

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 93-F-07

Date issued: June 8, 1993
Requested by: Al Jaeger, Secretary of State

- QUESTION PRESENTED -

Whether the provisions of House Bills 1211 and 1212 become effective July 1, 1993, or August 1, 1993.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the provisions of House Bills 1211 and 1212 that require the Secretary of State charge a fee for services or a fee for filing certain documents and instruments become effective August 1, 1993. It is further my opinion that the provisions of House Bill 1211 that require the Secretary of State to charge fees for certain licenses become effective July 1, 1993.

- ANALYSIS -

The North Dakota Constitution provides:

Every law, except as otherwise provided in this section, enacted by the legislative assembly during its eighty natural meeting days takes effect on August first after its filing with the secretary of state, or if filed on or after August first and before January first of the following year ninety days after its filing, or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act. Every appropriation measure for support and maintenance of state departments and institutions and every tax measure that changes tax rates enacted by the legislative assembly take effect on July first after its filing with the secretary of state or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act.

N.D. Const. art. IV, ? 13.

Neither House Bill 1211 nor House Bill 1212 were declared emergency measures by the Legislature or constitute appropriation measures. In light of the above quoted constitutional provision, therefore, the house bills become effective August 1, 1993, unless they are tax measures which change tax rates. Each provision of the bills must be examined separately to determine whether it is a tax measure which changes tax rates.

The fact that House Bills 1211 and 1212 refer to the charges as "fees" is not determinative. "Whether an exaction is called a 'fee' or a 'tax' is of little weight in determining what it really is." Scott v. Donnelly, 133 N.W.2d 418, 423 (N.D. 1965). It is the nature of the charge rather than its designation that determines whether it is a "fee" or a "tax."
Id.

The North Dakota Supreme Court has defined a "tax" as "an enforced contribution for public purposes which in no way is dependant upon the will or consent of the person taxed." Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971); see also Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). Thus, "any payment exacted by the State as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in the general benefit, is a tax." Menz, 117 N.W.2d at 297. Conversely, fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society,' they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (citations omitted).

The numerous charges provided for in House Bills 1211 and 1212 can be divided into three general categories: 1) fees for services; 2) filing fees; and 3) license fees. Each of these categories will be reviewed to determine whether the charges constitute a "fee" or a "tax."

1. Fees for Services.

House Bills 1211 and 1212 provide that the Secretary of State shall charge set fees for performing certain services, including receiving service of process, furnishing a certified copy of any document or instrument, affixing the signature of the Secretary of State to a certificate for sale, preparing a list or compilation of information recorded or filed in the Office of the Secretary of State, and obtaining information from the Uniform Commercial Code filing system. See House Bill 1211, ?? 6, 9, 13, 19; House Bill 1212, ? 2.

The beneficiaries of these services are the individuals or entities requesting that the services be performed by the Secretary of State. The charges are only imposed on those who choose to utilize the particular service. The party paying the fee has the option of not utilizing the service and thereby avoiding the charge. Further, the charges are collected not to raise revenue but to compensate the Office of Secretary of State for its reasonably anticipated expenses in providing the services.

The provisions of House Bills 1211 and 1212 that require the Secretary of State to charge fees for certain services are not tax measures and therefore become effective August 1, 1993.

2. Filing Fees.

House Bills 1211 and 1212 provide that the Secretary of State shall charge various filing fees to charter credit unions, foreign bank and trust companies, associations, domestic and foreign corporations, partnerships, and individuals or entities using the computerized Uniform Commercial Code central filing system.

As previously stated, taxes are burdens of a pecuniary nature imposed generally upon individuals or property for the purpose of defraying customary governmental expenditures. Fees on the other hand are characterized as "a visitation of the costs of special services upon the one who derives a benefit from them." Joslin v. Regan, 406 N.Y.S.2d 938, 941 (N.Y. App. Div. 1978) (quoting Synagogue v. Roslyn Harbor, 352 N.E.2d 115, 117 (N.Y. 1976)), aff'd, 397 N.E.2d 1329 (N.Y. 1979). Fees are imposed to defray or help defray the cost of providing the particular services.

The purpose of the filing fees in question is to defray the cost of providing the filing systems. "One of the legitimate purposes of filing fees is 'to make the system self-sustaining and paid for by those who use it rather than by tax revenues

drawn from the public at large.'" Manes v. Goldin, 400 F. Supp. 23, 30-31 (E.D.N.Y. 1975) (quoting United States v. Kras, 409 U.S. 434, 448 (1973)), aff'd, 423 U.S. 1068 (1976).

The filing fees provided for in House Bills 1211 and 1212 are charged to those who use the services and calculated not to raise revenue but to help make the system self-sustaining. I conclude, therefore, that they are "fees" and not "taxes." Consequently, the provisions of House Bills 1211 and 1212 which require the Secretary of State to charge filing fees are not tax measures and therefore become effective August 1, 1993.

3. License Fees.

Section 11 of House Bill 1211 provides that foreign corporations must pay an initial license fee of \$85.00. Section 14 of the bill provides license fees for contractors.

Pursuant to Section 15 a notary public is required to pay a \$25.00 fee to the Secretary of State for the issuance of a commission. Finally, Section 18 provides that the Secretary of State shall charge a fee of \$20.00 to register lobbyists. Neither the fees for issuance of the commission to a notary public nor for registration of a lobbyist are referred to as license fees, however the characteristics are the same. An individual may not act in the capacity of a notary public unless issued a commission, and an individual may not perform the activities of a lobbyist absent registration. These situations are similar to that of licensure, which prohibits an individual from performing certain acts absent receiving a license. They will therefore be treated the same for purposes of determining whether the fees constitute "taxes."

In Ralston Purina Co. an action was brought against the North Dakota Poultry Improvement Board challenging the constitutionality of N.D.C.C. ch. 4-13, the board's enabling act. The challenged law prohibited any person from engaging "in the business of . . . poultry or turkey feed manufacturer, wholesaler, or retailer, without first securing from the North Dakota poultry improvement board a license to engage therein."

188 N.W.2d at 407 (quoting N.D.C.C. ? 4-13-10). The Act further required that the licenses be renewed yearly, and provided a maximum schedule for license fees. Id.

In addressing whether the Act constituted an unlawful delegation of legislative authority, the supreme court first addressed whether the license fees constituted a "tax." The court, after explaining that a "tax" is an enforced contribution for public purposes which is not dependent upon

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the will or consent of the person taxed, held that "[a] license fee imposed by the State is an enforced contribution and therefore is a tax." Id. at 409.

Based upon Ralston Purina Co., it is my opinion that license and registration fees constitute taxes and not fees. Thus, the fees charged in Sections 11, 14, 15 and 18 of House Bill 1211 are tax measures which change tax rates and not fees. Accordingly, those sections become effective July 1, 1993.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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