

N.D.A.G. Letter to Whalen (July 26, 1991)

July 26, 1991

Honorable Joseph Whalen
State Representative
District 39
P.O. Box 1036
Bowman, ND 58623

Dear Representative Whalen:

Thank you for your May 31, 1991, letter in which you inquired about the method of assessment of registration fees against petroleum tank owners. Please excuse the delay in responding.

The assessment of the petroleum tank registration fee is an exercise of the state's taxing power. "A 'tax' is an enforced contribution for public purposes which in no way is dependent upon the will or consent of the person taxed." Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971). Fees are considered taxes, even when the receipts are designated for a specific purpose. Gange v. Clerk of Burleigh County District Court, 429 N.W.2d 429, 436 (N.D. 1988). Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). House Bill No. 1439, as adopted, provides that "[a]n owner or operator of a tank shall pay an annual registration fee of seventy-five dollars for each aboveground tank and one hundred twenty-five dollars for each underground tank owned or operated by that person." H. Bill 1439, 17, 52nd N.D. Leg. (1991). The payment is not optional. Any tank owner who does not pay the fee is subject to prosecution for a class B misdemeanor. H. Bill 1439, 16, 52nd N.D. Leg. (1991). In this respect, the registration fee may appropriately be considered a tax.

The state Legislature has exclusive authority to determine tax policy if it does so within constitutional guidelines. State v. Nichols, 265 N.W. 859, 862 (N.D. 1935). That being the case, the Legislature has the authority to change tax rates in the middle of a tax period. Thus, the Legislature may determine that higher petroleum tank registration fees may take effect prior to the expiration date of the former registration fees.

The resolution of your question also depends upon the effective date of the new registration fee rates and the date the increase is due.

The effective date of the increase was expressly changed in the original bill from July 1, 1991, to the date that the emergency clause took effect. This action was taken due to an Environmental Protection Agency requirement that tank owners significantly increase their liability coverage by April 18, 1991. Hearings on H.B. 1439 Before the House Comm. on Industry, Business and Labor, January 30, 1991 (Statement of Larry Fuller). The April 18, 1991, effective date for the new rates was necessary to protect the smaller petroleum

dealers in the state. Id. The increase was effective on the date the bill became effective. I now turn to the issue of when the increased registration fees are due.

The increased fees were necessary to provide additional liability coverage required by the federal government. The increased coverage was required immediately. To provide for this increased liability coverage, the administrator may prorate fees from the effect due date to the due date in order to establish a common due date.

All petroleum tanks are subject to the increased fee as of April 18, 1991. Differing due dates will not affect the liability of any tank owner. A common due date is merely an aid to avoid confusion and effectively administer the collection of fees as required by statute. Thus, the administrator may establish a uniform due date.

While the petroleum tank registration fees are taxes, they also serve as insurance premiums. The legislative history of H. Bill 1439 indicates that the primary purpose of the fund into which the fees are deposited is to insure petroleum tank owners against liability arising from spillage. In this sense, then, the fees take on a dual role. It has been established that the premium (tax) increase was necessary due to a federally required increase in liability coverage. As an insurance premium, however, those petroleum tank owners who paid tank registration fees for the period of July 1, 1990, to June 30, 1991, still have 73 days of unused premium for the period between April 18, 1991, the date the new rules took effect, and June 30, 1991, the end of the premium coverage period. The rates from the prior law were \$10 per year for aboveground storage tanks and \$25 per year for below ground storage tanks. Based on these rates, the unused premiums amount to \$2 per aboveground storage tank and \$5 per underground storage tank. It would be appropriate for the prorated tank registration fee covering the period from April 18, 1991, to June 30, 1991, to be offset in the amount of \$2 for every aboveground tank registered on July 1, 1990, and \$5 per underground tank registered on July 1, 1990.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

jfl