

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-03

Date Issued: January 16, 1998

Requested by: John T. Goff, Cass County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. § 57-12-01 requires a county board of equalization to assemble in a continuous meeting until it has completed its duties or whether the county board of equalization may recess the meeting for a period of time to gather information or to comply with the notice period required by N.D.C.C. § 57-12-06(2)(b).

II.

Whether a county board of equalization has the authority or the duty under N.D.C.C. ch. 57-12 to add property to the assessment roll which was improperly omitted or determined to be exempt by a local board of equalization.

III.

Whether a county auditor has the authority or duty to add property to the tax roll as omitted property under N.D.C.C. ch. 57-14 when a local board of equalization and a county board of equalization have already determined the property to be exempt, when the property has previously been determined to be commercial by the county board of equalization but was not assessed because of due process and procedural defects, and, to the extent it is possible to answer, when does a county auditor have authority or a duty to add property to the tax rolls as omitted property under N.D.C.C. ch. 57-14.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a county board of equalization may recess its yearly meeting for a reasonable period of time to gather necessary information or when it has no pending duties until a required period of notice to taxpayers has passed.

II.

It is my opinion that a county board of equalization does not have authority to add property to the assessment roll which was improperly omitted or determined to be exempt by a local board of equalization, but that the county board of equalization may request the auditor to exercise this authority under N.D.C.C. ch. 57-14.

III.

It is my opinion that a county auditor has the authority and duty to add property to the tax roll as omitted property under N.D.C.C. ch. 57-14 when a local board of equalization and a county board of equalization improperly determined the property to be exempt, when the property was not assessed by a city or township because of due process or procedural defects, and whenever property was omitted improperly from the tax roles, but the county auditor may not reassess the valuation placed on the property.

- ANALYSES -

I.

N.D.C.C. ch. 57-12 contains the powers and duties of a board of county commissioners acting as a county board of equalization. N.D.C.C. § 57-12-01 provides in pertinent part:

The board of county commissioners shall meet within the first ten days of June of each year and shall constitute a board of equalization of the assessments made within the county. The chairman of the board shall preside. The county board of equalization shall conduct a continuous day-to-day meeting, not to include Saturdays, Sundays, or legal holidays, until it has completed all duties prescribed by this chapter. [Emphasis supplied].

The word "shall", as used in statutes, is generally mandatory but where it is necessary to give effect to intent "shall" is interpreted as permissive. In at least four cases, the North Dakota Supreme Court has given a permissive meaning to "shall" when construing a statute. In Interest Of Nyflot, 340 N.W.2d 178, 182 (N.D. 1983); State v. McMorrow, 332 N.W.2d 232, 324 n.2 (N.D. 1983); Northwestern Bell Telephone Company v. Wentz, 103 N.W.2d 245, 254 (N.D. 1960); and Anderson v. Peterson, 54 N.W.2d 542, 552-553 (N.D. 1952). In enacting a statute, it is presumed that a just and reasonable result

and a result feasible of execution are intended. N.D.C.C. § 1-02-38(3), (4). Further, the maxims of jurisprudence in aid of the application of the law include that the law never requires impossibilities, that the law neither does nor requires idle acts, and that interpretation must be reasonable. N.D.C.C. § 31-11-05(22), (23), (33).

The North Dakota Supreme Court has approved the following test to determine whether a tax-related provision is mandatory or directory:

"If the provision is mandatory it must be followed or the assessment will be invalid; but if it is merely directory the assessment is not necessarily invalid because of failure to observe the statute. The test is whether the provision is for the benefit and protection of the individual taxpayer. If it is, the provision is mandatory. On the other hand if the regulations are designed to secure order, system and dispatch in proceedings, and the rights of interested taxpayers cannot be injuriously affected, the provisions are merely directory. * * *"

Fisher v. Golden Valley Bd. of County Comm'rs, 226 N.W.2d 636, 645 (N.D. 1975), quoting Cooley on Taxation, 4th Ed., Vol. 3, § 1061 (emphasis by the Court). The date set by N.D.C.C. § 57-12-01 for beginning the yearly meeting of the county board of equalization is intended to provide notice to the public so interested taxpayers may be heard, and the failure to meet during this time is jurisdictional. Powers v. Larabee, 49 N.W. 724, 726 (N.D. 1891). However, the provision requiring continuous meetings does not appear to be intended to protect the public, but is intended to secure dispatch in proceedings. This would not be jurisdictional. Id. (the board may meet at the time stated or at "an adjourned day named as a lawful meeting.").

Further, N.D.C.C. § 57-12-06(2)(b) provides in pertinent part:

The county board of equalization after notice to the local board of equalization may increase the assessment on any separate piece or parcel of real property even though such property was assessed in a city or township having a local board of equalization; provided, that the county board of equalization does not have authority to increase any such assessment unless it first gives notice by mail to the owner of the property that such person may appear before

the board on the date designated in the notice, which date must be at least five days after the mailing of the notice.

