OPINION
56-64

February 17, 1956 (OPINION)

INDIANS

RE: Real Estate Subject to Special Assessments

This is in reply to your letter of February 8, 1956, in which you inquire as to whether or not certain real estate owned by Indians is subject to special assessments for water and sewer mains and improvements.

You state that certain lots in the city of Dunseith have been assessed for water and sewer main improvements, and that the Indian owner holds a deed to said lots which states that the property is inalienable without the consent of the Secretary of the Interior, but the lots were not originally an Indian allotment or Indian homestead.

You also state there are two questions here:

> One is whether assessments for special improvements are taxes at all, so as not to be included within the provisions of Section 57-0208, and the other question is whether the proviso of Chapter 296, Laws of 1931, is no longer effective, so that whether or not the land was not originally an Indian Allotment or Indian Homestead is no longer material, so far as State law is concerned."

Section 57-0208 (4) of the North Dakota Revised Code of 1943 provides as follows:

> All property described in this section to the extent herein limited shall be exempt from taxation, that is to say:
>
> * * * *
>
> 4. Property of Indians where the title to such property is inalienable without the consent of the United States secretary of the interior;"

The second paragraph of section 203, Article XVI of the Constitution of North Dakota must also be considered. However, this is a lengthy section and for the sake of brevity is not included in this opinion.

The majority of cases cited in 41 Words and Phrases 121 hold that an assessment for benefits is not ordinarily included in the term "taxes". However, we do not believe that such a distinction can be applied to nullify the purposes and effect of section 203 of the Constitution of North Dakota and section 57-0208 (4) of the North Dakota Revised Code of 1943.

> A distinction exists between 'tax' and 'assessment of benefits conferred,' but both have common source in sovereign power of taxation, and hence distinction was immaterial to question

> whether assessments levied by state statutory irrigation district on government land were valid. United States v. Anders, 19 F. Supp. 740."

The futility of exempting the lands and not the improvements thereon was recognized in United States v. Rickert, 188 U.S. 432, wherein the court said:

> Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements."

We recognize that this case does not pertain to improvements which involve special assessments but the type of improvement is immaterial when we look to the result which may follow from the sovereign power of taxation.

Although federal statutes express the clear intent of Congress to continue homesteads of Indians tax exempt, whether the homestaed was purchased for the Indian or allotted to him, Felix S. Cohen, in his Handbook of Federal Indian Law, reports a division of opinion by federal courts pertaining to the exemption from state taxes of restricted lands purchased for Indians by the government with their restricted funds.

It is our conclusion that the fact that the levy is in the form of a special assessment is immaterial. In reference to the application of chapter 296 of the Session Laws of 1931, the code revisor's notes read as follows: In subsection 4 of section 57-0208 the clause "provided, however, that the provisions of this subsection shall not apply to any land that was not originally an Indian allotment or Indian Homestead", is omitted because it conflicts with federal statutes.

We believe, therefore, that original land allotments made to Indians including lands purchased for them by the government with their restricted funds cannot be encumbered by special assessments so long as title to the land is inalienable without the consent of the Secretary of the Interior.

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