OPINION
58-190

February 10, 1958 (OPINION)

TAXATION

RE: Assessment of Equipment - Location

This is in reply to your letter of January 31, 1958, asking where the road building equipment of a contractor should be assessed under the facts summarized from your letter as follows:

The party in question is a road building contractor who owns a very large assortment of road machinery which he moves to wherever he has obtained a contract. It appears that in late winter or early spring of 1957 this contractor, whose permanent residence and home is in Lakota in Nelson County, moved his road machinery to McHenry County where he had a contract. The machinery was moved at that particular time so that it could be moved on the roads before the weight restrictions imposed in the spring became effective, but he could not start work on the contract immediately after moving the machinery to the place where it would be used.

You state that you do not know whether he had been assessed in Lakota at the same time. Your question is whether he should be assessed for this road building machinery in the assessment district where he has his home or if he can be assessed in any district where the machinery happens to be on the assessment date of April 1.

Section 179 of our North Dakota Constitution and section 57-0215, N.D.R.C. 1943, both provide that taxable tangible personal property "shall be assessed in the county, city, township, village, or district in which it is situated."

I have found no North Dakota cases construing these provisions. The following is quoted from 110 A.L.R. 717:

> In its application to personal property, the word 'situated,' as used in a statute in effect authorizing the taxation of all property in the county, city, or district in which it is s 'situated,' connotes a more or less permanent location or situs, and the requirement of permanency must attach before tangible personal property which has been removed from the domicile of the owner will attain a situs elsewhere," citing Brock & Co. v. Los Angeles County, (Cal.) 65 P. 2d. 791.

See also to the same effect City of Dallas v. Texas Prudential Ins. Co. (Tex.), 291 S.W.2d. 693; 84 C.J.S. 650; 84 C.J.S. 658-659; and Cooley on Taxation, Fourth Edition, sections 444, 451, and 452.

Under a statute providing that machinery used in the conduct of the business of a domestic corporation should be assessed "where such machinery . . . is situated to the owner or any person having possession of the same on January first," the Massachusetts Supreme Court in Assessors of Sheffield v. J.F. White Contracting Co., 130

N.E.2d. 696, held that "situated" means "situs" which means the place where a thing having physical substance is; that property cannot be said to be situated in a place merely because it is temporarily in use there on the tax day; that to have a situs or to be situated implied "some degree of permanence of location" and "temporary lodgment or migratory presence . . . is not enough"; and that where a contractor's machinery used on construction of a town bridge had been in the town as much as nine months prior to the tax day of January first and was removed shortly thereafter, the machinery was in town only for temporary use and for an indefinite time and had not acquired a permanent situs in the township for tax assessment purposes on the tax day (assessment date).

We believe that the reasoning in these cases should be applied in construing the provisions of our Constitution and Code which require that tangible personal property be assessed in the assessment district in which it is situated. Such reasoning is consistent with the legislative policy expressed in section 57-0218 for assessing range stock in the assessment district where the owner has his home ranch regardless of where the livestock may be on the assessment date.

Apparently this contractor keeps all of his road building machinery in Lakota, where he has his home, when the machinery is not actually being used on the job or being moved or awaiting removal from one job to another. In such a case the machinery normally should be assessed in the assessment district where the owner resides, that is, at Lakota. However, because of the provisions of section 57-0217, N.D.R.C. 1943, if the assessor in McHenry County who assessed this machinery was not advised by the owner that he had already been assessed for it at Lakota or would be held for the tax for 1957 on it in Lakota, then he was justified in assessing it for 1957. If the owner of the machinery did show the assessor in McHenry County that he had been assessed for it in Lakota or was held for the 1957 tax on it in Lakota, then the McHenry County assessor should not have assessed it but should have made record of all of the facts in the case and reported those facts to the county auditor, as required by section 57-0217.

The owner of the machinery is entitled to have the 1957 assessment in McHenry County abated if he was assessed for the machinery at Lakota in 1957 provided it appears that the machinery was not in McHenry County permanently but only temporarily for the few months it was used in the completion of the road construction contract there.

This opinion is intended to apply only to similar problems of assessment arising between assessment districts within this state and is not intended to apply to problems of assessment that may arise when tangible personal property of one who is not a resident of this state is temporarily within this state on the assessment date.

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