

**LETTER OPINION**  
**80-130**

December 2, 1980 (OPINION)

Mr. Tom Tuntland  
Morton County State's Attorney  
Box 190  
Mandan, ND 58554

Dear Mr. Tuntland:

This is in reply to the request for an opinion you made in your letter of November 5, 1980, regarding the property tax status of certain property in the City of Mandan. Rather than paraphrase your letter, we quote from it as follows:

Housing Industry Training, Inc. (HIT) is an existing corporation organized under the provisions of the North Dakota Nonprofit Corporation Act, as a perpetual corporation. The articles of amendment to the Articles of Incorporation which are on file with the Secretary of State, set forth the purposes for which a corporation is organized as follows:

- A. To provide housing, industry and training for all individuals, particularly those having handicaps, and to otherwise engage in any lawful act or activity for which nonprofit corporations may be organized under the North Dakota Business Corporation Act.
- B. The purposes shall be charitable, religious, or educational within the meaning of section 501(c)(3) of the Internal Revenue Code.
- C. No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its members, trustees, officers, or other private persons except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered.

Under the provisions of chapter 40-57 of the North Dakota Century Code, the Municipal Industries Development Act of 1955, the City of Mandan, North Dakota authorized issuance of revenue bonds under the Municipal Industrial Development Act for the purpose of providing financing for the delivery of services to handicapped citizens in the City of Mandan to HIT, Inc. wherein HIT, Inc. became the project lessee of certain project property.

Pursuant to law bonds were issued, and the project, an old convent, was acquired. A proper lease was entered into between the City of Mandan and HIT, Inc. for repayment of the bonds.

Instead of operating an independent charitable or religious project in the convent, HIT, Inc. has leased the entire convent

to Mandan Public School District No. 1, which is utilizing the convent for classrooms. No part of the convent is being utilized directly by HIT, Inc.

Pursuant to the provisions of sections 57-14-01 through 57-14-03 of the North Dakota Century Code, the Morton County Auditor, at the request of the Mandan City Assessor, gave notice to HIT, Inc., that their property, the convent, had been added to the County Auditor's assessment book.

Pursuant to the provisions of section 57-14-04 of the North Dakota Century Code, HIT, Inc. presented their grievance to the Board of County Commissioners alleging that the convent, which is the "project" for the MIDA bonds, was exempt from taxation pursuant to the provisions of section 57-02-08 of the North Dakota Century Code.

Although HIT, Inc. did not specify a particular subsection of that section, their argument seemed to be that the property was being used by a nonprofit corporation for educational purposes.

We note the last paragraph quoted above and assume that HIT, Inc., either did not file the tax exemption certificate provided for in section 57-02-14.1, N.D.C.C., or did not file it in sufficient detail to indicate the basis for its claim of exemption. Our Supreme Court has held many times that the claimant of a property tax exemption has the burden of establishing the exempt status of the property and that a strict construction of the exemption provisions will be applied against the claimant. See, for example, *Butts Feed Lots v. Board of County Commissioners*, 261 N.W.2d. 667 at 672 (N.D. 1977). Although the North Dakota Supreme Court in *United Power Association and Cooperative Power v. Board of County Commissioners of McLean County* in an opinion filed on the twenty-first of last month, applied a liberal construction to the tax exemption statute construed there. We believe the two North Dakota Supreme Court cases cited in the following pages require the conclusion reached in this opinion.

Based upon the information set out in the quotation above from your letter, it is our opinion that HIT, Inc., has not met its burden of establishing that its property interest in the real property in question is exempt from taxation. Our reasons for this conclusion follow.

You noted that title to the property in question is in the City of Mandan pursuant to the provisions of chapter 40-57, N.D.C.C., The Municipal Industrial Development Act, and that the city has authorized issuance of revenue bonds under that act for the purpose of providing financing to HIT, Inc., who leases the property from the city and therefore is the project lessee for purposes of that Act. You advise that although the title owner of the property is the city, it is your opinion that the city is simply an equitable trustee for HIT, Inc., and therefore is not the owner of the property within the meaning of section 57-02-08(3), N.D.C.C., which exempts property belonging to any city from taxation.

The information you furnished does not indicate whether the lease of the property by the city to HIT, Inc., includes an option for

transfer of the title to the property to HIT, Inc., when the revenue bonds are all paid or at some other time, as authorized by section 40-57-03(10), N.D.C.C. If the lease does include such an option, that would no doubt lend support to your opinion that the city is really only an equitable trustee of the property for HIT, Inc., and not an owner for purposes of the exemption in section 57-02-08(3), N.D.C.C. We do not believe it is necessary, however, to decide that at this time, because if that is not correct, then we believe the full value of the property is taxable to HIT, Inc., pursuant to sections 57-02-04(1) and 57-02-26, N.D.C.C., unless HIT, Inc., can establish its claim of exemption under some other provision of law.

