

**OPINION
70-408**

April 10, 1970 (OPINION)

Mr. Byron L. Dorgan

Tax Commissioner

RE: Taxation - Exemption for New Industries - Application

This is in response to your letter in which you set forth some of the problems encountered in the interpretation of Chapter 40-57.1 and advise that there are presently before the board applications for the tax exemption. You then ask for an opinion to help formulate policies that will guide the board in its future actions on the administration of Chapter 40-57.1. You further state that the State Board of Equalization has directed you, as secretary of the board, to request an opinion on the following enumerated questions:

1. Do the ad valorem and income tax exemptions authorized, pursuant to Chapter 40-57.1 of the North Dakota Century Code, apply to businesses which existed on July 1, 1969 but since that date have expanded their business operations? If the answer to question number one is in the affirmative, we respectfully request your opinion on the following:
2. Would the exemptions be applicable only to the expanded portions of the business or would property utilized in the continuation of an existing business also qualify for the exemptions?
3. If the expansion portion of the business being conducted by the project operator will be conducted on the same premises as the project operator utilized on July 1, 1969, would the portion of the premises utilized in the expansion of the business qualify for the exemption?
4. If new facilities are acquired by the potential project operator in which the potential project operator continues the operation of a business which was operated by him on or before July 1, 1969 and, in addition thereto, utilizes a portion of the new premises in the conduct of the expanded portion of his business, will the entire property qualify for an exemption or will only that portion of the property that was utilized by the expansion portion of the business qualify for the exemption?

In addition to the above, the Board respectfully requests your opinion as to whether property utilized by a project operator qualifies for an exemption under Chapter 40-57.1 of the North Dakota Century Code, if the project operator dissolved the corporate entity which operated the business on July 1, 1969 and reorganizes under a new corporate structure to conduct the operation of a business as it existed on July 1, 1969 or partially continue that business together with an expansion of the business on or after July 1, 1969."

In answering the questions submitted, it is necessary to review the provisions of Chapter 40-57.1 and related provisions of law as well as the committee report which resulted in the introduction and enactment of the present law.

Chapter 40-57.1 was enacted by Chapter 385 of the 1969 session laws through Senate Bill No. 39. Senate Bill 39 was amended, but only as pertaining to the "Declaration and finding of Public Purpose" which contains the legislative intent, otherwise it was passed as introduced. The amendment added to the existing bill the following language which is now found in Section 40-57.1-01 and constitutes the last paragraph of said section.

* * * It is the intent of the legislative assembly that political subdivisions and the state board of equalization in their determination of whether the tax exemptions authorized by this chapter shall be granted, shall give due weight to their impact and effect upon existing industry and business to the end that an unfair advantage shall not be given to new enterprises which is to the substantial detriment of existing enterprises." (emphasis ours)

We note that the Legislature used the term "new enterprises" which we believe is significant and which will be discussed further later herein. The report of the Legislative Research Committee study recognizes several factors which influenced the decision by new out-of-state or existing companies to locate or expand within the State. It also recognized that location or expansion decisions are complex and involve a number of economic and noneconomic factors. The report enumerated some of them. It also recognized that some businesses because of police and fire protection made available to them might wish to contribute to the tax coffers of the municipality or forego in part some of the exemptions. This thought was ultimately incorporated in Section 40-57-17. Some of its provisions will be discussed later herein.

Because you prefaced your questions with the discussion of expansion of business and because the specific questions involve business or industries which have expanded, we find it necessary to examine the meaning of said term.

The committee report uses the terms expand and expansion in its discussion, but it does not state specifically what it meant when it used such terms. The term expanded is defined in Webster's Dictionary as follows: "1. To open wide; to spread out; to diffuse. 2. To make to occupy more space; to dilate; to distend; to enlarge. 3. To work out or develop in full detail, as an argument or an equation. - v.i. To spread apart; distend; enlarge; swell." Expansion is defined as follows: "1. Act or process of expanding, or state of being expanded; dilatation. 2. That which is expanded; extended surface; an expanded part. 3. Extent of working fluid, as steam, in an engine cylinder after cut-off, or, in an internal-combustion engine, after explosion. 5. Math. The developed result of an indicated operation; as, the expansion of $(a+b)^2$ is $a^2+2ab+b^2$." From the dictionary definitions, it appears quite obvious that the terms have several meanings.

The terms "expand" or "expansion" were used in the report without stating what was meant by such terms. The term "expansion" or "expand" could relate specifically to the physical structure of a business or enterprise. Such term could apply to financial expansion, territorial expansion, employment expansion, etc. Such term could also raise the further question of how much expansion must there be before the "expanded business" could qualify under the act if this were a material criteria to be considered under the existing legislation. By way of illustration, if expansion were to be a factor, would a one inch expansion of a physical plant be enough or would the expansion have to consist of several feet or at least 25 feet? As to expansion of employment, would it mean expansion by at least one additional employee? Would an expansion qualify where there was only one additional employee but a cut down elsewhere within the same business? Would expansion in the financial sense have to be in amounts in excess of \$1.00, or would they have to be in excess of \$10,000? These questions illustrate the utter confusion which could result if the term expansion was used in its broad general sense.