[Emphasis supplied.] The provisions of N.D.C.C. §§ 57-12-06(2)(b) and 57-12-09, which require that notice must be given to the property owner before a county board of equalization can increase an assessment, are jurisdictional and must be met or the increase is invalid. Fisher, 226 N.W.2d at 647. However, the public would not be protected by the board holding a meeting before the five day notice period has expired when there is no business the board may conduct.

Therefore, it is my opinion that "shall" as used in the third sentence of N.D.C.C. § 57-12-01 must be interpreted as permissive. It would not be reasonable to require a county board of equalization to sit continuously while waiting for the procurement and presentation of additional information necessary to resolve the remaining issues on the board's agenda or until a required notice period has expired. If there is no additional business on the agenda, the county board of equalization may recess for a reasonable period of time for this purpose.

II.

The powers of a county were articulated by the North Dakota Supreme Court in County Of Stutsman v. State Historical Soc., 371 N.W.2d 321, 329 (N.D. 1985):

In North Dakota, counties are creatures of the constitution and may speak and act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority.

A township board of equalization and a city board of equalization have statutory authority to add omitted property to the assessment rolls. N.D.C.C. §§ 57-09-04, 57-11-05. No such statutory authority exists for a county board of equalization. However a county board of equalization has the authority to initiate a proceeding to add omitted property to the tax roll, as well as adding to the roll property improperly exempted by a local board of equalization. N.D.C.C. chs. 57-12 and 57-14. See also Shark Bros., Inc. v. Cass County, 256 N.W.2d 701, 704 (N.D. 1977); Letter from Attorney General Nicholas J. Spaeth to Mr. Larry Quast, Stanton City Attorney, March

14, 1990; Letter from Attorney General Nicholas J. Spaeth to Mr. Steven J. Lies, Wahpeton City Attorney, August 13, 1992. This could be accomplished by asking the county auditor to add the subject property to the tax roll under the auditor's authority in N.D.C.C. ch. 57-14.

III.

N.D.C.C. ch. 57-14 contains the powers and duties of a county auditor to correct assessments of property.

The county auditor has the duty to add property to the tax roll if it was improperly exempted or if it was omitted in whole or in part. See part II, above, and 1961 N.D. Op. Att'y Gen. 244, 246. This power includes the power to look back to previous tax years and correct improper exemptions. Shark Bros., 256 N.W.2d at 703-704. However, a county auditor is not authorized under this chapter to assess again, or revalue, property that has been listed and assessed by the assessor. Golden Valley County v. Greengard's Estate, 284 N.W. 423, 428 (N.D. 1938); Mueller v. Mercer County, 60 N.W.2d 678, 683-685 (N.D. 1953). The county auditor has a duty under N.D.C.C. ch. 57-14 to list all omitted property. It then becomes a question of fact for the county auditor to determine whether a property is omitted within the scope of the chapter which requires it to be placed upon the assessment roll. 1961 N.D. Op. Att'y Gen. 244, 246-247.

Any concern about satisfying due process notice requirements is cured under N.D.C.C. ch. 57-14 because the county auditor is required to give the property owner notice that the auditor intends to add the property as omitted and the county auditor must set a hearing for the property owner at a specified time within fifteen days after the date of the mailing of the notice. N.D.C.C. § 57-14-02. Further, after the assessment of omitted property, the board of county commissioners shall hear all grievances and complaints about the assessment at its next regular meeting. N.D.C.C. § 57-14-04. Generally, defects in notice requirements for administrative proceedings may be cured as long as the party claiming the defect has ample opportunity to prepare for the proceeding and the proceeding is not invalid for other, fatal, reasons. See Hentz Truck Line, Inc. v. Elkin, 294 N.W.2d 774, 778-779 (N.D. 1980); Burkhardt v. State, 42 N.W.2d 670, 671-672 (N.D. 1950); Eikevik v. Lee, 13 N.W.2d 94, 97 (N.D. 1944). See also Trengen v. Mongeon, 200 N.W.2d 50, 53 (N.D. 1972)(improper notice of appeal to Supreme Court may be cured in proper instance).

Therefore, when a local board of equalization has dismissed a matter due to improper notice or other procedural defects but not on the merits, the county board of equalization may cure the defects by a new proceeding. The taxpayer is not prejudiced because the taxpayer has the same notice and opportunity to prepare before the county board as if the prior proceeding had never occurred and the matter was before the county board in the first instance.

Therefore, it is my opinion that a county auditor has the authority and duty to add property to the tax roll as omitted property under N.D.C.C. ch. 57-14 when a local board of equalization and a county board of equalization have improperly determined the property to be exempt, when the property was not assessed by a city or township because of due process or procedural defects, and whenever property was omitted improperly from the tax roles, but the county auditor may not reassess the valuation placed on the property.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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