We have previously held that when real property owned by a city or other governmental entity is leased to a nongovernmental lessee who cannot establish a right to an exemption, that lessee's leasehold interest is subject to taxation pursuant to section 57-02-04(1), N.D.C.C., and if the lease is for a term of years, the whole value of the property is assessed to the lessee, as provided in section 57-02-26, N.D.C.C., subject to an exception in that section that is not applicable here. See the enclosed copy of the opinion of February 12, 1979, from this office to Mr. R. E. Lommen, Land Commissioner, State Land Department, State Capitol, Bismarck, North Dakota. Also, we note that former section 40-57-17 of the Municipal Industrial Development Act, which included a provision for a property tax exemption for the project lessee's interest in the property, was repealed in 1975, thereby indicating that a lessee's interest in the property should not be regarded as exempt merely by reason of the fact that the project property was financed under the Municipal Industrial Development Act.

We therefore believe it is clear that HIT, Inc.'s, interest in the property is taxable unless there is a provision of law that clearly exempts it. As the following shows, we do not believe there is any provision of law which does exempt it.

According to the information quoted above from your letter, HIT, Inc., is a nonprofit corporation that is organized for charitable, religious, or educational purposes. The fact that a nonprofit corporation is incorporated for such purposes is not by itself sufficient to exempt the corporation's property from taxation. To be exempt, the property must also be used in the manner specified in the exemption provision under which the exemption is claimed. It does not appear that the property in question here is used in any way for a religious purpose, either by HIT, Inc., as lessee or by the school district as sublessee; consequently, an exemption could not be established on that basis under subsections 7 or 9 of section 57-02-08, N.D.C.C.

We do not believe an exemption for this property can be established under section 57-02-08(16), N.D.C.C., because neither HIT, Inc., as lessee nor Mandan Public School District No. 1 as sublessee is organized or created "under the laws of this state for the purpose of promoting athletic and educational needs and uses at any state educational institution in this state" (emphasis added) as provided in that exemption statute. We believe the word "state" in the term "state educational institution" excludes from that term local educational institutions such as primary and secondary schools.

Section 57-02-08(8), N.D.C.C., provides an exemption for property of an institution of public charity if the property is used wholly or in part for public charity. In *North Dakota Society for Crippled Children and Adults v. Murphy*, 94 N.W.2d. 343 at 347 (N.D. 1959), the Court, in construing that statute, said:

. . . We hold that the use contemplated by our statute is one that results in a benefit that has at least some direct and primary connection with the public charitable activities of the institution. . . .

Here, HIT, Inc., subleases the property to Mandan Public School District No. 1 for use by the school district for school purposes. Because HIT, Inc., does not actually occupy the property, we do not believe it can be regarded as using the property in a way that meets the use test set out above by the Court. Further, there is nothing to show that HIT, Inc., is actually engaged in any "public charitable activities" as an institution of public charity. Also see *Y.M.C.A. of N.D. State University v. Board of County Commissioners*, 198 N.W.2d. 241 (N.D. 1972), in which apartment houses owned by the Y.M.C.A. for rental purposes were held not to be exempt under section 57-02-08(8), N.D.C.C. The Court, in that case, said at page 244:

>5! Ownership of the property in question by an institution of public charity such as the YMCA does not, ipso facto, exempt the property from taxation. The property itself must be devoted to charitable purposes and it must actually be used in carrying out the charitable purposes of the one claiming the exemption.

In that Y.M.C.A. case, the Court also said in the last sentence of paragraph 5 of its syllabus that:

The fact that the income from such property is used for charitable purposes is immaterial.

Based on the information furnished, and the two cases just cited and quoted, we do not believe this property of HIT, Inc., is exempt under section 57-02-08(8), N.D.C.C., as property used for public charity.

Section 57-02-08(6), N.D.C.C., provides an exemption for "schoolhouses" and related property not used with a view to profit. This exemption was extensively considered in an opinion from this office on November 12, 1969, to The Honorable Edwin C. Becker, State Senator, 6th District, Willow City, North Dakota, a copy of which is enclosed. In that opinion it was concluded that property owned by a religious corporation and leased to a public school district was not exempt under North Dakota Century Code section 57-02-08(6) because the provisions in that subsection and in Section 176 of the Constitution "relative to the exemption of property used exclusively for schools must apply to those schools owned and used for school purposes by private organizations which would not otherwise be exempt under the constitutional and statutory provisions" (see the last sentence on page 5 of that opinion). Here the property in question

is not both owned and used for school purposes by a private nonprofit organization and, therefore, HIT, Inc., in our opinion, cannot establish a right to exemption under section 57-02-08(6), N.D.C.C.

We believe it is also clear from the Becker opinion just discussed that a private organization, either profit or nonprofit, that leases its property to a public school district is not entitled to an exemption for that property under section 57-02-08(3), N.D.C.C., or any other exemption provision.

We, of course, do not suggest that the purpose of the agreements between HIT, Inc., and the City of Mandan and between HIT, Inc., and Mandan Public School District No. 1 regarding this property might not be a worthy one. section 57-02-03, N.D.C.C., however, provides that all property is subject to taxation unless there is a provision that expressly exempts it. As has already been stated, the burden is on the one claiming the exemption to establish a right to the exemption under some provision of law. The property in question here has been assessed to HIT, Inc. Even though HIT, Inc., has not specified a particular provision of law under which it claims exemption, we conclude, as you did, from the information furnished, that there is no provision of law under which HIT, Inc., can establish a claim of exemption for this property.

Sincerely,

ALLEN I. OLSON

Attorney General