

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-6

Date issued: June 1, 1989

Requested by: Timothy L. Kingstad, Commissioner  
State Land Department

- QUESTION PRESENTED -

Whether a nonexempt person's possessory interest in government-owned real property that is managed or controlled by the Board of University and School Lands is subject to taxation on the value of the possessory interest if the real property is not subject to payments in lieu of ad valorem taxes.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a nonexempt person's possessory interest in government-owned real property that is managed or controlled by the Board of University and School Lands is subject to taxation on the value of the possessory interest if the real property is not subject to payments in lieu of ad valorem taxes.

- ANALYSIS -

Real property located in North Dakota and owned by the United States, the state of North Dakota, or its political subdivisions is exempt from ad valorem taxation. N.D. Const. art. X, § 5; N.D.C.C. § 57-02-08(1), (2), (3). However, this does not mean that a leasehold interest of a nonexempt person in real property owned by a governmental entity is exempt from ad valorem taxation.

Possessory interests are defined as real property for purposes of ad valorem taxation as follows:

**57-02-04. "Real property" defined.** Real property for the purpose of taxation, includes:

1. The land itself . . . and all rights and privileges thereto belonging to or in anywise appertaining . . . .
2. All structures and buildings . . . and all rights and privileges thereto belonging or in anywise appertaining . . . .

All property in this state is subject to taxation unless expressly exempted by law. N.D.C.C. § 57-02-03. The taxation of a possessory interest in certain property was addressed by a 1988 Attorney General's opinion. That opinion stated the following:

A possessory interest in government owned real property held by a nonexempt person is therefor subject to taxation on the value of the possessory interest, regardless of the characterization of the lease under which it is held because no exemption is provided by law. See, Otter Tail Power Co. v. Degnan, 252 N.W. 619 (N.D. 1934); Lower Yellowstone Irrigation District No. 2 v. Nelson, 2 N.W.2d 180 (N.D. 1941); and United States v. Fresno County, 429 U.S. 452 (1977).

1988 N.D. Op. Att'y Gen. 29, 30. This taxable interest is collectible as a personal charge against the nonexempt holder of the possessory interest. N.D.C.C. § 57-24-31; 1981 N.D. Op. Att'y Gen. 351.

The remaining issue is whether these principles of law apply to a nonexempt person's possessory interest in government-owned real property managed or controlled by the Board of University and School Lands.

In Otter Tail Power Co. v. Degnan, 252 N.W. 619 (N.D. 1934), the supreme court held that Otter Tail's possessory interest in buildings owned by the city of Devils Lake was taxable under section 2076 of the Compiled Laws of 1913. The 1913 statute is the predecessor to N.D.C.C. § 57-02-04(1), (2).

In Ex parte Gaines (Garland County v. Gaines), 56 Ark. 227, 19 S.W. 602, it is held that "the interest of a lessee in lands leased from the United States is not exempt from assessment for taxation," and further that such interest acquired by the lease was property. To the same effect is Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 49 Cal. App. 120, 193 P. 137; Carrington v. People, 195 Ill. 484, 63 N.E. 163; State ex rel. Sioux County v. Tucker, 38 Neb. 56, 56 N.W. 718. In this latter case the court held that "school lands sold by the state, but to which the equitable title of the purchaser has not been completed by full payment of the purchase money, are subject to taxation to the extent of the purchaser's interest therein."

This latter holding is based upon the broad general principle that "exemptions, no matter how meritorious, are of grace, and must be strictly construed"; and "the constitution and the statutes passed thereunder contemplate the taxation of all property not specifically exempted." It is true there was also a statute in Nebraska specifically providing for the taxation of the purchaser's interest in school lands, similar to one in this state, but the court holds that independent of such statute such interest is taxable. If leasehold and possessory interests are taxable as rights and privileges appertaining to the real estate, we see no reason why the right to the use of the building involved herein is not also taxable. Such an eminent authority as Cooley in his work on taxation (I Cooley on Taxation [3d Ed.] p. 635) says: "It is entirely competent to provide for the assessment of any mere possessory right

in lands whether they are owned by the government or by private individuals."

252 N.W. at 621-22 (emphasis supplied). The North Dakota Supreme Court cited this case with approval in Lower Yellowstone Irr. Dist. No. 2 v. Nelson, 2 N.W.2d 180, 183 (N.D. 1942).

Besides the Nebraska decision that was relied upon in the Otter Tail decision, other state courts have also held that leasehold interests in state-owned school lands are subject to taxation. People v. Hendrickson-Pontiac, Inc., 137 N.E.2d 381 (Ill. 1956); City of Chicago v. University of Chicago, 134 N.E. 723 (Ill. 1922); Sexton v. Board of Supervisors, 38 So. 636 (Miss. 1905); Street v. City of Columbus, 23 So. 773 (Miss. 1898); Annot., 54 A.L.R.3d 402, 537, 540, 541, 543 (1974); Annot., 23 A.L.R. 248, 252 (1923).

Therefore, a possessory interest held by a nonexempt person in government-owned real property that is managed or controlled by the Board of University and School Lands is subject to taxation on the value of the possessory interest. No enabling legislation is necessary because an assessment of this kind would be made in the same manner as any other assessment against a nonexempt person having a possessory interest in government-owned land.

The 1989 Legislative Assembly enacted House Bill No. 1075, which is effective for all taxable years after December 31, 1988. This legislation directs the Board of University and School Lands to make payments in lieu of ad valorem taxes on the following property:

[R]eal property owned by the board of university and school lands or by the state treasurer as trustee for the state of North Dakota, title to which was obtained after January 1, 1980, by foreclosure or deed in lieu of foreclosure of a mortgage given to the Bank of North Dakota, including a mortgage assigned to the state treasurer under section 54-30-02.

Because of these in lieu payments, a possessory interest held by a nonexempt person in these properties is not subject to taxation on the value of the possessory interest.

In the interest of fairness to people who may wish to bid for leasehold interests in real property that is managed or controlled by the Board of University and School Lands, notice should be given that these possessory interests are subject to ad valorem assessment if they are held by a nonexempt person.

To the extent that this opinion conflicts with the 1979 N.D. Op. Att'y Gen. 267, the 1979 opinion is overruled.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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