

**OPINION
69-431**

November 12, 1969 (OPINION)

The Honorable Edwin C. Becker

State Senator, Sixth District

Willow City, North Dakota

RE: Taxation - Lease of Nonpublic Schools - Tax Exempt Status

This is in reply to your letter of October 16, 1969, relative to the lease of property by a church to a school district. You state the following facts and questions:

In the last few months, I have noted an increased interest on the local level of government concerning the problems being faced by nonpublic schools and the attempt by these schools to remain functionable. Many of the schools, facing the prospect of being buried in rising costs for educational services, have closed their doors and added burdens to the surrounding public school districts, since the increase in public school enrollment usually requires that additional facilities be provided. I have been involved in some discussions myself on this subject, and it appears that some of the problems that surround the closing of a nonpublic school can be eliminated if the affected public school district is able to lease the facilities of the nonpublic school in order to handle the additional students. Both the public and nonpublic schools would be benefited by this utilization. There is, however, a certain reluctance on the part of many nonpublic schools to lease their facilities, a reluctance created in part by the uncertain tax status they will face as a result of the leasing arrangement. Therefore, I feel it would be of considerable value to many nonpublic schools if they could have their real property tax status clarified.

Assuming that a nonpublic school leases exempt real property, such as an auditorium, to a public school district, the property to be used for the same purpose, in your opinion, would the property lose its exempt status insofar as the real property tax is concerned? And, in the event your answer is in the affirmative, would it make any difference if the amount of the lease payments were such as to provide only for costs of maintenance (i.e., special assessments, electricity, repairs, etc.) and that no profit over and above these costs would be realized?

I am sure that an opinion on this question or tax status would be welcomed by both nonpublic schools that are contemplating closing their doors and are at a loss as to how to occupy their educational buildings, and public school districts who are anxious to lease these buildings rather than bond their districts and build new structures."

Section 176 of the North Dakota Constitution provides:

Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. The legislature may by law exempt any or all classes of personal property from taxation and within the meaning of this section, fixtures, buildings and improvements of every character, whatsoever, upon land shall be deemed personal property. The property of the United States and of the state, county, and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. Except as restricted by this Article, the legislature may provide for raising revenue and fixing the situs of all property for the purpose of taxation. Provided that all taxes and exemptions in force when this amendment is adopted shall remain in force until otherwise provided by statute."

Section 57-02-08 (subsections 6, 7, 8 and 9) of the North Dakota Century Code provides:

All property described in this section to the extent herein limited shall be exempt from taxation, that is to say:

6. All schoolhouses, academies, colleges, institutions of learning, with the books and furniture therein, and the grants attached to such buildings necessary for their proper occupancy, use, and enjoyment and not otherwise used with a view to profit, and all dormitories and boarding halls, including the land upon which they are situated, owned and managed by any religious corporation for educational or charitable purposes for the use of students in attendance upon any educational institution, if such dormitories and boarding halls shall not be managed or used for the purpose of making a profit over and above the cost of maintenance and operation;
7. All houses used exclusively for public worship, and lots or parts of lots upon which such buildings are erected, and any dwellings belonging to religious organizations intended and ordinarily used for the residence of the bishop, priest, rector, or other minister in charge of the services of the church, together with the lots upon which the same are situated;
8. All buildings and contents thereof belonging to institutions of public charity, including public hospitals under the control of religious or charitable institutions, used wholly or in part for public charity, together with the land actually occupied by such institutions not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining and belonging exclusively to such institutions;
9. All real property, not exceeding two acres in extent, owned

by any religious corporation or organization, upon which there is a building used for the religious services of such organization, or upon which there is a dwelling with usual outbuildings, intended and ordinarily used for the residence of the bishop, priest, rector, or other minister in charge of such services, shall be deemed to be property used exclusively for religious services, and exempt from taxation, whether such real property consists of one tract or more. All taxes assessed or levied on any such property, while the same was so used for religious purposes, are void and of no effect, and must be canceled. All personal property of any religious corporation or organization used for religious purposes is exempt from taxation; * * *."

