

**OPINION
68-502**

October 4, 1968 (OPINION)

Mr. Edwin Sjaastad

Tax Commissioner

RE: Taxation - Withholding - Refund

This is in response to your letter in which you state the following:

"During the last half of 1967, a man who was a resident of Minnesota earned wages in North Dakota from which his employer withheld North Dakota income taxes as required by the 1967 withholding law, the provisions of which are found in sections 57-38-58 through 57-38-65, N.D.C.C. The employer paid the amount withheld to the tax department. The man and his wife then filed a timely North Dakota joint income tax return on which a refund of the amount withheld was claimed. The refund claim was approved by the tax department and the refund check issued in their two names was sent to them.

"The wife then advised that she could not cash the check because her husband had died prior to the time it was received. She was then asked by the tax department to return the check and to furnish the name and address of the administrator or executor of her husband's estate; she replied that there was no administrator or executor and that there was nothing to be probated. She returned the refund check issued in their two names and asked that a new one be issued in her her name. The amount to be refunded is slightly less than \$60.00."

"The decedent's wife received no income from any North Dakota source during the period covered by their joint return."

You then ask for an opinion as to whether or not you may issue a refund check to the widow and, if so, what procedure should be established for this and similar cases.

We have examined chapter 57-38 of the North Dakota Century Code, and specifically as to the legal effect of filing a joint tax return. While the North Dakota income tax laws have in many instances incorporated provisions of the Federal income tax laws, we are not aware of any statutory provision which incorporates the Federal Act on joint returns. As a matter of interest the Federal Act, in substance, provides that in joint returns each spouse is liable for the full amount of the tax, penalties and interest arising out of such return regardless of the amount of his or her separate taxable income. Their liability is joint and several, but the treasury does not have to collect equally from both spouses. (See 33 Am. Jur. 2d. Federal Taxation (1968), section 1361, Page 336.)

Section 57-38-31 of the North Dakota Century Code relates to filing of joint returns. However, in examining this provision we do not find any authority for filing a joint return where one spouse does

not have any income. By implication it seems to recognize that joint returns may be made and filed even though one spouse does not have any income.

It appears to have been common practice in this state that a joint return may be filed even though one spouse had no income. This is at least recognized, if not supported, by the instructions found on Page 4 for the 1967 income tax returns. In the first paragraph on Page 4 we find, amongst other things, the following statement: "If a joint return, give your spouse's social security number even though your spouse may not have had any income."

The facts submitted merely indicate that a joint return was filed and for that matter no question is raised whether or not the individuals concerned were in a position to file a joint return. On this assumption, both spouses assumed some responsibility and liability on the return. The legal results of joint endeavors must be recognized even though there is no specific statutory provision for same in our income tax statutes.

Because we have for many purposes, either specifically or by indirection, geared the North Dakota income tax provisions to the Internal Revenue Code it would follow that the concepts developed under the Internal Revenue Code would have some application to the state income tax laws, particularly where same are not inconsistent with the common principles of joint endeavors. There is no information which would indicate that the surviving spouse has done anything to change the relationship, nor is there any indication that any effort was made to change the joint return to a separate return.

On the foregoing basis, it is our opinion that the tax department may cancel the check which was issued to both the husband and wife and issue a new check for the same amount to the surviving spouse. For purpose of maintaining continuity in your files, it is recommended that the check be issued to "Mary Doe, the surviving widow of John Doe."

We do not believe that Section 34-01-12 would have application in this instance. We are also of the opinion that the same procedure may be followed in other instances.

HELGI JOHANNESON

Attorney General