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# THE NORTH DAKOTA BUSINESS PRIVILEGE TAX

GARRY A. PEARSON\*

Is there one of us who hasn't been asked, "Why can't they pass a simple income tax statute? Why must it be a thousand pages long? Why can't we just pay a small flat percentage of our income as tax—that would be simple?"

This article is about that simple income tax, though it is known by another name; it is the North Dakota Business Privilege Tax, contained in one not overly long section of the North Dakota Code. In fact it is short enough to appear in the margin, which it does.<sup>1</sup>

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1. N.D. CENT. CODE 57-38-66 (Supp. 1969) Business and corporation privilege tax.—

1. Each individual, estate, or trust required to file an income tax return pursuant to chapter 57-38 and who derives income from the operation of a business, trade, or profession, other than as an employee, shall pay a tax for the privilege of doing business in this state of one percent of the net income derived from the operation of such business, trade, or profession, but the minimum tax assessable to any one taxpayer shall be twenty dollars, which tax shall be a separate tax that is levied in addition to the taxes provided for in chapter 57-38. For the purposes of this subsection, the term "net income" means the gross income derived from such business, trade, or profession less the expenses of carrying on such business, trade, or profession, as computed for federal income tax purposes pursuant to the provisions of the United States Internal Revenue Code of 1954, as amended.

2. Each foreign and domestic corporation, the personal property of which is not assessed by the state board of equalization, and which is not subject to a special tax in lieu of personal property taxes, required to file an income tax return pursuant to the provisions of chapter 57-38, in addition to any other taxes imposed by such chapter, shall pay a separate and additional tax, for the privilege of doing business in this state, of one percent of its taxable income computed as provided by section 57-38-01.3, except that federal income taxes paid or accrued shall not be deducted, and except as otherwise provided in this title. Each cooperative corporation required to file an income tax return pursuant to the provisions of chapter 57-38, in addition to any other taxes imposed by such chapter, shall pay a separate and additional tax, for the privilege of doing business in this state, of one percent of its net income, except that this tax shall not apply to cooperative corporations taxed under the provisions of chapters 57-33, 57-33.1, and 57-34. For the purposes of this subsection, net income of a cooperative corporation shall include distributed patronage dividends, amounts allocated but withheld, and amounts earned but not allocated by the cooperative corporation. Each corporation or cooperative corporation which does business in the state of North Dakota shall be required to report its full and true income resulting from transactions completed in the state of North Dakota or from income-producing activity performed in North Dakota and shall pay the tax provided in this section on such actual North Dakota earned income. The minimum tax assessable to any one taxpayer subject to the provisions of this section shall be twenty dollars.

3. For the purposes of this section, the term "United States" Internal Revenue Code or 1954, as amended" shall have the same meaning as provided in subdivision a of subsection 21 of section 57-38-01.

4. For the purposes of administering the provisions of this section, the provisions of chapter 57-38, pertaining to the administration of the income tax law, not in conflict with the provisions of this section and including but not limited to the provisions re-

But its simplicity (and brevity) is its downfall, for the problems which now arise are staggering.

The Business Privilege Tax was enacted by the 1969 legislature as a part of a lengthy effort to repeal the personal property tax. A brief history of that movement is helpful to understand how the Business Privilege Tax came to be what it is.

In 1965 the North Dakota legislature enacted a comprehensive tax reform bill which repealed the personal property tax in most respects and replaced the lost revenue through increases in the income tax and sales tax.<sup>2</sup> However, these provisions were referred to a vote of the people in a campaign led by Robert McCarney, a Bismarck automobile dealer, and defeated, leaving North Dakota tax statutes in approximately the same position they were prior to the 1965 legislature.<sup>3</sup> However, there was clearly widespread dissatisfaction with the personal property tax, for again, in 1967, the North Dakota legislature repealed portions of the personal property tax, the governor vetoed the act and the legislature was unable to override the veto.<sup>4</sup> While it was popular to oppose that tax, it was more difficult to invent a painless method to replace lost revenue; no one seemed willing to make do without it. Lacking an immediate answer the 1967 session created a commission to study the problem and report to the 1969 session with a plan.<sup>5</sup>

