OPINION
61-244

November 27, 1961 (OPINION)

TAXATION

RE: Nonprofit and Charitable Properties - Property Not Used Exclusiv

for Business and Ceremonies of Organization

This is in answer to your letter of October 16, 1961, in which you requested my opinion on various questions relating to the exempt or taxable status for property tax purposes of the property of the Apple Creek Country Club located east of Bismarck.

Your letter is quoted as follows:

> The Apple Creek Country Club, located about six miles east of Bismarck in Burleigh County, has been organized as a nonprofit organization for quite some number of years. They are the record owners of the Northeast Quarter (NE 1/4) of Section Four (4), Township 138, Range 79, in Burleigh County, and upon this property they have club buildings located on approximately three acres of land, including a swimming pool and a pro shop for the golf course, and in this club building they serve meals to members and guests and have a bar from which they sell drinks, mixed and otherwise, to their members and guests. The balance of the land owned by the country club is in the form of a golf course, idle land, while some of it is farmed out. Also they have a full-time caretaker, living on the premises who is furnished housing and meals as part of his remuneration for services performed.
>
> Sec. 57-02-08(11) provides for an exemption from taxation of certain specified nonprofit and charitable properties.
>
> Upon the foregoing statement of facts, I would appreciate receiving your opinion as to the tax status of the properties in the light of the following questions:
>
> 1. Query: Would just the land with the buildings on the same be exempt, and the balance taxable?
>
> 2. Query: Would the fact that the club does sell to its members and guests its food, liquor, etc. for a profit preclude the club from claiming this exemption?
>
> 3. Query: This property, by reason of opinion from your office under date of July 19, 1955 addressed to Mr. Robert H. Lundberg, Assistant State's Attorney of Burleigh County, has not been taxed for many years. If, in your opinion, these properties could or should have been taxed, could these taxes be now assessed for those years as 'escape taxation'?

4. Query: Is the caretaker's housing and personal effects taxable under the personal property tax laws?"

The opinion issued by this office on July 19, 1955, to Mr. Robert H. Lundberg, Assistant State's Attorney, Bismarck, North Dakota, to which you refer as the reason all of the acreage and improvements of this club have been exempted from taxation in past years, I believe, needs to be reconsidered and clarified. While that opinion did recognize that the club operated a golf course and other recreational facilities, the primary question was whether the operation of a bar and restaurant by the club exclusively for its members destroyed any part of the exemption to which it might be entitled under subsection 11 of section 57-0208, N.D.R.C., which at that time exempted real and personal property owned by "lodges, . . ., and like organizations, and associations," not organized for profit, and used by them for places of conducting their meetings and ceremonies.

Insofar as the conclusions reached in this opinion with respect to the meaning of this exemption provision are concerned, it is assumed, but not decided, that this club is within the class of organizations whose property was intended by subsection 11 to be exempt from property taxes; however, it is possible that an examination of the facts disclosed in your letter, together with all other facts relating to the organization and operation of this club, might compel the conclusion that it is not within the class of organizations whose property is intended to be granted exemption by that subsection or other exemption provisions.

In this connection see the following reference in 84 C.J.S. to denial of exemptions for property of organizations used primarily for social or recreational purposes: Page 610, section 295 and footnote 75; page 562 and footnotes 69, 74, and 83; page 604 and footnotes 10, 15, and 16; page 607 and footnote 39; and page 609 and footnote 67. Also see 143 A.L.R. 274.

It is evident, I believe, that the acreage used as a golf course by the members of this club or others is not used by them "for places of meeting and for conducting their business and ceremonies" within the meaning of subsection 11, and that "their business" as used in that subsection means the business of the organization claiming exemption and not the personal business of the individual members.

The place on the club property in which any meetings for either the business purposes or the ceremonial purposes, if any, of the club are conducted undoubtedly is in the clubhouse itself and not on the golf links. Consequently, the acreage used for the golf course as well as any other acreage owned by the club and not used for any particular purpose cannot be considered as meeting the requirements of the exemption provision. That acreage is therefore subject to assessment for property tax purposes and should have been assessed in 1961 as well as in prior years.

