adequate contributions which this bill would allow a member to withdraw. The proposal is unsound. The best simple analogy would be a bill to allow a policy holder to obtain repayment of his fire insurance premiums because his house did not burn down. No pension or insurance system can operate on that basis unless the right of withdrawal were taken into account in computing the premium, which would have to be higher.

"The fact that the law does not allow withdrawal was one of the factors entering into the computation of the deficit now being made up, and this bill would destroy the validity of that computation. Besides, the records of contributions were hopelessly incomplete when the fund was salvaged in 1952, and it would probably be impossible to establish the facts for individual members."

When the individual in question was a member of the Consolidated Police and Firemen's Retirement System he had no right to a withdrawal of his contributions. His transfer to the Public Employees' Retirement System did not give him any greater rights in the System from which he transferred. You are accordingly advised that the estate of the deceased member is not entitled to a return of any contributions made by him while he was a member of the Consolidated Police and Firemen's Retirement System.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: JUNE STRELECKI
Deputy Attorney General

FEBRUARY 29, 1960

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-3

DEAR MR. KERVICK:

You have requested our opinion as to the taxability under the Corporation Business Tax Act of the Farmers' Cooperative Association of New Jersey, Inc. No. 3821-2750.

In your request for an opinion, you have stated the facts as follows: The above named corporation was incorporated in New Jersey in 1915 under an act to incorporate associations not for pecuniary profit. In 1936 the corporation by resolution of its members became subject to the 1924 Act entitled "An act to Provide for the Incorporation and Regulation of Cooperative Agricultural Associations, either with or without Capital Stock" (R.S. 4:13–1 et seq.) and it incorporated thereunder (R.S. 4:13–13). Until 1952 the corporation operated without capital stock; thereafter, it issued capital stock which is now outstanding. The Cooperative claims that it is not

legally obligated to pay taxes from 1946, the date upon which the statute by virtue of which it claims an exemption became effective, through 1952, the date of the Co-operative's issuance of capital stock. The Corporation Tax Bureau has contended that during the period in question, the corporation has regularly earned income and made a profit which it has distributed to stockholders and patrons and that it is, therefore, liable for taxes under the Corporation Business Tax Act.

The claimed exemption of the subject corporation from taxability under the New Jersey Corporation Franchise Tax Act depends on the applicablity of R.S. 54:10A–3, the pertinent portion of which reads as follows:

> "The following corporations shall be exempt from the tax imposed by this act:
>
> * * *
>
> "(d) Non-profit corporations, associations or organizations established, organized or chartered, without capital stock, under the provisions of titles 15, 16 or 17 of the Revised Statutes, or under a special charter or under any similar general or special law of this or any other state, and not conducted for pecuniary profit of any private shareholder or individual;"

The C.C.H. New Jersey State Business Tax Reporter correctly summarizes the requirements for tax exemption under this section as follows:

> "In general there are four prerequisites for exemption under this section. The organization must prove that it is:
>
> (1) A non-profit corporation;
> (2) organized without capital stock;
> (3) established under Title 15, 16 or 17 of the Revised Statutes or under a special law or special charter; and
> (4) in actual practice is not conducted for profit." (Par. 5-225.)

Preliminarily, it should be noted that, as the subject corporation apparently agrees, the second enumerated requirement of the statute makes the exemption inapplicable to the Cooperative during any period when it was organized with capital stock. As to the period prior to the issuance of capital stock, our opinion is that the failure of the subject corporation to fulfill the fourth stated requirement renders it ineligible for the tax exemption and therefore makes it unnecessary to consider any of the other requirements for an exemption.

A section of the statute under which the subject corporation is incorporated, R.S. 4:13–3 lists the permissible purposes of an Agricultural Co-Operative as follows:

> "An association may be organized to engage in any or all of the following activities for its members, and within the limitations hereinafter in this chapter set forth, for non-members:
>
> (a) The marketing or selling of agricultural products; or
> (b) the production, manufacture, harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, ginning or utilization thereof;
> (c) the manufacturing or purchasing for or hiring, selling or supplying machinery, equipment or supplies including livestock;

(d) the hiring or supplying of labor;

(e) the financing or any one or more of the above enumerated activities; or

(f) any one or more of the activities specified in this section."

