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NOTES

NORTH DAKOTA INCOME TAX—ITS APPLICATION
AND PROCEDURE

INTRODUCTION

The effective use of a state income tax began with the Wisconsin enactment of a centrally administered tax in 1911.¹ Within the next six years, at least four other states began to utilize this form of tax as a source of revenue.² In 1919, North Dakota passed its first income tax law.³ The state constitution does not expressly authorize the Legislature to impose an income tax. However, the principal provisions restricting the power of the Legislature in revenue matters⁴ have been construed as confined in their application to ad valorem taxes, and as not to exclude the use of other forms of taxation.⁵

Except for a greater emphasis on the "graduated" tax principle and somewhat more liberal provisions as to deductibility of federal income taxes, the effective tax rate in North Dakota is quite comparable to that of most other states.⁶ Since the income base upon which the tax is levied varies widely from state to state,⁷ it is difficult to make further structural comparisons.

One of the more recent trends in state tax administration has been to adopt a system of withholding similar to that used

1. Wis. Laws 1911, Ch. 658.

2. Mass. Laws 1916, ch. 269 which applied only to individuals; Miss. Laws 1912, ch. 101; Mo. Laws 1917, p. 524; N. Y. Sess. Laws 1917, ch. 726 which imposed tax on corporations; N. Y. Sess. Laws 1919, ch. 627 which imposed a tax on individuals.

3. Laws of N. D. 1919, ch. 224 provided a differential rate structure on "earned" and "unearned" individual income. All corporate income was taxed on one rate structure.

4. N. D. CONST. art XI, § 174 directs the legislature to raise revenue to pay the expenses of the state, not to exceed four mills per dollar of assessed valuation of taxable property. N. D. CONST. art XI, § 176 provides that taxes shall be uniform on the same class of property.

5. State *ex rel.* Fargo v. Wetz, 40 N. D. 299, 168 N.W. 835 (1918) held that section 174 established the limit for revenue raising by taxing property on an ad valorem basis, but does not prohibit the Legislature from adopting some other reasonable basis on which to determine the amount of tax. State *ex rel.* Haggartt v. Nichols, 66 N.D. 355, 265 N.W. 859 (1935) determined that the statute levying the state income tax at graduated rates which operate equally and uniformly on all in like circumstances does not violate the requirements of uniformity of taxation.

6. Koenker & Fisher, *Tax Equity in North Dakota* 109, 111, Table X:3 (Sept. 1960).

7. E. g., Alas. Comp. Laws ch. 48-10 (Cum.Supp. 1957) (Rates based on a percentage of federal income tax); Ind. Stat. Ann. ch. 64-26 (Burns, 1951) (Tax on gross income); Mo. Rev. Stat. ch. 143 (1959) (Graduated rates but the entire taxable amount of each net income is computed at only the one rate wherein the income falls); Tenn. Code Ann. ch. 67-26 (1956) (Tax is levied only on income from stocks and bonds).

by the federal government.⁸ The Legislative Research Committee, Subcommittee on Taxation, is presently considering the feasibility of instituting a "pay as you go" system in North Dakota.⁹

North Dakota income tax is levied upon individuals,¹⁰ corporation,¹¹ banks and trust companies,¹² and estates and trusts.¹³ The tax upon individuals and corporations is based on the "net income" concept.¹⁴ In 1959, the federal definition of "net income" was adopted; this definition, for North Dakota income tax purposes, applies only to individuals and means adjusted gross income, as computed for the federal income tax, with adjustments.¹⁵ The taxable income of estates and trusts is also determined by referring to the Internal Revenue Code.¹⁶ The term "net income", as applied to corporations, is defined in North Dakota without reference to the federal tax laws.¹⁷ The tax upon banks and trust companies is an "in lieu" tax which superseded a former tax upon the capital stock of banks, and is in lieu of all other state, county, and local taxes except those upon real property.¹⁸

In North Dakota, the state tax laws are administered by the Tax Commission. The Tax Commission is an administrative agency,¹⁹ and thus its proceedings are governed by the ADMINISTRATIVE AGENCIES PRACTICE ACT.²⁰ Authority to make reasonable rules and regulations necessary to carry out the provisions of the tax law is vested in the Tax Commissioner.²¹ Upon receiving a favorable opinion by the Attorney General, a rule or regulation has the force and effect of law until amended or declared invalid by judicial act.²² The Commissioner has directed that in any instance where the income tax