This interim committee was active; it enjoyed the advice of competent personnel, held hearings and submitted two major plans to the 1969 legislature, neither of which was found to be entirely appropriate.<sup>6</sup> At almost the last minute the Business Privilege Tax was born as essentially a compromise of many suggested measures, and the repeal of the personal property tax was finally achieved; in addition the sales and use tax was increased from three to four per cent — a clear shift of the burdens of taxation to the consumer.<sup>7</sup> Presumably, it was felt that the farmer, doctor and businessman should bear some part of the replacement burden, but the Business Privilege Tax will raise only 25% of the \$19,000,000 lost by the re-

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lating to the filing of returns, the withholding of income taxes, the payment of income taxes and interest and penalties thereon, refunds, attachment of liens for failure to pay such taxes, and civil and criminal penalties for failure to comply with the provisions of that chapter, shall govern the administration of the taxes levied in this section.

5. The provisions of this section shall be effective for all taxable years beginning on or after January 1, 1970.

2. Grand Forks Herald, March 11, 1965, at 1.

3. Grand Forks Herald, September 22, 1965, at 1.

4. Fargo Forum, March 6, 1967, at 1.

5. N.D. Sess. Laws 1967, Ch. 469.

6. Fargo Forum, December 22, 1968, at B-5.

7. N.D. CENT. CODE §57-39.2-03.1 (Supp. 1969), added by N.D. Sess. Laws 1969, Ch. 528, §11.

peal of the personal property tax; the balance is made up by the sales tax.<sup>8</sup>

The Business Privilege Tax did not become effective for any taxable year that began prior to January 1, 1970,<sup>9</sup> so accordingly taxpayers, and the Tax Commissioner and the public had a considerable lead line to plan for this new tax. Unfortunately, it is doubtful that any amount of time would have been sufficient for the Tax Commissioner to solve all his interpretative challenges for, as we shall shortly see, the Commissioner was forced to add meat and muscle to a skeletal scheme of taxation based upon varying standards of anatomy. Undoubtedly the Tax Commissioner will be the butt of considerable criticism arising from his new rules, regulations and explanations but, in the author's opinion, criticism here is as unavoidable as death and taxes.

The Commissioner promulgated rules on June 19, 1970 and promptly scheduled hearings throughout the State, inviting attorneys, accountants and practitioners to appear and discuss the Business Privilege Tax. Following these hearings the Commissioner's office sorted the questions, answers, protests, and occasional vitriolic innuendos, into a group of questions most commonly asked and published them in December. From these interpretations we know how the tax will be administratively applied.

At just reading the Business Privilege Tax, it seems devilishly simple. Basically it is in three parts, each of which imposes a 1% tax upon "income," which finds a different definition in each part. The first part is found in subsection 1, and applies to individuals, estates and trusts that earn income from a trade, business, or profession. The second and third parts are in subsection 2 and deal with corporations and then cooperatives. Any liable taxpayer, individual, corporation, trust, etc. that must file a return is liable for a minimum tax of \$20.00.

Words are words, but some words are the mere nucleus of a much larger concept. These "words of art" are probably more common in taxation than any other field. The difficulty with the Business Privilege Tax is that it is laced with such words, and our legislature cast them in contexts in which they had not previously appeared. With this in mind let us examine the statute.

The great bulk of taxpayers, individuals, estates, and trusts, are covered in subsection 1. Simply put, these provisions require that any member of that class that is required to file a North Dakota income tax return will be liable for the Business Privilege Tax if

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8. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, at 1.

9. N.D. CENT. CODE §57-38-66(5) (Supp. 1966).

they have income from a business, trade or profession. One would presume that the legislature is simply seeking to tax those businessmen, farmers and the like that will no longer have to pay personal property taxes. And tying the minimum tax to the filing requirements has the distinct advantage of simplicity; however, it is not without its problems.

The North Dakota filing requirements are about the same as the federal requirements, i.e. any individual having more than \$600 income is required to file a North Dakota return (\$1,200 if over 65).<sup>10</sup> Since the minimum tax applies regardless of the amount of business income it would seem that a literal reading of the statute would compel the individual with \$1.00 in business income and \$599 in salary (which is not Business Privilege Tax income) to pay the \$20.00 minimum tax, for he qualifies, i.e. he has \$600 income and has income from a business, trade or profession. The Tax Commissioner disagrees and states that the legislature must have intended that only the individual who has \$600 gross income from business, trade or profession need pay the minimum tax.<sup>11</sup> This result is generous, fair and equitable but does violence to the plain language of the statute.

