

**OPINION
58-186**

April 18, 1958 (OPINION)

TAXATION

RE: Abatement - Application by Lessee

This is in reply to your letter of March 25, 1958, requesting an opinion on the question of whether our statutes authorize a lessee to apply for and be granted an abatement of a certain percentage of a general real estate tax levied against the real estate owned by the lessor but which taxes the lessee is obligated under the lease to pay for the lessor-owner. The property in question consists of two pieces of business property in Fargo, which are used for motion picture theaters by the American Amusement Company and which lands and property are owned by a multitude of people scattered all over the United States.

It appears that the abatement sought would, if granted, abate the alleged excessive or invalid part of the 1957 assessment and the taxes levied with respect to such excessive assessment, since the application for abatement that has been made is one to abate a certain percentage of the general real estate tax for the year 1957. If so, and if the applicant is a proper party, the application for abatement should be considered, under the provisions of section 57-2303, N.D.R.C. 1943, providing for abatement of invalid, inequitable or unjust assessments.

The authorities recognize that the rights or persons in the various jurisdictions to abatement of assessments and taxes are governed by the applicable statutes of the jurisdictions in question. 51 Am. Jur. 692, section 759 et seq.; 74 A.L.R. 1221; 84 C.J.S. 1168, section 583d; and 84 C.J.S. 1223, section 610. The statutory provisions for abatement of assessments and refund of taxes are included in Chapter 57-23, N.D.R.C. 1943.

Section 57-2303 first appeared in our laws as subsection 7 of section 1 of Chapter 276, S.L. 1931; the other six subsections have been codified as section 57-2304. Subsection 7 was repealed by section 24 of Chapter 269, S.L. 1941, but was enacted again as section 8 of Chapter 265, S.L. 1943, and codified as section 57-2303. As enacted in 1943, it specifically provided that any application filed under it should comply with the "requirements of Chapter 276 of the 1931 Session Laws," which language, as now codified in section 57-2303, provides that the application shall comply "with requirement of this chapter." Thus, it is necessary to determine whether a lessee, obligated by contract with the lessor to pay the taxes on the leased premises, is entitled to an abatement under Chapter 57-23.

In addition to section 57-2303, section 57-2307 provides for abatements by way of compromise with the owner of the property. This section also has its source in Chapter 276, S.L. 1931. The only other section of Chapter 57-23 that provides for abatements is 57-2304 which along with section 57-2303 has its source in section 1 of Chapter 276, S.L. 1931. Section 1 of the 1931 act provided in

part as follows:

Unless otherwise expressly provided, if any person (including any firm or corporation) against whom an assessment has been made or a tax levied claims such assessment, or tax or any part thereof to be invalid for any reason herein stated, the same may be abated, or the tax refunded if paid, and the board of county commissioners is authorized and empowered, subject to the approval of the State Tax Commissioner, to abate or refund, in whole or in part, such invalid assessments or taxes in the manner hereinafter prescribed and in the following cases only. . ."

This was codified in section 57-2304 of the 1943 Code to read as follows:

Upon application as in this chapter provided, the board of county commissioners, subject to the approval of the state tax commissioner, may abate or refund, in whole or in part, any assessment or tax upon real or personal property, in the following cases: . . ."

The code reviser's note to the above section states: "Revised in form for clarity." Based on section 1-0225, N.D.R.C. 1943, and the weight in general given to notes of the code revisers in the cases of *Eisenzimmer v. Bell*, 75 N.D. 733, 743, 32 N.W.2d. 891, 895, *Kershaw v. Burleigh County*, 77 N.D. 932, 938, 47 N.W.2d. 132, 135, and *Schmutzler v. North Dakota Workmen's Compensation Bureau*, 78 N.D. 377, 382, 49 N.W.2d. 649, 651-652, it is my opinion that the above-quoted part of section 57-2304 must be given the same meaning as that part of section 1 of Chapter 276, S.L. 1931, quoted above in which it has its source. That is, only a person "against whom an assessment has been made or a tax levied" can have "such invalid assessments or taxes" abated or refunded by the board of county commissioners and tax commissioner under section 57-2304.

Other sections of the property tax laws (57-0226, 57-0231, 57-0232, 57-0238, 57-0904, 57-1003, 57-1103) clearly indicate that assessments of privately owned real estate and the taxes levied thereon, as a practical matter are against the owner of the real estate, although he has no personal liability therefor. Accordingly, the words "against whom an assessment has been made or a tax levied" must mean the owner of the real estate, or the person listed on the assessment rolls as owner. See also *Fiman v. Hughes County*, 55 S.D. 204, 225 N.W. 711, construing the similar South Dakota statute from which section 1 of Chapter 276, S.L. 1931 was copied.

To summarize, section 57-2307 specifically authorizes abatement by way of a compromise with the "owner"; section 57-2304 contemplates approval of applications for abatement by person against whom the assessment was made or the tax levied; other sections contemplate that assessments of privately owned real estate be made against the owner; sections 57-2303, 57-2304, and 57-2307 all have a source in Chapter 276, S.L. 1931; which has been codified as Chapter 57-23.

In view of this, it is my opinion that the board of county commissioners and tax commissioner do not have authority to grant an

abatement under section 57-2303 to anyone except the owner of the property involved or the person against whom it was assessed, and that these officials therefore do not have authority to abate an assessment under section 57-2303 if the application for the abatement is made by a lessee of the property even though the lessee is obligated by contract with the lessor to pay the taxes.

However, while the designated officials have no authority under section 57-2303 to grant an abatement to an applicant who is a lessee, the lessee might pay the taxes under written protest pursuant to section 57-2020, submit an application for abatement and refund as required by sections 57-2020, 57-2312, and 57-4509, and after its rejection by the board of county commissioners seek whatever relief may be available to it in the courts. If the taxes are not paid under written protest, the action of the board of county commissioners rejecting the application pursuant to this opinion can of course be appealed to the district court, as provided by sections 57-2303 and 57-2310.

Insofar as you suggest that a "taxpayer" has a right to abatement, the term is not used in Chapter 57-23 except in section 57-2302 which gives a taxpayer the right to petition his local board of equalization to correct his assessment at its annual equalization meeting. Applications for abatement, on the other hand, are not submitted to any equalization board but to the board of county commissioners. "Taxpayer" as commonly used signifies one who owns property within the state or taxing district. 85 C.J.S. 1122 and Cooley on Taxation, 4th Ed., section 17.

Referring to the Minnesota case of International Harvester Co. v. State, 274 N.W. 217, which you cite, the ruling of the court granting relief to a lessee who had covenanted to pay the taxes is based on a statute authorizing relief by the court to "any person having any estate, right, title or interest in or lien upon any parcel of land who claims that . . . the tax levied against the same is illegal, in whole or in part . . ." This statute is distinguishable from ours because it is much broader than is ours, which authorizes the board of county commissioners and tax commissioner to grant abatements only to an applicant who is the owner or against whom the assessment was made or the tax levied.

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