

Date Issued: June 24, 1987 (AGO 87-13)

Requested by: Gary D. Preszler, Commissioner  
Department of Banking and Financial Institutions

- QUESTION PRESENTED -

Whether state-chartered banks and credit unions are subject to the new assessment rate set forth in House Bill No. 1010 in relation to the 1987 assessments.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that state-charted banks and credit unions are subject to the new assessment rate set forth in House Bill No. 1010 in relation to the 1987 assessments.

- ANALYSIS -

Section 4 of House Bill No. 1010 increases the yearly assessment of state-chartered banks from .0125 percent to .015 percent of gross assets as of June 30 in the year of the assessment. Section 5 of House Bill No. 1010 establishes a similar assessment procedure for state-chartered credit unions. The assessments are required to be paid to the State Treasurer within thirty days of each June 30. Section 7 of House Bill No. 1010 provides that "the first assessments of banks and credit unions under sections 4 and 5 of this Act apply to assets as of June 30, 1987." House Bill No. 1010 was filed with the Secretary of State on April 27, 1987.

Initially, it is helpful to determine the effective date of House Bill No. 1010. North Dakota Constitution Article IV, Section 13 (as amended at the March 18, 1987, special election) states in relevant part as follows:

Every law, except as otherwise provided in this section, enacted by the legislative assembly takes effect on July first after its filing with the secretary of state or ninety days after its filing whichever comes later, or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the act. Every appropriation measure for support and maintenance of state departments and institutions and every tax measure that changes tax rates enacted by the legislative assembly take effect on July first after its filing with the secretary of state or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the act. An emergency measure takes effect upon its filing with the secretary of state or on a date specified in the measure.

(Emphasis supplied.)

In accordance with North Dakota Constitution Article IV, Section 13, House Bill No. 1010 would become effective on July 1, 1987, if the

assessment constitutes a "tax measure." Alternatively, if the yearly assessment does not constitute a "tax measure," it would become effective on July 26, 1987 (ninety days after its filing with the Secretary of State). The effective date set forth in section 7 of House Bill No. 1010 does not constitute an emergency declaration and, therefore, does not affect the effective date of the bill.

The courts have generally distinguished a tax from a revenue raised for regulatory purposes. This distinction has been stated as follows:

The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax.

City of Milwaukee v. Milwaukee and Subway Transportation Corp. 94 N.W.2d. 584, 588-89 (Wis. 1959) (quoting 4 Cooley on Taxation section 1784 at 3511 (Fourth ed.)). See also Joslin v. Regan 406 N.Y.S.2d. 938, 941 (N.Y. Sup. Ct. 1978); Yourison v. State 140 A. 691 (Del. 1928); Fireman's Fund Ins. Co. v. Comm'rs. 90 N.E.2d. 668, 670-71 (Mass. 1950).

Although the assessment funds are paid into the state treasury, as opposed to a special fund for the banking department, the revenue is clearly intended to provide a source of funds for the Department of Banking and Financial Institutions so that it may effectively conduct its examinations of financial institutions and carry out its other regulatory functions. Indeed, a financial institution is not even liable for the assessment if it has "not been examined by the commissioner . . . for three years prior to any assessment date . . . ." House Bill No. 1010, sections 4 and 5.

Additionally, it is significant to note that independent of the assessment provisions, other statutes specifically address the taxation of financial institutions. N.D.C.C. chapters 57-35 (taxation of banks and trust companies, five percent), 57-35.1 (taxation of building and loan associations, five percent), and 57-35.2 (two percent privilege tax on net income of banks, trust companies, and building and loan associations); N.D.C.C. section 6-06-29 (specifically exempts credit unions from most state taxes). These independent tax statutes support the characterization of the assessments as regulatory revenues.

Based on the foregoing, it is my opinion that the yearly assessments of state-chartered banks and credit unions are an exercise of the state's general police powers, as a means of regulating banks and credit unions, and do not constitute "tax measures." As such, House Bill No. 1010 is effective on July 26, 1987 (ninety days after its April twenty-seventh filing with the Secretary of State).

Having concluded that the effective date of the bill is July 26, 1987, it is necessary to determine whether the new assessment rate

should be applied for the 1987 yearly assessments. The Legislature's statement in section 7 of House Bill No. 1010 that "the first assessments under sections 4 and 5 of this Act apply to assets as of June 30, 1987" clearly indicates its intent that the new rate (.015 percent of gross assets) is applicable for purposes of the 1987 assessment.

The imposition of an assessment according to a previous assessment date has been upheld by the United States Supreme Court. *Kentucky Union Co. v. Kentucky* 219 U.S. 140, 152-53 (1911); *Locke v. New Orleans* 71 U.S. (4 Wall.) 172 (1867). Thus, the fact that the law is not effective until July 26, 1987, does not preclude the retrospective imposition of the new assessment rate as to gross assets on a prior date. Furthermore, the thirty days within which financial institutions have to pay their assessment liability extends beyond the July 26, 1987, effective date of House Bill No. 1010.

It is my opinion, therefore, that the Department of Banking and Financial Institutions should impose the .015 percent assessment rate contained in House Bill No. 1010 in relation to its 1987 assessment of state-chartered banks and credit unions. Please note that section 5 of House Bill No. 1010 exempts "credit unions whose examinations have begun within the six months immediately prior to July 1, 1987" from the first yearly assessment.

- EFFECT -

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

NICHOLAS J. SPAETH  
Attorney General

Assisted by: Steven E. Noack  
Assistant Attorney General