

Opinion No. 70-24

March 3, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Dr. Thomas C. Donnelly President New Mexico Highlands University Las Vegas,
New Mexico 87701

QUESTIONS

FACTS

New Mexico Highlands University has developed a plan whereby parcels of University-owned land are leased to faculty members, who in turn agree to build private homes for their personal use on the land. These long-term leases are for periods in excess of twenty-five years, but such arrangements are authorized by Section 6-1-8.1 (B), N.M.S.A., 1953 Compilation.

The owner of the home pays ad valorem taxes on the assessed value of the house, as provided by Section 72-1-2, N.M.S.A., 1953 Compilation:

"Improvements and other personal property on state lands under lease or sales contract. -- Improvements and all other personal property located or placed upon lands leased or held under purchase contract from the state or upon the public domain for grazing, agricultural or mining purposes shall be subject to taxation. In case of default of the payment on such improvements, and the sale thereof for such unpaid taxes, only the interest of the lessee shall be sold."

Heretofore he has not paid ad valorem taxes on the assessed value of the leased land.

QUESTIONS

Is the lessee of University-owned land liable for ad valorem taxes based on the assessed value of the land itself, as distinct from the value of the improvements erected upon the land?

CONCLUSION

No.

OPINION

{*40} **ANALYSIS**

As a matter of well-settled law, the landlord and not the tenant is liable for ad valorem taxes assessed against the leased property, unless the lease agreement specifically provides to the contrary. **Coy v. Raabe**, 69 Wash. 2d 346, 418 P.2d 728 (1966); **Lawrence v. F.W. Woolworth Co.**, 45 Cal. Rptr. 140, 403 P.2d 396 (1965); **Eckert v. Miller**, 57 Ariz. 94, 111 P.2d 60 (1941). Thus, in the normal landlord-and-tenant situation, the party from whom the taxing authorities should seek satisfaction is the lessor and not the lessee.

The lease agreement under consideration, however, specifically declares that this traditional relationship will not exist between the lessor University and the faculty tenant. The relevant portion of the document provides:

TAXES

"The Lessee shall pay all general property taxes which may be lawfully levied and assessed against either the demised land or the improvements erected thereof (sic), or both, during the term of this lease."

Thus, the lessee is required by the terms of the lease to pay any taxes lawfully levied and assessed against the land itself; it remains to be determined whether the land is lawfully subject to taxation.

Article VIII, Section 3, Constitution of New Mexico, declares that certain classes of property are exempt from taxation. The terms of the constitutional exemption should be carefully studied, for they provide exemption on three fundamentally distinct grounds.

"The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporation, 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.

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 outright 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 amended November 1, 1914 and November 5, 1946.)

It is to be observed that the constitutional exemption may arise as a matter of sovereign immunity, based on the ownership of the property; as a matter of policy based on the

use of the property; or, as in the case of government bonds, as a matter of intra-governmental comity.

Article XII, Section 11, Constitution of New Mexico, includes New Mexico Highlands University among those schools "hereby confirmed as state educational institutions." Land owned by the University in fee is thus state land. The Supreme Court of New Mexico has examined the exemption of state land from taxation, and has declared that when exemption is claimed for state property, the **ownership** of the property, and not its use of beneficial enjoyment, is the **sole** test of exemption. In **Church of the Holy Faith v. State Tax Commission**, 39 N.M. 403, 48 P.2d 777 (1935), the Court emphasized the difference between the exemption based on ownership and that based on use:

"The constitutional provision {41} before us reads: 'The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporations . . . shall be exempt from taxation.' Article 8, § 3.

"Here ownership seems plainly the sole test. Elsewhere in the section 'all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit . . . shall be exempt from taxation.' Here use seems to be the sole test . . .

"There would seem to be a logic in making ownership the test as to exemptions of property of the United States, the state, and all counties, towns, cities, and school districts and other municipal corporations. As to the United States, the statement is little more than a declaration of inability of one sovereign to tax another related sovereign. For the state to tax its own property would simply be taking money out of one pocket and putting it into another."

The continued vitality of the analysis employed by the Court may be verified in **Colwell v. City of Great Falls**, 117 Mont. 126, 157 P.2d 1013 (1945); and in **Eisley v. Mohan**, 31 Cal. 2d 637, 192 P.2d 5 (1948). Moreover, in **Kirtland Heights, Inc. v. Board of Commissioners**, 64 N.M. 179, 326 P.2d 672 (1958), the New Mexico Supreme Court permitted taxation of residential property leased from the United States only after first finding that the federal government had waived the tax-exempt status of the land. It is thus clear that while the lessee faculty member is required to pay taxes on the value of improvements erected on the lot by the terms of Section 72-1-2, N.M.S.A., 1953 Compilation, the land on which the improvements are erected is constitutionally exempt from ad valorem taxation.

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