

**OPINION
79-260**

February 14, 1979 (OPINION)

The Honorable Vernon Wagner, Speaker
House of Representatives
Forty-sixth Legislative Assembly
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Speaker:

This is in reply to Representative Layton Freborg's letter of February 7, 1979, to me requesting, with your approval my opinion on the question of whether House Bill No. 1303 requires a vote of two-thirds of the members in both houses to be enacted because it provides a credit against the income tax liability of individuals and corporations imposed by Sections 57-38-29 and 57-38-30, N.D.C.C.

As is noted in that letter, the question arises because of Section 8 of the new constitutional article on initiative, referendum, and recall that was approved as Measure No. 3 by the people at the general election in November, 1978, and because of approval by the people at the same election of Initiated Measure No. 2 which set new rates of state income tax on individuals and corporations by amendment of Sections 57-38-29 and 57-38-30, N.D.C.C.

As explained in the following paragraphs, it is our opinion that House Bill No. 1303 would require a two-thirds majority vote of approval by each house of the Legislature before it could become effective. We note, incidentally, that this conclusion is consistent with the ruling of the Speaker on final passage of House Bill 1303 that it lost for want of a two-thirds majority (Journal of the House for February 6, 1979, page 645). We also note that the House reconsidered its action on House Bill 1303 by placing the Bill on the calendar for second reading and final passage only after this opinion is received. (Journal of the House for February 7, 1979, page 671).

Measure No. 3 not only approved a new article to the North Dakota Constitution relating to the initiative, referendum, and recall but also repealed Section 25 of the North Dakota Constitution which reserved to the people the initiative and referendum powers that included in the next to last paragraph of Section 25 the following provision:

" . . . No measure enacted or approved by a vote of the electors shall be repealed or amended by the legislature, except upon a yea and nay vote upon roll call of two-thirds of all members elected to each house."

This provision has been interpreted by the state Supreme Court and by this office a number of times, but since it has now been repealed it is necessary to compare it with the provision replacing it to determine whether those interpretations are still applicable.

The new constitutional article also reserves to the people, in Section 1, the initiative and referendum powers and includes in Section 8 the following provision:

"A measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house."

Except for the seven year limitation on the two-thirds vote requirement for the Legislature to amend or repeal an initiated or referred measure, this provision in Section 8 of the new article to the Constitution is substantially the same as the provision quoted above from repealed Section 25 of the Constitution. We therefore must be guided by the decisions of the state Supreme Court and by prior opinions from this office interpreting former Section 25 in our determination of whether an act of the Legislature amends or repeals an initiated or referred measure and therefore is subject to the requirement of a two-thirds vote of the Legislature to do so.

Initiated Measure No. 2 that was approved by the people at the general election last November expressly amended Sections 57-38-29 and 57-38-30 of the state income tax law so that they now read as follows:

"57-38-29. RATE OF TAX ON INDIVIDUALS. - A tax is hereby imposed upon every individual, to be levied, collected, and paid annually with respect to the taxable income of such individual as defined in this chapter, computed at the following rates:

1. On taxable income not in excess of three thousand dollars, a tax of one percent;
2. On taxable income in excess of three thousand dollars and not in excess of five thousand dollars, a tax of two percent;
3. On taxable income in excess of five thousand, and not in excess of eight thousand dollars, a tax of three percent;
4. On taxable income in excess of eight thousand dollars, and not in excess of twelve thousand dollars, a tax of four percent;
5. On taxable income in excess of twelve thousand dollars, and not in excess of thirty thousand dollars, a tax of five percent;
6. On taxable income in excess of thirty thousand dollars, a tax of seven and one-half percent.

"57-38-30. RATE OF TAX ON CORPORATIONS. - A tax is hereby imposed upon the taxable income of every domestic and foreign corporation received from the sources described in sections 57-38-12, 57-38-13, and 57-38-14, which shall be levied, collected, and paid annually is in this chapter provided, and

which shall be computed at the following rates:

1. For the first three thousand dollars of taxable income, at the rate of three percent;
2. On the taxable income above three thousand dollars and not in excess of eight thousand dollars, at the rate of four percent;
3. On all taxable income above eight thousand dollars and not in excess of fifteen thousand dollars, at the rate of five percent;
4. On all taxable income above fifteen thousand dollars, and not in excess of twenty-five thousand dollars, at the rate of six percent;
5. On all taxable income above twenty-five thousand dollars, at the rate of eight and one-half percent."

