

Opinion No. 55-6143

April 19, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Richard F. Rowley, District Attorney, Ninth Judicial District, Clovis, New Mexico

You have presented to this office two taxation problems for interpretation. The first question is as follows:

"1. An individual executes a contract with a municipality whereby he agrees to sell and the municipality agrees to buy a certain described piece of real estate. Payments are to be made each month. A warranty deed is executed and placed in escrow in the hands of an escrow agent. The contract provides that in the event of default that the payments are to be considered as rent. How should this property be taxed? Must it be taxed in the name of the contract seller, or may it be placed in the name of the municipality and thus be exempt, or should only the municipality's equity therein, according to the terms of the contract, be exempt?"

The exemption which the municipality could claim in the event it is the owner of the property is contained in Art. VIII, Section 3 of the Constitution of the State of New Mexico, which reads as follows:

"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."

As can be seen, there is nothing in this verbiage which would indicate whether the title to the property held by those entities entitled to the exemption must be legal title in fee or not.

It is believed of importance in determining this question to note that the Supreme Court stated in the case of **Church of The Holy Faith v. State Tax Commission, et al**, 39 N.M. 403, that in the constitutional provision exempting property of the United States, State and all counties, cities and school districts and other municipal corporations from taxation, **ownership** is the test of whether property is exempt; further, that with reference to the exemption to property used for educational or charitable purposes and all cemeteries not used or held for private or corporate profit, **use** is the test. It is, therefore, necessary to determine what kind of ownership the constitution makers had in mind in solving your perplexing problem.

It must be stated that there are no New Mexico cases directly in point on this problem. Just how our Court will rule upon this and other problems surrounding real estate or land contracts is therefore a matter of conjecture at this time.

There are numerous authorities from other states and there are three ALR annotations which this office feels controlling on this problem. In **95 ALR** at page 1081 the case of **Ritchie v. City of Green Bay** is reported, which case holds that the vendee in possession under a land contract is the owner of the property within the meaning of the exemption statute.

There is plenty of authority contrary to the above cited proposition; however, this office feels that the following statement from **156 ALR** at page 1302 expresses the preferable rule of law:

"As indicated later, the authorities are not entirely in accord as to whether or not one having an equitable title under an executory land contract is an owner within the meaning of a tax exemption statute which makes 'ownership' of the property the test. It is submitted that the rule (infra, II b) recognizing equitable ownership as sufficient for this purpose constitutes the preferable rule of law, despite the principle of strict construction of tax exemption against an allowance of an exemption, at least where the vendee is given possession under the contract, because the reasons for allowing the exemption obtain in such a case with equal force as in the case of legal ownership. On the other hand, where the vendee is not given possession of the land, a particularly strong showing should be required that, under the circumstances, the vendee still is in a position comparable to that of a legal owner, before the property should be declared tax exempt."

In arriving at this conclusion, it is particularly significant in the opinion of the writer that were we to state otherwise the municipality would be paying taxes to the state which, in effect, means that the state is taxing itself, which is contrary to the basic intent of the exemption contained in the Constitution. Furthermore, by analogy, if the situation were reversed and the city had sold the property on an executory contract to an individual not entitled to the exemption, it would not be fair to give that individual the benefit of the exemption since that violates the intent to grant the exemption to the agency of the state and not to an individual. In short, the beneficial ownership of the land would have passed from the tax exempt body and the public would be hurt by allowing the exemption to continue in the non-exempt purchaser.

The other ALR annotation of importance is found in **166 ALR**, page 588. This annotation points up the fact that the older cases follow the strict interpretation rule and require legal title as opposed to equitable title to vest before the exemption applies. However, the later cases seem to be taking the opposite view.

The second question you have asked is as follows:

"2. A contract similar in nature is executed between the seller and an ex-soldier who is entitled to soldier's exemption. How is this property to be taxed, assuming that the seller is not entitled to an exemption?"

In addition to considering Art. VIII, Section 5 of the Constitution of this State, we have examined the veterans' exemption statute contained in our statutes. It must be admitted that there is certain language contained therein, particularly in § 72-1-16, NMSA, 1953, which causes one to hesitate; however, to remain consistent we must state that the answer to your first inquiry applies with equal force to the second.

Therefore, a veteran, who has purchased property on an executory contract with legal title remaining in escrow pending the final payment under the purchase contract, is the beneficial owner of the property and is the owner for purposes of taxation in the opinion of this office.

In writing this opinion, it is assumed that individuals claiming exemption will be required to present the necessary documents (real estate or land contracts) to the county assessor to receive the benefit of same.

By J. A. Smith

Assistant Attorney General