Opinion No. 62-53

March 30, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Marvin Baggett, Jr., Assistant Attorney General

TO: Mr. Abner Schreiber, Assistant District Attorney, P. O. Box 800, Los Alamos, New Mexico

QUESTION

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1. What is the property tax liability of individuals who executed certain purchase contracts with the AEC for lots within the project prior to January 1, 1962, but who had not, as of that date, sufficiently complied with the contract so as to be entitled to receive title from the AEC?

2. Is the liability for taxes affected by the fact that in some instances full payment was made for the lots prior to January 1, 1962, although title was not received?

CONCLUSIONS

1. None.

2. No.

OPINION

ANALYSIS

The answers to the questions posed in your letter involve construction of statutes, our Constitution, and the contracts in question between the parties. A copy of such contract between the AEC and the purchasers was forwarded by you along with several questions relating to the interpretation of our property tax laws. We have, in the interest of convenience, and because of our conclusions, taken the liberty of reducing your questions to two.

We must start with the premise that property of the Federal government and its agencies is exempt from property taxation in New Mexico. (Article VIII, Sec. 3, Constitution of New Mexico). Section 73-2-3, N.M.S.A., 1953 Comp., provides that:

"Every person, firm, association, or corporation shall, in each year, make a declaration of all property **subject to taxation** of which he is the owner . . . (Emphasis supplied).

Section 72-2-1, N.M.S.A., 1953 Comp., requires that "all property, real, personal and intangible, not otherwise assessed and valued for purposes of taxation, shall be declared, listed, assessed and taxed in the county where it is situated on the first day of January of each year . . ."

The sole question presented is who was the owner of the property concerned as of January 1, 1962. According to the terms and provisions of the contract with which we are here involved, the purchaser:

(1) made a down payment;

(2) was obligated to pay the balance of the purchase price within three months (Article III, Sec. 2 of the contract);

(3) had no right to enter upon the property until the total price was paid, except for purposes of surveying and planning (Article VII);

(4) might make a start of construction, after complying with certain other provisions (Article IV, Sec. 2) and after payment in full for the lot (Article IV, Sec. 2);

(5) would be entitled to receive a quit-claim deed from the AEC after payment in full and after start of construction (Article IV, Section 3).

There is nothing in the contract relating to taxation. In Attorney General's Opinion No. 6143, dated April 19, 1955, we observed:

"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 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.'"

We held in that opinion that a conditional vendee in possession was to be considered the owner for purposes of our taxation statutes and for purposes of determining whether or not the property was exempt in taxation.

That conclusion in general agrees with the general rule in the United States regarding liability for taxes as between vendor and vendee. In **12 ALR,** 412, the rule is stated thusly:

"As between the parties to a contract for the sale of land in the Uinted States, in the absence of a specific statute or an express or implied agreement, the party who is in possession or entitled to possession at the time of accrual, is ordinarily bound to pay taxes accruing on the land after the making of the contract and before a conveyance, unless there has been a delay in making the conveyance caused by the fault of the other party."

However, here we do not have the problem of a vendee in possession. Were such the case, our conclusions might well be entirely different because there is much authority to the effect that the conditional vendee in possession is the "owner" for purposes of taxation. Nor do we have the situation where the contract between the parties provides for payment of taxes.

Did the vendee, in the circumstances present here, have such an equitable interest in the property as of January 1, 1962, so as to subject such interest to taxation? As to those persons who had not made the final payment on the purchase price, we believe it is clear that they did not have such a taxable interest. Under the executory contract,

they had no rights in the property nor did they even have the right of entry upon the land except for surveying or planning.

In the absence of any contractual obligations regarding assessments for taxes, in view of the fact that legal title was vested in the United States on tax day, and because the would-be purchaser had no substantial rights or interests, we must conclude that the particular property is exempt for the taxable year 1962 as belonging to the Federal government.

The situation regarding those owners who had paid the purchase price but who had not made the start required by contract so as to entitle them to receive a quit-claim deed is somewhat less clear, in our opinion. However, we conclude that these parcels, too, were not taxable as of January 1, 1962.

Article X, Sec. 2 of the contract provides that the purchaser by "any act or thing whatsoever" done by him or his agent shall not encumber in any manner the property or the government's title thereto. It further provides that this provision shall be of no force or effect upon delivery of the quit-claim deed.

The assessment of property in New Mexico results in a lien for the taxes due as of the assessment date, January 1, (Sec. 72-5-12, N.M.S.A., 1953 Comp.), and should the purchaser have declared the property, he would have violated the express provisions of the purchase contract. It appears that the intent of the parties was that the full title to the property would remain in the government until the quit-claim deed was delivered.

Under these circumstances, even though the purchaser had paid the full purchase price prior to January 1, by the terms of the contract itself, he had no rights sufficient to legally enable him to create a charge or lien on the property. We feel then, that these particular parcels also could not be taxed for 1962.

Finally, to allow the assessment of property, the legal title of which is vested in the United States, even where the conditional vendee has equitable interests which would ordinarily be taxable, poses problems regarding the collection of taxes. Should the AEC elect to terminate the contract (and under the contract it has ample power to do so and is even the sole judge of some provisions), concerned and should the property have been assessed prior to such termination, there would be a hopeless conflict between the exemption of the Federal government for taxation and our statutes which state that an assessment once made becomes a lien on the property.

Considering the situation in its entirety, we conclude that unless and until the quit-claim deed is delivered to the purchaser, or at least until he is entitled to such delivery. The property here concerned need not be assessed and should not be placed on the tax rolls.

We wish to reaffirm our earlier statement that this opinion is necessarily largely based upon the terms and provisions of the sales contract sent us.