

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-10

Date issued: July 17, 1989

Requested by: Jerril Rustan, Chairman
North Dakota Agricultural Products
Utilization Commission

- QUESTION PRESENTED -

Whether the ethanol production subsidy established by 1989 N. D. Sess. Laws ch. 82 may be applied to ethanol produced prior to July 1, 1989, the effective date of the subsidy program.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the ethanol production subsidy established by 1989 N. D. Sess. Laws ch. 82 may not be applied to ethanol produced prior to July 1, 1989, the effective date of the subsidy program.

- ANALYSIS -

The 1989 Legislative Assembly adopted a subsidy for the North Dakota ethanol industry to replace the existing tax reduction for ethanol blended gasoline. 1989 N. D. Sess. Laws ch. 82, ' 5 (codifying House Bill No. 1415, 51st Leg. (1989)). The law provides a \$3.5 million appropriation to the Agricultural Products Utilization Commission to distribute at the rate of forty cents per gallon of ethanol that is "produced in the state [and] marketed by the producing plant to a distributor or wholesaler for sale within North Dakota."

Id. The purpose of the section is to provide "a production subsidy to North Dakota ethanol plants for the period beginning July 1, 1989, and ending June 30, 1991." Id.

Before July 1, 1989, N. D. C. C. ' 57-43.1-02(2) provided a tax reduction of four cents per gallon of gasoline that had been blended with ethanol that was manufactured or distilled in North Dakota. Under the prior statute gasoline blended with ethanol manufactured or distilled in another state qualified for the tax reduction allowed by the state in which it was manufactured or distilled if that state allowed a similar credit for ethanol produced in North Dakota. N. D. C. C. ' 57-43.1-02(3) (1987 Supp.).

The United States Supreme Court in New Energy Co. of Indiana v. Limbach, 486 U. S. 269 (1988), held that Ohio's reciprocity clause for out-of-state produced ethanol violated the federal commerce clause. Although the North Dakota reciprocity clause for out-of-state produced ethanol is not identical to the Ohio statute, the constitutionality of the North Dakota provision was called into question in light of the Supreme Court's decision. Hearing on H. 1415 Before the House Finance and Taxation Comm., 51st Leg. (Jan. 25, 1989) (testimony of Rep. Myrdal and Carla J. Smith, Assistant Attorney General). In order to continue state support for North Dakota's ethanol industry, the 1989 legislature adopted House Bill No. 1415 to replace the tax reduction with a direct subsidy to North Dakota ethanol plants through the Agricultural Products Utilization Commission. House Bill No. 1415 phased out the tax reduction for ethanol blended gasoline as of midnight June 30, 1989, and authorized direct subsidy payments to North Dakota ethanol plants as of July 1, 1989. 1989 N. D. Sess. Laws. ch. 82, " 3, 4, 5.

In order to qualify for the pre-July 1, 1989 tax reduction, the ethanol had to be blended with gasoline. See N. D. C. C. ' 57-43.1-02 (1987 Supp.) This blending is usually done by a wholesaler or distributor. The wholesaler or distributor then sells the ethanol blended gasoline to a retailer for sale to the consumer. The wholesaler or distributor collects the gasoline tax at the time of sale to the retailer and remits it to the Tax Commissioner.

Under the old tax reduction statute the tax collected on ethanol blended gasoline was four cents per gallon less than the tax on unblended gasoline. When the tax reduction was phased out, some wholesalers or distributors were left with inventories of either raw unblended ethanol or ethanol blended gasoline which had not yet received the reduced tax rate (because they had not yet sold the product to retailers) and which after July 1, 1989, is no longer eligible for the four cent tax reduction. On and after July 1, 1989, ethanol blended gasoline and unblended gasoline are subject to the same tax rate. The issue is whether these inventories qualify for the ethanol production subsidy that was phased in on July 1, 1989, pursuant to House Bill No. 1415.

It is a general rule of jurisprudence that the Legislature intends a statute to have a prospective application unless the statute explicitly states that it is retroactive. N. D. C. C. ' 1-02-10 provides: "No part of this code is retroactive unless it is expressly declared to be so." In Reiling v. Bhattacharyya, 276 N. W. 2d 237 (N. D. 1979), the North Dakota Supreme Court construed N. D. C. C. ' 1-02-10, stating:

All statutes enacted by the legislature are to be applied prospectively, i.e. they are to be applied only to causes of action that arise after the effective date of the statute, unless the legislature clearly expresses that they are to be applied retroactively.

276 N.W.2d at 240-41 (footnote omitted). The court further noted that by giving statutes only a prospective effect, the "legislature will be given notice that it must specifically state that a statute is to apply retroactively if the legislature desires it to apply retroactively." Id. at 240 (footnote omitted). See also Gofor Oil, Inc. v. State, 427 N.W.2d 104, 108 (N.D. 1988). The prospective application of legislative enactments applies to substantive and procedural statutes. Reiling, 276 N.W.2d at 240.

In this case the Legislature did not specifically state that the subsidy provision was to apply retroactively. Therefore, the subsidy is prospective only.

The relevant portion of House Bill No. 1415 states that distribution of the production subsidy is "at the rate of forty cents for each gallon of agriculturally derived fuel [ethanol] produced in the state that is marketed by the producing plant to a distributor or wholesaler for sale within North Dakota." 1989 N.D. Sess. Laws ch. 82, ' 5. This language establishes that to qualify for the production subsidy, the ethanol must be produced in North Dakota and marketed for sale in North Dakota. If the statute is applied prospectively, only ethanol produced in North Dakota and marketed in North Dakota after July 1, 1989, qualifies for the production subsidy. Therefore, the raw ethanol and blended gasoline held in the inventories of wholesalers or distributors before July 1, 1989, do not qualify for the subsidy because the fuel was produced and marketed before July 1, 1989.

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- 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 is decided by the courts.

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