Even if an occasional meeting for business or ceremonial purposes of the club were held on the golf course, the golf course acreage could not be regarded as exempt. This is because the law is well established that when an exemption provision is based upon use of property but does not require that the property be exclusively used

for the exempt purpose, it is the primary or dominant use of the property which determines whether it is exempt. See 84 C.J.S. 449-451. Also see 84 C.J.S. 551-557, section 282(g). Obviously, the golf course is used primarily for the social and recreational purpose of golfing and not for the conduct of club business or meetings.

Considering now the use of the clubhouse and the quantity of land reasonably necessary for use in connection with it, this office has previously held that the part of the valuation of a building and lot used for an exempt purpose may be regarded as exempt while that part not used for an exempt purpose is taxable. Insofar as any particular part of this clubhouse is used primarily for the purpose of conducting business or ceremonial meetings of the club, the valuation attributable to that portion of the property should be exempt, assuming, as already noted, that this club is in fact an organization of the type exempted by subsection 11 of section 57-02-08. The incidental use also of that part of the property for serving meals and beverages would not destroy the exemption for 1961 and prior years. The valuation attributable to the part of the property used primarily for social or recreational purposes rather than as a place for conduct of the club's business or ceremonial meetings should be placed on the tax rolls for 1961 and prior years. If, for example, one-fourth of the clubhouse is used primarily for business or ceremonial meetings of the club membership and it is determined that five acres are reasonably required for use of the clubhouse, then one-fourth of the value of the clubhouse and of the five acre tract should be exempt and the other three-fourths assessed and taxed.

Since at least some of the property of this club was not entitled to exemption, it is property which was omitted in whole or in part from assessment in 1961 and previous years and the county auditor should not assess it for each year in which any part escaped taxation pursuant to the provisions of section 57-14-01 through section 57-14-07, N.D.C.C. It is the conclusion of this office that the county auditor should assess it for all years in which it escaped taxation regardless of the number of years involved. See Westland v. Stalnecker 76 N.D. 291, 296-297, 35 N.W.2d. 567, 570, in which the Supreme Court held that the county auditor had properly exercised his duty under section 57-1401, N.D.R.C., when he assessed real estate in 1947 for the years 1938-1941 for which no assessments had been made. Obviously, the county auditor will have to determine from all of the facts whether this club is within the class of organizations whose property is intended to be exempt under subsection 11 of section 57-02-08, and, if it is, will then have to determine the value of the part of the property that has been omitted from taxation in 1961 and prior years which should not be assessed for those years. In this connection, our Supreme Court requires a strict construction of exemption statutes and places on the claimant of the exemption the burden of establishing that its property is exempt. See North Dakota Society for Crippled Children and Adults v. Murphy 94 N.W.2d. 343, 345.

Considering now the personal effects of the caretaker and the housing accommodations furnished by the club to him, it is clear that whatever may be the nature of the accommodations, whether in a separate building or not, they are not used primarily as a place for conducting the business or ceremonial meetings of the club and should

be assessed for the years in which no assessments were made. See Crippled Children's case cited above. Similarly, the personal effects of the caretaker in no way meet the requirements for exemption and should be assessed by the county auditor for each year in which they escaped assessment and taxation. Such personal effects of the caretaker should be assessed to him regardless of whether or not he is a citizen of this state and country or of a foreign country. 84 C.J.S. 161, section 59(c).

Assessors in determining for 1962 and later years whether property is exempted by subsection 11 of section 57-02-08 will have to take into account the 1961 amendments to that subsection which became effective July 1, 1961. Subsection 11 is set out in full as follows and the language added to it by the 1961 amendment is underlined:

1. Real and personal property owned by lodges, chapters, commanderies, consistories, farmers' clubs, commercial clubs, and like organizations, and associations, grand or subordinate, not organized for profit, and used by them for places of meeting and for conducting their business and ceremonies, and all real and personal property owned by any fraternity, sorority, or organization of college students if such property shall be used exclusively for such purposes: provided further that any portion of such premises not exclusively used for places of meeting and conducting the business and ceremonies of such organization shall be subject to taxation.

   Provided further, that where any such organization as contemplated by this subsection shall be licensed for the sale of alcoholic beverages as defined by the statutes of the state of North Dakota, such portion of such premises where such alcoholic beverages are consumed or sold shall be deemed not to be so used exclusively for conduct of its business and meeting if such beverages are sold at a profit.

