

OPINION
65-406

October 26, 1965 (OPINION)

Mr. Eugene K. Anthony, State's Attorney

McKenzie County

RE: Taxation - Special Assessments - Prorated

This is in reply to your letter dated October 11, 1965, which was accompanied by a letter which your office received from Miss Lucille McMahan, Treasurer of McKenzie County, Watford City, North Dakota, dated September 23, 1965. Miss McMahan stated in her letter that she was Secretary of the North Dakota County Treasurers' Association and during a recent meeting of that association several questions arose pertaining to laws passed by the North Dakota Legislature during the 1965 Session. She enclosed the questions which were discussed and asked that you request an Attorney General's opinion on them. Pursuant to Miss McMahan's request, you asked opinion on them. Pursuant to Miss McMahan's request, you asked that this office give an opinion on the questions raised by her.

Section 40-24-15 of the North Dakota Century Code, as amended, provides in part as follows:

* * * In the event that the county treasurer receives less than the full amount of taxes and special assessments due at any time on any lot or tract of real estate, he shall allocate the amount of such payment between taxes and special assessments in proportion to the respective amounts of taxes and special assessments which are then due. * * *."

With reference to this section you asked the following question:

If John Doe wishes to pay his 1965 tax in full, including the Consolidated tax and the Special Assessment, yet has an unpaid special assessment for 1962 or prior year. Is the amount that he pays to be pro-rated between the amount of the 1965 Consolidated tax due, and the prior amount of the special assessment due? In other words is the law to cover prior years taxes, or is the law only effective on taxes collected and due after July 1, 1965?"

The reference to "lot or tract of real estate", as quoted in section 40-24-16 herein, makes it clear that the law is applicable to units of land and not to individual taxpayers as such. In other words, the special assessments and the taxes must be outstanding on the same unit of land before the statute is applicable. It is a cardinal rule of statutory construction that statutes are to be applied only prospectively unless it clearly appears that a retroactive application was intended by the Legislature. Applying this rule to the statute in question, it would appear that the Legislature

intended only a prospective application. This would mean that the county treasurer should not go back to payments made in prior years to apply the allocation rule, but should apply it only to payments made after July 1, 1965, on taxes and special assessments then owing. To apply the allocation rule to taxes and special assessments due and owing, but not paid, before the effective date of the statute would not be to apply it retroactively because the payment of the taxes rather than when they arose is the decisive factor.

To answer the first question specifically, it is our opinion that any payment made by "Mr. Doe" should be first applied and allocated between taxes and special assessments due and owing for 1962 and other prior years before any portion of it is applied to the 1965 taxes and special assessments as such. If "Mr. Doe" is the owner of more than one unit of land upon which prior taxes and assessments are owing, the allocation must be made only on the unit he designates, or if he does not designate which unit he wishes the payment applied to, then payment should be applied to all units owned by him.

Section 21-03-40 of the North Dakota Century Code, as amended, provides as follows:

* * * The county treasurer shall be custodian of each sinking fund for the payment of bonds issued by each taxing district within the county except in case of any city, school district, or park district having a population of more than one thousand. In the case of any municipality having a population of more than one thousand, the treasurer thereof shall be custodian of each of its sinking funds."

With reference to Section 21-03-40, you asked the following question:

Shall it be the duty of the County Treasurer to determine the population of said School District or City? If so, in what manner is this to be determined? Realizing the school census is available for an organized township or city, how is one to determine the census of an unorganized township?"

The only change made in section 21-03-40 was the lowering of the population requirement from four thousand to one thousand population. There is no method set forth by the statute to determine the population of the school districts, cities or park districts. Therefore, it would appear that the various school boards and governing bodies of municipalities will have to make the initial determination of the populations of their respective jurisdictions. It will only be necessary to ascertain whether the population is over or under one thousand persons and, in many instances, this can be determined without a great deal of effort. In certain instances where there is a question, it might be necessary to gather more statistics. In this regard any election results, school census, etc., which might be available can be used to determine whether the population is over one thousand persons.

Also with reference to section 21-03-40, you asked the following question:

Shall the funds on hand be turned over to said School District

or City by a signed order from such School District or City? Or shall the County Treasurer simply turn said funds over to said School District or City, and receive acknowledgement of same?"