The title to House Bill 1303 provides that it is a bill "to provide credits against individual and corporate income taxes if the balance in the general fund exceeds the estimated balance." The Bill then prescribes, in Subsection 1 of Section 1, a procedure for the Director of the Department of Accounts and Purchases to annually certify to the State Tax Commissioner the actual and projected state general fund balances on specified dates. The remainder of the Bill (Subsections 2 and 3 of Section 1) is as follows:

2. If the actual balance in the state general fund as certified pursuant to subsection 1 exceeds the amount which has been estimated by five million dollars or more, there shall be allowed to individuals, estates, trusts, and corporations required to file an income tax return a credit against the amount of tax liability imposed by sections 57-38-29 and 57-38-30 for the taxable year for each taxpayer beginning on or after the preceding January 1. The credit to which any person or corporation may be entitled shall be determined according to the following schedule:
 - a. If the actual balance in the state general fund exceeds the amount estimated by at least five million dollars but by less than ten million dollars, the credit shall be ten percent of the tax liability imposed by sections 57-38-29 and 57-38-30, provided that the maximum credit for any taxpayer shall not exceed one hundred dollars.
 - b. If the actual balance in the state general fund exceeds the amount estimated by ten million dollars or more, the credit shall be twenty percent of the tax liability imposed by sections 57-38-29 and 57 38-30, provided that the maximum credit for any taxpayer shall not exceed one hundred dollars.
3. The credit provided by this Act shall be placed on the state income tax returns for individuals, estates, trusts,

and corporations as a separate line item on each type of return which shall follow the computation of tax liability pursuant to the provisions of chapter 57-38. The liability of each taxpayer shall be reduced by the amount of this credit up to the maximum credit as provided in subsection 2."

Although House Bill 1303 refers to Sections 57-38-29 and 57-38-30 that were amended by Initiated Measure No. 2 last November, it does not expressly amend either of those sections. The question is whether House Bill 1303 does nevertheless amend those two sections and therefore would have to be passed by a two-thirds vote in both houses in order to be effective.

We believe the answer to the question is controlled by State ex rel. Strutz v. Baker, 71 N.D. 153, 299 N.W. 574, a 1941 North Dakota Supreme Court case. In that case, the Court had to determine whether Chapter 147, S.L. 1939, amended a 1926 initiated measure that provided for a gasoline tax law to be administered by the State Auditor. Chapter 147 received a majority vote in each house but not a two-thirds majority vote. The Court said:

"Though this chapter 147 of the Session Laws of 1939 does not in express terms refer to the measure initiated in 1926, nevertheless, it is legislation on the same subject; changes the method of administration of the initiated law and some of its provisions; and to that extent amends certain portions of the initiated measure; ' 71 N.D. at 159, 299 N.W. at 577.

In concluding that Chapter 147, S.L. 1939, did amend the prior initiated law and therefore was invalid because not enacted by the necessary two-thirds majority vote, the Court quoted with approval from an Illinois case as follows:

" . . . even though an act professes to be an independent act and does not purport to amend any prior act, still if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject so as to make of the old and the new a connected piece of legislation covering the same subject, the latter act must be considered an amendment of the former." 71 N.D. at 162, 199 N.W. at 578.

Even though House Bill 1303 professes to be an independent act and does not purport to amend Sections 57-38-29 and 57-38-30 of the income tax law, it does nevertheless provide that in certain circumstances the amount of income tax to be paid by a taxpayer on his taxable income shall be less than the amount imposed by applying the tax rates prescribed in Section 57-38-29 or Section 57-38-30. We therefore believe that House Bill 1303 would be regarded by the courts as an amendment to those two sections that could be valid only if it were passed by a two-thirds vote in each house.

Its effect is to amend the tax rates prescribed in Sections 57-38-29 and 57-38-30 as amended by Initiated Measure No. 2 last November by providing for a new credit that results in a lesser tax than that obtained by only applying the tax rates prescribed in those sections

to taxable income.

We have previously said that a proposed enactment of the Legislature may effectively amend an initiated measure even though it professes to be a separate and independent act and that it therefore could be valid only if enacted by the required two-thirds majority vote. See, for example, the letter of January 25, 1977, from this office to the Honorable Oscar Solberg, Speaker, House of Representatives, Forty-fifth Legislative Assembly, a copy of which is enclosed.

We trust that this adequately answers the questions presented.

Sincerely,

ALLEN I. OLSON

Attorney General