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Attorney General's Opinions

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QUESTION: *Is the real or personal property of a religious organization which is used for the operation of a retail business exempt from taxation?*

A. G. OPINION: No.

SUMMARY: Property used exclusively for religious purposes is exempted from taxation by Section 176 of the Constitution of the State of North Dakota. North Dakota Century Code § 57-02-03 (1960) requires that any exemption be expressly provided by law. North Dakota Century Code § 57-02-08 (Supp. 1973) includes houses of worship and dwellings for persons in charge of worship services in its list of exempt property; the statute does not deal specifically with retail businesses run by religious organizations.

The Attorney General indicates a belief that the North Dakota Supreme Court has recognized that a religious organization's real property would be taxable if owned or used for financial gain or profit. This recognition occurred in *Lutheran Campus Council v. Board of County Commissioners of Ward County*, 174 N.W.2d 362, 366-67 (N.D. 1970), where an exemption was supported by a finding that the property was not used for financial gain or profit.

By analogy to a case—*Y.M.C.A. of North Dakota State University v. Board of County Commissioners of Cass County*, 198 N.W.2d 241 (N.D. 1972)—in which the North Dakota Supreme Court held property to be non-exempt although the income it produced was used for charitable purposes, the Attorney General rules that use of income for religious purposes does not make the operation of a retail business a use for religious purposes.

The business equipment and retail stock does not meet any of the statutory requirements for exemption from taxation of the personal property of nonprofit corporations and so is taxable. North Dakota Century Code § 57-02-08(25) (Supp. 1973).

The portion of the real property used for the business is taxable; the remainder is exempt. This parallels the tax treatment of lodges and clubs provided for in an opinion issued by the Attorney General on October 10, 1955. April 29, 1974 opinion.

QUESTION: *Can a county construct a new jail out of emergency funds even though a bond issue for construction of new facilities was defeated?*

A. G. OPINION: Emergency funds can be used in "emergency" situations caused by the destruction or impairment of county property. Defeat of a bond issue for new facilities does not affect the right of the county to use such funds.

SUMMARY: North Dakota Century Code § 57-15-28 permits each county to establish a limited fund "for emergency purposes caused by the destruction or impairment of the affairs of the county." In *Brusegaard v. Schroeder,* 201 N.W.2d 899 (N.D. 1972), the North Dakota Supreme Court interpreted this section to permit Grand Forks County to construct a new county road shop. The county was forced to abandon its old building because of urban renewal. The Court held on page 911 that this was a suffient impairment of needed property so as to constitute an "emergency." The Court made its decision, however, without defining what constitutes a "sufficient impairment" or what would be considered property "necessary for the conduct of the affairs of the county."

The Attorney General relied on North Dakota Century Code § 11-10-20, as amended, and also Section 12-44-01 to establish that a jail is necessary for the conduct of county affairs. These sections require that each county keep a jail at county expense. He then stated, that, if the facts show an actual need to abandon the jail because of structural defects, this would be a sufficient impairment under Section 57-15-28 in view of *Brusegaard.* Defeat of the bond issue does not affect the right of the county to use the funds.

The Attorney General did not consider in his opinion whether Section 12-44-29, as amended, would affect the emergency status of the funding. This section establishes procedures for housing of prisoners when there is no jail in a county or when the present jail facilities are not adequate. December 18, 1974 opinion.

QUESTION: *May a prosecutor compel a person who has been charged with a non-criminal traffic offense to testify at a hearing to determine whether that person committed such offense, or would such action constitute a violation of the privilege against self-incrmination?*

A. G. OPINION: A person charged with a non-criminal traffic violation can be called as a witness and compelled to testify, but upon asserting the privilege against self-incrimination in the

hearing or the appeal therefrom, the defendant may not be compelled to testify.

SUMMARY: The privilege against self-incrimination is guaranteed "in any criminal action" by the Fifth Amendment of the United States Constitution, Section 13 of the North Dakota Constitution, and Section 31-01-09 of the North Dakota Century Code. The Attorney General indicated that legislative designation of an offense as "non-criminal" is not necessarily decisive and that the privilege could be asserted equally in a civil action, such as a traffic offense hearing.

There were however two basic differences between application of the privilege in criminal and in civil cases. In criminal actions, a defendant may not be compelled to testify against himself and no inference can be drawn from his election not to testify. However, in a civil action, a defendant may be called as a witness adverse to his interests and must testify unless he asserts his privilege. Moreover, where a defendant in a criminal action would have to be advised of his right to exercise the privilege, there is no such requirement in a civil case.

