

**OPINION
69-379**

October 20, 1969 (OPINION)

Mr. Raymond R. Rund

Steele County State's Attorney

RE: Taxation - Delinquent Real Estate Taxes - Lien on Property

This is in reply to your letter of October 15, 1969, with regard to the date that real estate taxes in this state become a lien on real property.

Your letter states further that this would include levies for the state, county, township or any political subdivisions that certify assessments or their tax levies to the County Auditor to be spread and levied against the real property.

You call our attention to the following:

- 1) Section 57-02-11 (1) where all real property subject to taxation shall be listed on April 1st of the year;
- 2) Section 57-02-34, wherein the assessor has the months of April and May to perform his assessor's duties;
- 3) The statutes requiring the local boards to equalize and the County Commissioners and State Board to equalize the values;
- 4) Section 57-02-40 (1) which makes real property taxes a paramount lien but does not say when it becomes a lien;
- 5) Section 57-02-41, as amended, which states that all taxes become a lien on real estate on and after January first, as between vendor and purchaser;
- 6) Section 57-20-01, as amended, which provides that all real and personal property taxes become due on the first day of January following the year for which such taxes were levied.
- 7) 84 C.J.S. Taxation Section 592, pages 1190, 1191, 1192 and 1193."

Your letter states further that you have been unable to find a statute which says that the tax on real estate becomes a lien on a specific day, nor do you find any North Dakota cases which hold that the tax becomes a lien on a specific day. For deduction purposes on a federal estate tax return, that department will allow such deduction only if such taxes were a lien on the property on the date of death. It further states that the question then arises, when does a real estate tax become a lien on the property (real property) in this state.

You quote from Section 592 of Volume 84 C.J.S. as follows:

* * * Where the statute is silent as to the time when the tax lien attaches, it attaches when, under the governing statutes, the amount of the tax is definitely fixed and the liability for its payment commences, as of the date of the levy or the fixing of the rate; the time of the assessment of the tax; when the assessment roll is confirmed, filed, turned over to the receiver of taxes, or extended on the roll and levied; or on the return of the assessment.

Under some statutes, the time when a tax lien shall attach is fixed as of a certain day in the year, although the amount of the tax is not then determined and the tax is not yet payable or the tax is assessed and levied afterward. * * *."

You cite the case of Swenson v. Greenland, 62 N.W. 603, 4 N.D. 532, indicates that this refers to an older statute on personal property and your belief that same does not apply today even as to person property.

We have examined carefully the citations you submit.

We have noted the provisions of section 57-02-40 of the North Dakota Century Code, as follows:

TAXES PARAMOUNT LIEN ON REAL ESTATE - STATUTE OF LIMITATIONS
NOT APPLICABLE TO PERSONAL PROPERTY TAXES.

1. Taxes upon real property are a perpetual paramount lien thereon against all persons, except the United States and this state.
2. Taxes upon personal property shall not be affected by any general statute of limitations.
3. A tax lien shall include the principal of the tax, and all costs, penalties, interest, charges, and expenses which by law shall accrue, attach, or be incurred."

We note that, while this statute definitely does make those taxes a lien, it does not state when that lien attaches. Insofar as this statute also makes such line a "paramount" lien, it is not usually necessary to examine into the time when such lien attaches, and this may be the reason the Legislature did not specifically provide for when the lien does attach.

The Legislature has apparently made provision for time of attachment of the lien in two specific instances in section 57-02-41 of the 1969 Supplement to the North Dakota Century Code. That section provides:

ATTACHMENT OF TAX LIEN AND PRORATING TAXES AS BETWEEN VENDOR AND PURCHASER. All taxes, as between vendor and purchaser, shall become a lien on real estate on and after the first day of January following the year for which such taxes were levied. In any case where real property is sold or otherwise disposed of or purchased or otherwise acquired by a tax exempt

corporation or organization after the assessment date and used for the purposes provided in section 57-02-08, the property shall be liable for taxes during the portion of the year for which it has been assessed computed to the nearest month such property was not used as provided in section 57-02-08. The taxes so computed shall attach as a lien on such property and the purchaser shall take the property subject to such lien. When such property has not been assessed, it shall be assessed as omitted real property and taxes computed as herein provided."

We note that the first sentence of this statutory provision definitely and authoritatively establishes the date at which the tax becomes a lien, but only in the instance there specified. There is no designation therein of the date of such tax lien would attach if such provision were not made. The latter part of this section, added in 1963, does establish a different date for attachment of the tax lien in instances where the property is transferred to a tax exempt corporation or organization, i.e., immediately after the assessment date.

Noting that in a prior telephone conversation you indicated you did not have a copy of Abstract and Title Practice, Flick, Second Edition, Volume 1, the statement contained therein as part of Section 694, page 676, states:

Section 694. ATTACHMENT AND PRIORITY OF TAX LIEN. The statutes, as a rule, fix the time when the tax lien attaches. A provision which creates a tax lien before determination of the amount of tax is valid. If there is no statutory provision, the lien has been held to attach (1) when amount of tax becomes fixed and liability for payment accrues; (2) from levy date; or (3) from completion of assessment."

In support of proposition (1) they cite Larson v. Hamilton County, 99 N.W. 133, 123 Iowa 485, and J. M. Jones Lumber Co. v. Homochitto Development Co., 141 So. 589, 163 Miss. 305. In support of their proposition (2) they cite N.C. Henderson Bldg. & Loan Assn. v. Burwell, 174 S.E. 125, 206 N.C. 358, and McAnally v. Little River Drainage Dist., 28 S.W.2d. 650, 325 Mo. 348. In support of their proposition (3) they cite Eaton v. Chesebrough, 46 N.W. 365, 82 Mich. 214, and Nicolet Securities Co. v. Outagamie County, 259 N.W. 621, 217 Wis. 439.

We note that our Supreme Court has had occasion to consider questions of priority of liens, between tax and other liens, in an instance where the "paramount" provision of section 57-02-40 did not apply. In that decision, State v. Divide County, 68 N.D. 708, 283 N.W. 184, our Court states at page 715 of the North Dakota Report:

When we examine the legislative provisions with reference to the investment of the school fund, we note in Section 287 of the Compiled Laws, as amended and carried forward into Section 287 of the Supplement and chapter 215 of the Session Laws of 1929, it is the legislative policy, upon taking a mortgage to secure the repayment of a loan from the permanent school fund, that all prior encumbrances shall be paid before

the net proceeds are turned over to the applicant, and all releases of encumbrances must be recorded at his expense. This, of course, covered taxes that were then due. This lien for taxes in such case would be prior to the mortgage lien and therefore superior. Hence, they had to be paid to attain priority for the mortgage." (emphasis supplied)

In that decision, we note further at page 718 of the North Dakota Report the statement that:

* * * It is clear, however, on principle, that the same rule must apply in this case. Taxes levied and not due are not liens upon the real estate, and after the state acquires title to the land, no tax lien can attach so long as the state holds it. * * *." (emphasis supplied)

Noting the context in which these statements are made, it would appear that it was intended to specify the time the lien would attach upon the basis of the nature of the lien set out without regard to the specific reasoning in that decision, we would assume the 1963 amendments to said section 57-02-41 would not change such result.

Noting that section 57-20-01 of the North Dakota Century Code provides that these taxes shall become due on the first day of January following the year for which such taxes were levied, we would further conclude that that is the date of the attachment of the lien to the property.

We are enclosing herewith a letter of date 11 August 1959, on behalf of the State Tax Commissioner with regard to the same subject.

HELGI JOHANNESON

Attorney General