

**OPINION
78-191**

August 3, 1978 (OPINION)

The Honorable Byron L. Dorgan
State Tax Commissioner
State Capitol
Bismarck, ND 58505

Dear Mr. Dorgan:

I have your letter of June 23, 1978, in which you asked for my opinion on questions relating to the compromise of delinquent real estate taxes pursuant to Section 57-23-07 of the North Dakota Century Code, which authorizes a board of county commissioners, subject to the approval of the State Tax Commissioner, to compromise such taxes "by reason of depreciation in the value of the property or for other valid cause."

The situation to which your questions relate is described in your letter as follows:

"I would like to have your opinion on a question relating to N.D.C.C. Section 57-23-07 which authorizes a board of county commissioners, subject to the approval of the State Tax Commissioner, to compromise delinquent taxes on real estate 'by reason of depreciation in the value of such property or for other valid cause.'

"In the particular case to which my questions relate the property consists of one or more city lots on which improvements worth considerably in excess of \$200,000 are located and which property has been used for the operation of a business that is having financial difficulties. The property owner, a corporation, has not paid its real estate taxes for the three years of 1974, 1975, and 1976 and the property has been sold to the county for delinquent taxes pursuant to Section 57-24-14 and other sections of Chapter 57-24, but a tax deed has not been issued to the county pursuant to Section 57-28-09 nor has notice of expiration of period of redemption been given pursuant to Chapter 57-28.

"The property is subject to a Small Business Administration mortgage for a loan of substantial size (over \$300,000) on which no principal payments have been made. The Small Business Administration loan was obtained by the property owner to start the business operated on the property.

"The business is of economic importance to the city and county in which it is located because it provides employment to more than twenty people and attracts customers for other business in the community.

"The property owner is trying to sell the property to a purchaser who will continue to operate the business and perhaps expand it but if the business cannot be sold it apparently will be closed at least temporarily and the property will likely be taken over by the Small Business Administration. The property apparently is in good physical

condition and has not depreciated in value more than is normal.

"The delinquent real estate taxes for the three years 1974, 1975 and 1976 plus the penalty and interest due thereon amount to nearly \$13,000 and that amount is a prior and paramount lien on the property by virtue of N.D.C.C. Section 57-02-40 and 15 USCA Section 646. The latter provision subordinates the Small Business Administration's security interest for its loan to the lien for real estate taxes.

"The property owner has filed an application for compromise of part of the 1974, 1975 and 1976 delinquent real estate taxes pursuant to Section 57-23-07."

Your first question is whether facts such as those set out above constitute "valid cause" under Section 57-23-07 for approval of a compromise of any part of the taxes and penalty and interest on payment of the remainder. In this connection you refer us to three opinions from this office that are published in the Report of the Attorney General for July 1, 1934, to June 30, 1936, which interpret this statute and you ask whether those opinions interpret the words "other valid cause" in the statute too broadly in view of various Supreme Court opinions.

The three opinions from this office in the Report of the Attorney General for July 1, 1934, to June 30, 1936, to which you refer are:

Opinion dated December 17, 1935, on pages 271-272.

Opinion dated March 29, 1935, on pages 274-275.

Opinion dated June 19, 1935, on pages 275-276.

The opinion of December 17, 1935, deals with depreciation in the value of real property as grounds for abatement and compromise of taxes under this statute. Since the situation described in your letter relates primarily to "other valid cause" rather than to depreciation in value as grounds for abatement and compromise of real estate taxes, we will not consider the December 17, 1935, opinion further.

The opinion of March 29, 1935, does, however, interpret the term "other valid cause" in the statute as giving the county commissioners a very broad latitude in determining what is valid cause and the opinion of June 19, 1935, states that "What is a valid cause is a question to be determined exclusively by the County Commissioners and the State Tax Commissioner." Both of those opinions concluded that "other valid cause" authorized compromise of a portion of the delinquent taxes on a tract of land so as to permit the taxing districts to bear a share of the loss that other creditors would be compelled to take in order to place the land back on the tax list again as revenue producing land.

No doubt the conclusions reached in the two opinions discussed in the preceding paragraph were influenced to a great extent by the severe depression conditions of the 1930's that so drastically disrupted all private economic activity and the payment of taxes and caused taxing districts to be faced with unprecedented fiscal problems. Because of

that, we hesitate to say now that the conditions at this time did not warrant compromise of delinquent real estate taxes so as to permit the taxing districts to bear a share of the loss that other creditors would be compelled to share in order to place the property back into a tax paying status that would provide the taxing districts with sorely needed revenue.

Whether or not the conditions in the 1930's justified the conclusions reached in those opinions of March 29, 1935, and June 19, 1935, we believe the general economic conditions today and the fiscal conditions of taxing districts today are so different from those in the 1930's that the question of what constitutes grounds for compromise of delinquent real estate taxes under Section 57-23-07 must be reexamined.