Since the buildings in question would not be used for religious purposes, it becomes apparent that the only exemption which could be applicable would be the exemption specified in subsection 6 of section 57-02-08. There would be no doubt that if the building were owned by the school district it would be exempt from taxation. See section 57-02-08(3) of the North Dakota Century Code and section 176 of the North Dakota Constitution. There would also be no doubt that if the building were used by the religious organization for educational purposes it would be exempt from taxation. However, we believe a different situation arises in those instances in which the building is owned by a religious organization and leased to a school district for school purposes. The religious organization is not using the building for school purposes and therefore the exemption is not available on that basis. While the school district is using the building for school purposes, there would appear to be no doubt that if the school district were leasing the building from an organization or individual whose property was subject to taxation the property would be subject to taxation.

We would further note that section 176 of the North Dakota Constitution, prior to its amendment in 1918, provides in part: "the property of the United States, and of the state, county and municipal corporations, shall be exempt from taxation; and the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, charitable or other public purposes * * *." It will be noted that the portion applicable to exemption of property used exclusively for schools was not self-executing as it appears to be in the present provision of section 176. However, we would also note that the present provision of section 176 provides, last sentence, "Provided that all taxes and exemptions in force when this amendment is adopted shall remain in force until otherwise provided by statute." This provision is not, of course, self-executing and requires us to look to the statutory exemptions as they existed prior to the amendment of section 176 in 1918. Thus section 2078 of the Compiled Laws of 1913 provided:

All property described in this section to the extent herein limited shall be exempt from taxation, this is to say:

1. All public school houses, academies, colleges, institution of learning, with the books and furniture therein, and the grounds attached to such buildings necessary for their

proper occupancy, use and enjoyment, not to exceed forty acres in area, and not leased or otherwise used with a view to profits; also all houses used exclusively for public worship and the lots and part of lots upon which such houses are erected.

* * *

7. All properties belonging to counties and to municipal corporations that are used for public purposes.

* * *."

It will be observed that subsection 7 of the above quoted section is similar to subsection 3 of section 57-02-08 except that school districts and certain other political subdivisions included within subsection 3 were not included within the political subdivisions listed in subsection 7. Subsection 1 is similar to subsection 6 of section 57-02-08 except that under the provisions of the 1913 statute only "public" school houses were exempt from taxation.

While the subsequent amendments to these provisions indicate all school houses, public or not, were exempt from taxation in accordance with the provisions of section 176 of the North Dakota Constitution, as amended in 1918, and property owned by political subdivisions, including school districts, were exempt from taxation, it appears the intent of the amendment to section 176 of the Constitution and the amendments to section 57-02-08 were for the purpose of exempting all property of school districts, including, of course, schools owned by them, under the provisions of subsection 3 of section 57-02-08. Private schools are exempt under the provisions of subsection 6 of section 57-02-08 but only when the school buildings are used by the private corporation or organization for school purposes. It would not appear it was the intent to provide exemptions to public schools under two provisions, i.e., the provision exempting all property of school districts and the provisions exempting property used exclusively for schools. Thus we believe the provision relative to exemption of property used exclusively for schools must apply to those schools owned and used for school purposes by private organizations which would not otherwise be exempt under the constitutional and statutory provisions.

While there may be a logical and constitutional basis for the legislature to determine that school property held by a religious organization may be leased to a public school district for school purposes without disturbing the tax exempt status of the property, we find no basis in the present law for such a conclusion. The exemption provisions appear to require the property be owned and used by the exempt organization for the exempt purposes. In this instance the property would be owned by an exempt organization and used for an exempt purpose but the organization owning the property would not be using it for the exempt purpose although the school district which would be using the property would also be exempt.

We would also note the State Tax Department has previously taken the position that school buildings and lots owned by religious organizations which lease such property to a governmental

organization for school purposes lose their tax exempt status. I am enclosing herewith a copy of a letter written by Tax Department Counsel to Mr. Hugh McCutcheon, Minot City Attorney, on May 16, 1968. While the conclusion of the Tax Department is not binding upon this office we are aware of the statutory rule of construction that the administrative interpretation placed on statutes by the department which has the duty of administering same is to be given considerable weight in construing an ambiguous statute.

With respect to your second question, it would not appear the amount of the lease payments would be of significance under the present status of the North Dakota statutes governing this matter.

In conclusion it is our opinion that if a nonpublic school leases exempt real property, such as an auditorium, to a public school district, the property to be used for the same purpose, such property would lose its exempt status insofar as the real property tax is concerned. It is our further opinion that it would make no difference if the amount of the lease payments were such as to provide only for costs of maintenance (i.e., special assessments, electricity, repairs, etc.) and that no profit over and above these costs would be realized.

HELGI JOHANNESON

Attorney General