

**OPINION
70-479**

May 12, 1970 (OPINION)

Honorable Shiro Kashiwa
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C.

RE: Taxation - Real Property Tax - Proration Between Vendor and Purchaser

This is in response to your letter in which you relate that in instances in which the United States acquires title to land by direct purchases it has been the requirement of your department that all ad valorem taxes which have become a lien on the property must be paid, and if they are not due and payable at the time of settlement, a sufficient sum must be withheld from the purchase price to insure payment when they do become due and payable. You then refer us to section 57-02 -41 of the North Dakota Century Code and an opinion issued to Mr. Raymond R. Rund, Steele County State's Attorney, Finley, North Dakota, dated October 20, 1969, which discusses the time when a lien attaches. You then specifically ask for our construction and interpretation of section 57-02-41.

Said section was amended in 1963. It now provides as follows:

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 purchased or otherwise acquired by a tax exempt corporation an 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."

All of the language in the above section, except the first sentence, came into being in 1963. In 1969 there were some minor amendments and the language, "tax exempt corporation", was inserted in lieu of "religious organizations." The first sentence in the above quoted section, without question, established the date of January first following the year for which taxes were levied as the date upon which the lien attaches between a purchaser and a vendor. This provision of law has been in the North Dakota Code for many years. We must assume that because no provision is found elsewhere which specifically states when the lien attaches that considerable weight was given to this

provision where a vendor and purchaser were not involved, and possibly too much. We also recognize that what case law has developed involved purchasers and vendors and, as a result, the date of January first became more firmly imbedded.

Section 57-02-40 of the North Dakota Century Code provides that taxes upon real property are a perpetual paramount lien thereon against all persons, except the United States and this state. Unfortunately the legislature, except for section 57-02-41, never did provide by specific language the date upon which the lien attaches. A lien is defined in section 35-01-02 to mean: "A charge imposed upon specific property by which it is made security for the performance of an Act." Section 35-01-01 states that a lien is created by contract or by operation of law and that no lien arises by operation of law until the time at which the act to be secured thereby ought to be performed. This statutory provision, however, relates to liens generally and does not necessarily apply specifically to tax liens. The term "lien" is also defined in 53 C.J.S., Page 826, as follows:

In its broadest sense and common acceptance a lien is understood and used to denote a legal claim or charge on property, either real or personal, as security for the payment of some debt or obligation; * * * It includes every case in which personal or real property is charged with the payment of a debt. * * *."

As to the attachment and priority of a tax lien, Flick in his text, "ABSTRACT AND TITLE PRACTICE," 2nd Edition, Volume I, Page 676, makes the following statement:

The statutes as a rule fixed a 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 the amount of tax becomes fixed and liability for payment accrues; (2) from levy date; or (3) from completion of assessment."

With reference to section 57-02-41, the legislature obviously felt there was a need to establish a specific date as to when the lien attaches as between purchaser and vendor. This specific provision leaves the implication that the lien attaches at some other time when the purchaser and vendor are not involved.

It becomes quite obvious in examining the language which came into being as a result of the 1963 amendment that the legislature considered a lien to have attached at some other time other than January first for purposes other than between purchaser and vendor. While the statute does not specifically so provide, there is a clear implication that an inchoate lien attaches to the property on the date of assessment for purposes other than between purchaser and vendor. The date of assessment is April first, pursuant to the provisions of section 57-02-34. This is the date upon which ownership, value and taxability of property is determined. The mere fact that the assessor has two months in which to complete his work does not change this conclusion. (See Gaar, Scott & Co. v. Sorum, 11 N.D. 164, 90 N.W. 799.) The date of April first fixes the ownership, value and taxability for the entire year and not only as of that date.

The United States Supreme Court in United States v. Alabama, 85 L.ed. 1327, 313 U.S. 274, recognized that a lien can exist and will be honored even though the property is acquired by the United States and the remedy to enforce such lien is no longer available. However, in that case, by state law, the lien by specific statutory provision attached as the date of assessment. We do not have such specific statutory provision.

Real property, when assessed, becomes impressed with an obligation and liability. Even though the specific amount may not be known on that date and must be determined at a later date, nevertheless as of such date such property has been impressed with an obligation and liability.

We are aware of the statements and holdings of the Court in the case of State v. Divide County, 68 N.D. 708, 283 N.W. 184, but we do not believe that same are pertinent to the question at hand. We also recognize that section 57-02-41 came into being subsequent thereto. The pertinent provision of section 57-02-42, relating to transfer of property from taxable status to exempt status, can be given full meaning only if the tax lien attaches on the date of assessment. If the date of January first, which is the date which applies between purchaser and vendor, would also be applicable to instances where property is transferred to a tax exempt organization from a nonexempt organization, its provisions would be meaningless. We must assume that the legislature does not perform an idle act. On that basis it is our opinion that for purposes of section 57-02-41, except for the first sentence in said section, an inchoate lien attaches to real property as of April first, when same is assessed, even though the exact amount of taxes may not be determined until a later date.

It is our further opinion that the language, " * * * 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. * * *", means from the beginning of the calendar year, January first, and does not mean from the date of assessment, April first. The language, "computed to the nearest month", means "full" month. For example, if the transfer took place June fifteenth, the portion of taxes to be computed would be up through May thirty-first. The taxes for the year in question would be prorated from January first through May thirty-first. The opinion dated October 20, 1969, addressed to Mr. Rund is clarified accordingly.

HELGI JOHANNESON
Attorney General