8. E. g., Del. Code Ann. ch. 30 § 1191-1197 (Supp. 1960) (1953); Mont. Rev. Code § 84-4943 (Supp. 1960) (1955 and revised withholding law in 1957); Ariz. Rev. Stat. § 43-188 (Supp. 1960) (1959); Idaho Code § 63-3035-36 (Supp. 1960) (1959); Minn. Sess. Laws 1961, ch. 213 (Withholding becomes effective Jan. 1, 1962).

9. Minutes of Meeting of L.R.C., Sub-Comm. on Taxation, app. B, p. 10 (Sept. 27, 28, 1961).

10. N. D. Cent. Code § 57-38-02, 03 (1961).

11. *Id.* § 57-38-11.

12. *Id.* § 57-35-02.

13. *Id.* § 57-38-07.

14. See notes 10 and 11 *supra*.

15. N. D. Cent. Code § 57-38-01 subsection 20 (1961). For a discussion of the constitutionality of federalizing the North Dakota personal income tax see Note, 35 N.D.L. Rev. 151 (1959).

16. N. D. Cent. Code § 57-38-01 subsection 20 (1961).

17. *Id.* § 57-38-21.

18. *Id.* § 57-35-06.

19. *Langer v. Gray*, 73 N.D. 437, 15 N.W.2d 732 (1944).

20. N. D. Cent. Code ch. 28-32 (1961).

21. *Id.* § 28-32-02, see also § 28-32-04 for right of interested persons to a hearing; as to reconsideration or modification of any such rule.

22. *Id.* § 28-32-03.

treatment of a particular set of facts is not clearly defined by North Dakota law, the provisions of the federal income tax law will be controlling.²³

It is outside the scope of this article to set forth, in detail, the computations involved in ascertaining the amount of the tax liability. The foregoing discussion was designed only to acquaint the reader with some of the basic features of the North Dakota income tax. The remainder will be confined to a determination of who must pay the tax, and the taxpayers' duties, rights, and remedies after liability has attached.

SECTION I FILING

(a) *Individuals*—Both resident and non-resident individuals may be required to file a North Dakota income tax return. A resident may readily determine if he must file by making reference to his taxable income, whereas a non-resident must not only consider the amount of income earned, but also where it was earned.

Every resident having a taxable income during the income year of \$600 or over, and who is single, or married but not living with his or her spouse at the close of that year, must file an income tax return.²⁴ Other married residents are required to file if their taxable income exceeds \$1500.²⁵ The above rule is subject to the exception that any person having a gross income of \$5000 or more must file a return regardless of the amount of his taxable income.²⁶

For income tax purposes, a resident is a natural person who is either domiciled in North Dakota, or maintains a permanent place of abode within the state and spends, in the aggregate, more than seven months of the tax year within this jurisdiction.²⁷ A person not a resident who comes into the state with the intention of making it his permanent place of residence acquires a domicile in North Dakota for income tax purposes the moment he arrives.²⁸ All resident individuals report their entire income to North Dakota, no matter where that income was earned, *e. g.*, federal employees who are

23. Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 46 (1957).

24. N. D. Cent. Code § 57-38-31, subsection 1 (1961).

25. *Ibid.*

26. *Ibid.*

27. Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 1 (1957).

28. *Ibid.*

domiciled in North Dakota, but who work in Washington, D. C., must report their income to North Dakota.²⁹ If any resident pays an income tax to another state or foreign country, he is entitled to a credit on his North Dakota tax.³⁰ The purpose of this credit is to prevent hardship which may arise from double taxation.