   Provided further, that if food other than that served at lodge functions and banquets and food sold or consumed in any fraternity or sorority house, is sold at a profit on the premises, that portion of the premises where such food is sold at a profit shall be deemed not to be used exclusively for places of meeting or conducting the business and ceremonies of such organization.

The last proviso added to the first paragraph by the 1961 amendment changes for 1962 and following years the conditions under which property of the class of organizations set out in the subsection may be exempt. As already discussed, the exemption of property under this subsection prior to the 1961 amendment extended to property used primarily by the organization or association for places of meeting and for conducting their business and ceremonies. The proviso added to the first paragraph of subsection 11 by the 1961 amendment narrows the exemption for 1962 and following years by providing, as to the premises, that only that part of the premises used exclusively for places of meeting and conducting the business and ceremonies of the organization shall be exempt from taxation. Accordingly, use of the

premises primarily for the exempt purposes is no longer enough to qualify the property exemption; the portion of the property for which the exemption is claimed must be used exclusively for the exempt purposes in order for it to qualify for the exemption. "Exclusive" use can include an occasional use for a nonexempt purpose but it does not include any regular or consistent secondary use for a nonexempt purpose. See 84 C.J.S. 555-556.

In addition to the above part of the 1961 amendment just discussed, the amendment also added two new paragraphs which further limit the scope of the exemption. The first new paragraph (second paragraph of subsection 11) provides, in effect, that if any organization contemplated by subsection 11 is licensed to sell alcoholic beverages any part of the premises on which those alcoholic beverages are consumed or sold shall not be exempt if the alcoholic beverages are sold at a profit. "Alcoholic beverages" as used therein undoubtedly means the definition provided in subsection 1 of section 5-01-01, N.D.C.C., which defines alcoholic beverages as including any beverage the alcoholic content of which is one-half of one percent or more by volume.

The last paragraph added to subsection 11 by the 1961 amendment also further limits the exemption by providing, in effect, that the portion of the premises of an organization or association contemplated by the subsection where food is sold shall not be exempt if the food is sold at a profit, except that this provision does not apply to such organizations or associations which serve food at lodge functions or banquets nor does it apply in the case where food is sold or consumed in any fraternity or sorority house even if the food in either instance is sold at a profit.

In those cases where the sale of either alcoholic beverages or food at a profit cause a portion of the premises to be taxable, it is noted that express "sold at a profit" is not defined. It is therefore necessary to determine what the Legislature intended by the use of those words. "Profit" or "sold at a profit" have been judicially defined in numerous ways, depending upon the particular statutory or other provisions involved. Generally, they are defined to include, in various details or shades of meaning, the general terms of either "gross profit" or "net profit."

Many cases define "profit" or "sold at a profit" as meaning sale of an item at an amount in excess of its purchase price or cost, regardless of any expenses incurred in, or attributable to, the sale of it. It is in this sense that we believe the Legislature intended that the term "sold at a profit" as used in subsection 11 should be understood.

This conclusion is based, first, upon the belief that the Legislature was concerned with:

1) Reducing the competitive advantage that such organizations would otherwise enjoy over a private business whose property was not tax exempt; and

2) Requiring such organizations which sell food or alcoholic beverages at a profit to contribute through payment of

taxes to the cost of various governmental services such as fire and police protection, street maintenance, etc.

Secondly, this conclusion is impelled by the rule "that the laws under which such an exemption is claimed will receive a strict construction against the claimant." See North Dakota Society of Crippled Children and Adults v. Murphy, 94 N.W.2d. 343, 345.

Accordingly, it is the opinion of this office that any part of the premises of an organization or association contemplated by subsection 11 of section 57-02-08 on which alcoholic beverages are sold and consumed, if sold for more than their cost price to the organization, will not be exempt but must be assessed and taxed for 1962 and following years. Similarly, any part of the premises of such an organization or association on which food is sold at a price above the purchase price or cost to the organization will be taxable in 1962 and years following, except that the sale of food either at cost or at a profit will not cause the part of the premises on which the food is sold to become taxable if such food is served at a lodge function or banquet or is sold or consumed in any fraternity or sorority house.

LESLIE R. BURGUM

Attorney General