

Opinion No. 26-3893

May 29, 1926

BY: ROBERT C. DOW, Assistant Attorney General,

TO: Hon. Thor W. Kolle, State Tax Commission Representative, Box 101, Albuquerque, N.M.

This Office is in receipt of your letter requesting an opinion as to whether or not certain classes of property are exempt from taxation; the questions presented have been confusing to the tax officials of the state and counties for many years, and various opinions have been given upon the subject by legal advisers for such officials, some of which opinions are conflicting, and the greater portion of which, on account of such questions being so close, advise that such matters be decided in the courts; in order that this may be definitely determined, such questions should be decided in the courts and thereby settled for taxing authorities in future years. Since the failure to pass upon such matters has invoked the decision of the courts only in a small measure, I shall, therefore, attempt to pass upon each question positively and specifically in the hope that it may attain the required result. Your questions are as follows:

- "1. Is a Hospital or Sanitarium owned or operated by a religious order (such as St. Joseph's or the Presbyterian) where regular hospital fees are charged and where the State, County or Municipality donates funds for the care of charity patients subject to taxation?
- "2. Is property whose record title rests in the name of a member of the clergy of a church or in that of a Priest or any other high official of a religious order exempt from taxation?
- "3. Is property owned by a religious order from which revenue is derived such as a business building rented or leased to a layman for business purposes or a house rented to an individual exempt from taxation?
- "4. Is property owned by a Fraternal Order, such as the B. P. O. E. here in Albuquerque, which rents rooms as a hotel to members and non-members subject, in part, to taxation?
- "5. Is property owned by a Fraternal Order which is isolated from the property used for Fraternal purposes and which is rented or leased to individuals subject to taxation?
- "6. The Santa Fe Hospital Association has in Albuquerque a hospital for the care of sick or injured A. T. & S. F. Ry. Co. employees. As I understand it each employee has a certain amount deducted from his wages each payday which goes to support this hospital, and when an employee is ill or is injured he is entitled to hospital care without

additional charge. In such a case is the hospital property owned by the Santa Fe Hospital Association subject to taxation?

"7. The A. T. & S. F. Ry. Co. owns the piece of real estate on which the Y. M. C. A. stands and the Y. M. C. A. leases the real estate from the railway company. Of course, the railroad is holding the property until such time as terminal expansion necessitates additional space. Is this real estate, because of the fact that it is leased to the Y. M. C. A., exempt from taxation?"

Article 8, § 3 of the Constitution is, in part, as follows:

"* * * all church property, all property used for educational or charitable purposes * * * shall be exempt from taxation."

§ 5430, Codification of 1915, contains the following provision:

"The following property shall be exempt from taxation:

* * * the grounds, building, books, papers, and apparatus of literary, scientific, benevolent, agricultural, and religious institutions and societies, when the property of said institutions and societies shall be devoted exclusively to the appropriate objects of such institutions, and not leased or rented or otherwise used with a view to pecuniary profit."

Under an opinion rendered from this office by Honorable Carl A. Hatch, Assistant Attorney General, it was held that § 5430 of the above Statute was unconstitutional for the reason that the Constitution of New Mexico having exempted certain property from taxation that this exemption was intended to be exclusive, and that the Legislature had no power to exempt other property that that specified in the Constitution; there is authority to sustain such opinion. The question does not seem to have been passed upon specifically by the Supreme Court of New Mexico, but in the case of *Asplund v. Alarid*, Assessor of Santa Fe County, 29 N.M. 137, the court lays down the rule as follows:

"The power of taxation is inherent in the state, and may generally be exercised through its Legislature without let or hindrance, except in so far as limited by the Constitution, and the state likewise has the reciprocal power of exempting from taxation, except as limited by the Constitution. *Cooley on Taxation* (3rd Ed.) 343."

The above case does not exactly overrule the opinion of the Assistant Attorney General, such case not being in point for the reason that they did not refer to a property tax, but did refer to a per capita road tax, at any rate the rule seems to be, that unless limited by the Constitution, the State has reciprocal power of exempting other property from taxation; I might also state that the Supreme Court of New Mexico, in the case of *Berger v. University of New Mexico*, 28 N.M. 666, passed upon certain exemptions coming under § 5430 of the Code, but the question of the constitutionality of such section was

not questioned. I shall go upon the assumption, therefore, that § 5430 is not unconstitutional in view of such decisions.

