

**OPINION
70-456**

March 5, 1970 (OPINION)

Honorable Byron L. Dorgan

Tax Commissioner

RE: Taxation - Personal Property Tax Repeal - Classification of Prop

This is in response to your letter in which you state that a number of questions have arisen since the repeal of the personal property tax. You also point out that probably the most important is the question of what constitutes "real" property and what constitutes "personal" property. You further advise that in April and May of 1969, following the repeal of the personal property tax, your department issued guidelines to the assessor of the state in assessing leasehold improvements and other property. In doing so you relied on the existing property tax laws, which were based primarily on section 41-07-05 of the North Dakota Century Code and other statutes.

You also state that the definition of "fixtures" seems to be the cause of most of the misunderstanding in applying the correct classification to property. You discussed this problem with the Interim Finance and Taxation Committee, whereupon some of the members recommended that you promulgate rules upon the classification of property for the 1970 assessment and that you ask approval of your rules from the attorney general. You also have met with assessors of the state and they have asked that you request an opinion from the attorney general on the classification of the various types of property.

Also attached to your letter is a survey conducted by the State Tax Department in the fall of 1969, which vividly shows the disparity among assessing districts in classifying property as either "real" or "personal." The items listed in the survey are the ones causing the greatest difficulty.

You have submitted for our consideration rules and regulations governing the assessment procedures for 1970 and specifically designate certain property to be classified as either real or personal. You then ask for a formal opinion on the validity of the rules and regulations which you have submitted. You are asking specifically for an opinion as to the correctness of the classifications you have assigned to the listed types of property.

We recognize the difficulties encountered and realize that certain problems exist which were brought to our attention at previous conferences with your office and staff members.

We believe it is essential to first examine that portion of the Act which exempts certain property, provides for exceptions, and sets forth other provisions. The pertinent portion is found in section 57-02-08, subsection 25, as amended by chapter 528 of the 1969 Session Laws, and provides as follows:

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

* * *

5. All personal property not required by section 179 of the constitution of North Dakota to be assessed by the state board of equalization shall become exempt from assessment and taxation in the year 1970 and such property shall not be assessed or taxed for that year or for any year thereafter; provided that this provision shall not apply to any property that is either subjected to a tax which is imposed in lieu of ad valorem taxes or to any particular kind or class of personal property, including mobile homes or house trailers, that is subjected to a tax imposed pursuant to any other provision of law except as specifically provided in this subsection. In addition, this subsection shall not exempt from taxation the personal property of any corporation organized pursuant to the North Dakota Nonprofit Corporation Act, which is not exempt from personal property taxation under any other statute nor shall it exempt from assessment and taxation fixtures, buildings, and improvements upon land which are now assessed as real estate." (Underscoring ours.)

While subsection 25 of section 57-02-08 does not in specific terms state that all the property heretofore classified as real or personal property shall hereafter be continued to be classified as real or personal property, nevertheless the language clearly indicates that real property assessed and taxed as such in 1968 shall remain so. Nowhere throughout chapter 528 of the 1969 Session Laws do we find any language which suggests to the contrary, nor do we find any amendments to the existing definitions of "real" or "personal" property which would suggest a reclassification of such property.

The underscored language in subsection 25, quoted above, clearly illustrates that none of its provisions are to be construed so as to provide any exemption for fixtures, buildings, and improvements upon land which are now assessed as real estate. This language, in effect, prohibits the reclassification of any real estate property as personal property if same was assessed and taxed as real property in the year 1968. The language, "* * * now assessed as real estate * * *", obviously must refer to the classification and the assessment and taxes levied on such property in the year 1968. Had the legislature meant at the time that the Act goes into effect, it would have said so. The term "now" obviously refers to the situation as it existed when chapter 528 was passed by the North Dakota Legislature. A reclassification of property from "real" to "personal" would make it exempt, which is prohibited in the above language.

Prior to the exemption of personal property from taxation, the need to distinguish between "real" and "personal" property was not relevant because the dollar value placed on the property ultimately determined the mill levy to which such property was subjected, and in most instances, if not in all, the mill levy was applied equally to

personal and real property. However, with the repeal of the personal property tax the classification of property became a vital factor in taxation. This is particularly true because in addition to the exemption the legislature in enacting chapter 528 provided for a payback formula which was to supply the revenue lost from the repeal of the personal property tax. The legislature also set up a formula whereby the state would contribute \$1.00 for every \$4.00 resulting from increases in real property taxes. The legislature also established a base consisting of the classification of property assessments and taxes produced in the year of 1968 as a factor to be employed in the formula. This further supports the proposition that the legislature did not contemplate a revision of classification of property for taxation purposes.

While inequities and misclassifications have existed prior to the repeal of the personal property tax, it did not become vital until the repeal of the personal property tax. Upon the repeal of the personal property tax these discrepancies became more apparent and caused considerable concern amongst the taxpayers. It is readily conceivable that because of classification, property on one side of the street would be classified as real and similar property on the other side of the street would be classified as personal. One would be taxed, the other would not be taxed. The resulting benefit, burden or windfall is obvious. Because of the built-in base and application for formulae, a reclassification of property to eliminate an inequity could and will result in creating another inequity or shift the inequity to some other place.