QUESTION: *Does the Water Commission have binding authority to attach standards to a water permit that are more stringent than current state statutes require?*

A. G. OPINION: Generally, yes.

SUMMARY: It was the opinion of the Attorney General that the conditions on the Michigan-Wisconsin Pipeline Company and United Power Association/Cooperative Power Association conditional water permits were basically valid. The Attorney General did add the precautions that the courts would make final dispositive determination as to the validity of the condition and that any condition the water commission would impose must reasonably relate to the use of the waters of the state. Section 62-01-01 of the North Dakota Century Code states that the waters of the state "belong to the public and are subject to appropriation for beneficial use. . . ." The Attorney General ruled that the attachment of conditions to a water permit is an appropriate means of applying the "beneficial use" requirements of the Century Code.

The Attorney General relying on numerous sections of the Code comes to the conclusion that the commission has broad general powers over the regulation of appropriation of the waters of the state.

In the first section of the state water commission chapter of the Century Code, § 61-02-01, the Attorney General finds that the regulation of water concerns the general welfare and that the sovereign powers of the state therefore should be exercised with the

state water commission exercising any and all sovereign powers.

In two different sections the Attorney General finds justification for the enforceability of attached conditions to water permits. First, under § 61-02-09 the commission is given contracting power. Therefore in the case of UPA/CPA the conditions on the water permit are valid as contract. Secondly, under § 61-02-14 the conditions are valid and enforceable under the commission's grant of police power.

The police powers granted in § 61-02-14, the Attorney General states, must be considered with § 61-02-28 where the commission is given full authority and jurisdiction to exercise and assert actual possession over the corpus of all water that would be used for the purposes of electric power generation, mining and manufacturing.

It was with these sections of the code and others (61-02-07, 61-02-28, 61-02-29, 61-02-30, and 61-02-73) that the Attorney General concluded that the water commission was the sole state agency responsible for the overall development, utilization and conservation of the state water resources and that the water commission has broad general powers over the regulation of appropriation of the water of the state. The Attorney General, nevertheless, added that an applicant is afforded judicial review as required by due process of law. November 7, 1974 opinion.

QUESTION: *Are employees of state school districts covered by the State Department of Labor's Minimum Wage Order No. 7 dated January 7, 1974?*

A. G. OPINION: Yes.

SUMMARY: The statutory authority for the Commissioner of Labor to enact minimum wage orders is found in Section 43-06-01 of the North Dakota Century Code. The Attorney General indicated that school districts would be "any person or group of persons acting in the interest of an employer in relation to an employee" as used in that statutory definition of "employer." As such, the employees of a school district would be effected by any Minimum Wage Order issued pursuant to Section 43-06-01. While state employees had been previously exempted from coverage under the Minimum Wage Order by virtue of Section 54-06-16 of the North Dakota Century Code, this was held inapplicable to employees of political subdivisions of the state, such as school districts.

The enumeration of which types of employees are covered under the Minimum Wage provisions was left to the State Labor Commissioner. The Attorney General did indicate that under the de-

finition contained in the Order, district secretaries, clerks, teacher's aids, and paraprofessionals would be covered and that study hall and lunch room supervisors might be covered. Food service personnel might not be covered under this Order, but rather governed by some other minimum wage order. April 10, 1974 opinion.

QUESTION: *Is an apeal from the state tax appeals board a trial de novo or is the appeal limited to issues contained in the record filed with the District Court?*

A. G. OPINION: The appeal is to be limited to the record filed with the district court.

SUMMARY: The State Tax Appeals Board was created by Chapter 57-23.1 of the Century Code. Its purpose is to serve as another level of appeals for tax assessments which have already been reviewed by the county commissioners. The language in question is contained in Section 57-23.1-02 which states in part that "any party aggrieved by a decision of the tax appeals board may appeal to the district court."

The Attorney General first determined that the appeals board was an "administrative agency" as defined by Section 28-32-01. This determination was made based on the conclusion that the appeals board was not a court and that it had state wide jurisdiction to make orders, findings, determinations, awards or assessments which have the force and effect of law and which are appealable. Turning to the Administrative Agency Practice Act, North Dakota Century Code § 28-32-19 requires that the "court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court." On this basis the Attorney General stated that an appeal from the Tax Appeals Board is limited to the record filed with the district court and is not a trial de novo.

The probable impact of this determination, according to the Attorney General, would not be to limit the issues considered by the district court but to require the Tax Appeals Board to make an appealable record of the proceedings. The statutory requirement calls for the taking of stenographic notes although this is often waived in favor of electronic recording. Otherwise, Chapter 28 provides several methods to supplement and correct the record. A petition for a rehearing can be made under Section 28-32-14. Section 28-32-18 allows the district court to order the taking of additional evidence by the agency if the evidence is material and if there are reasonable grounds for failing to originally include such evidence or if it was improperly excluded by the agency. December 6, 1974 opinion.