The following sections of the statute are also pertinent. R.S. 4:13–32 provides:

"In the case of associations without capital stock after payment of expenses and the establishment of the funds, as authorized in section 4:13–31 of this Title, and as soon after the end of the fiscal year as possible, the whole balance remaining shall be divided among those patrons, members and nonmembers, for whom the association has marketed, provided marketing facilities, processed or financed agricultural products, or for whom the association has manufactured, hired, sold or supplied machinery, equipment and supplies including livestock, during the fiscal year in the proportion that the volume of business done for such patrons by the association during the fiscal year bears to the total volume of business transacted by the association during the fiscal year; . . ."

R.S. 4:13–11 provides:

"After liquidation of the assets of the association, payment of its debts and of the reasonable expenses of dissolution, the balance remaining, if any, shall be distributed and paid in the following order:

* * *

(b) . . . or if the association has no capital stock, first, among the persons entitled to participate in the patrons' revolving capital fund, whether evidenced by certificates of equity or otherwise, to the extent of the amounts due to them, according to their respective earned patronage margins retained therein, without relationship to the times at which such margins accrued, with such interest, if any, as may be due thereon; and

(c) Then, among the members of the association in proportion to the amount of business done by them with the association during the five years of active operation next preceding the date of dissolution, or such other period of time as may be specified in the by-laws, the entire balance, if any, then remaining undistributed."

In other words, the statute contemplates that a cooperative organized thereunder will derive a net return from its activities and that this excess of receipts over expenditures will be distributed among members or patrons in part from year to year, and the balance upon dissolution.

Although there are no judicial decisions construing the phrase "not conducted for pecuniary profit of any private shareholder or individual" in R.S. 54:10A–3, there have been numerous decisions construing other statutes similarly limiting tax exemptions to corporations not conducted for profit.

For example in *Fairmount Hospital, Inc.* v. *State Board of Tax Appeals,* 122 N.J.L. 8 (Sup. Ct. 1939) aff'd. o.b. 123 N.J.L. 201 (E. & A. 1939) the taxpayer sought an exemption under R.S 54:4–3.6 which exempts from taxation "all buildings actually and exclusively used in the work of associations and corporations organized

exclusively for . . . hospital purposes . . . *provided . . . the associations, corporations or institutions using and occupying them as aforesaid are not conducted for profit. . . .*" (Emphasis added.) The hospital in question had originally been organized by a group of doctors as an ordinary stock corporation; they thereafter conveyed the hospital to a corporation organized under the act for the incorporation of corporations not for pecuniary profit, retaining, however, a mortgage on the assets of the corporation in an amount equal to their prior stockholdings. The doctors thus expected to receive interest on their mortgage certificates and presumably the return of their capital. The Court held that the hospital corporation, although organized under the Act for the incorporation of corporations not for pecuniary profit, was "conducted for a profit" within the meaning of the tax exemption statute and was therefore not entitled to the exemption claimed.

In *Consumers Research Inc.*, v. *Evans*, 128 N.J.L. 95 (Sup. Ct. 1942) aff'd. o.b. 132, N.J.L. 431 (E. & A. 1945), the Court considered the claim of a consumers' research organization for exemption from the Unemployment Compensation Act as "a corporation . . . organized and operated exclusively for . . . scientific . . . purposes . . ., *no part of the earnings of which inures to the benefit of any private shareholder or individual.*" R.S. 43:21–19 (i-7). (Emphasis added.) The corporate structure did not provide for any distribution of profits to any individuals, whether by dividends or otherwise during the operation of the business. During the course of its existence, the corporation had accumulated substantial assets, but all of these were, or would be, devoted to the acquisition, enlargement and maintenance of its facilities. The court pointed out, however, that in the event of dissolution, the net assets of the corporation would be transferred to the five stockholders of the corporation. For this reason, the court held that it was not a corporation, "no part of the earnings of which inures to the benefit of any private shareholder or individual."

