

OPINION
64-253

June 2, 1964 (OPINION)

TAXATION

RE: Constitutional Amendment - Personal Property

This is response to your letter in which you ask for an opinion on the legal effect of the proposed constitutional amendment amending Section 176 of the North Dakota Constitution.

The proposed changes in Article XI, Section 176 are set out as follows: The language to be deleted is contained with brackets (()) and the new language is underscored. The proposed change is as follows:

Section 176. Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. ((The legislature may by law exempt any or all classes of personal property from taxation and within the meaning of this section, fixtures, buildings and improvements of every character, whatsoever, upon land shall be deemed personal property.)) The property of the United States and of the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes, all personal property owned by persons or corporations residing or doing business within the State of North Dakota, and all personal property located within the State of North Dakota shall be exempt from taxation. Except as restricted by this Article, the legislature may provide for raising revenue and fixing the situs of all property for the purpose of taxation. ((Provided that all taxes and exemptions in force when this amendment is adopted shall remain in force until otherwise provided by statute.))"

The amended section will then read as follows:

Section 176 of Article XI: Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority of levying the tax. The property of the United States and of the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes, all personal property owned by persons or corporations residing or doing business within the State of North Dakota, and all personal property located within the State of North Dakota shall be exempt from taxation. Except as restricted by this article, the legislature may provide for raising revenue and fixing the situs of all property for the purpose of taxation."

You request an opinion on the following questions:

1. Just what type of personal property is covered in these petitions?
2. If this move is successful, will the law exemption personal property, as defined in the petition, be constitutional? In other words, if a pipe line should become exempt from personal property tax, would my residence (deemed personal property as defined by Section 176 of the North Dakota Constitution) also be exempt from taxation? Or would my residence still be considered real estate?
3. Does this proposal exempt franchises, inventories, public utility property, cattle, machinery and house trailers used as residences in trailer courts?
4. From what other source, or sources, would the revenue from personal property taxes be taken?"

It is noted that no specific facts are submitted with the questions and that the questions are hypothetical in nature. Under these conditions it is extremely difficult to give precise answers to the questions.

The Constitution of this state is one of limitations and restrictions rather than one of grants as is the Constitution of the United States.

The Courts have consistently held that:

The provisions of the state constitution relating to taxation are limitations and restrictions and not grants." (Aubol v. Engseth, 66 N.D. 62, 262 N.W. 338)

Similarly the Courts have consistently held that:

The taxing power of the State is vested in the legislature and is without limit, except such as may be provided by the constitution itself."

Cooley on Taxation, Fourth Edition, Section 131 states in part:

The provisions in state constitutions in relation to taxation are not grants of power but limitations on the taxing powers of the states." (See also State v. Turner, 37 N.D. 635, 164 N.W. 924; First State Bank of Jud, 52 N.D. 231, 202 N.W. 391; Baird v. Burke County, 53 N.D. 140, 205 N.W. 17 and Fargo v. Wetz, 40 N.D. 299, 168 N.W. 835. this latter case will be discussed later herein.)

As to your first question, all personal property defined as such by statute (see for example sections 57-02-05 (defines personal property), 57-05-04 (defines certain railroad property), 57-06-22 (defines public utilities) would be exempt, except such property as is in fact not personal property although defined as such for taxation purposes. Under this concept the validity of some of the present statutory definitions of real and personal property for

taxation purposes may be legally questionable. It is recognized that these definitions may be amended by the Legislature in order to satisfy the provisions of the proposed constitutional amendment and in order to bring the definitions in line with the ordinarily accepted concepts of real and personal property. (See *Minneapolis, St. Paul and Sault Ste Marie Railway Company v. Dickey County*, 11 N.D. 107, 90 N.W. 260.)

In answer to the first part of your second question, you ask that if the move to exempt personal property is successful, "Will the law exempting personal property, as defined in the petition, be constitutional?" The petition is not one for submission of an initiated law to the people but instead is one for submission to the people of a proposed amendment to Section 176 of the North Dakota Constitution, and if approved by the people it would be part of the state Constitution.

In answer to the second part of your second question, the status of your residence under the proposed amendment will be considered separately from that of pipeline property. We assume that your residence is neither used as a farm residence nor located on agricultural lands. Under these circumstances, we believe it will continue to be taxable, since the proposed amendment will remove the second sentence of Section 176 by which all improvements upon land are deemed to be personal property. Under the amendment the residence would then be what it, in fact, really is - real estate - and because the amendment does not include any new exemptions for real estate, the residence would continue to be taxable under our present laws.

Whether or not the Legislature would have authority to provide complete exemption from property taxes for any residence or other improvements upon land or for the land itself is a question to which only speculative answers can be given. It is a basic rule of law that a state Legislature has inherent and plenary powers to enact laws, as limited and restricted by the state and federal constitutions. In *State ex rel. Fargo v. Wetz* 40 N.D. 299, at 307-308, 168 N.W. 835, 838, the Supreme Court recognized this principle in the following language:

We are, then, confronted with the question of the power of the Legislature to effect such a change in the tax laws under the limitations of the Constitution. In approaching the consideration of the constitutional questions presented by the petitioner, we must do so in the light of the rule that, in the exercise of the legislative power, the will of the Legislature is supreme, and cannot be set at naught except where it contravenes restrictions upon the legislative authority that can be pointed out in the Constitution. *Cooley's Constitutional Limitations* (Seventh Edition) p. 236."

