ARTICLE 81-01.1
PRACTICE AND PROCEDURE

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CHAPTER 81-01.1-01
GENERAL PROVISIONS

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81-01.1-01-01. Applicability.

This article applies to practice and procedure before the tax commissioner unless rendered inconsistent by a specific statute or rule, in which instance the more specific statute or rule will apply.

History: Effective July 1, 1985.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-02. Definitions.

As used in this article and in the provisions of North Dakota Century Code title 57, unless otherwise required, all terms and phrases have the same meaning as defined in the North Dakota Century Code, and, in addition:

1. "Assessment" means the determination and imposition of tax by the tax commissioner of any state tax due and owing based upon information on a tax return, upon information obtained through an audit, or upon the best information available. The term does not include a self-assessment made by a taxpayer on a tax return, a calculation of tax made by a taxpayer with the assistance of the tax commissioner, or an adjustment made due to a mathematical or clerical error on a tax return.

2. "Audit" means an examination or investigation by the tax commissioner to determine the accuracy of information on a tax return or to determine whether a tax liability exists.

3. "Determination" means a decision by the tax commissioner on a refund or an assessment of tax. The term does not include a self-assessment made by a taxpayer on a tax return, a

calculation of tax made by a taxpayer with the assistance of the tax commissioner, or an adjustment made due to a mathematical or clerical error on a tax return.

4. "Field audit" means any audit where taxpayer's books and records are examined at the taxpayer's place of business.

5. "Mathematical error" or "clerical error" means:

   a. An error in addition, subtraction, multiplication, or division shown on any tax return.

   b. An incorrect use of any table provided by the tax commissioner with respect to any tax return if such incorrect use is apparent from the existence of other information on the tax return.

   c. An entry on a tax return of an item that is inconsistent with another entry of the same or another item on such tax return.

   d. An omission of information that is required to be supplied on the tax return to substantiate an entry on the tax return.

   e. An entry on a tax return of a deduction or credit in an amount that exceeds a statutory limit.

6. "Notice" means a communication in writing issued by the tax commissioner or the taxpayer.

7. "Notice of determination" means notice provided by the tax commissioner to the taxpayer, pursuant to subsection 3 of North Dakota Century Code section 57-38-39, North Dakota Century Code sections 57-39.2-15, 57-40.2-13, and 57-40.3-12, and subsection 3 of section 81-09-02-02.

8. "Notice of reconsideration" means notice to taxpayer pursuant to subsection 5 of North Dakota Century Code section 57-38-39, subsection 8 of North Dakota Century Code section 57-38-40, subsection 6 of section 81-09-02-02, and subsection 7 of section 81-09-02-03.

9. "Notice of refund change" means notice provided to the taxpayer, as provided in subsection 10 of North Dakota Century Code section 57-38-40, North Dakota Century Code section 57-39.2-25, and subsection 3 of section 81-09-02-03, that all or part of the requested refund is denied.

10. "Office audit" means any audit where a taxpayer's books and records are examined in the tax commissioner's office.

11. "Tax form" means a document prescribed by the tax commissioner requesting specific information, and includes a document submitted to the tax commissioner by means of electronic transmission, such as wires, cables, electromagnetic waves, light waves, or similar media now in existence or that may be devised.

12. "Tax return" means a tax form containing facts required and sufficient information from which the tax commissioner can determine a tax liability and includes information returns. The terms "tax form" and "tax return" are not synonymous.

13. "Taxpayer" means an individual, partnership, firm, corporation, joint venture, association, estate, fiduciary, trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number who is or may be required to file a tax return under North Dakota Century Code title 57.

History: Effective July 1, 1985; amended effective May 1, 1991; November 1, 1996; July 1, 1998.
General Authority: NDCC 28-32-02

Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-02.1. Computation of time for response - Service by mail - Effect of mail refusal.

1. In computing any period of time prescribed or allowed by this title, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation.

2. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days must be added to the prescribed period, or six days if mailed out of state.

3. If a notice or other process is mailed with delivery restricted and requiring a receipt signed by the addressee, the addressee's refusal to accept the mail constitutes delivery. Return of the mail bearing an official indication on the cover that delivery was refused by the addressee is prima facie evidence of the refusal.

4. Any notice or statement will be considered as mailed if sent by facsimile transmission or common carrier delivery service, including, but not limited to, united parcel service or federal express.

5. The date of any notice or statement will be considered the date of mailing as evidenced by date of certified mail, affidavit of mailing, or postmark.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-03. Examination or investigation for purposes of an audit.

In order to determine the accuracy of a tax return, the correct tax liability, or whether a filing requirement exists, the tax commissioner may investigate or examine the taxpayer's records as defined in subsection 1 of section 81-01.1-04-03, any other pertinent documents, tangible personal property, equipment, computer systems, business facilities, plants, and shops.

A taxpayer must make all items and places available to the tax commissioner upon request. The tax commissioner may require the taxpayer to be present to answer questions, provide testimony, and submit proof of material or information examined. The taxpayer must answer all questions to the best of that taxpayer's information and ability.

