

N.D.A.G. Letter to Hasti (Nov. 29, 1985)

November 29, 1985

Mr. Barry Hasti
State Supervisor of Assessments
North Dakota Tax Department
State Capitol -- Eighth Floor
Bismarck, ND 58505

Dear Mr. Hasti:

Thank you for your letter concerning the application for a new business tax exemption that is before the State Board of Equalization in behalf of An-Dee Drilling, Inc. of Minot, North Dakota.

You have informed me that since 1981, An-Dee has operated its business in Minot in a leased facility. The company intends to build a 60' x 150' steel building in Minot. When the building is completed, An-Dee will vacate the leased facility and move into its new building.

It is my further understanding that the primary business activity performed by An-Dee in Minot is the servicing and repair of drill stems, bits, pumps, drilling rigs and large trucks for the oil and gas exploration industry. However, the company apparently is engaged in some fabrication at this facility also.

Your first question is whether an existing business can qualify for the new business exemption if it builds a new facility within the same political subdivision.

It has previously been held in an opinion issued by this office that the expansion of an existing business within the same political subdivision does not come within the scope of the tax exemption for new business. 1970 N.D. Op. Att'y Gen. 408. The following observation was made in that opinion:

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. Id. at 412.

Subsequent to this opinion, the 1971 Legislative Assembly defeated Senate Bill No. 2054 which would have permitted simple expansion to qualify for the new business tax exemption. Thus, it can be concluded that the Legislature did not wish to permit mere expansion to qualify for a new business tax exemption.

Therefore, it is clear that an existing business cannot qualify for the new business tax exemption if it merely builds or expands a new facility within the same political subdivision.

The ultimate question which must be resolved is whether the applicant is a new business. The subject matter of that question involves a finding of fact which is the function of the State Board of Equalization. The authority to answer that question is not vested in this office.

Your second question is whether a business that is primarily engaged in service and repair can qualify for the new business tax exemption.

N.D.C.C. 40-57.1-02 describes those business activities which may qualify for the new business tax exemption as follows:

40-57.1-02. "PROJECT" AND "MUNICIPALITY" DEFINED. -- As used in this chapter, unless a different meaning clearly appears from the context, the term, "municipality" includes counties as well as municipalities of the types listed in subsection 4 of section 40-01-01, and the term "project" means 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:

Assembling, fabricating, manufacturing, mixing, or processing of any agricultural, mineral, or manufactured produces, or any combination thereof, including the retail sale of any such product by the enterprise that assembled, fabricated, manufactured, mixed, or processed it and the incidental sale of any service of a kind essential to the primary activities of the enterprise.

Storing, warehousing, distributing, or selling any products of agriculture, mining, or manufacturing, provided that "selling" does not include the sale of any service except storing, warehousing, and distributing or as provided in subsection 1 nor does it include the sale at retail of any product except as provided in subsection 1.

The new industry tax exemption law as first enacted in 1969 included a broad definition of "project" that made any lawful business or industry eligible for the exemption. 1969 N.D. Sess. Laws 385, §2. Since that time, N.D.C.C. §40-57.1-02 has been amended twice to restrict the kinds of business activities which could be qualifying projects. 1973 N.D. Sess. Laws 341, §2; 1977 N.D. Sess. Laws 391, §2.

It is clear from reading N.D.C.C. §40-57.1-02 in its present form that a service and repair business would not qualify as a project that is eligible for a new industry tax exemption. See also 1976 N.D. Op. Att'y Gen. 181.

Once again, the nature of the applicant's actual business is a question of fact which must be determined by the State Board of Equalization. The authority to make that finding is not vested in this office.

Sincerely,

Nicholas J. Spaeth

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