Numerous cases have dealt with the question of whether particular "colleges, schools, academies or seminaries" were "not conducted for profit" within the meaning of the exemption from the real property tax. R.S. 54:4–3.6. *Compare Institute of Holy Angels* v. *Bender*, 79 N.J.L. 34 (Sup. Ct. 1909) *with Carteret Academy* v. *Orange*, 98 N.J.L. 868 (E. & A. 1923). Our present Supreme Court has stated that the only test for determining the eligibility of a school for exemption under 54:4–3.6 is whether the school "is conducted for the purpose of making a profit." In reaching its determination, the court will consider among other factors, the background and nature of operation of the school, the amount of its income as compared with its cost of operation, the amount and purpose of its accumulated surplus, and the amount of its tuition charges. *Kimberly School* v. *Town of Montclair*, 2 N.J. 28 (1948).

Finally, in applying the rules of the cited cases, and numerous similar tax exemption cases, to the facts upon which you have requested our opinion, it must be remembered that it is an "accepted rule that since tax exemption statutes afford special privileges they are to be construed most strongly against the claimant." *Jersey City* v. *Ligget & Myers Tobacco Co.*, 14 N.J. 112, 116 (1953).

The principles of the cited cases and other similar cases, may be summarized as follows: In determining whether or not a particular corporation is conducted for a profit, the actual operation of the corporation, and not its certificate of incorporation or by-laws, must receive primary consideration. Whether or not the taxpayer operates at a profit in a given year is irrelevant if, in fact, it "is conducted for the purpose of making a profit." Conversely, even if the operations of the corporation consistently produce a net excess of income over operating expenses, but all such

surplus is reinvested in the corporate activities without actual or potential distribution for the benefit of any private shareholder or individual, the corporation is not conducted for pecuniary profit within the meaning of the law. But if there is a distribution of profit, the particular form of distribution is irrelevant; whether the profits of operation are distributed as interest on mortgage bonds or other fixed debt, by salaries so large that they necessarily constitute distribution of profits, or by any other means, or even if profits are undistributed, but accumulated with the potentiality of distribution to shareholders or other persons interested in the corporation upon its dissolution, the taxpayer must be considered as conducted for a profit.

Applying these principles to the facts which you have presented to us, our opinion is that the Farmers' Cooperative Association of New Jersey, Inc. No. 3821-2750 is subject to the New Jersey Corporation Business Tax Act for the years 1946 to 1952 because it contemplates making, and has made, a net return or profit, part of which is distributed annually to patrons and members, and the remainder of which will be distributed to members upon dissolution.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General

MARCH 17, 1961

HON. GEORGE C. SKILLMAN, *Director*
Division of Local Government
Department of Treasury
137 East State Street
Trenton, New Jersey

MEMORANDUM OPINION—P-4

DEAR DIRECTOR:

You have asked whether a county board of chosen freeholders may contribute to a first aid, volunteer ambulance or rescue squad rendering service in less than all of the municipalities in the county. R.S. 40:5–2 provides that:

> "Any county or municipality may make a voluntary contribution of not more than three thousand dollars ($3,000.00) annually to any duly incorporated first-aid and emergency or volunteer ambulance or rescue squad association of the county, or of *any* municipality therein, rendering service generally throughout the county, or any of the municipalities thereof."

It has been suggested that a county board of chosen freeholders is prohibited from making contributions to a particular squad unless it is organized and operates on a county-wide basis. The argument is that the placement of the disjunctive term "or" conveys a direction that counties may only contribute to county squads and municipalities are limited to supporting municipal squads operating within the particular borders of the municipality.