

LETTER OPINION
2001-L-24

July 6, 2001

The Honorable Roger Johnson
Agriculture Commissioner
Chairman, North Dakota Potato Council
600 East Boulevard Avenue, Dept. 602
Bismarck, ND 58505

Dear Commissioner Johnson:

Thank you for your May 4, 2001, letter on behalf of the North Dakota Potato Council inquiring about N.D.C.C. ch. 4-10.1, the potato assessment.

The assessment must be "levied and imposed upon all potatoes grown in the state or sold to a designated handler," but there is an exception for potatoes "retained by growers to be used for seed purposes or for consumption by the grower." N.D.C.C. § 4-10.1-09. You have asked whether the exception applies to an individual farmer who grows seed potatoes, then transfers the seed potatoes to a potato growing partnership in which he is a partner, without exchanging cash for the seed. Your letter states that the remaining partners purchase their own seed from other sources for their independent portions of the partnership. In other words, one partner transfers to the potato growing partnership his own seed potatoes for his portion of the growing partnership, while the other partners purchase seed for their portions.

This issue was addressed in a 1992 opinion by Attorney General Spaeth. Letter from Attorney General Nicholas Spaeth to Sarah Vogel (December 23, 1992). He analyzed the transfer of seed potatoes grown by one partnership to (1) a different farm where they are raised in a 50/50 partnership with another farmer; and (2) a corporation, formed by the same individuals in the partnership, which raises the potatoes. The 1992 opinion stated that because the seed growing entity and the potato growing entity were separate "persons" or separate "growers" based on the definitions in N.D.C.C. ch. 4-10.1, the seed potatoes transferred to a potato growing partnership were not retained by the same grower, but were actually planted, raised and harvested by a separate entity. Accordingly, the opinion concluded that the exception did not apply.

The 1992 opinion focused on the fact that the seed growing entity was separate from the potato growing entity, which continues to be the case under the facts you have provided. It is somewhat unclear whether the seed growing entity is an individual farmer or a

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partnership, but under either situation, both entities are separate "growers" under N.D.C.C. ch. 4-10.1. However, the 1992 opinion did not analyze the absence of a cash sale between the seed growing entity and the potato growing entity, and the effect of that transaction on the assessment.

N.D.C.C. § 4-10.1-09 provides that the assessment "must be levied and imposed on all potatoes grown in the state or sold to a designated handler." However, I understand that as a practical matter, the assessment is actually levied only on those potatoes sold to a designated handler. The Designated Handler's Report, which is submitted quarterly to the Potato Council and accompanies the remittances, accounts only for potatoes purchased, and does not refer to other potatoes that are merely grown. There are many potatoes grown in the state on which the checkoff is not, and cannot realistically be assessed, such as, for example, potatoes that are culled or destroyed by disease. Based on the Potato Council's interpretation of the statute, it appears that it is the sale of potatoes, rather than growing potatoes, that is intended to be the taxable event. The exception for potatoes retained by growers for use as seed or for their own consumption is consistent with this interpretation, because again, there is no sale.

Therefore, whether the assessment must be imposed when the seed potatoes are transferred to the potato growing partnership in the situation you have described depends on whether the potatoes are being sold to a designated handler. "Sale" is defined as "the exchange of goods or services for an amount of money or its equivalent." American Heritage Dictionary 1085 (2nd coll. ed. 1991). While your letter states that no cash is exchanged for the seed potatoes, it is unclear whether any other "equivalent" is exchanged. If no cash or equivalent, or any other consideration, is exchanged for the seed potatoes, then the transaction is not a sale, and the potatoes are not being "sold to a designated handler" under N.D.C.C. § 4-10.1-09. Because the seed grower is transferring seed potatoes for his portion of the partnership, for no consideration, the grower is essentially retaining the potatoes for his own seed purposes. Therefore, the exception applies, and the assessment need not be imposed.

This opinion is based on the facts presented in your letter and otherwise available to me. If these facts are inaccurate or change, the legal conclusions in this opinion may also change.

Sincerely,

Wayne Stenehjem
Attorney General

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