In regard to the above question, there likewise appears to be no procedure set out in the statutes directing how funds on hand with the county treasurer should be turned over to cities or school districts that now must be custodians of their own sinking funds. It would seem, however, that sections 11-13-06 and 11-14-16 of the North Dakota Century Code are applicable. Section 11-13-06 provides in part as follows:

* * * Upon application of the treasurer of any local taxing district, the county auditor shall give him an order on the county treasurer for the amount due such local taxing district, and shall charge him with the amount of such order, and at the same time shall notify the clerk of each local taxing district of the issuance of such order, * * *."

Section 11-14-16 provides in part as follows:

* * * The county treasurer shall pay over to * * * any municipal corporation or organized township, or to any body politic, on the order of the county auditor, all moneys received by him arising from taxes levied and collected, belonging to * * * such municipal corporation or organized township or school district. * * *."

It is our opinion that the procedures outlined in sections 11-13-06 and 11-14-16 should be followed with regard to sinking funds that are turned over to cities and school districts which must now act as their own custodians.

You also ask for clarification of an opinion issued under date of July 24, 1965, to Mr. Lloyd Omdahl, State Tax Commissioner, regarding the provisions of section 57-37-24 of the North Dakota Century Code, as amended. The specific question presented is as follows:

'If property of an estate is located in a city or village and all of it passes to a surviving spouse or charitable organization and if the estate is entitled to an exemption for all of that particular property because of its passing to the spouse or charitable organization but the estate pays a tax because of other property not situated in that city or village, does the city or village share in the estate tax?'"

Our opinion dated July 24, 1965, issued to Mr. Omdahl, stated in essence that the right of a city or village to participate in the portion of the estate tax which is returned to the cities, villages and counties is not predicated upon whether or not the property located within its jurisdiction actually is included in the "taxable estate" upon which the estate tax is ultimately based. All that is required is that the decedent, upon his death, leave some property within the jurisdiction of that city, village or county. That the property so located is exempt from estate tax is irrelevant to the issue of whether the city can participate in the sixty-five percent

returned to the cities, villages and counties under section 57-37-24.

By way of further clarification, we might draw your attention to that portion of section 57-37-24 of the North Dakota Century Code, which provides as follows:

* * * If any part of decedent's property was located within the limits of a city or village the share of tax based on such property shall be divided between city or village and the county in proportion to their respective total mill levies, except school levies. * * *."

(Empahsis supplied.)

The word "share" in that portion of section 57-37-24 as quoted above refers to the share of tax returned to the cities or counties because of the location of the property and not to the "share" of the tax paid by reason of the property. To illustrate how the division of estate tax pursuant to section 57-37-24 will be accomplished, the following hypothetical situation might be helpful.

Assume a decedent leaves three parcels of property - one in county "A" valued at \$10,000.00, one in count "B" valued at \$10,000.00, and one in city "C" (a city in county "B") valued at \$10,000.00. Assume further that the property located in city "C" is all given by will to the "Angleworm Lovers Association" and is hence exempt from being included in the taxable estate of the decedent. Assuming that the arbitrary figure of \$9,000.00 represents sixty-five percent of the total tax paid, this amount would have to be divided into three equal shares because the parcel left by the decedent in each jurisdiction was the same even though taxable parcels were not. Since, however, part of the property was located within a city which in turn was located in county "B", another division would have to take place between county "B" and city "C", based on their respective mill levies. Assuming their mill levies were the same, there would be an even split. Thus county "A" would receive one-third of the total, which would be \$3,000.00; county "B" would receive the second third plus one-half of the last third, equaling \$4,500.00; and city "C" would receive one-half of the last third, which would amount to \$1,500.00.

The last question as presented asks if it is the duty of the county treasurer to search the files of the county clerk of court for a listing of the location and valuation of the deceased's estate, or can the county treasurer demand from the executor of the estate, or the attorney handling the estate, a listing of location and valuation of the deceased's estate.

The statutes set out no procedure instructing the county treasurer how to go about finding out where the various property was located. Section 57-37-19 of the North Dakota Century Code designates the State Tax Commissioner as the one having complete supervision of the enforcement and collection of all estate taxes, so presumably he could adopt rules and regulations covering the matter in question. In default of such regulations, however, it appears that the easiest means of obtaining the information would be through an arrangement with the clerks of court. There is nothing in the Code which

requires the executor or administrator to file such an inventory with the county treasurer and it is doubtful whether he could be forced to do so if he did not offer to file it voluntarily.

ATTORNEY GENERAL

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