

**OPINION  
69-406**

August 18, 1969 (OPINION)

Mr. Bruce L. Bartch

Director, North Dakota Business and

Industrial Development Department

RE: Taxation - Exemptions - Municipal Industrial Development Act

and Exemptions for New Industries

This is in reply to your letter of August 6, 1969, relative to section 40-57-17 and Chapter 40-57.1 of the North Dakota Century Code, as amended. You refer to the opinion issued to you by this office on July 29, and the two opinions issued to you on August 1, 1969, and state it is necessary to request our opinion to determine if what we applied to the one Act applies equally to the parallel Act. You state the following facts and questions:

For example, on July 29 you stated 'that municipalities and industries providing for tax exemptions under said Chapter 40-57.1 might well consider the possibilities of a land exemption being subsequently declared unconstitutional in view of the provisions of Section 176 of the North Dakota Constitution . . . .' Does this finding apply equally to Section 40-57-17?

Also on July 29, 1969, you held that for the purposes of Chapter 40-57.1, it is your opinion that the tax imposed under Section 57-38-66 is a state income tax and a corporate entity may be exempted from the tax. Could corporations negotiating for income tax exemption under Section 40-57-17 also be exempted from the business and corporation privilege tax?

On August 1, 1969, you also held that cooperative corporations and nonprofit corporations come within the scope of Chapter 40-57.1. Are they also within the scope of Chapter 40-57?"

With respect to your first question, there is a difference which would cause a distinction to be made between the two acts involved if the constitutionality of the exemption provision contained in Chapter 40-57.1 is questioned. Chapter 40-57.1 is based on private ownership of the real property involved, i.e., the property on which the industry is erected is owned by the same firm operating the industry or some other private entity from whom the land is leased. Under section 40-57-17, the Municipal Industrial Development Act, the entire theory of the Act is that the real property is owned by the city and leased to the industrial enterprise. Property owned by the city is exempt from taxation under Section 176 of the North Dakota Constitution. While we believe the Legislature may properly tax the leasehold interest of an industry leasing property from the city under the provisions of Chapter 40-57, the Municipal Industrial Development Act, it may also exempt such property if it deems it

proper without violating the provisions of Section 176 of the North Dakota Constitution. We call your attention to page 2 of the August, 1969 opinion in which this matter was specifically discussed. In direct reply to your first question, the statement in the July 29, 1969 opinion that municipalities and industries providing for tax exemptions under said Chapter 40-57.1 might well consider the possibilities of a land exemption being consequently declared unconstitutional in view of the provisions of Section 176 of the North Dakota Constitution does not apply equally to section 40-57-17.

With respect to your second question, it is our opinion that the tax imposed under section 57-38-66 would be considered an income tax for the purposes of section 40-57-17 as well as for Chapter 40-57.1. There would appear to be no reason for distinguishing between the two acts as to the nature of the Business and Corporation Privilege Tax. The reasoning used in reaching the conclusion in the July 29, 1969 opinion would apply equally to this question.

Insofar as your third question is concerned, it is our opinion that cooperative corporations and nonprofit corporations come within the scope of Chapter 40-57 in the same manner as they are within the scope of Chapter 40-57.1. The reasoning used in reaching the conclusion in the August 1, 1969 opinion would apply equally to this question.

HELGI JOHANNESON

Attorney General