Opinion No. 55-6124

March 9, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. C. Chase, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

Your request for an opinion dated March 1, 1955, on three questions regarding exemption from taxation of church property has been received. I quote from your letter the factual situation which gives rise to your first question:

"A local church was organized a few years ago and in order to secure a loan for the erection of a church, title to the property was left in the name of the individual who originally owned that property. A church was subsequently erected on the property and is now being used exclusively for church purposes, however, the property is assessed in the name of the individual who originally owned it."

Your first question is whether or not the property above is eligible for exemption from taxation under Article VIII, Section 3 of the Constitution of this State. That constitutional provision reads:

"The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, **all church property,** all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the state of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation. (Emphasis ours)

"Provided, however, that any property acquired by public libraries, community ditches and all laterals thereof, property acquired by churches, property acquired and used for educational or charitable purposes, and property acquired by cemeteries not used or held for private or corporate profit, and property acquired by the Indian service, and property acquired by the U.S. Government or by the state of New Mexico by out-right purchase or trade, where such property was, prior to such transfer, subject to the lien of any tax or assessment for the principal or interest of any bonded indebtedness shall not be exempt from such lien, nor from the payment of such taxes or assessments."

As applied to church property, the above constitutional provision was extensively discussed by our Supreme Court in at least two cases. Church of the Holy Faith vs. State Tax Commission, et al., 39 N.M. 403; Trustees of Property of Protestant Episcopal Church in New Mexico vs. State Tax Commission, et al., 39 N.M. 419. In the Church of the Holy Faith case the church owned the land in question. At once it becomes apparent that the situation here, i.e., ownership in a third person and use made of the land for church purposes was not before the Court.

As pointed out in the Church of the Holy Faith case, exemption statutes or constitutional provisions are roughly classified into three groups: (1) Those making ownership of the property by a certain institution or class of people the test; (2) Those making the particular use of the property rather than ownership the test; (3) Those requiring a concurrence of ownership and use as the test. Since ownership was not in question in the Church of the Holy Faith case, the holding of that case does not govern the situation you present. That case held that use was required. Ownership as a concurring factor was not ruled out. In the situation before it, any pronouncement by the Court on ownership as a necessary concurring factor in this or any other situation must be treated as dicta. However, what the Court said there upon ownership as a requisite concurring factor is helpful in predicting the result were the question you present put to our Court.

In the case above are found expressions which lend some support to either view, i.e., use alone as the test and ownership and use as necessary concurring factors as the test. In the above case at page 415, appears the following:

". . . Taxation is the rule, exemption the exception, and it is plain that the quid pro quo theory as supporting the exception fails as to property of a church as an entity which is not necessary for or is not used to promote the object or purposes of the church. It must be supposed that the teaching and inculcating of religious ideas is beneficial to the state. This theory sought to be encouraged by exempting church property from taxation necessarily rests upon the assumption that the property **of the** church as a religious society **will be held and used by the church** for those purposes for which the church was incorporated and exists. In so far as the property of the church is not so employed, there is no quid pro quo." (Emphasis ours)

"The greater the amount of property that escapes taxation, the greater the burden is upon other property holders to bear the support of the government."

The above would seem to indicate that ownership should also inhere in addition to use for religious or church purposes in order that the property be brought within the exemption. This, of course, is very general language. As to the first paragraph quoted above, it would seem that it is no more than a general expression of the theory behind exemption of church property or property used for church purposes. What appears here is said to support and to emphasize the result ultimately reached, i.e., that use is a requisite, and not necessarily to rule into the test ownership as a concurring factor. The same can be said of the second paragraph quoted above.

On the other hand support for the view that ownership is not a necessary concurring factor is found in the following at page 410:

"As to 'community ditches and all laterals thereof', **we sense the only instance of a concurrence possibly of ownership and use as requisites."** (Emphasis ours)

The above language was prompted by an examination of all types of property listed under Article VIII, Section 3 of our Constitution. Thus, if among all the other types of property listed, church property being one of the many types, only "community ditches and all laterals thereof" was the only type of property which required as a test for exemption, concurrence of ownership and use, then, a fortiori, all other types fell into ownership exclusively or use exclusively categories. The Court rejected ownership exclusively as a test for exempting church property. Of necessity, therefore, the Court must have thought that church property fell into the use exclusively category.