Both Federal and State Law have long allowed husbands and wives to file joint returns and probably most legislators do, at least at the federal level. But if both the husband and wife have \$600 business income, there will be two separate business privilege tax returns to file, and perhaps two minimum taxes to pay.<sup>12</sup>

One of the more common state income tax problems deals with taxation of nonresidents, and in 1969 North Dakota largely solved the problem by exempting from North Dakota tax individuals who live in another state, are employed in or practice a profession in North Dakota, but whose income is subject to an income tax in the state of their residence.<sup>13</sup> These people need not file a North Dakota return, and it would seem that they would be exempt from the North Dakota Business Privilege Tax. However, the Tax Commissioner reasons that inasmuch as the Business Privilege Tax was enacted to replace the personal property tax, which these out of state individuals theretofore had been paying that the legislature must have intended to include them as Business Privilege Tax taxpayers.<sup>14</sup> This ignores the clear exemption in 57-38-66(1) for non-taxpayer-filers, as well as the fact that not all business or professional

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10. INT. REV. CODE of 1954, §6012(a).

11. Business & Corporation Privilege Tax: Rules & Regulations, Rule 2(A)(1).

12. *Id.* Rule 2(A)(5).

13. N.D. CENT. CODE §57-38-04(1) (Supp. 1969).

14. Business & Corporation Privilege Tax: Rules & Regulations, June, 1970, Rule 2(A)(2), note to Rule 2(A)(2), Explanatory Notes, at 3 and 4. These notes have been printed by the Tax Commissioner's office and are available upon request.

taxpayers own property in North Dakota. The Moorhead, Minnesota, doctor practicing in Fargo's hospitals may bring only his black bag into the State.

We all know that a partnership is not a separate legal entity and that partners pay income tax on their distributive share of partnership net income.<sup>15</sup> It is obvious that the lawyer in a partnership in North Dakota will pay the Business Privilege Tax on his distributive share of the firm's net income and it seems fair that an architect living in Minnesota but having an office in North Dakota should pay the Business Privilege Tax (subject to the statutory construction argument above) but, for purposes of the minimum tax, a new partnership concept has been created, one that has no parallel in Federal law, *distributable gross income*. If a partner has \$600 or more of distributable North Dakota *gross income* then he is liable for the North Dakota Business Privilege Tax regardless of where he lives and works, so long as he has a partner who is doing business in North Dakota.<sup>16</sup> For example, most large national accounting firms are organized as partnerships. If we assume that Peat, Marwick and Mitchell grosses \$24,000 in North Dakota income (and I suspect they do), and if we assume they had 400 partners, who share partnership profits equally, scattered throughout the globe in Europe, Australia, Asia and South America, each of those partners would be liable for a minimum tax in North Dakota of \$20.00, although they have never set foot in the state, nor for that matter, never heard of North Dakota. This seems wrong.

For individuals, estates and trusts the tax applies to net income derived from a trade, business or profession, defined as "gross income derived from such business, trade, or profession less the expenses of carrying on such business, trade, or profession, as computed for federal income tax purposes pursuant to the provisions of the United States Internal Revenue Code of 1954, as amended." This seems simple enough, but unfortunately federal law does not really define any of these concepts. It does define self-employment income,<sup>17</sup> but the Tax Commissioner has chosen not to be governed or guided by those standards, although it is clear that most individuals who pay self-employment tax will be liable for the Business Privilege Tax.<sup>18</sup>

The most difficult problem in defining gross income from a trade,

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15. INT. REV. CODE of 1954, §702(a).

16. Business & Corporation Privilege Tax: Rules & Regulations, June, 1970, Rule 2(A)(4), Notes to Rule 2(A)(4), Explanatory Notes, at 4, 5, 14 and 15.

