

**OPINION
74-574**

December 6, 1974 (OPINION)

Mr. W. L. Eckes
Vice Chairman
State Tax Appeals Board
Beach, ND 58621

Dear Mr. Eckes:

This is in response to your letter of November 5, 1974, wherein you make inquiry of this office concerning appeals from determinations of the State Tax Appeals Board as provided by Chapter 57-23.1 of the North Dakota Century Code, as amended. You submit the following in your letter of inquiry:

"I am writing this present letter at the request of Kay Braaten, the Chairman of the State Tax Appeals Board, of which I am Vice Chairman.

As I understand it, this Tax Appeals Board was created under Chapter 57-23 which provides:

The board may abate or order the refund of, in whole or in part, any assessment or tax upon real or personal property for any of the grounds provided for in section 47-23-04-----Any party aggrieved by a decision of the tax appeals board may appeal to the district court. The state tax commissioner and any taxing district which has levied a tax which will be affected by the action shall be made a party in the appeal to district court.

The question here is whether an appeal calls for a trial de novo in district court. This decision has been put to us many times and it is my personal assumption that this is a trial anew. Others believe, and this includes lawyers as well, that this is an appeal from the ruling of the State Tax Appeals Board and that the issues would be confined to that which was raised at the hearing before the State Tax Appeals Board. Now, if the latter is true, we would be obliged to make an excellent record and possibly also appear in the hearing before the District Court which raises other questions."

We assume that your inquiry is limited to those appeals provided for by Section 57-23.1-02, relating to appeals from the determinations of the State Tax Appeals Board. For this reason we will not consider the other possible alternatives which provide, among other things, that an applicant for abatement may appeal the decision of the board of county commissioners directly to the district court without first appealing the same to the tax appeals board as provided by Sections 11-11-39 and 11-11-41 of the North Dakota Century Code. To this extent we are limiting our response to the appeal referred to in Section 57-23.1-02 of the North Dakota Century Code, as amended, as you have quoted in your letter.

Initially we feel it proper to classify the procedures under which the tax appeals board operates and the statutes governing rights of persons or entities whose cause is determined thereunder.

Section 28-32-01 of the North Dakota Century Code, setting forth the definitions for the purposes of the Administrative Agencies Practice Act, provides as follows, in part:

28-32-01. Definitions. In this chapter, unless the context or subject matter otherwise provides:

1. "Administrative agency" or "the agency" shall include any officer, board commission, bureau, department, or tribunal other than a court, having statewide jurisdiction and authority to make any order, finding, determination, award, or assessment which has the force and effect of law and which by statute is subject to review in the courts of this state; (Emphasis supplied)

Accordingly, it would appear that the State Tax Appeals Board is within the definition afforded "administrative agency", hence the rules and statutes governing procedures and rights thereunder would be applicable. It is clear that the tax appeals board is not a court; its having statewide jurisdiction and authority to make orders, findings, determinations, awards or assessments which have the force and effect of law, and which are by statute subject to review in the courts of this state. Among other procedural requirements, a record is made of the proceedings. The statutory requirement in this regard is for the taking of stenographic notes, however, for practical purposes this requirement is generally waived in favor of an electronic recording, which, in cases where an appeal from the resulting Order may be taken, the same is reduced to a written transcript.

Before considering the matter of appeal from an order of the tax appeals board, we feel it proper to point out that under the provisions of the Administrative Agencies Practice Act, Section 28-32-14 of the North Dakota Century Code, there is provision for a rehearing for the purposes and causes stated therein. The same provides as follows:

28-32-14. Petition for rehearing. Any party before an administrative agency who is aggrieved by the decision thereof, within fifteen days after a copy of such decision has been mailed or delivered to such party by the administrative agency, may request a rehearing by such agency. He shall submit with the request for rehearing a statement of any further showing to be made in the proceeding, and such request and statement shall constitute a part of the record in the proceeding. The administrative agency may deny such request for rehearing or may grant the same on such terms as it may prescribe. This section, however, shall not limit the right of any agency to reopen any proceeding under any continuing jurisdiction which is granted to any such agency by any law of this state.

With regard to appeals taken from determinations of the agency, we would note the provisions of Sections 28-32-15, 28-32-16, 28-32-17,

28-32-18, 28-32-19, 28-32-20 and 28-32-21 of the North Dakota Century Code, all relating to procedures and the extent of matters upon which an appeal is taken.

With regard to your basic question concerning the nature of the appeal, we would note specifically the provisions of Section 28-32-19 of the North Dakota Century Code, which provides as follows:

28-32-19. Scope of and procedure on appeal for determination of administrative agency. The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that such decision or determination is not in accordance with law, or that it is in violation of the constitutional rights of the appellant, or that any of the provisions of this chapter have not been complied with in the proceedings before the agency, or that the rules or procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court. (Emphasis supplied)

Accordingly, and while we note that provision is made by Section 28-32-18 for additional or excluded evidence, it would appear that an appeal from a determination of the tax appeals board would be confined to the record filed with the court. As a practical matter, all papers, notices and documents involved in the appeal to the tax appeals board, together with a transcript of the evidence, and the findings of fact, conclusions of law and order would appear to be the extent of the record filed with the court upon appeal. For this reason we are of the opinion that an appeal under Chapter 57-23.1 of the North Dakota Century Code, as amended, is limited to the record filed with the court and is not subject to an appeal as a trial de novo. At this point we feel we should note that the term "appeal", without further specification, indicates that the review or "appeal" must be upon some form of record, upon which an order or determination was based. If the term "appeal" is used in the statutes with the specific provision that such appeal is to be "de novo", then the matter appealed is not the record but the issue to be determined by the action or proceeding. Such an appeal is not limited to matters supporting the order or determination but rather may include any testimony, evidence or other matters properly brought before the appellate body or court. The provisions for appeal from a determination of the Tax Appeals Board do not indicate that the same is an appeal "de novo" but rather an "appeal", without further specification, being limited to the record filed with the court. We

would also note that the determination of the district court, upon appeal, is also subject to appeal or review in the supreme court in the same manner as any case tried to the court without a jury, except that the appeal to the supreme court must be taken within three months after the service of the notice of entry of judgment in the district court, in accordance with the provisions of Section 28-32-21 of the North Dakota Century Code.

We trust that the foregoing general observations, comments, information and expressions will adequately set forth the thinking of this office upon the matters submitted.

Sincerely yours,

ALLEN I. OLSON

Attorney General