

N.D.A.G. Letter to Larson (Nov. 28, 2000)

November 28, 2000

Mr. Stuart A. Larson
Traill County State's Attorney
PO Box 847
Hillsboro, ND 58045-0847

Dear Mr. Larson:

Thank you for your letter asking for my opinion on whether certain assisted living apartments attached to nursing homes in Traill County are exempt from property taxation under N.D.C.C. § 57-02-08(8). The assisted living apartments are attached to and operated by nursing homes that are owned and operated by nonprofit corporations. While you do not question that the assisted living facilities are owned by charitable organizations, you do question whether the assisted living apartments constitute a charitable use exempt from property taxation.

Following the receipt of your letter, I became aware that the State Board of Equalization made a determination on the assessment for this year of the properties in question at its September 20, 2000, meeting. The minutes of the Board reflect that it declined to accept the recommendation of staff to uphold the taxability of these properties. The State Board of Equalization is the body charged by law with making such determinations when presented to them. See generally N.D.C.C. ch. 57-13. Because the Board has made its determination for this year, it would be inappropriate for me to issue an opinion on the matter at this time. Nevertheless, I do offer the following discussion for your general information and future guidance. This discussion should not necessarily be considered a formal legal position of this office.

One of the assisted living facilities you wrote about was constructed in 1984 and the apartments rent for \$685 per month for a one-bedroom unit and \$820 per month for a two-bedroom unit. The other facility has five one-bedroom apartments constructed in 1989 and rented for \$575 per month. Six additional units were constructed in 1999, with a one-bedroom renting for \$625 per month and a two-bedroom for \$725 per month. No information was provided about market rents for comparable properties in the area or whether these rents are in any way subsidized.

You indicate that neither facility has alternate provisions for individuals unable to pay the full rental amount to live in the apartments, although one of the facilities mentioned that a renter could apply to the Traill County Housing Authority for a rent voucher. Both facilities offer a number of services included in the rental price and also offer additional services for a fee. Services included in the rent include housekeeping, utilities, cable TV, and availability of nursing home activities. Additional services for a fee include meals, nursing services, medication distribution, and other services less than skilled nursing. These

apartments appear to be intended for elderly individuals who are able to live more or less independently with some assistance and services available, but who do not presently require nursing home care. In fact, according to the written information you submitted, one of the facilities retains the right to terminate any lease if the residents can no longer take care of themselves. These facilities appear to be designed more for those essentially capable of independent living and less to provide care and treatment for those with significant physical or mental limitations. Little was provided to indicate that the apartments are being operated for any purpose other than to generate revenue.

State law permits certain exemptions from property taxation. N.D.C.C. § 57-02-08(8) provides the following exemption:

8. All buildings belonging to institutions of public charity, including public hospitals and nursing homes licensed pursuant to section 23-16-01 under the control of religious or charitable institutions, used wholly or in part for public charity, together with the land actually occupied by such institutions not leased or otherwise used with a view to profit, and this includes any dormitory, dwelling, or residential-type structure, together with necessary land on which such structure is located, owned by a religious or charitable organization recognized as tax exempt under section 501(c)(3) of the United States Internal Revenue Code which is occupied by members of said organization who are subject to a religious vow of poverty and devote and donate substantially all of their time to the religious or charitable activities of the owner.

“[T]he burden of establishing that property comes within the tax-exemption statute is upon the person or entity who claims the exemption, and . . . any doubt as to whether the property is used for charitable or benevolent purposes so as to exempt it from taxation must be resolved against the claimant.” Riverview Place, Inc. v. Cass County, 448 N.W.2d 635, 640 (N.D. 1989). “[T]he determination of whether an institution falls within the exemption is, essentially, a two-step process in which it must be determined whether the organization claiming the exemption is in fact a charitable one, and whether the property on which the exemption is claimed is being devoted to charitable purposes.” Id. (citations omitted). As indicated above, you do not question whether the nonprofit corporations are charitable, but do question whether the property for which the exemption is claimed is being devoted to charitable purposes.

The North Dakota Supreme Court in the Riverview Place case also stated that

The ownership of the property in question by an institution of public charity does not, by that fact alone, exempt the property from taxation. . . . Additionally, “[t]he mere fact that the services performed by a charitable corporation also are rendered by profit-making organizations [does] not of itself preclude [a charitable organization’s] right to tax exemption.” . . . Rather, “[i]t is the use made of the property . . . which determines whether

the property is exempt from taxation.” . . . The property’s use must be devoted to charitable purposes, and it must actually be used in carrying out the charitable purposes of the organization claiming the exemption.

Id. (emphasis in original).

As indicated above, the burden is on an entity which is claiming the property tax exemption to prove it and that doubts about whether property is being used for a charitable purpose must be resolved against the claimant. Riverview Place, Inc. v. Cass County, 448 N.W.2d at 640. It does not appear from the information provided that the assisted living apartments which are claimed to be exempt from property taxation are being used for a charitable purpose. As indicated above, there was no information provided that the apartment rents are being offered at less than market or that the nonprofit corporations are in any way subsidizing the rents or that the apartments are anything other than a form of a commercial enterprise. Furthermore, as you indicate, there appear to be no provisions for individuals unable to pay the full amount of the rents. Nor was there proof offered that the elderly residents are in need of or being provided any significant care or treatment. Based on the information submitted, as in the Riverview Place case:

[T]he record does not reflect any evidence presented . . . to indicate that their residents have a demonstrated need for care or charity. In fact, the record is absent of evidence to show that residents of Riverview Place are anything but “functionally independent” and fully capable of living on their own while at Riverview Place. Furthermore, there is nothing to demonstrate that “care” is being rendered to the elderly at Riverview Place. . . . In short, we believe that Evangelical requires something more than merely providing an aggregate-living facility for the elderly in order to qualify as a charitable use of property under Sec. 57-02-08(8). Rather, in order for similar facilities to qualify as a charitable use of property, Evangelical requires the organization operating a living-facility to also provide care to elderly persons who have a demonstrated need for it.

448 N.W.2d at 642.

As the North Dakota Supreme Court also noted in YMCA of N.D. State University v. Board of County Com’rs, 198 N.W.2d 241, 244 (N.D. 1972):

Ownership of the property in question by an institution of public charity such as the YMCA does not, ipso facto, exempt the property from taxation. The property itself must be devoted to charitable purposes and it must actually be used in carrying out the charitable purposes of the one claiming the exemption.

The YMCA Court also stated:

There is no evidence that the cost to the tenants is below ordinary rent charged by commercial enterprises for similar services furnished. In fact, the record shows that the property produced an income sufficient for the plaintiff to realize a profit each year. The apartments compete with commercial housing facilities.

Id. at 246.

The Court further stated that the “use of the apartments in question are not for charitable purposes but are for revenue.” Id. at 247.

While there was no information provided about the profitability of the apartments or whether they compete with commercial apartments, neither has there been information provided that the use of the apartments is for charitable purposes. Assuming the information provided, and the general levels of apartment rents in this state do not materially change over the next year, a reasonable inference certainly may be drawn next year by the appropriate tax officials that the “use of the apartments in question are not for charitable purposes but are for revenue.” Id. If that conclusion were to be disputed, it would be incumbent upon the property tax exemption claimants next year to demonstrate otherwise.

I trust this discussion is helpful to you.

Sincerely,

Heidi Heitkamp
Attorney General

jjf/pg