17. INT. REV. CODE of 1954, §1402.

18. Business & Corporation Privilege Tax: Rules & Regulations, June, 1970, Rules 5(4)(c) and 5(5)(a) and (b). Minor exceptions exist like ministers, who can elect, nonresident aliens, who aren't eligible for the self-employment tax, and those individuals who have under \$400 in net earnings for self-employment. Newsboys under 18 are not liable for self-employment income tax but would be liable for the business privilege tax if they had \$600 gross income from their paper route.

business or profession is distinguishing between business income and investment income, particularly for landlords. A doctor buying a fourplex surely feels he is making an investment, not entering a new business, but the Tax Commissioner holds that if that doctor supplies any services to tenants such as utilities, heat, light, water, garbage disposal or janitorial work, then a trade or business exists and the Business Privilege Tax is levied.<sup>19</sup> Indeed the tax is even extended to the modest basement apartment occupied by a college student, for again some service must be rendered. Rental activity is specifically exempt from the self-employment tax provisions heretofore discussed,<sup>20</sup> and so, with curious reasoning, the Commissioner holds that since no similar exemption exists in the Business Privilege Tax rents must be covered.<sup>21</sup> While it is probably idle to speculate on the collective mind of the legislature while passing this statute, I would hazard a guess that it was not intended to tax receipts from this source.

The Tax Commissioner feels that the case law from other states compels the conclusion that when one rents an apartment and furnishes services, such activities constitute a trade or business. It would seem more likely to the writer that the legislature had federal standards, if anything, on its mind when drafting the statute. But federal law is not today concerned with distinguishing between investment or business income, because both are taxable. It has not always been so. Section 162, Internal Revenue Code of 1954 deals with the deduction for ordinary and necessary expenses of a trade or business; it is supplemented by Section 212 allowing a deduction for most other expenses that are associated with transactions entered into for profit or involving property held for the production of income. In *Higgins v. Commissioner*,<sup>22</sup> the United States Supreme Court distinguished between investment expenses and trade or business expenses and held that the costs incurred by an investor in stocks and bonds who maintained an extensive office and staff were not deductible as trade or business expenses, since investing in stocks was not a trade or business.<sup>23</sup> While the similarities are not precise it would seem that the investor with an office staff is more actively engaged in a continuous business than a landlord maintaining a room for a college student.

The Tax Commissioner distinguishes between the taxpayer who is presently in business and the taxpayer going out of business.

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19. *Id.* Rule 5(7)(e) and (f); Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Questions 93-110.

20. INT. REV. CODE of 1954, §1402(a)(1).

21. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 98.

22. *Higgins v. Commissioner*, 312 U.S. 212 (1942).

23. The predecessor of INT. REV. CODE, §212, was enacted to overrule *Higgins*.

It is held that the farmer who sells his farm and machinery and retires from farming, but retains grain which he sells in a year after he retires does not realize business privilege income since he was no longer in a trade or business.<sup>24</sup> This position seems tenuous for it would seem the character of inventory property like grain would not change.

The individual who has a business savings account or temporarily invests in stocks and bonds in his business name will realize business privilege income from these investments.<sup>25</sup> However, if that individual changes his account to a personal account, the income will be exempt. Surely once the Commissioner's position becomes generally known there will be few remaining business savings or stock accounts.

As seen above "net income" is defined as "gross income derived from such business, trade, or profession less the expenses of carrying on such business, trade, or profession, as computed for federal income tax purposes." Since North Dakota has long since "federalized" its approach to income taxation it would seem that no problem could arise. However, the difficulty is that federal law does not define gross or net income *from a business, trade or profession*. Federal law proceeds on the basis that virtually all income is taxable, less those items specifically deemed exempt (municipal bond interest, scholarships, income of states and political subdivisions, etc.) and federal law allows a host of deductions from gross income which may or may not qualify as "expenses of carrying on a business, trade or profession."

For example, does gross income include capital gains on business assets? The Tax Commissioner says it does and asserts that the individual taxpayer must pay the tax on the gross amount of capital gains without benefit of the 50% capital gains deduction.<sup>26</sup> Of course federal law does not distinguish between business capital gains and personal capital gains (except for Section 1231 assets), so the problem of separating the two has never really arisen before. I suggest that laymen do not view any capital gain as "business income" for it would seem that term is reserved for the normal, day-to-day receipts of a business. Certainly under federal law capital gains are not treated as such and have been historically segregated for the purposes

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24. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 88.

25. Business & Corporation Privilege Tax: Rules & Regulations, June, 1970, Rule 5(7) (a) and (b).

26. *Id.* Rule 5(7) (d); Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 131. After press time the problem was eliminated by the amendment of N.D. CENT. CODE 57-38-66(1) with Senate Bill No. 2413. This Bill provides that in computing gross income or net income for business privilege tax purposes, any gain or loss from the sale or exchange of property used in the operation of a business, trade or profession shall not be taken into account. This law does not apply to property held for sale in the regular course of that business, trade or profession. Also, the bill does not apply to corporations but only to individuals, estates and trusts and is effective retroactively to January 1, 1970.

of tax computations; they have acquired their own folklore in development of the law of federal income taxation. It is conceded that any definition of "gross income" is more than broad enough to include capital gains but, once again, one wonders whether the legislature really intended to include them.