Answering your first question, if such hospital or sanatorium is church property, owned by the church, then it makes no difference what use is made of the property, or who uses the property, under the Constitution it is exempt from taxation. If such hospital or sanatorium charges fees to patients and is not owned by the church, then it is neither church property nor for charitable purposes, and is, therefore, subject to taxation under the Constitution, however, if such hospital or sanatorium is a benevolent or religious institution, as contemplated under the statute, and is devoted exclusively to the appropriate objects of such institution, and not leased or rented or otherwise used with a view to pecuniary profit, then it is exempt from taxation. On the other hand, if it is not church property and charitable patients are accepted, then so much of the property as is used for charity patients is exempt from taxation, and this regardless of whether or not the state, county or municipality donates funds for the care of such charitable patients; under our Constitution property used for charitable purposes is exempt; the mere fact that a municipality may donate funds for charity patients would make no difference, because the use that the property is put to is the criterion.

In answer to your second question, even though the record title of the property rests in the name of a member of a church or in the name of a priest, or other high official of a religious order, it is subject to taxation unless it be actually the property of the church, in which case it would be exempt.

In answer to your third question, if such property is owned by the church it is exempt from taxation, and it makes no difference what use is made of the property or who uses it, but if it is not property owned by the church and such property is rented and revenue derived therefrom, then it is not exempt from taxation.

In answer to question 4, the property owned by the B. P. O. E., Fraternal Order, is exempt from taxation so long as it is actually used by such order, but any portion of such property which is rented to either members or non-members and a revenue derived therefrom is subject to taxation; such order is classed as a benevolent and charitable institution, and the fact that such funds derived from such rents or profits are used for benevolent or charitable purposes would make no difference, the property would still be subject to taxation.

In answer to your fifth question, property owned by a Fraternal Order and isolated from their property which is used for fraternal purposes, and at the same time rented or leased to individuals, is subject to taxation.

In answer to question 6, the property of a Santa Fe Hospital Association in Albuquerque belonging to the A. T. & S. F. Railway Company, and used for the care of sick or injured employees, but a certain amount being deducted from the wages of such employees on payday, such amounts going to the support of the Hospital, is not a charitable or benevolent institution, and is, therefore, subject to taxation; the weight of authority

seems to be that such institution is more on the order of a mutual relief or insurance association. This is a close question but such property should be taxed and the matter tried out and definitely settled.

In answer to question 7, the real estate owned by the A. T. & S. F. Railway Company and leased to the Y. M. C. A., upon which real estate the Y. M. C. A. have constructed a building, the same being used by the Y. M. C. A., the building itself is exempt from taxation, but the real estate owned by the Railway Company is not exempt from taxation; at first glance it would seem that the Constitution would exempt property from taxation if it is merely used for educational or charitable purposes, but under the law the use of property does not seem to be the criterion.

The general law on this subject seems to be set out in the 26 Ruling Case Law, page 323, as follows:

"Ordinarily, property occupied by an educational institution is not exempt unless it is owned by the institution. Property belonging to an individual and leased to such an institution is taxable, * * *"

In the case of Travelers' Ins. Co. v. Kent, 50 N. E. 562, wherein the question arose under a somewhat similar constitutional provision as to whether or not property owned by one person and used for educational purposes was exempt, the court said:

"The sole question for decision is whether lands owned by one person, and used by another for school purposes, are subject to taxation. It would seem that there could not be any doubt that such lands are taxable, as against the owner. If the Brookston Academy, or Prairie school township, or the school town or Brookston, were here, as owner of the lands in controversy, there would be no question that, as to such school corporations, the property would not be taxable. But the Travelers' Insurance Company is not engaged in conducting a school; and, if its property should be held to be exempt from taxation because it is suffered to be used for school purposes, then it would follow that any person who rents a hall, a store building, or a part of his house for the use of a school would thus be able to claim such hall, store building, or part of his dwelling free from taxes, -- at least, during the time he was so receiving rent for the property."

We have well known rules of construction which have been handed down by the Supreme Court of New Mexico in the following cases: State v. Board of Trustees of the Town of Las Vegas, 28 N.M. 237; Berger v. University of New Mexico, 28 N.M. 666; and Asplund v. Alarid, Assessor of Santa Fe County, 29 N.M. 129.