While it appears that the legislature intended no change in classification, nevertheless we must also take into account equitable principles and constitutional provisions. Section 176 of the North Dakota Constitution begins with the language that "* * * Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. * * *." As a "Monday morning quarterback", we could easily state what should have been done in preparation of repeal of the personal property tax, but this is of no assistance to the immediate problem.

The principles of equity and the constitutional provision that taxes shall be uniform strongly imply that no person should be benefited or harmed simply because of lack of uniformity in classification of property for taxation purposes. In fact, these principles demand that there be uniformity and equity in the classification of property for tax purposes.

Statutory definitions of "property" are not too helpful, as will be explained later. "Real property" generally, not necessarily for taxation, is defined in section 47-01-03 of the North Dakota Century Code as follows:

'REAL PROPERTY' DEFINED. Real or immovable property shall consist of:

1. Land;

!mf122. That which is affixed to land;

3. That which is incidental or appurtenant to land; and
4. That which is immovable by law."

"Fixtures" are defined in section 47-01-05 of the North Dakota Century Code as follows:

'FIXTURES DEFINED. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

"Real property" for taxation purposes is defined in section 57-02-04 of the North Dakota Century Code as follows:

'REAL PROPERTY' DEFINED. Real property, for the purpose of taxation, includes the land itself, whether laid out in town lots or otherwise, and, except as otherwise provided, all buildings, structures and improvements except plowing and trees, and all rights and privileges thereto belonging or in anywise appertaining, and all mines, minerals, and quarries in and under the same and shall expressly include all improvements made by persons upon lands held by them under the laws of the United States, all such improvements on land the title to which still is vested in any railroad company and which is not used exclusively for railroad purposes, and improvements to land belonging to any other corporation whose property is not subject to the same mode and rule of taxation as other property."

"Personal property" for taxation purposes is defined in section 57-02-05 of the North Dakota Century Code as follows:

'PERSONAL PROPERTY' DEFINED. Personal property includes:

1. All goods, chattels, moneys, credits, and effects wheresoever they may be;
2. All ships, boats, and vessels, whether at home or abroad, and all capital invested therein;
3. All moneys at interest, whether within or without this state, due the person to be taxed, and all other debts due such persons;
4. All public stocks and securities;
5. All stocks in turnpikes, railroads, canals, and other corporations, except national banks out of the state, owned by the inhabitants of this state;
6. All personal estate of moneyed corporations, whether the owner thereof resides in or out of the state;
7. The income of any annuity, unless the capital of such

annuity is taxed within the state;

8. All shares of stock in any bank organized, or that may be organized, under any law of the United States or of this state;
9. All improvements made by persons upon lands held by them under the laws of the United States;
0. All such improvements upon land the title to which still is vested in any railroad company, and which is not used exclusively for railroad purposes; and
1. The improvements of any other corporation whose property is not subject to the same mode and rule of taxation as other property."

Subsection 12 of section 57-02-05 is found in the 1969 Supplement to the North Dakota Century Code and provides as follows:

2. All structural improvements other than paving or surfacing made to land used exclusively for the business of operating an automobile parking lot within a city open for general public patronage."

We believe we can assume that the legislature believed all property was properly classified.

The court cases in this state while of some help are not necessarily decisive of the questions presented. They can be used merely as a general guide. Each type of property, and for that matter the individual property, must be examined and classified in accordance with the facts pertinent to the property in question. It is assumed that property which is similarly and substantially situated with other property should have the same classification as such property for tax purposes.

We recognize that we are now confronted with the proposition whether or not the inequities which we now have, in fact, existed should temporarily be continued, or is it more equitable to reclassify property so as to develop uniformity throughout the state and thereby eliminate the unjust burdens, benefits, or windfalls which might otherwise exist and would be perpetuated. Mere reclassification is not a complete answer to the problem.

By reclassifying property to bring it within the uniform classification, other problems and inequities will arise unless precaution is taken and accurate records maintained to account for the dollar value of the property so reclassified. This becomes necessary because of the formulae adopted by the 1969 Legislature. As an example of further inequities that can result from reclassification is the situation where property had been classified as "personal" and is now reclassified to be "real" property. The same property was used in compiling personal property tax revenue figures for purposes of payback, and the same property would now, because of reclassification, be used in establishing that there was an increase in real property taxes above the 1968 base in the taxing

district. Unless some adjustment is made the district would benefit twice from the same property. The converse would be true where property was formerly classified as "real" and it is now classified as "personal."

If any reclassification were to be accomplished it would require maintaining an accurate record of the reclassifications so that proper adjustment could be made in the total personal property revenues produced in 1968, which is the basis for payback and a similar adjustment of real property taxes upon which contributions of \$1.00 for every \$4.00 is made because of the increase of real estate taxes. This would demand that the adjustments in certain taxing districts would have to be accomplished before the payback formula is applied. However, this would require legislation. This office is not authorized to legislate but may only interpret and construe existing legislation. We are not permitted to change the formulae or to make adjustments of the payback method without appropriate legislation, even if this were our wish and were desirable.

