

REFUND OF TAXES UNDER THE GIFT PROHIBITION OF THE CONSTITUTION

Article X, Section 18, of the Constitution of North Dakota provides in part:

. . . neither the state nor any political subdivision thereof shall . . . make donations to or in aid of any individual, association or corporation except for reasonable support of the poor . . .

This section of the constitution is commonly referred to as the constitutional "gift" prohibition.

In *Petters & Co. v. Nelson County*, 281 N.W. 61 (N.D. 1938), the North Dakota Supreme Court held that real estate taxes paid by the purchaser of a tax sale certificate could not be refunded if no provision of law in existence at the time of the purchase authorized any refund of those taxes. The court found invalid a later enacted law to the extent that it provided for refund of such taxes on the grounds that the law violated the constitutional gift prohibition (Section 185 of the constitution at that time) because at the time the purchaser paid the taxes, the purchaser had no legal, equitable, or moral claim to a refund. The court found that the subsequent legislative enactment allowing such a refund was an unconstitutional gift.

A California constitutional provision similar to Article X, Section 18, of the Constitution of North Dakota was applied in the California Supreme Court decision in *Estate of Skinker*, 303 P.2d 745 (1956). The California Supreme Court held in that case that if an inheritance "tax has become due, a subsequent act of the legislature reducing the tax by reason of the change in the exemption, tax rates, or for that matter in any way, is held to be a gift of state moneys and is prohibited" by the California Constitution. The court's reference to when the tax becomes due is not to when the tax return must be filed but to the time when the obligation to pay the tax attaches (*supra* at 749). A subsequent California decision applying the same constitutional provision states that when a "taxing agency's right to a tax becomes vested" any subsequent reduction of liability is unconstitutional (*California Computer Products, Inc. v. County of Orange*, 166 Cal. Rptr. 68 (1980)). Under the California analysis, forgiveness of any "vested" or "attached" obligation for taxes is considered to be an unconstitutional gift of public funds.

It appears that similar provisions in other state constitutions have concluded that a public benefit from a "gift" of state funds may serve as consideration that would negate the gift aspects of the transaction.

In determining whether there has been a donation or a subsidy in violation of this section prohibiting a gift of public monies to a private association, public benefit to be obtained from the private entity as consideration for the payment or conveyance from the public body

may constitute valuable consideration, but this section may be violated if the value to be received by the public is far exceeded by the consideration being paid by the public. In reviewing such questions, courts must not be overly technical and must be of appropriate difference to findings of the governmental body. *Wistuber v. Paradise Valley Unified School District*, 687 P.2d 354 (Ariz. 1984).

Constitutions in some states do not specifically prohibit gifts but have a provision of similar effect which prohibits providing benefits to taxpayers which do not serve a public purpose. In a 1998 opinion to Governor Tony Knowles, Alaska Attorney General Bruce Botelho concluded that prospective application of a tax exemption for income earned by foreign corporations would be constitutional but that retroactive application would likely be declared unconstitutional under the public purpose clause of the Alaska Constitution. In the opinion, Attorney General Botelho stated:

In this case, the adoption of a retroactive tax exemption resembles an appropriation to individual taxpayers. The liability created by the tax has resulted either in money being paid to the state treasury or in a debt to the state. In either case, the right to the money has clearly vested in the state. Moreover, the rationale of encouraging future investment or industry in the state is clearly absent - the taxpayer will have already earned income in the state which has accrued a tax liability. Former taxpayers may benefit from this exemption even if they never do business in Alaska again.

Attorney General Botelho went on to review decisions of courts concluding that retroactive repeal of a tax could be upheld under constitutional gift or public purpose provisions if it serves an overriding public purpose, such as discharging a moral obligation. A moral obligation has been found to exist in situations such as a provision reducing income tax liability that was later found unconstitutional and restored full tax liability for taxpayers. Because taxpayers had a reasonable expectation that they would receive the tax reduction, the Supreme Court of Alaska concluded that the state had a moral obligation to provide the refund by subsequent legislation. However, Attorney General Botelho observed that the general rule is that retroactive tax repeals do not serve a public purpose and cited *Estate of Austin v. Austin*, 254 Cal. Rptr. 372 (1988); *Estate of Skinker*, 303 P.2d 745 (Cal. 1956); and *Wilentz v. Hendrickson*, 38 A.2d 199 (N.J. 1944).

It appears from examination of the legal authority available, including a 1938 North Dakota Supreme Court decision, that a retroactive tax reduction or

refund would be found to constitute a gift of public funds prohibited by Article X, Section 18, of the Constitution of North Dakota. It appears that this prohibition applies once a tax liability has attached, which in the case of income taxes and property taxes is January 1. Although courts in some other states have recognized that a public benefit from a retroactive tax reduction or refund could provide a form of consideration so that the reduction or refund might not be interpreted to be a gift, there is no

indication in its decisions that the North Dakota Supreme Court would recognize such a public benefit exception.

It must be remembered that any law enacted by the Legislative Assembly is entitled to a presumption of constitutionality and may not be declared unconstitutional except by decision of at least four of the five justices of the North Dakota Supreme Court under Article VI, Section 4, of the Constitution of North Dakota.