As already noted, Section 57-23-07 authorizes a board of county commissioners, subject to the approval of the State Tax Commissioner, to compromise delinquent taxes on real estate "by reason of depreciation in the value of such property or for other valid cause." We do not believe this gives those officials an unlimited authority and discretion to compromise delinquent taxes since, if it were construed to do so, it would constitute an unconstitutional delegation of legislative power. See, for example, such cases as the following which hold that statutes giving unregulated discretion to nonlegislative bodies are invalid: *Wilder v. Murphy*, 56 N.D. 436 at 442-443, 218 N.W. 156 at 158; *Northwestern Improvement Co. v. Morton County*, 78 N.D. 29 at 41-42, 47 N.W.2d. 543 at 550; *Nord v. Gray*, 141 N.W.2d. 395 at 401 (N.D.); and *Montana-Dakota Utilities Co. V. Johanneson*, 153 N.W.2d. 414 at 419-422 (N.D.).

The economy and the counties and other local taxing districts are of course not faced today with the severe fiscal problems that they faced in the 1930's. The facts relating to the situation you set out in your letter indicates that the county has a valid real estate tax lien of less than \$13,000 on considerably more than \$200,000 worth of property that has not incurred more than normal depreciation and that is subject to a Small Business Administration loan of over \$300,000 and that this county real estate tax lien is prior and paramount to all liens, including that of the Small Business Administration, by virtue of N.D.C.C. Section 57-02-40 and 15 USCA Section 646. There thus appears to be no doubt that the tax lien is full collectible by the county through the usual statutory tax lien foreclosure provisions.

Under the circumstances set out in the preceding paragraph it appears to us that a compromise of the amount due the county for its real estate tax lien would not fall within the grounds of other valid cause authorized in Section 57-23-07. Where the right of the county to collect a tax or other claim is in doubt, the courts have recognized the authority of the county commissioners to adjust and compromise its claim - see *Hagler v. Kelly and Marin*, 14 N.D. 218 at 226, 103 N.W. 629 at 631; *Johnston Land Co. v. Convis.*, 34 N.D. 146 at 151, 157 N.W. 980 at 981; and *Traill county v. Moackrud*, 65 N.D. 615 at 620, 260 N.W. 821 at 823. Here, however, where there appears to be no doubt as to either the validity of the taxes or the ability of the county to be able to collect them since the value of the property is many times greater than the county's real estate tax lien

on the property, we believe a reduction in the tax lien by a compromise would amount to an unauthorized surrender of valuable rights of the county and of the other taxing districts that have an interest in the matter and therefore would not be a valid cause for compromise pursuant to Section 57-23-07.

Section 185 of the North Dakota Constitution prohibits the state and its political subdivisions from making "donations to or in aid of an individual, association or corporation except for reasonable support of the poor." Therefore a political subdivision cannot give away to anyone any of its property or rights to property unless it is for the support of the poor since such a gift would not be for a public purpose but, instead, would be for a prohibited private purpose. See *Petters & Co. v. Nelson County*, 68 N.D. 471, 281 N.W. 61; *Herr v. Rudolph*, 75 N.D. 91, 25 N.W.2d. 916; and *Solberg v. State Treasurer*, 78 N.D. 806, 53 N.W.2d. 49.

Unpaid real estate taxes that were validly levied represent property rights of the county and of other taxing districts that levied them. We note that the state's portion of such uncollected taxes are public moneys for purposes of the limitations imposed by Section 186 of the state constitution on the authority of the legislature to make appropriations - *Campbell v. Towner County*, 71 N.D. 616, 3 N.W.2d. 822. We believe the portions of such unpaid taxes belonging to the county and other political subdivisions are also public moneys or property of the taxing districts which can be disbursed or otherwise disposed of only for such public purposes as are authorized by law. When there is little, if any, doubt that an unpaid real estate tax which was validly imposed can be fully collected, a reduction of it by way of a compromise under Section 57-23-07 would, in our opinion, violate Section 185 of the Constitution because it would be the equivalent of a gift by the county for a private benefit rather than for a public benefit. Cancellation of part of such an unpaid tax by compromise in such a case would be no different in principle than if the county, after collecting the tax, gave part of it back to the property owner. See the cases cited at the end of the preceding paragraph.

It is therefore our opinion that N.D.C.C. Section 57-23-07 does not authorize a board of county commissioners and the Tax Commissioner to compromise a delinquent real estate tax that was validly imposed on property that has been sold to the county for those taxes in a case where the property has not depreciated in value more than is normal and where there is little doubt that the tax is fully collectible because it was validly imposed and is secured by a prior and paramount lien that is only a fraction of the amount that the property is worth.

Sincerely,

ALLEN I. OLSON

Attorney General