LETTER OPINION
80-136

May 16, 1980 (OPINION)

Ms. Cynthia A. Rothe
Cass County States Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, North Dakota 58108

Dear Ms. Rothe:

This is in response to your letter of April 7 in which you asked for an opinion regarding the property tax exemption provision in subsection 15 of section 57-02-08, N.D.C.C., for farm structures and improvements. The applicable part of the exemption stature, as you noted, are the first three sentences of subsection 15 of section 57-02-08, which read as follows:

> 57-02-08. PROPERTY EXEMPT FROM TAXATION. All property described in this section to the extent herein limited shall be exempt from taxation:
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> * * *
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> 5. 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. Any structure or structures used in connection with a retail or wholesale business other than farming, even though situated on agricultural land, shall not be exempt under this subsection . . . .

The first set of facts and your three questions regarding those facts are quoted from your letter as follows:

> This past assessment year in Cass County, a seed plant was placed on the assessment roll and an abatement has been filed asking that the property be exempt from taxation as farm structures in accordance with subsection 15 of section 57-02-08. There are several similar seed plant operations in Cass County. Grain is grown by the farmer and stored on that farm where it is cleaned, treated, and sold either in bulk or bagged as seed. Under those circumstances, would the following structures be taxable or exempt within subsection 15 of section 57-02-08?
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> 1. Storage facilities where the seed is kept before any cleaning, treating, or bagging has been done?
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> 2. Structure or structures used in connection with the cleaning, treating, and bagging process?

3. Structure or structures used in storing the product after the seed has been conditioned by cleaning and treating.

We understand from the facts just quoted that the seed plants in question are "located on agricultural lands" within the meaning of the first sentence of subsection 15 of section 57-02-08 and we assume that the structures constituting each seed plant facility are used by the farmer only in connection with grain grown by that farmer. Under these circumstances it is our opinion that all of the storage facilities and structures for the grain, both before and after the cleaning, treating, and bagging process, as well as the structures used in connection with the cleaning, treating, and bagging process, are exempted from assessment and taxation by subsection 15 of section 57-02-08.

There would seem to be no doubt that an element of a grain farming enterprise is the selling by the farmer of some part or all of the grain he has grown. We have not found any case which indicates that farming does not include the growing of grain crops to be sold for use as seed as distinguished from the selling of them for eventual use for other purposes, such as milling, feed, etc. Nor have we found any case which indicates that farming does not include the growing of grain crops by one who sells them at retail, that is, sells them directly to a consumer for use as seed or feed, for example, as distinguished from selling them at wholesale, that is, selling them to one who will then resell them either in the same form or after some degree of processing.

We do not believe that a person who grows grain crops and cleans the grain before selling it either in bulk or in bags is any less a farmer for having cleaned the grain or bagged it, whether it is sold for seed or for other purposes. Similarly, we do not believe the treating of such grain prior to the sale of it by the person who grew it makes that person any less a farmer if the original form of the grain is not changed by some process, such as by grinding or germination; in this regard we assume the "treating" of the grain involves some method of disinfecting it to protect it from disease or vermin without changing its original form.

These conclusions are based on an analysis of numerous cases, including particularly two North Dakota Supreme Court cases. In Boehm v. Burleigh County, 130 N.W.2d.170 (1964), at pages 174-175, the "preparation for market" of the product grown was regarded as an agricultural or farming activity. In Butts Feed Lots v. Board of County Commissioners, 261 N.W.2d.667 (1977), at pages 670-673, the distinction drawn between a farming operation and an industrial operation is one that recognized that various evolutionary processes, including that of fattening cattle, are involved in present-day methods of farming but that when the activity is one by an operator who feeds either breeder or feeder cattle largely on feed purchased by him rather than on feed grown by him the activity is an industrial operation rather than a farming operation.

For these reasons we have concluded that a person who grows grain crops which, after harvesting, he prepares for market by cleaning and by treating and bagging all or part of them is engaged in farming and

therefore any structures or improvements used by him only by cleaning, treating, and bagging that grain and for storing it before or after doing so are part of a farm plant and are exempt if they are located on agricultural lands.

Your next question is quoted from your letter as follows:

> Would it make any difference in each of the above three cases, if all or part of the grain was purchased from other producers in its original condition and then cleaned, treated, and sold by the farmer making the purchase? If purchase of the grain is a deciding factor, then how should the structures be valued for tax purposes if part is purchased and part is grown by the operator?

Your reference to "each of the above three cases" is, of course, to the three cases listed at the end of the paragraph in your letter that is quoted in the first part of this reply. We conclude that no part of the value of any structure described in your question would be exempt if the structure is used partly or totally by the farmer for storing or for cleaning or treating grain that he purchased from other producers in its original condition and which he then sold after storing, cleaning, or treating it.

This conclusion is based on the statutory history of the first sentences of subsection 15 of section 57-02-08 that are quoted above. The last of those three sentences was added by the Legislature in 1971 (Chapter 533, S.L. 1971) and it provides that:

> Any structure or structures used in connection with a retail or wholesale business other than farming, even though situated on agricultural land, shall not be exempt under this subsection.