An examination or investigation by the tax commissioner may extend to any person having access to information which may be relevant to an audit of a taxpayer.

History: Effective July 1, 1985; amended effective May 1, 1991; June 1, 2002.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-04. Audit requests - Enforcement.

1. When the tax commissioner requests audit information be sent to the tax commissioner's office, such request must be in writing and the taxpayer has thirty days to respond.

2. If, within thirty days, a taxpayer fails to respond, or fails to request and receive a written extension, the tax commissioner shall issue another written request, second notice, and allow the taxpayer thirty days to respond. If an extension has been granted, no second notice is required.

3. If, within thirty days, the taxpayer fails to respond to the second notice, or fails to respond within the extension deadline, the tax commissioner shall issue a final notice. The final notice must inform the taxpayer that if the taxpayer fails to respond within thirty days, the tax commissioner may serve the taxpayer with a subpoena, issue a notice of determination based on the best information available, or, in the case of income tax, issue a nonreviewable determination. The notice must also specify that the taxpayer may, within thirty days after the final notice, request in writing that the tax commissioner issue a subpoena for the audit information. If the taxpayer requests a subpoena, the tax commissioner shall issue the subpoena in lieu of issuing a notice of determination.

History: Effective May 1, 1991; amended effective November 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-05. Time for completion of an audit.

1. The tax commissioner shall notify the taxpayer in writing if the tax commissioner is unable to complete a field or office audit within twelve months of the commencement of such audit. For purposes of this section, an office audit is commenced on the date the tax commissioner first makes written request for information. A field audit is commenced on the date the auditor begins the review of taxpayer's records at the taxpayer's place of business.

2. If the tax commissioner issues a notice of determination later than twelve months after the commencement of a field or office audit, subsection 2 of section 81-01.1-01-09 applies. The twelve-month period is extended by any agreed-upon extensions of time, by the time it takes information requested but not provided during a field audit to be received by the tax commissioner, and by the time expended after the second notice provided for in section 81-01.1-01-04.

3. Audits conducted by the multistate tax commission are not subject to the time deadlines set forth in subsection 1 or 2.

History: Effective May 1, 1991; amended effective November 1, 1991; August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-06. Protest of notice of determination or refund change.

1. A taxpayer has the right to protest any notice of determination or notice of refund change only if a protest is perfected in full and timely compliance with the requirements contained in subsections 2 and 3.

2. The taxpayer has thirty days, or ninety days if the taxpayer is outside the United States, after the notice of determination or refund change to file a notice of protest. This notice of protest must be signed by the taxpayer or a duly authorized agent and must contain the following information:

   a. Taxpayer's name, address, telephone number, social security number or federal identification number, and sales tax permit number, if applicable.

   b. Name, address, and telephone number of taxpayer's agent, if any, for the purpose of the protest.

c. Type of tax and tax periods under protest.

d. Amount under protest.

The taxpayer may file an oral protest provided the oral protest is made within the thirty days and is confirmed in writing.

3. The taxpayer has up to ninety days after the notice of determination or refund change within which to file a written statement of grounds for protest setting forth the taxpayer's specific reasons for opposing the determination or refund change, unless the taxpayer and tax commissioner agree to extend the ninety days set forth in this subsection.

4. If the notice of protest or the statement of grounds for protest is served by mail, certified mail is recommended.

5. If the taxpayer fails to timely file either the notice of protest or statement of grounds, the notice of determination or the notice of refund change becomes finally and irrevocably fixed.

6. The tax commissioner shall acknowledge receipt of the statement of grounds within fifteen days of receipt of the statement of grounds. If the taxpayer fails to specifically state the reasons and facts for opposing the determination or refund change, the tax commissioner shall give the taxpayer thirty days to perfect the statement of grounds. The tax commissioner shall state specifically the additional information required.

7. Amounts of tax not protested are irrevocably fixed and must be paid.

History: Effective May 1, 1991; amended effective August 1, 1994; June 1, 2002.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-07. Response to statement of grounds.

Within ninety days of the final statement of grounds, the tax commissioner must provide a detailed response. The tax commissioner's response must address each objection raised by the statement of grounds. The taxpayer may request a more specific statement within fifteen days of the tax commissioner's detailed response. The tax commissioner shall respond to the request for a more specific statement within thirty days. If the tax commissioner fails to meet the deadlines specified in this section, subsection 2 of section 81-01.1-01-09 applies, unless the taxpayer and tax commissioner agree to extend the ninety-day period in this section.

History: Effective May 1, 1991; amended effective August 1, 1994.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-08. Notice of reconsideration.

In reference to notices sent pursuant to North Dakota Century Code sections 57-38-39 and 57-38-40 and sections 81-09-02-02 and 81-09-02-03, the tax commissioner shall issue a notice of reconsideration within nine months of the final statement of grounds, plus any mutually agreed extensions. If a notice of reconsideration is sent later than nine months, plus agreed extensions, after the statement of grounds, subsection 2 of section 81-01.1-01-09 applies.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-09. Waiver of interest and penalty - Waiver of interest in certain circumstances.