If one does assume that capital gains are subject to the Business Privilege Tax it would seem they should be included subject to the other provisions of federal law. In this the Tax Commissioner agrees in part and disagrees in part. For example the Tax Commissioner agrees that the Business Privilege Tax does not apply to a disposal of capital assets pursuant to Section 1031 (non-taxable exchanges, i.e. trade-ins, exchanges of like kind property, etc.) and Section 1033, exchanges (the election of non-recognition on replacement of property involuntarily converted).<sup>27</sup> The Commissioner however, would not allow the 50% capital gain deduction; a literal reading of Section 1201, Internal Revenue Code of 1954 leaves one uncertain whether more than 50% of net long term capital gains constitutes a part of gross income despite the common vernacular which speaks of the "50% long-term capital gain deduction." Once again these matters have always been immaterial for federal purposes and there are no federal guides.

It has long been recognized that the casual seller of real or personal property should not have to pay tax on sales where he receives a small down payment (30% or less) and the balance in future years.<sup>28</sup> The installment reporting method has long been available to permit that taxpayer to defer the tax until the cash is received, but not for the Business Privilege Tax. The full tax will be due in the year of sale regardless of how much cash is received by the seller.<sup>29</sup>

The Commissioner has ruled that the sale of business assets following the termination of business is exempt, since taxpayer is *no longer* in business.<sup>30</sup> Accordingly, the farmer who retires and sells his farm avoids the tax, but the farmer who sells only a portion of his land is liable.

While the statute allows the deduction of expenses of carrying on a trade, business or profession, the Commissioner has ruled that an individual may not deduct a net operating loss, either on the basis that a loss is not an expense, or perhaps on the theory that it is nondeductible since a net operating loss is not deducted on

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27. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 123.

28. INT. REV. CODE of 1954, §453(b).

29. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 136.

30. *Id.* Question 124.

Schedules C or F of the federal return.<sup>31</sup> In any event since only expenses are mentioned in 57-38-66(1) is it to be inferred that other so-called "losses," such as casualty losses on business property, bad debt losses, losses from worthless securities, abandonment losses and the like are not deductible? On this point the Commissioner has not ruled.

The legislature apparently overlooked including apportionment language in Section 57-38-66(1), for it appears to require the payment of the tax upon an individual's global income regardless of where he lives or works. The Commissioner has ruled that the tax need only be paid upon a non-resident's North Dakota income,<sup>32</sup> a not overly generous attitude, since it would seem unconstitutional to hold otherwise. However, resident individuals may exclude out of state income (and must exclude expenses attributable thereto) although North Dakota could clearly subject that income to tax.<sup>33</sup>

The approach in taxing corporations is somewhat different. The legislature did not repeal the personal property tax for certain types of corporations, namely banks, savings and loan associations, mutual telephone companies, rural electrification, nonprofit tax exempt organizations, lodges, clubs, and other organizations dispensing food or alcoholic beverages and utilities. For other corporations the 1% tax is applied against corporate income as defined by 57-38-01.2 (the same base used for other North Dakota corporate tax purposes), plus federal income taxes paid or accrued. Unlike subsection 1 we do have reference to a statute defining taxable income, and our problems are not nearly so numerous. Taxable income is also adjusted by items which are "\* \* \* otherwise provided in this title," and herein lies the most likely argument for corporations, i.e., the treatment to be accorded to Subchapter S corporations, the so-called small business corporation whose undistributed income is taxable to the stockholders in proportion to their stock ownership.<sup>34</sup>

Subchapter S corporations are not taxable, although they file returns; for North Dakota purposes a corporation may elect Subchapter S treatment pursuant to the provisions of 57-38-01.4, and, if it does, its North Dakota income will be zero. And it would seem that the stockholders would avoid the Business Privilege Tax, for their salaries, or dividends, or their share of undistributed taxable income is not income from a business, trade or profession (undistributed taxable income is treated as a dividend).<sup>35</sup> However, the

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31. *Id.* Question 11.

32. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 38.

