

LETTER OPINION
97-L-203

December 24, 1997

Hon. Rick Clayburgh
Tax Commissioner
State Capitol
600 E Boulevard Ave
Bismarck, ND 58505-0599

Dear Commissioner Clayburgh:

Thank you for your letter regarding the effective date of 1997 House Bill 1068, which provides for major changes in tax policy relating to the telecommunications industry.

These changes include: (1) eliminating the operating property, both real and personal, of telecommunication companies from central assessment by the State Board of Equalization under the provisions of N.D.C.C. ch. 57-06; (2) making all telecommunication carriers subject to the adjusted gross receipts tax in lieu of property tax provisions of N.D.C.C. ch. 57-34; and (3) providing that this legislation is effective for taxable years beginning after December 31, 1997.

The basis for the in lieu tax is determined as follows: (1) each telecommunications carrier shall file with the Tax Commissioner on or before May first of each year a report containing a statement of its gross receipts in North Dakota during the preceding calendar year, plus allowable deductions; (2) on or before July fifteenth of each year, the Tax Commissioner shall review the report and compute the tentative total tax to be assessed against each telecommunications carrier at a rate of two and one-half percent of adjusted gross receipts; (3) the State Board of Equalization shall assess the tax at its August meeting; and (4) the tax is due and payable to the Tax Commissioner on January first following the year in which the tax was assessed.

Your question is whether the first year that the State Board of Equalization may assess the tax based on the preceding calendar year's adjusted gross receipts of telecommunication carriers is 1998. Presumably, you are concerned that the 1998 assessment would be based

Hon. Rick Clayburgh
December 24, 1997
Page 2

upon the 1997 adjusted gross receipts which is a year before the effective date of the Act.

For the following reasons, it is my opinion that the first year that the State Board of Equalization may assess the tax based on the preceding calendar year's adjusted gross receipts of telecommunication carriers is 1998.

The phrase "taxable year" as used in the section of 1997 House Bill 1068 specifying the bill's effective date is not defined in N.D.C.C. ch. 57-34. As used in that chapter, "taxable year" could refer either to the year the tax is assessed or to the year the gross receipts are earned upon which the amount of tax is computed. "A statute is ambiguous if it is susceptible to differing but rational meanings." Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 735 (N.D. 1996) (quotation omitted). The North Dakota Supreme Court in Hamich v. State, 564 N.W.2d 640, 644 (N.D. 1997) set forth the following rule of statutory construction:

If a statute is ambiguous, extrinsic aids useful in construing the statute to determine legislative intent include the object sought to be obtained, the legislative history, and the administrative construction of the statute.

A review of the legislative history reveals that the object sought to be obtained by this legislation was to change tax policy to reflect the changing nature of the telecommunications industry. No longer do all telecommunication carriers own personal property in North Dakota.

In order to create uniformity in the industry, the personal property tax that was traditionally assessed by the State Board of Equalization on the operating property of telecommunication carriers was repealed and it was replaced by an in lieu gross receipts tax that would apply to all telecommunication carriers doing business in North Dakota. At no time during the legislative process was it suggested that the personal property tax be repealed after the 1997 tax year and the effect of the new in lieu tax postponed until 1999, giving the telecommunications industry a one year tax holiday. Further, the fiscal note, and its several amendments, was calculated to reflect that the first year of the in lieu adjusted gross receipts tax would be the second year of the 1997-1999 biennium. It is appropriate to consider the fiscal note when attempting to ascertain legislative intent. Puklich & Swift, P.C. v. State Tax Com'r, 359 N.W.2d 846, 850 n. 4 (N.D. 1984).

Hon. Rick Clayburgh
December 24, 1997
Page 3

Although labeled a "gross receipts tax" in your letter and this opinion, the tax is actually imposed on the privilege of doing business in this state. N.D.C.C. § 57-34-11. Gross receipts are simply used as the basis for the amount of tax assessed in each taxable year. The fact that a tax is computed based on an organization's earnings does not by itself determine the nature of the tax. 1982 N.D. Op. Att'y Gen. 165, 169-70, citing Southern Ry. Co. v. Watts, 260 U.S. 519, 529 (1923); 1978 N.D. Op. Att'y Gen. 86, 88 (same).

A similar issue was presented to the North Dakota Supreme Court in Northwestern Savings and Loan Ass'n v. Baumgartner, 136 N.W.2d 640 (N.D. 1965). In that case, a property tax on personal property of a savings and loan association was replaced with a "lieu tax" based on the earnings of the association for the previous calendar year. The court rejected the taxpayer's claim that the "lieu tax" was for the year in which the earnings accrued, and concluded that the tax was for the privilege of doing business in the state for the year in which the tax was imposed. Id. at 643.

Even though the 1998 assessment will be measured by the 1997 gross receipts, a year prior to the effective date of the Act, an improper retroactive effect is not created. A tax which draws on antecedent facts for its operation is not an improper retroactive enactment. Westfield-Palos v. City of Rancho Palos Verdes, 141 Cal.Rptr. 36, 41-42 (App. 1977). Tax laws may be given a retroactive effect unless they are violative of some right guaranteed by the state or federal Constitution. State v. Flaherty, 178 N.W. 790, 791 (N.D. 1920). On its face, 1997 House Bill No. 1088 does not violate any of these guaranteed rights.

In conclusion, the tax assessed under N.D.C.C. § 57-34-04 as amended by 1997 House Bill 1068 is for the privilege of doing business in this state for the year in which the tax was assessed. The previous year's earnings are simply the basis for computing the amount of tax. Therefore, it is my opinion that the phrase "effective for taxable years beginning after December 31, 1997" in 1997 House Bill 1068 means that the first year that the State Board of Equalization may assess the tax based on the preceding calendar year's adjusted gross receipts of telecommunication carriers is 1998.

Sincerely,

Heidi Heitkamp

Hon. Rick Clayburgh
December 24, 1997
Page 4

ATTORNEY GENERAL

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