The total income requirements of non-residents are the same as those which apply to residents.³¹ However, they need file a North Dakota tax return only if some of their income is earned within the state.³² Income is earned in North Dakota when it arises from personal services performed within the state,³³ from tangible property located within the state,³⁴ or from a business conducted within the state.³⁵ Income which accrues to non-residents from intangible property located in North Dakota is considered earned outside the state and is not subject to tax.³⁶ All income of non-residents, no matter where it was earned, must be disclosed on the North Dakota return and an adjustment should be made for any income earned outside the state.³⁷ Business deductions are allowed only to the extent that they are connected with the production of North Dakota income.³⁸ Exemptions and all other non-business deductions are prorated by the ratio that the North Dakota income bears to the total income.³⁹ The tax credit is available to residents exclusively, and non-residents may not deduct from

29. North Dakota Attorney General's Opinion, March 26, 1941.

30. N. D. Cent. Code § 57-38-04, subsection 6 (Supp. 1961) allows the taxpayer to deduct the income tax paid to other state or foreign countries from the tax for North Dakota. The amount deducted as a credit cannot exceed the difference between (a) the tax that would be due if all of his income had been received from sources within North Dakota and (b) the amount of tax that would be due if the income from outside North Dakota together with expenses related thereto were excluded from the computation of the North Dakota income tax and the federal income tax deduction were prorated by the ratio the North Dakota income bears to the total income. In order for the taxpayer to become eligible for this credit, he must submit written proof of such payment to the Tax Commissioner. Examples of sufficient proof include a copy of the return to the other state or a photocopy of the receipt from the other state.

31. See note 24 *supra*.

32. See N. D. Cent. Code § 57-38-03 (1961).

33. *Id.* § 57-38-04, subsection 1 (1961); Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 4 (1957).

34. N. D. Cent. Code § 57-38-04, subsection 3 (1961); Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 7 (1957).

35. N. D. Cent. Code § 57-38-04, subsection 4, 5 (1961).

36. *Id.* § 57-38-05. See Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 7 (1957).

37. See generally, N. D. Cent. Code § 57-38-31, subsection 1 (1961); Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 6A (Supp. 1959).

38. Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 6A (Supp. 1959).

39. *Ibid.*

their income tax, taxes paid to other states and foreign countries.

Individual income is reported in North Dakota on Form 37. Preparation of this form has been simplified by the "federalizing" act of 1959. If a complete facsimile or photo copy of the federal return and supporting schedules are attached to Form 37, only page one and the adjustments schedule and the federal income tax deductions schedule on page two need be completed.⁴⁰ If an individual makes use of the optional standard deduction on his federal return, he may not itemize his deductions on his state return, but must take the 5% standard deduction allowed by North Dakota.⁴¹ The standard deduction may be taken on Form 37, even though the taxpayer has itemized deductions on the federal return.⁴²

A husband or wife, each having separate income, may file separately with the state, regardless of whether they filed joint or separate federal returns for the same year. If separate state returns are prepared by spouses who filed joint federal returns, the federal income tax deduction is prorated in the ratio that the individual income bears to the joint income.⁴³ The personal exemption for a man and wife living together at the close of the income year is \$1500.⁴⁴ When separate returns are filed the entire exemption may be taken by either spouse or divided between them in any manner they may desire.⁴⁵ When a fiduciary is in charge of the income of an individual, he should prepare the return for that person in the same manner as if the taxpayer himself were making it.⁴⁶ The final return of a decedent should be prepared by the legal representative of that person on Form 37.⁴⁷

(b) *Partnerships, Estates and Trusts*—North Dakota imposes no income tax upon partnerships.⁴⁸ However, the partnership is required to file an information return.⁴⁹ Distributed and undistributed profits are reported by the partners on

40. See generally, N. D. Cent. Code § 57-38-31, subsection 7 (1961).

41. *Id.* § 57-38-22.1 (Supp. 1961).

42. *Ibid.*

43. *Id.* § 57-38-22, subsection 3 (1961).

44. N. D. Cent. Code § 57-38-26, subsection 2 (1961).

45. *Ibid.*

46. *Id.* § 57-38-27 (1961); see also § 57-38-31, subsection 4, 5, 6 (1961).

