibility of the appropriate governmental entity to identify the facts to which the legal standard is applied. In this case, the legal standard is straightforward: the gross receipts tax must be assessed on adjusted revenues from charges for "telecommunication service," which is defined as "two-way communication." N.D.C.C. § 57-34-01. It would be up to the Board to determine whether communications are sent both ways between an internet service provider and a subscriber of those services.

This conclusion does not mean that identifying or finding the material facts involves a policy question for the Board to answer, as your letter suggests. N.D.C.C. § 57-34-03 provides that the Board "shall assess the tax under this section." By using the mandatory term "shall," this section does not merely authorize the Board to assess the gross receipts tax; the assessment is required. As discussed later in this opinion in response to your second question, I believe the Board has some decision-making authority in applying N.D.C.C. ch. 57-34. However, that authority is limited to carrying out the mandates of state law and does not include policy decisions by the Board. See, generally, 1981 N.D. Op. Att'y Gen. 280 (the Board must comply with the directives of the Legislature).

You next ask whether the Board has authority to grant an exemption or otherwise determine what activity is subject to tax under N.D.C.C. ch. 57-34. The Board is not authorized in N.D.C.C. ch. 57-34 to grant an exemption for activity which would otherwise be subject to the gross receipts tax. Rather, the Board is charged with making the assessments that are required in that chapter. However, in a recent summary of its standard of review in cases where an assessment of taxes is challenged, the North Dakota Supreme Court reiterated its opinion that administrative agencies have some authority to make binding legal interpretations of the statutes which are enforced or administered by the agency.

The [Tax] Commissioner's interpretation of a statute is fully reviewable by this court. Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733 (N.D.1996). In construing a statute, our duty is to ascertain the intent of the Legislature. Id. We look first to the words of the statute to discern legislative intent, and we construe those words in their ordinary sense. Id. Still, when the Commissioner interprets a statute on a complex and technical subject, the Commissioner's interpretation is entitled to appreciable deference if it does not contradict the language of the statute, or if it is not

The Honorable John Dorso
August 6, 1999
Page 3

arbitrary and unjust. NL Industries v. State Tax Commissioner, 498 N.W.2d 141 (N.D.1993). We review the Commissioner's interpretation of NDCC 57-38-01.3(1)(c) within that framework.

Kinney Shoe Corp. v. State, 552 N.W.2d 788, 790 (N.D. 1996). This standard of review is not unique to the tax commissioner, but applies to all administrative agencies applying complex or technical statutes. See True v. Heitkamp, 470 N.W.2d 582, 587 (N.D. 1991). Thus, reasonable interpretations by the Board of complex or technical statutes in N.D.C.C. ch. 57-34 may be entitled to some deference.

The Board's authority to interpret N.D.C.C. ch. 57-34 is limited. The court has stated that it will not defer to an agency's construction of a statute when the statute is clear and unambiguous or when the agency's construction is contrary to the intent of the Legislature. Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733 (N.D. 1996). Accordingly, it is my opinion that the Board, in addition to the fact-finding function discussed earlier in this opinion, has limited authority to determine what activity is subject to tax under N.D.C.C. ch. 57-34 as a matter of law when the Board is applying a statute which is ambiguous or complex, at least in the absence of a contrary Attorney General's opinion. In exercising this authority, the Board's responsibility is to act consistently with legislative intent and not to establish new policies on behalf of the state.

Your last question asks whether services provided by internet service providers are "two-way communication" under N.D.C.C. § 57-34-01(5) and thus are subject to tax under N.D.C.C. ch. 57-34. This office could answer your question as a matter of law if we were provided all the material facts. However, as I recently stated in an opinion to Representative Rae Ann Kelsch, it is the long-standing practice of this office not to issue opinions on issues under consideration in pending litigation. 1999 N.D. Op. Att'y Gen. L-52 (citations omitted). I understand that litigation is pending between the State of North Dakota and two internet service providers in the South Central Judicial District. A key issue in that litigation is whether the providers are taxable under N.D.C.C. ch. 57-34. Accordingly, although I understand your interest in obtaining my opinion for guidance on assessments for future years, I respectfully decline to issue an opinion on your last question. The decision of the court in these cases should resolve the matter for the years in question and future years for the Board.

Sincerely,

The Honorable John Dorso
August 6, 1999
Page 4

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