

OPINION
66-359

February 8, 1966 (OPINION)

Mr. Lloyd Omdahl

Tax Commissioner

RE: Taxation - Farm Residence - Exemption

This is in reply to your request for an opinion of this office in regard to the tax-exempt or non-tax-exempt status of property as farm residence, with particular regard to the new statutory provision contained in section 57-02-01, subsection 10, of the 1965 Supplement to the North Dakota Century Code.

You inform us that the questions you present are general in that they are not intended to identify any particular farm residence or owner or occupant of a farm residence. The question, however, was submitted at the request of the Board of County Commissioners of the county in which a particular residence is situated. The owner of this residence in his application for abatement of the assessment states that "he is the owner in fee simple of several hundred acres of farmland" in a particular township in the county; "that in addition to the several hundred acres which he owns, he also rents several hundred acres; that his farm residence is situated on farmland owned by him * * * that he conducts a full-scale grain and livestock farming operation upon the farmlands owned and leased by him" and that the Board of County Commissioners has levied an assessment upon "his said farm residence, contrary to subsection 15 of section 57-02-08 of the North Dakota Century Code."

You further inform us that the application does not state other facts except that it does give the legal description of the quarter section of land on which the residence is located and the amount of the assessment that was placed on the residence. You have been advised by the applicant and his attorney by telephone that the site on which the residence is located is about one and one-half miles beyond the boundaries of one of the large incorporated cities of the state and that he and his family make their home in this residence. It is also your understanding the applicant has annual income from nonfarm business interests and business executive salary that is larger than the net income he receives from operation of the 1400 acres.

You enclose a copy of the decision by the Supreme Court of this state in *Frederickson v. Burleigh County, et al*, and particularly emphasize that part of the opinion in which the Court states as follows:

At the time of the assessment of the tax here in question, and at the time this case was tried before the lower court there existed no tests or standard of income with respect to the definition of 'farm' or 'farmer.' Therefore, we are not at liberty to invoke or supply such a test or standard in this case now, although such action is urged upon us by the

defendant and was to a great extent the basis of the lower court's decision in its favor. Were we to do so we would be departing from our judicial purpose and function and encroaching into that field reserved exclusively for the legislative body. The solution here lies in legislative action and this is and has been recognized by the fact that in its 1963 session, the legislature added subsection 10, defining a farm, to section 57-02-01, this reads as follows:

'There shall be a presumption that a unit of land is not a farm unless such unit contains a minimum of five acres which normally provides the owner, lessee, or occupant farming the land with not less than fifty percent of his annual income.'

Your first question is stated as:

1. Is the tax-exempt status, in connection with the residence on a farm consisting of several hundred acres, in any way contingent upon whether the owner's major income is from agricultural or nonfarm enterprises?"

Tax-exempt status would appear to be dependent upon the exemption provided by subsection 15 of section 57-02-08 of the North Dakota Century Code providing insofar as here applicable:

57-02-08. PROPERTY EXEMPT FROM TAXATION. All property described in this section to the extent herein limited shall be exempt from taxation, that is to say:

* * * * *

15. All farm structures, and improvements located on agricultural lands. This subsection shall be construed to exempt farm buildings and improvements only, and shall not be construed to exempt from taxation industrial plants, or structures of any kind not used or intended for use as a part of a farm plant, or as a farm residence;

* * * * *."

To attempt to paraphrase the statute, if the property is a "farm structure", an "improvement located on agricultural lands" and used or intended for use as a "part of farm plant", or as a "farm residence" it has tax-exempt status. Looking to section 57-02-01, subsection 10 of the North Dakota Century Code, as amended, to the current date, we find it provides:

57-02-01. DEFINITIONS. As used in this title, unless the context or subject matter otherwise requires:

* * * * *

10. There shall be a presumption that a unit of land is not a farm unless such unit contains a minimum of five acres which normally provides the owner, lessee, or occupant farming the land with not less than fifty percent of his

annual income."