33. *Id.* Question 43; *Bechert v. Commissioner of Taxation*, 221 Minn. 65, 21 N.W.2d 101 (1945).

34. INT. REV. CODE of 1954, §1373.

35. *Id.*

Tax Commissioner has ruled that Subchapter S corporations are liable for the tax, based partly on his view of legislative history and partly upon a sequence of reasoning that commences with the premise that the Business Privilege Tax is a replacement for personal property tax the Subchapter S corporation would otherwise pay.<sup>36</sup> Even were we to concede the Commissioner's contentions it would seem that no resort is required to legislative history, for the statute is unambiguous; clearly it is *otherwise provided* in Title 57, that Subchapter S corporations will have zero income, and it would seem that such corporations would be subject only to the minimum tax, for they are required to file a return.<sup>37</sup>

Another way out of the Business Privilege Tax for the dedicated tax avoider is to form a corporation, and pay its earnings to himself as a salary, for that income is specifically exempt from the Business Privilege Tax. However, an individual who does this will be subject to additional employment taxes; his FICA taxes increase from the self-employment rate (7.5% of \$7,800) to the employee-employer rate, (10.4% of \$7,800), a difference of \$226.20 at the current rates. Of course the employer's share is tax deductible as a business expense while no part of the self-employed tax is deductible. Our employer might also then become liable for federal unemployment insurance, but by and large one might make the assumption that a self-employed person earning \$20,000 to \$25,000 per year will profit by incorporating and paying his earnings to himself as salary, assuming, of course, he can justify a salary of that amount. In that event the only tax due will be the \$20 minimum payable by the corporation.

Subsection 2 also purports to tax cooperatives and here applies a 1% rate to the cooperative's "net income." Once again we are in never-never land because neither North Dakota nor the federal statutes defines a net income for cooperatives. The Tax Commissioner takes the position that the legislature must have equated the net income of cooperatives with net income for corporations, and this may well be the case.<sup>38</sup> One adjustment is provided; net income is to be increased by any amounts distributed or allocated to patrons as patronage dividends.

The difficulty with this approach is that under federal law there are three types of cooperatives: the cooperative which is fully tax exempt, the cooperative which is partially tax exempt and the cooperative which is fully taxable just like a corporation;<sup>39</sup> with each,

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36. Business & Corporation Privilege Tax: Rules & Regulations, June, 1970, Rule 2(B)(2), Notes to Rule 2(B)(2), at 6, 7. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 147.

37. N.D. CENT. CODE §57-38-01.4(1) (Supp. 1969).

38. Business & Corporation Privilege Tax: Rules & Regulations, June, 1970, Rule 6(C)(2).

39. See Pearson, *The Farm Cooperative and the Federal Income Tax*, 44 N.D.L. Rev. at 490-504, reprinted, *The Monthly Digest of Tax Articles*, April, 1969, at 69-80.

the definition of net income differs. The tax-exempt cooperative may deduct patronage refunds, etc. as well as dividends on capital stock up to certain maximums, and the federal definition of "patronage" is broader than that mentioned in 57-38-66,<sup>40</sup> but it would be fair to presume that the legislature intended to treat all forms of patronage refunds similarly. However, the non-exempt cooperative will pay less tax than the partially-exempt or fully taxable cooperative, as it can deduct dividends on capital stock. In addition, since the farmer will pay the Business Privilege Tax on patronage he receives, the cooperative patronage payment will be taxed twice.<sup>41</sup>

The comments made above are not exhaustive; and they are intended to be a survey somewhat illustrative of the problems of enacting a simple statute referenced to yet another statute, i.e., one riddled with exceptions, with considerable special interest legislation and nontax objectives. While the point of this article is that the Business Privilege Tax is difficult to interpret (and may require thorough and major overhaul), it is perhaps more important that it is a statute which is practically impossible for the Tax Commissioner's office, as it is now organized, to enforce. One of the primary objectives of federalizing the North Dakota income tax was to shift the responsibility for most audit enforcements to the Internal Revenue Service and freeing the Tax Commissioner's office from work which is largely duplicitious. Since we now depart in so many ways from federal concepts, audit responsibility has returned to the Tax Commissioner's office.

In summary, it can be said that the legislature was clear in one respect; the rate is 1%.

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40. INT. REV. CODE of 1954, §1388.

41. Business & Corporation Privilege Tax Questions, North Dakota State Tax Department, December, 1970, Question 140.

