OPINION
60-280

February 2, 1960 (OPINION)

TAXATION

RE: Township Board of Equalization - Raising of Valuation - Notice

This is in reply to your letter of January 27, 1960 requesting an opinion on interpretation of section 57-0904 of the N.D.R.C. of 1943. The language in question is as follows:

> . . . . The assessment of the property of any person shall not be raised until such person shall have been notified of the intent of the board to raise the same. . . ."

The North Dakota Supreme Court in Martin v. County of Burleigh, 38 N.D. 373 (165 N.W. 520) had under consideration a similar statute which provided that the valuation of any personal property as returned by the assessor shall not be increased more than twenty five percent without first giving the owner or his agent notice of the intention of the board so to increase it. This statute referred to action by the city board. The court after some discussion discussion disposed of this matter by saying: "It is elementary that, where notice of an assessment proceeding is required by statute, the failure to give notice is fatal to the proceeding." It then cited McMillen v. Anderson, 95 U.S. 37 as its authority.

However, in checking the U.S. case it is found that the court did not hold that failure to give notice of an increase in assessment was fatal, but rather the court said: "The mode of assessing tax in the States by the Federal Government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal or illegal. . . ."

The court also said it seems to be supposed that it is essential to the validity of this tax that the party charged should have been present or had an opportunity to be present in some tribunal when he was assessed. But this is not and never has been considered necessary to the validity of a tax, and the fact that most of the states now have boards of revision of tax assessments does not prove that taxes levied without them are void. Therefore, we cannot give much consideration to the North Dakota case cited.

Recently the North Dakota Supreme Court dealt with the question more directly in Vetter v. Benson County, 81 N.W. 2d. 758. In this case the issue was somewhat squarely before the court and in discussing the provisions of section 57-0904, the one in question here, the court said:

> . . . . The precise question whether the provision in Section 57-0904, supra, for notice to the property owner by the local board of equalization is mandatory or directory has not been before this court so far as our research discloses. However the general rule as established by judicial decisions in other state is to the effect that provisions essential to the acquirement of jurisdiction and provisions which are designed to force collection of a tax or divest the owner of his property for failure to pay the tax are mandatory, whereas the procedural steps which relate to the assessment, computation, and levy of the tax are directory. . . ."

It then cited from 50 Am. Jur. section 26, page 49, and from 80 C. J. S. pages 138 and 139. It also relied on Minnesota cases 115 N.W. 645 and 42 N.W. 473.

Being that the North Dakota case cited is of recent origin, 1957, we must give considerable weight to such case. We are also strongly impressed with the reasoning of the court to the effect that this is a procedural matter and not a jurisdictional matter.

It is therefore our opinion that the language referred to is not mandatory but directory, and that an increased assessment made without such notice is not fatally defective.

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