1. All or part of the penalty and interest may be waived for good cause upon request. "Good cause" means that a taxpayer has been cooperative during the audit process and has a history of correct filing. Penalties and interest may be waived at any time before payment.

2. If the tax commissioner fails to meet the deadlines specified in sections 81-01.1-01-05, 81-01.1-01-07, or 81-01.1-01-08, good cause will be shown for waiver of interest. The waiver must equal the pro rata amount of interest accrued from the deadline date to the date the tax commissioner actually issues the notice of determination or refund change, response to the statement of grounds, or the notice of reconsideration. For example, if the notice of determination is due the fifteenth of November and the tax commissioner issues the notice of determination the thirtieth of December, interest equal to one and one-half percent will be waived.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-10. Waiver of penalty and interest based on written opinion signed by a division director or section supervisor.

An opinion signed by the division director or section supervisor, as identified in article 81-01, is not binding. However, if the taxpayer can produce the letter requesting the opinion and the written opinion and can demonstrate detrimental reliance on such advice, good cause will exist to waive one hundred percent of the penalty and two-thirds of the interest on the assessment.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-11. Opinion of the tax commissioner.

1. An "opinion of the tax commissioner" means an opinion issued under this section with respect to prospective tax liability. It does not include ordinary correspondence of the commissioner or a final determination of the commissioner arising from a request for administrative review of an assessment or a claim for refund.

2. If a taxpayer requests in writing an opinion from the tax commissioner as to whether or how certain property, income, source of income, or a certain activity or transaction will be taxed, the commissioner's written response is an "opinion of the tax commissioner" and binds the commissioner, in accordance with subsections 3, 7, and 8, provided all of the following conditions are satisfied:

   a. The taxpayer's request fully discloses the specific facts or circumstances relevant to a determination of the taxability of the property, income, source of income, activity, or transaction, and if an activity or transaction, all parties involved in the activity or transaction are clearly identified by name, location, or other pertinent facts.

   b. The commissioner's response is signed by the commissioner and designated as an "opinion of the tax commissioner".

3. An opinion of the tax commissioner remains in effect and protects the taxpayer for whom the opinion was prepared and who reasonably relies on it from liability for any taxes, penalty, or interest for any tax year that may be specified in the opinion or until the earliest of the following dates:

a. The effective date of a written revocation by the commissioner sent to the taxpayer by certified mail, return receipt requested. The effective date of the revocation is the taxpayer's date of receipt.

b. The effective date of any legislative amendment or enactment that is inconsistent with the opinion.

c. The date on which a court issues an opinion which establishes or changes relevant case law that is inconsistent with the opinion.

d. If the opinion of the commissioner was based on the interpretation of federal law, the effective date of any change in the relevant federal statutes or regulations, or the date on which a court issues an opinion establishing or changing relevant case law with respect to federal statutes or regulations inconsistent with the opinion.

e. The effective date of any change in the taxpayer's material facts or circumstances.

f. The effective date of the expiration of the opinion, if specified, in the opinion.

4. A taxpayer is not relieved of liability for any activity or transaction related to a request for an opinion that contained any misrepresentation or omission of one or more material facts.

5. If the commissioner provides written advice under this section, the opinion must include a statement that:

   a. The tax consequences stated in the opinion may be subject to change for any of the reasons stated in subsection 3.

   b. It is the duty of the taxpayer to be aware of such changes.

6. The commissioner may refuse to offer an opinion on any request received under this section.

7. This section binds the commissioner only with respect to opinions of the commissioner issued on or after January 1, 1991.

8. An opinion of the commissioner binds the commissioner only with respect to the taxpayer for whom the opinion was prepared.

9. If a commissioner rescinds a written opinion of a previous commissioner, the commissioner shall, by certified mail, notify the taxpayer of the intent to rescind the opinion at least thirty days before the effective date of the rescission. The rescission is effective prospectively only.

10. The commissioner shall make available the text of all opinions issued under this section, except those opinions prepared for a taxpayer who has requested that the text of the opinion remain confidential. In no event may the text of an opinion be made available until the commissioner has removed all information that identifies the taxpayer and any other parties involved in the activity or transaction.

11. An opinion of the commissioner issued under this section is not a final determination of the commissioner and may not be appealed to the North Dakota district court.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-12. Tape recordings.

A taxpayer or the tax department may record, electronically or otherwise, any audit conference or meeting. However, prior to such recording, advance notice must be given of the intent to record.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-13. Reaudit.

1. Provided the statute of limitations remains open, the tax commissioner may reaudit years that were previously audited. Such reaudit is limited to issues and facts not previously audited. Documents previously supplied by the taxpayer may not be requested in future audits of the same year unless the taxpayer utilizes those documents as relevant to the new audit or the tax commissioner and taxpayer have otherwise agreed.

2. The tax commissioner may not audit tax years previously audited if the purpose of the reaudit is to examine issues which were assessed and subsequently resolved in the previous audit.

History: Effective May 1, 1991; amended effective November 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02