From the report and the legislation enacted, we are inclined to believe that the committee, when it used the term expand or expansion in the report, had in mind a situation where a business expanded by establishing or creating new enterprises in other localities. We believe that the committee had in mind a situation where a business was located in a certain place in the State of North Dakota and expanded by creating branch office, businesses or enterprises in other localities.

It is significant to observe and note specifically that while the terms "expansion" and "expand" were used in the committee report, such terms are not found in Chapter 40-57.1. We would also observe that if such terms were used without any further guidelines, the legislation might be vulnerable.

It appears to us that the Legislature specifically deemed it advisable not to use the terms "expand" and "expansion" conceivably on the basis that such terms would confuse rather than instruct.

The Legislature used the term project. The term project is defined in Section 40-57.1-02 and is as follows:

* * * the term 'project' shall mean any real property, buildings and improvements on real property or the buildings thereon, and any equipment permanently located on such real property or in such buildings, which are used or useful in connection with revenue-producing enterprises, or any combination of two or more such enterprises, engaged or to be engaged in:

1. Assembling, fabricating, manufacturing, mixing, or processing of any agricultural mineral, or manufactured products, or any combination thereof.
2. Storing, warehousing, distributing, or selling any products of agriculture, mining, or manufacture.

3. Any other industry or business not prohibited by the constitution or laws of the state of North Dakota."

It is noted that the term project includes any other industry or business not prohibited by the Constitution of the State of North Dakota.

We would further note that the Legislature had in mind that personal property of such new businesses could be exempt from taxation as well as real property. However, with the repeal of the personal property tax, the only property remaining is real property. Thus, the exemption would apply only to real property and to income tax as provided for in Section 40-57.1-04.

In this respect, we would like to note that the exemption granted in 40-57-17 pertained to personal property, and the Legislature specifically provided that leaseholds would be classified as personal property. With the exemption of personal property from taxation, this portion of the statute is no longer significant. The only remaining portion which is pertinent is that pertaining to income tax. We do, however, deem Section 40-57-17 significant because it resulted from the Legislative Research Committee study, which study also brought about the enactment of Chapter 40-57.1. Section 40-57-17 uses the term "commenced business operations" and "commences business operations" which implies that its provisions refer to new businesses, at least to the extent that they are new in a certain locality. The term commences or commenced as used in Section 40-57-17 leaves no room for any other construction.

On August 1, 1969, we issued an opinion to Bruce L. Bartch, Director of the North Dakota Business and Industrial Development Department. In that opinion we concluded that the provisions of Chapter 40-57.1 do not authorize a tax exemption for businesses, industries or enterprises which were in existence and actually commenced operations prior to July 1, 1969. In that opinion we were not required to delineate or define what is meant by new businesses or projects which had commenced operations. We, however, clearly meant that an expansion in the same location, whether it be merely plant expansion, financial expansion, employment expansion, or any other expansion or a combination of these, would not qualify as a new business enterprise or project. At that time, we noted specifically that Section 40-57.1-03 used the term "potential project operator" in several instances. Such term was used with reference to the authority granted to municipalities to negotiate with potential project operators. The term "potential project operators" clearly implies that it refers to operators who were then (July 1, 1969) not actively engaged in that business, and as such, a mere expansion of the business without starting a new business or similar business in another location would not qualify or come within the concept of such term.

We are impressed with the fact that the committee report used the terms "expand" and "expansion", but these terms were not incorporated or found in the legislation resulting from the study. This fact almost forces the legal conclusion that the Legislature deliberately did not wish to employ such terms because of the broad concepts that

would be embraced in such terms.

We also note the title of the act which provides as follows: "To give political subdivisions the authority to grant ad valorem taxation exemptions to new industries, providing for the approval of the State Board of Equalization, and granting authority to the State Board of Equalization to also exempt these industries from State income taxation." The expression "new industries" is a clear indication as to what the Legislature intended. In this respect, we must take cognizance of Section 61 of the North Dakota Constitution which provides "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." The title of the act relates only to new industries. If the body of the act were to include expansion of existing businesses, a doubt could be raised whether or not the expansion portion would be constitutional. We are, at this moment, not resolving this particular question because the body of the act does not use any specific language to include industries or businesses other than new ones.

All of the items considered, or which should be taken into consideration, militate against the inclusion of expanded businesses or enterprises as qualifying for a tax exemption.

On the basis of the foregoing, and in response to your first question, it is our opinion that the exemptions authorized under Chapter 40-57.1 do not apply to businesses which existed on July 1, 1969, but have since then expanded their business operations unless the expansion included the institution of a new business operation in another location which is new in the new location. For example, if a business operation in existence in the city of Bismarck, manufacturing agricultural equipment or supplies, were to open a new business or a branch office in another city, the new business or branch office or manufacturing enterprise located in another city would be eligible for the tax exemption. In such event, only the newly organized business in a different locality would be exempt.

Because of the response given to question No. 1, it will not be necessary to answer questions No. 2, 3, and 4.

In response to your last question, it is our further opinion that a mere reorganization, whether it be from private individual ownership to a partnership, or from a private ownership or partnership to a corporation, or by dissolving a corporation and creating a new corporation, or by merging one corporation with another corporation, does not constitute a project which could be deemed eligible for exemption under the provisions of 40-57.1.

HELGI JOHANNESON

Attorney General