47. See *id.* § 57-38-07 (1961); Income Tax Law, Rules and Regulations of the State of North Dakota, Rule 9 (1957).

48. N. D. Cent. Code § 57-38-08 (1961).

49. *Id.* § 57-38-42 (1961). The return must contain the gross income and deductions of the partnership and shall show how this income is distributable among the partners.

their individual returns.⁵⁰ Allocation of income by non-resident partners is handled as if the partnership were a corporation.⁵¹ Resident partners must include in taxable income their share of the total profits, even though the partnership is engaged in business in another state.⁵²

The income of estates and trusts is divided into two classes for income tax purposes.⁵³ The tax on the first class is imposed upon the estate or trust and is paid by the fiduciary. This consists of income received by estates during the period of administration or settlement unless it is properly paid or credit to any beneficiary; income accumulated in trust for the benefit of unborn or unascertained persons or for persons with contingent interests; income held in trust for future distribution under the terms of the will or trust; and income of estates or trusts to the extent that the distribution of such income is in the discretion of the fiduciary. The second class of income is that which the tax is imposed upon, and paid by the beneficiary. This consists of income which is to be distributed to beneficiaries periodically, whether or not at stated intervals; income collected by the guardians of an infant and which is to be held or distributed as the court may direct; and income of an estate which during the period of administration is properly paid or credited to the beneficiary.

(c) *Corporations*—All domestic corporations, except those specifically excluded,⁵⁴ are subject to the North Dakota income tax. In addition, the tax applies to every foreign corporation doing business within the state.⁵⁵ No definition of "doing business" has been attempted by the legislature, and although the term has often been before the courts, little more than confusion will result from any detailed examination of the cases.⁵⁶ The only clear rule which seems to have evolved is

50. *Id.* § 57-38-08 (1961). See also § 57-38-20 subsection 3 (1961).

51. *Id.* § 57-38-10 (1961).

52. *Goldberg v. Gray*, 70 N.D. 663, 297 N.W. 124 (1941).

53. *Income Tax Law, Rules and Regulations of the State of North Dakota*, Rule 8 (1957).

54. N. D. Cent. Code § 57-38-09 (Supp. 1961) exempts any religious, fraternal, or similar non-profit organization; cooperative organizations for the sole benefit of the members; corporations organized for the exclusive purpose of holding title to property, the income of which goes to other tax exempt organizations, and insurance companies paying a tax on the gross amount of premiums to the state.

55. *Id.* § 57-38-11 (1961).

56. See e. g., *Cottonwood Coal Co. v. Junod*, 73 Mont. 392, 236 Pac. 1080 (1925) which defines "engaged in business" as contemplating a gainful occupation; *Ford Motor Co. v. State*, 65 N.D. 316, 258 N.W. 596 (1935) holding that "gross income from sales" isn't synonymous with "business conduct ed." *United States Glue Co. v. Oak Creek*, 161 Wis. 211, 153 N.W. 241 (1915) (affirmed 247 U.S. 321 (1918) where a taxpayer engaged in interstate commerce was held not to be engaged in business outside the state to that extent.

that each case must stand upon its own merits.⁵⁷ It has long been established that a state tax upon a corporation doing only an interstate business may be invalid because levied (1) upon the privilege of doing interstate business within the state, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself.⁵⁸ The states, in a thorough search to uncover legitimate grounds for taxing foreign corporations have found several: "local business"⁵⁹ will support a franchise tax apportioned to business done within the state; "local authority"⁶⁰ is a legitimate basis for a non-discriminatory privilege tax; and "local events"⁶¹ apart from the flow of interstate commerce, provide taxable incidents.

By its decision in *Northwestern States Portland Cement Co. v. Minnesota*,⁶² the United States Supreme Court sanctioned the levy of a state tax on the apportioned net income of a foreign corporation doing exclusively interstate business. This was an extension of the traditional concept of state taxing power under the commerce and due process clauses of the federal constitution. Subsequent to the *Northwestern* decision, the Supreme Court upheld the right of North Carolina to tax the income of an interstate motor carrier which maintained no offices in the state, but did maintain warehouses there.⁶³ On the same day the United States Supreme Court dismissed the taxpayer's appeal in *Brown-Forman Distiller's Corporation v. Collector of Revenue*.⁶⁴ In the latter case, the out-of-state corporation maintained neither a sales office nor warehouse in the state, but limited its activities to the presence of "missionary men" who did not solicit sales but called upon wholesale dealers and assisted them in display and activities at the retailer level. Two months later the Court denied certiorari when a state court upheld a tax on interstate com-

57. See *United Mercantile Agencies v. Jackson*, 351 Mo. 709, 173 S.W.2d 881, 883 (1943).

58. *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948); *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U.S. (1903); *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

59. *International Shoe Co. v. Shartel*, 279 U.S. 429 (1929).