The tax commissioner is empowered and entrusted with certain powers and duties. Under subsection 2 of section 57-01-02 of the North Dakota Century Code, the tax commissioner is charged with the responsibility of supervising assessors. This subsection provides as follows:

2. Shall exercise general supervision over all assessors of general property or other taxes, over township, county, village, and city boards of equalization, and over all other assessing officers, in the performance of their duties, to the end that all assessments of property be made relatively just and equal in compliance with the laws of the state;

* * *."

The objective of the above-mentioned provision is to make all assessments relatively just and equal in compliance with the laws of this state. It gives authority to the commissioner to supervise assessors, but yet classification is a legislative function. The assessor applies the law to the facts.

The Rules and Regulations for the 1970 Assessment, which you submitted to this office for our consideration as to their validity, can be more properly termed as instructions and guidelines to assessors. A rule or regulation may be adopted to cover assessments and possibly some of the property in question, however, such rule must be more specific than merely identifying the property generally. Any such rule should amplify what constitutes being affixed to the property and matters of that kind. The material you submitted to us for consideration can be deemed only as procedural guidelines for the assessors. It would appear to us that mere identification of property is not sufficient to determine whether it is "real" or "personal." The manner by which property is attached or affixed is significant under statutory definitions.

We deem it significantly important to again emphasize that if any reclassification is made of property so as to change its

classification from what it was in 1968 for tax purposes, adequate records and figures must be maintained so as to permit proper adjustment under the payback formula and the contribution provision of \$1.00 of every \$4.00 in increase of real estate taxes, and legislation is needed to accomplish all of this.

Some of the problems that exist can be rectified by guidelines to establish uniformity, but by no means will such procedure correct all of the inequities now existing or those that will remain. It appears obvious to us that legislative action will be required to correct the major inequities. Such legislation should also provide that appropriate adjustment must be made of the respective tax revenue base for 1968 as pertaining to real and personal property.

Because of the variance in classification which has forcefully been brought to the attention of everyone concerned, the legislature might wish to review its statutory definitions of "real" and "personal" property, and delineate with reasonable accuracy the classification which shall be employed for purposes of taxation in this state.

Much of the discussion herein centers around what is desirable. Regardless what is desirable or what may be done in the future, we are compelled to construe and interpret the law as it was enacted.

We believe that it is a fair assumption that every legislator who voted for approval or disapproval of the bill when it was up for passage acted in accordance with his knowledge or understanding of what constitutes personal and real property by taking into account the situation in his home district. We may further assume that each legislator was thinking of "real" and "personal" property as it existed at the time. This would mean as it existed in 1968. By giving significant attention to the following language, which seems to spell out the clear intent of the legislature, we begin to entertain serious doubt whether any reclassifications can be made without first enacting appropriate legislation. The language, " * * * nor shall it (the Act) exempt from assessment and taxation fixtures, buildings, and improvements upon land which are now assessed as real estate * * *", is sufficiently clear so as to leave little room for construction. It is also noted that it uses the term "assessment" in addition to "taxation." A reclassification from "real" to "personal", in effect, makes the property exempt, which is prohibited by the Act.

Taking into account the specific language and the problems and inequities that can result by reclassification of property, and the apparent need for legislation to permit a reclassification and adjustment of the formulae in some manner or form, the legal conclusion emerges that the property as classified and assessed in the year 1968 is to remain substantially in the same classification. This, however, does not mean that the legislature may not enact appropriate legislation establishing guidelines as to how reclassifications can be made and directing the necessary adjustments in the payback formula and contributions resulting therefrom. By contributions we mean the state's contribution on the basis of \$1.00 for every \$4.00 increase in real property taxes above the 1968 base. (See section 20 of chapter 528 of the 1969 Session Laws.)

This would also imply that any reclassifications made in 1969 should be reclassified so as to put the property in the same classification as it had when it was assessed in 1968.

On the basis of the foregoing, it is our opinion that the classifications made by the assessor in 1968 should so remain until the legislature has had an opportunity to enact appropriate legislation permitting reclassification and adjustments to formulae, etc., to accomplish this.

It is our further opinion that while the guidelines you have proposed would be satisfactory as very general guidelines, we nevertheless must point out that they would be inadequate without any further explanation, because they do not embody some of the provisions found in the statutory definitions. These guidelines with refinements could satisfy most statutory provisions. However, because guidelines would change or reclassify real property to personal property, which is not permitted, it would not be proper to institute the guidelines for assessments to be made in 1970. We strongly encourage guidelines but they should use or employ additional criteria rather than merely identifying the property. The attachment, if any, of the property would be significant in determining whether or not the property is "real" or "personal." However, the legislature in its wisdom can, if need be, arbitrarily identify property as "real" or "personal" and set the standard for assessments, assuming that the legislature stays within reason in designating the property which shall be "real" or "personal."

However, we wish to advise that the guidelines as submitted can, with refinement, be used to classify new property. For that matter, new property may be classified independent of the restrictions in subsection 25 of section 57-02-08 of the North Dakota Century Code.

HELGI JOHANNESON

Attorney General