We necessarily assume that when the Legislature enacted this third sentence in 1971, it must have intended to make a change in the existing exemption that was set out in the first two sentences of subsection 15. It therefore becomes necessary to consider whether a structure located on agricultural land that was used totally or partly for nonfarming purposes was exempt under the provisions of the first two sentences of that subsection. We find that the applicable rules for construing such tax exemption statutes are expressed as follows:

> Under some provisions, in order to be exempt, the property must be used exclusively for the designated purpose, but in the absence of such requirement, it is the primary, as distinguished from an incidental, use of the property that determines whether it is exempt from taxation. (84 C.J.S. pages 449-450)

Generally, in determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental or secondary use, will control. (71 Am.Jur. 2d.page 675, section 368)

The first two sentences of subsection 15 do not require that farm buildings be used exclusively as part of a farm plant in order to be

exempt. Therefore, if the primary or dominant use (that is, over half of the use) of the building or structure was for use as part of the farm plant, the entire building or structure was exempt, but if the primary or dominant use was not a use as part of a farm plant, the entire building or structure was taxable. See Boehm v. Burleigh County, 130 N.W.2d.170 (1964), where on page 175 the Court discusses Unemployment Compensation Division v. Valker's Greenhouses, 70 N.D. 515, 296 N.W. 143.

When the Legislature enacted the third sentence of subsection 15 in 1971, it must be regarded as having intended to change the exemption provided in the first two sentences. The language of the third sentence indicates that it was intended to limit the existing exemption rather than expand it. It is apparent then that the purposes of the third sentence must have been to provide that such a structure or building should not be exempt when used both in farming and in a nonfarming business even though the primary or dominant use of it is in farming.

When grain is purchased by a person who did not grow it but who resells it either at retail or at wholesale, that person by so handling that grain is conducting a retail or wholesale business other than farming. We believe this conclusion is compelled by the definitions of farming in Boehm v. Burleigh County, 130 N.W.2d.170 (N.D. 1964); Frederickson v. Burleigh County, 139 N.W.2d.250 (N.D. 1965); and Butts Feed Lots v. Board of County Commissioners, 261 N.W.2d.667 (N.D. 1977).

It therefore follows that a building or structure that is "used in connection with a retail or wholesale business other than farming" but is also used in connection with farming is not exempt even though it is used mainly, or primarily or predominately, in connection with farming.

Your third question as stated in your letter is as follows:

> Would structures located on agricultural land and owned by a qualified farmer, but rented to a seed farm which is incorporated under the laws of the State of North Dakota and in the business of cleaning, treating, and bagging seed, be subject to assessment and tax.
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> The fact that the seed farm which rents the structures in question is incorporated does not affect the exempt or taxable status of those structures, according to Butts Feed Lots v. Board of County Commissioners, 261 N.W.2d.667 at 669. Because these structures are located on agricultural land, the only remaining test for determining if they are exempt is their use. If the seed farm uses them in connection with storing, cleaning, treating, or bagging of grain that it purchases from others and resells, then, as explained in the answer to the previous question, we believe the structures are taxable even if the predominant or main use of them by the seed farm might be that of storing, cleaning, treating, or bagging grain that has been grown by it.
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> If, however, the seed farm uses those structures for storing,

> cleaning, treating, or bagging only grain that it has grown, then it is necessary to determine whether this use by the seed farm is controlling so as to exempt those structures or whether the use of them for rental income purposes by their farmer-owner by renting them to the seed farm is a use that makes them taxable.
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> This question has apparently never been ruled upon by the North Dakota Supreme Court, and the decisions of courts in other states show considerable conflict; see 55 A.L.R. 3d. 430 at 455. As stated in Butts Feed Lots v. Board of County Commissioners, 261 N.W. 2d.667 at 669: "Nothing in section 57-02-08(15), N.D.C.C., indicates that ownership of the particular buildings or structures is determinative of the exemption." The only two tests in the circumstances here on location (on agricultural lands) and use (as part of a farm plant); see Eisenzimmer v. Bell, 75 N.D. 733 at 738 (1948), 32 N.W.2d.891. The conflict in the decision in other states is summarized in 55 A.L.R. 3d. 430 at 435 as follows:
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> Where exemption depends upon the use which is made of property and not upon ownership of such property, there is considerable conflict in the decisions, some courts allowing the exemption for property which is leased and used by the lessee for the purposes for which the exemption is granted, even though the exemption provision requires that the property be 'used exclusively' for the specified purpose and the lessee is required to pay rent for the use of the property. Other courts allow exemption for such property only if the owner does not derive any economic advantage from the lease, and deny the exemption where the lease requires the payment of rent to the lessor, at least a substantial or profitmaking rent or the ordinary rent, and where the exemption provision requires that property be 'used exclusively' for the purposes specified.

There are, of course, facts relating to the rental of these structures that are not set out in your letter and which the claimant of the exemption as well as the assessing officials would no doubt wish to establish.

In the Butts Feed Lots case the Court (261 N.W.2d.at 672) again stated that in examining the facts and the law it would apply the applicable rules that the claimant of the tax exemption has the burden of establishing the exempt status of the property and that a strict construction of the statute against the claimant will be applied.

In view of the foregoing and because the taxable or exempt status of rented structures such as those in question here has not been previously determined in the North Dakota courts, it is our opinion that in these circumstances the assessing officials are obliged to treat them as taxable structures.

Sincerely,

ALLEN I. OLSON

Attorney General