60. *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662 (1949).

61. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948).

62. 358 U.S. 450 (1959); *Williams v. Stockholm Valves & Fittings, Inc.* was decided in the same opinion. Many law review commentaries are available on this subject. Two of the better articles are Note, 2 Wm. & Mary L. Rev. 223 (1959) and Comment, 45 Iowa L. Rev. 192 (1959).

63. *ET & WNC Transportation Co. v. Currie*, 359 U.S. 28 (1959).

64. 359 U.S. 28 (1959).

merce where the employer's only activity in the state consisted of the selling efforts of fifteen salesmen.⁶⁵

The immediate result of these judicial decisions was an appeal to Congress by businessmen for legislative relief. On September 14, 1959, P. L. 86-272 put into effect a federal limitation on the power of the state to levy taxes on income earned in interstate commerce.⁶⁶ This legislation overruled the precedent set by the *Northwestern* decision and provided for the study, by congressional committees, of all matters pertaining to state taxation of income derived exclusively from interstate commerce. Congress is scheduled to consider the committees' recommendations in 1962. Many states have expressed their indignation at this bold interference with state taxing activities.⁶⁷

The wide variation of methods employed by the states in allocating income,⁶⁸ often subjects corporations doing business in more than one state to double taxation. To correct this injustice, the UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT has been proposed.⁶⁹ Although only one state has adopted this act,⁷⁰ it is apparent that a uniform law is the only equitable solution to the problem.

(d) *General Requirements*—Income tax returns must be filed on or before April fifteenth in the year following the income year for which the return is made.⁷¹ If the taxpayer elects to report on a fiscal year basis, returns are to be filed on or before the fifteenth day of the fourth month following the close of the fiscal year.⁷² A taxpayer must secure permission from the Commissioner before a change in accounting period will be allowed. If the change is authorized a separate return must be prepared for the period between the close of the last income year and the start of the new income year.⁷³

65. *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So. 2d 640 (1958), cert. denied, 359 U.S. 984 (1959).

66. 15 U.S.C. §§ 381-383 (Supp. 1960).

67. 37 Taxes 1028 (1959).

68. *E. g.*, Colo. Rev. Stat. § 138-1 28 (Supp. 1960); Kan. Gen. State. §§ 79-3217, 3218 (Supp. 1959); La. Rev. State. tit. 47 §§ 243-245 (Supp. 1960); N.M. State. Ann. § 72-15-32 (1953); N.D. Cent. Code ch. 57-38 §§ 12-14 (1961); R.I. Gen. Laws § 44-11-14 (1956).

69. For a further discussion of this law see 36 Taxes 533 (1958).

70. Alas. Sess. Laws 1959, ch. 175.

71. N. D. Cent. Code § 57-38-34 (1961).

72. *Ibid.*

73. *Income Tax Law, Rules and Regulations of the State of North Dakota*, Rule 24 (1957). When a "short year" return is filed, the amount of tax liability is determined by dividing the amount of income and deductions by the fraction of the year the return represents. Then add the full year's exemptions and compute the tax as if the return was made for a full year. To arrive at the tax liability, then multiply the tax thus computed by the fraction used above.

The taxpayer may be granted a reasonable extension of time for filing a return if, in the judgement of the Commissioner, good cause exists. However, interest accrues at the rate of 6% per annum from the time the tax would have been due had the extension not been granted.⁷⁴

If the total tax liability for any year exceeds \$100, it may be paid in quarterly installments.⁷⁵ If paid in this manner, the first installment must be paid at the time the tax would normally be due. If at any time an installment is not paid in full on or before the date fixed for its payment, the entire amount of the unpaid tax becomes due and payable upon demand by the Commissioner.⁷⁶ The Tax Commissioner will issue a receipt in acknowledgement of all tax payments. This receipt is for the amount of the remittance only, and does not discharge further tax liability.⁷⁷