Let us look at the expressions of the Court in this case in another manner. If everything except what was said in regard to community ditches were in this case, the Court relying on the dicta therein could very well conclude without doing violence to any of the language used in that case that ownership was a necessary concurring factor to use, or on the other hand, that it was not. However, with that language in the case if the Court were to hold that ownership in the case of church property was a necessary concurring factor then in effect it would have to hold that what was said in this case regarding community ditches and, thus, indirectly church property, was just a worthless gratuity. Or put stronger, that it was a misleading and incorrect expression of the construction to be placed upon this Article of the Constitution.

Dictum does not bind, but generally dictum points to the results which ultimately will be reached. As concerns the situation you present in your first question, this is all we have to rely on in this jurisdiction. Thus we conclude that as concerns "all church property", use is the exclusive test for determining whether or not it falls within the exemption. Where that is the test then it matters not who holds title to the land.

"'If the exemption depends on the use made of the property, rather than the ownership, the title to the property is immaterial, i.e., the title need not be in the user claiming the exemption. In such a case it is the use and not the ownership which determines the right to the exemption. It follows that the owner may claim the exemption although the use is by another.'"

Cooley, Taxation, 4th Edition, Section 680, cited in the Church of the Holy Faith case, at page 408.

It may be well to make some further comment on the above situation. As a general rule it is said that where someone would bring himself within an exemption to taxation, the provision creating the exemption will be strictly construed. Taxation is the rule, exemption the exception. Church of the Holy Faith case, supra.

However, this jurisdiction also recognizes that where the exemption is for the "promotion of religious, educational, charitable, or similar objects, deemed beneficial to the state, and to afford a quid pro quo, an exception (to the rule above stated) has frequently been declared." Temple Lodge No. 6, A. F. & A. M. vs. Tierney, 37 N.M. 178. The theory is that the state by granting the exemption will receive its return in benefits gained by

making it more convenient and easier for its citizens to receive the admittedly worthwhile fruits of religion, education, etc.

The danger which immediately becomes apparent in holding as we do here is that a private individual who rents or leases land to a church for a private profit could take advantage of the exemption. Some jurisdictions in such a situation allow the exemption.

However, in other jurisdictions, and this is the qualification we attach to holding here, where lands are owned by other than the church, if the owner derives income from the land, though the same is being used for church purposes, the exemption will not apply. Commissioners of Cambria Park vs. Board of County Commissioners of Weston County, et al., 174 Pac. 2d, 402, and other cases cited therein.

Your first question is therefore answered in the affirmative. The property in question is exempt from taxation.

Your second question is whether or not parsonages located on church property for the purpose of providing a place of residence for the parson, reverend, priest or other church officials would be exempt from taxation. In the Church of the Holy Faith case, at page 415, appears the following:

"Our construction would logically lead to a holding that buildings with land they occupy and furnishings therein, used for religious purposes, **or for residence of the priests or ministers,** together with adjacent land reasonably necessary for convenient use of such buildings, are exempt from taxation." (Emphasis ours)

On the strength of the above, it is the opinion of this office that the land which you ask about in your second question is exempt from taxation.

In your third question you ask whether or not property owned by the church and rented to private individuals on the same basis as any other rental property is exempt from taxation. You state that the profits are turned into the church fund and are used exclusively for church purposes. The situation you present under this question is precisely the situation treated in the Church of the Holy Faith case, supra. The answer given by our Supreme Court is that such property is not exempt from taxation. The answer to your third question is therefore answered in the negative.

Enclosed you will find Attorney General's Opinion No. 6088, concerning the same situation.

I trust that this answers your inquiries satisfactorily.

By: Santiago E. Campos

Assistant Attorney General