In the example you give it is apparently assumed by all parties concerned that the factor of the unit being one "which normally provides the owner, lessee, or occupant farming the land with not less than fifty percent of his annual income" does not exist. Assuming that this is correct, on such basis the unit of land concerned would be presumed to be not a farm and the residence therefore not a farm residence. This would automatically shift the burden of proving that the unit of land concerned was a farm to the owner thereof. From the information you submit as to the use of the lands in question, and applying thereto the definitions of "farm" used by our Supreme Court in case of *Frederickson v. Burleigh County, et al*, it would appear that the lands in question have been proven to be a farm and the residence thereof to be a farm residence, that the landowner has sustained the burden of proof thus imposed upon him and that the residence in question has tax-exempt farm residence status.

Thus in specific answer to your first question, application of the statutory presumption is dependent upon whether the owner's major income is from agricultural or nonfarm enterprises. Tax-exempt status is dependent upon whether or not the building concerned is a "farm residence."

Your second question is stated as:

2. If the answer to the preceding question is 'Yes', does income from nonfarm enterprises include all types of income, for example, interest income, dividend income, salaries, wages, commissions, profits from business other than farming, royalty from oil and gas production or other mineral production, etc.?"

We believe all types of income mentioned in this question should be considered in determining whether the statutory presumption applies.

Your third question is stated as follows:

3. If the answer to the first question is 'Yes', must the applicant for the abatement of the assessment disclose in his application or in the alternative to the Board of County Commissioners (see section 57-23-06, N.D.C.C.) the amount of his farming income and the amount of his nonfarming income as shown on his state or federal income tax return or from other records?"

Where the applicant chooses to show the amount of his farming income and the amount of his nonfarming income by means of state or federal income returns or other records, assuming the farming income to be greater than the nonfarming income, and further assuming that the unit of land is more than five acres in extent, the statutory presumption would become inapplicable. In addition, we believe that this type of information would be substantive proof as to the point at issue as well in the usual situation, i.e., that the structure was a "farm residence", though it is conceivable that such evidence could be directly controverted, or traversed and avoided.

It is also conceivable that the applicant would not choose to attempt to render the statutory presumption inapplicable but would choose to leave the presumption stand, meet, and overcome it. In such circumstances, proof qualifying the unit of land under any and all of the definitions of the word "farm" set out in the case of *Frederickson v. Burleigh County, et al*, would be of value. Proof of any "farm income", we believe, would be relevant though we do not believe we could rule as a matter of law that such proof would be essential to establish the existence of the tax status of being a farm residence.

Your fourth question is stated as:

4. If the answer to question No. 1 is 'Yes', is the taxable or exempt status of any other improvements other than of the residence affected by the amount of the owner's or occupant's farm and nonfarm income?"

In regard to your fourth question, if the landowner chose to let the statutory presumption stand and did not meet it, and the unit was not otherwise shown to be a farm, it is conceivable that the buildings to which you make reference would not be considered to be "improvements located on agricultural lands" or "farm structures" and therefore tax-exempt. It is conceivable, however, that proof would be submitted that a particular building was a "farm structure" by a showing that farm income was derived therefrom, though it seems equally possible that such proof might well also show that the land was farmland. If on the other hand the landowner did choose to meet and overcome the statutory presumption, or did choose to render it inapplicable, by affirmative proof of farm income greater than other income, it might well also incidentally appear that the buildings to which you make reference would be, in the usual instance, improvements located on agricultural lands.

Your fifth question is stated as:

5. If the answer to question No. 1 is 'Yes', would it be necessary for the assessing authorities to require the occupant of such a residence to show in each real assessment year (that is, each odd-numbered year, section 57-02-11, subsection 1) that his nonfarm income is less than the amount of farm income he normally receives?"

Where it is known that the unit of land does not normally provide the owner, lessee, or occupant farming the land with not less than fifty percent of his annual income, the presumption would exist. Where obvious that the unit was a farm, we believe that the assessor could note this fact. Where the assessor did not note this fact, a showing would probably have to be made by the owner. There is no presumption given in this statute that a unit of more than five acres does not normally provide the owner, lessee, or occupant farming the land with not less than fifty percent of his annual income. This would have to be determined from other information, and until this was determined the presumption would not arise.

Your sixth question is stated as:

6. If the answer to question No. 1 is 'Yes', and the occupant of the residence normally receives the greatest part of his income from the farming operation but in a particular year operates the farm at a loss but does receive some other nonfarm income, would the farm residence and other improvements be subject to assessment and taxation that year?"

This question can only be answered in the negative.

HELGI JOHANNESON

Attorney General