To the same effect, see *State ex rel. Haggart v. Nichols* 66 N.D. 355, at 361, 265 N.W. 859, at 862-863.

If it were clear that our Constitution does not restrict the Legislature's inherent and plenary right to enact any kind of property tax legislation, then it follows that if the the proposed

amendment is adopted, the legislature could, if it chose to do so, enact legislation that would exempt any class of land or improvements upon land from property taxation, provided of course that the classification was a reasonable one and not arbitrary. The discussion in the above-quoted Wetz case and subsequent cases, however, cast doubt on whether the Legislature has plenary or complete powers in matters of exempting property from taxation which is not expressly exempted by the Constitution or authorized by it. The Wetz case, although it involved personal property taxation, indicated that the then existing state constitutional provisions did restrict the right of the Legislature to exempt both real or personal property from property taxation and that the Legislature was prohibited from granting property tax exemptions except as authorized by the Constitution. To the same effect, see *Westland v. Stalnecker* 76 N.D. 291, at 295, 35 N.W.2d. 567; also see *State ex rel. Fargo v. Wetz* 40 N.D. 299 at 317, 318, and 319, 168 N.W. 835; *Gamble-Robinson Fruit Company v. Thoresen* 53 N.D. 28, at 36 (last paragraph), 204 N.W. 861; and *State v. Kromarck* 78 N.D. 769, at 774, 52 N.W.2d. 713.

If the proposed amendment to Section 176 were to become law, we believe that no one except the courts can say with any certainty that the Legislature will or will not have the authority to exempt any class of land or any class of improvements upon land. However, the present statutes exempting certain property not expressly exempted by the proposed amendment would have the presumption of validity and would stand unless successfully challenged through the courts. If the courts decided that the Legislature would not have any authority under the proposed amendment to exempt any class of land or any class of improvements upon land, then the various exemptions for improvements that are now provided in our statutes would become null and void and those improvements would become subject to property taxes and the Legislature would not be able to exempt them. Classes of property that may be involved in this matter include, for example, the following which are not exempt:

1. All farm structures and improvements, 57-02-08(15);
2. Parsonages occupied as residences by bishops, priests, rectors or other ministers in charge of services of the church, 57-02-08(7) and (9);
3. Buildings belonging to institutions of public charity, including public hospitals under the control of religious or charitable institutions, if used only in part for charitable purposes, 57-02-08(8);
4. Agricultural fair association property, 57-02-08(10);
5. Dormitories or houses owned by private organizations and occupied by fraternity or sorority members or other students as living quarters, 57-02-08(11) and 15-17-06;
6. Homes of certain disabled veterans, 57-02-08(20); and
7. Homes of blind persons, 57-02-08(22).

In reply to your third question, such specific franchises which are

considered as personal property, inventories, cattle, machinery, and house trailers located upon leased land would be exempt from property taxation under the proposed amendment.

As to utilities, included as a portion of your third question, we believe that under the current statutes governing the property taxation of public utilities' property, all property of public utilities assessed by the state board of equalization would be exempt from property taxation under the present existing statutes, if the amendment becomes law. (See Minneapolis, St. Paul, Sault Ste Marie Railway Company v. Dickey County, supra.)

However, we recognize the fact that the Legislature may provide a different method of taxing property of public utilities and it would apparently be possible for the Legislature to tax public utilities' property which is in fact real property. Any public utility which is in fact personal property would apparently be exempt from property taxation under the proposed constitutional amendment and the Legislature would be without authority to impose any property tax on it. See also answer to first question.

As to the fourth question, while there are other methods of imposing taxes, it would be rather presumptuous if not resented for this office to assume prerogatives of the Legislature and state what methods should be used. Accordingly, we must refrain from making any suggestions as to how revenues may be raised. However, if either branch of the Legislature were to inquire as to the validity of any proposed legislation or ask for assistance in drafting legislation, this office would render the necessary legal assistance and cooperation.

Since all of the question are hypothetical in nature, we believe it is appropriate to supplement our answers with the following explanation.

This office as early as 1927 made the observation that when a doubt exists relative to a law, it is elementary that our duty is to resolve such doubt in favor of its constitutionality. When, however, the Legislative Assembly asks for an opinion as to its constitutionality (on a proposed law), we do not believe the same rule prevails, and in such case we do not feel called upon to give an opinion as would lead to the enactment of a bill of doubtful validity.

In line with this policy, if the proposed amendment to Section 176 of the North Dakota Constitution becomes law any statutes now in effect or later enacted by the Legislature an relating either expressly or impliedly in some manner to Section 176 would be presumptively constitutional and the person attacking same would have the burden of showing it is unconstitutional.

HELGI JOHANNESON

Attorney General