(e) *Information Returns*—Anyone who has paid a North Dakota taxpayer \$600 or more is required to file an information return, Form 59A, with the Tax Commission.⁷⁸ A separate form should be made for each taxpayer to whom such payments were made.⁷⁹ These forms are to be prepared on the basis of the calendar year and filed on or before April fifteenth of the year following.⁸⁰

SECTION II ADMINISTRATIVE PROCESS

(a) *The Assessment*—The most common way in which an income tax case arises is through an audit of the taxpayer's return.⁸¹ If the audit discloses a deficiency, it is computed, and the taxpayer is sent a "notice of reassessment".⁸² The contents of this notice must include, in detail, the reasons for the additional assessment. Upon receiving the notice, the taxpayer may exercise any one of four alternatives. He may: (1) pay the tax in settlement of the reassessment; (2) pay under protest; (3) file objections without paying the assessment; or

75. *Id.* § 57-38-36 (Supp. 1961).

76. *Ibid.*

77. *Id.* § 57-38-37 (Supp. 1961).

78. *Id.* § 57-38-42.

79. The return shows to whom the payments were made and the amount of these payments.

80. The information return is to be filed on the calendar year basis regardless whether the taxpayer files his tax return on the calendar year basis or the fiscal year basis. N. D. Cent. Code § 57-38-42 subsection 3 (1961).

81. In North Dakota this most likely will be a desk audit done in the tax commission's office although it may be done in the field where there are four auditors working.

82. N. D. Cent. Code § 57-38-38, subsection 1 (Supp. 1961).

(4) do nothing at all. If no objection is made to the proposed assessment, the tax will become delinquent forty-five days after notice.⁸³ By filing objections, the taxpayer also consents to furnish the Commissioner with all information necessary to reach a fair determination. Fifteen days after notice of a re-determination the tax will become delinquent.⁸⁴

In the case of a complete failure to file a return, the Commissioner may give the taxpayer notice of the failure and request the filing of a correct return within thirty days.⁸⁵ If the taxpayer complies, the return is simply delinquent and bears the penalty and interest prescribed by statute.⁸⁶ The Commissioner may exercise one of two options if the requested return is not filed. He may apply for a writ of mandamus to compel filing,⁸⁷ or he may determine the tax without a return *according to his best information and belief*.⁸⁸ Although this is the usual procedure, the Commissioner is not required to issue a notice of failure to file; he may, at his discretion, assess the tax arbitrarily and request the institution of a judicial proceeding for its collection.⁸⁹

Authority to make reassessment is terminated by lapse of time unless false or fraudulent information is contained in a return, or if failure to file was, in fact, due to a willful attempt to evade the tax.⁹⁰ Delinquent taxes are a personal debt to the state, and upon request by the Tax Commissioner, the Attorney General will institute judicial proceedings for their collection.⁹¹

Caveat: Do not fall into the penalty and interest trap. At the time a tax becomes delinquent, a penalty of 5% immediately attaches. Thereafter, interest accrues at the rate of 1% a month until the tax is paid.⁹² As stated, when notice of assessment is received, the taxpayer may choose to permit the tax to become delinquent and prepare to defend a lawsuit. It is obvious that the provisions for penalty and interest make this remedy extremely unattractive. Of course, prompt pay-

83. *Id.* § 57-38-39 (1961).

84. *Ibid.*

85. *Id.* § 57-38-45, subsection 6 (1961).

86. N. D. Cent. Code § 57-38-45, subsection 1 (1961).

87. *Id.* § 57-38-47 (1961).

88. See note 85 *supra*. (Emphasis supplied)

89. N. D. Cent. Code § 57-38-45, subsection 4 (1961).

90. *Id.* § 57-38-38 (Supp. 1961). This section provides a ten year statute of limitations where the assessment is made because of an innocent failure to file, a six year limitation where more than 25% of the income is omitted from the return and a three year limitation in all other cases.

91. *Id.* § 57-38-51 (1961).

92. *Id.* § 57-38-43 (1961).

ment will enable the taxpayer to avoid these penalties. A voluntary payment, however, operates as a bar to any further objection to the assessment.⁹³ The taxpayer should clearly indicate that payment of a disputed assessment is tendered under protest and for the sole purpose of avoiding penalties and interest.⁹⁴

(b) *Taxpayer's Remedies*—A taxpayer may make application for a revision of tax liability anytime within three years from the due date of the return or from the date of the additional assessment.⁹⁵ The Commissioner is directed to grant a hearing on any such request. At this hearing the taxpayer is afforded the same opportunity to present evidence and to examine witnesses as is permitted to parties to an action before the district court.⁹⁶ If the determination is favorable to the taxpayer, the Commissioner will cause the tax to be refunded. No interest is allowed on a claim for refund of income tax payments.⁹⁷ In the event the determination results in an adverse judgement the taxpayer may apply for a rehearing. This second hearing is permitted at the discretion of the Commissioner, and is held upon any terms which he may stipulate.⁹⁸

(c) *Judicial Review*—Orders of the Tax Commissioner are appealable orders.⁹⁹ Time for appeal is limited by statute¹⁰⁰ to thirty days after notice of a determination from a hearing or within thirty days after denial of a rehearing. The case is tried in district court without a jury, and is limited to a review of the record submitted from the hearing.¹⁰¹ The Court may order that the Commissioner consider additional evidence if it is material to the determination of the case and good cause existed why it was not presented at the hearing.¹⁰² After these facts are considered and entered into the record, the Commissioner will reverse, amend, or resubmit his former determination to the Court. The Commissioner's determination must remain undisturbed unless he has misapplied the law, infringed upon constitutional rights, or has made his

93. *Ford Motor Co. v. State*, 65 N.D. 316, 258 N.W. 596 (1935).

94. *Ibid.*

95. N. D. Cent. Code § 57-38-40 (Supp. 1961).

96. See *id.* § 28-32-05 (1961).

97. *Ford Motor Co. v. Baker*, 71 N.D. 298, 300 N.W. 435 (1941).

98. N. D. Cent. Code § 28-32-14 (1961).

99. *Langer v. Gray*, 73 N.D. 437, 15 N.W.2d 732 (1944).

100. N. D. Cent. Code § 28-32-15 (1961).

101. *In re Guon*, 76 N.D. 589, 38 N.W.2d 280 (1949).

102. N. D. Cent. Code § 28-32-18 (1961).

determination upon facts not supported by the evidence.¹⁰³ The judgement of the District Court can be appealed to the Supreme Court in the same manner as other cases tried without a jury. The time for appeal is limited to three months.¹⁰⁴

A RE-EXAMINATION OF THE ADMINISTRATIVE PROCEDURES

How satisfactory are the procedures just described? The procedures adopted by the Commission have not been criticized to any serious degree. When the taxpayer is at odds with the Commission, his remedies are comprehensive and he is assured of fair treatment. Under our system of "self-assessment", the contented taxpayer is the man who is informed of the laws and conducts himself honestly. To him, the tax burden is relatively small. Dishonesty and carelessness are rewarded as they should be—with penalties and rapidly compounding interest.

It is submitted that installment of a system of withholding in North Dakota should be delayed until adequate enforcement techniques are adopted by the Commission. Under the current, meager enforcement practices,¹⁰⁵ large amounts of income are never reported. Thus withholding would place an unfair burden upon the wage-earner. It is further suggested that North Dakota might follow in the footsteps of those states who are actively exchanging audit information with the Internal Revenue Service.¹⁰⁶

All recent attempts to increase revenues through income tax have been confined to legislative action. We may desire a government of laws, not of men, but good men are still necessary to administer the laws. Retention and support of competent administrators will do more to establish and maintain effective enforcement than any debate over alternative statutory schemes.

FREDERICK F. PLANKEY
PAUL M. BEEKS

103. *Williams Electric Coop. v. Montana-Dakota Utilities Co.*, 79 N.W.2d 508, 515 (N.D. 1956).

104. N. D. Cent. Code § 28-32-21 (1961).

105. See Penniman & Heller, *State Tax Administration* (1959).

106. Schmidt, *Federal and State Governments Are Exchanging Tax Audit Information*, 14 J. Taxation 376 (1961).

*"To tax and to please, no more than to love and to be wise,
is not given to men."*

EDMUND BURKE—On American Taxation (1774)