

Opinion No. 74-12

April 1, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. William C. Simms, Director Department of Development 113 Washington Avenue Santa Fe, New Mexico 87501

QUESTIONS

QUESTIONS

1. Does the federal district court decision, **Norvell v. Sangre de Cristo Development Company, Inc.**, subject industrial revenue bond project leases to ad valorem taxation?
2. Are a private lessee's possessory rights in an Industrial Revenue Bond Act project otherwise subject to ad valorem taxation?
3. If the answer to either question is in the affirmative, what standard applies to determine the value of the rights for ad valorem taxation?

CONCLUSIONS

1. No.
2. Yes.
3. See analysis.

OPINION

{*21} ANALYSIS

Norvell v. Sangre de Cristo Development, Inc., F. Supp. (D.C. N.M. 1974), held "that the state's ad valorem tax provision is broad enough to encompass a lessee's interest in otherwise tax-exempt property." The decision dealt exclusively with ad valorem taxation of a leasehold interest in Indian property. The decision did not apply to, consider or contemplate ad valorem taxation of a private lessee's interest in an industrial revenue bond project. The decision does not and could not authorize ad valorem taxation of industrial revenue bond project leases.

Section 72-25-4, NMSA, 1953 Comp. provides as follows:

"Unless otherwise imposed by law, there is imposed a property tax upon all tangible property in the state except that exempted by the Constitution or by existing law."

An Industrial Revenue Bond Act project lease under Section 14-31-3(B) is "tangible {*22} property in the state." See **Ampco Corporation v. City of New York**, 247 N.Y.S.2d 865, 197 N.E.2d 285; **Transcontinental Oil Company v. Emerson**, 298 Ill. 394, 131, N.E. 645, 16 A.L.R. 507; **Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property**, 3 N.M. Law Review, 136, 156; see also **Kirtland Heights V. Board of County Commissioners**, 64 N.M. 179, 326 P.2d 672. Such leasehold interests are not constitutionally exempted from property tax. Article VIII, Section 3, Constitution of New Mexico; see also **Kirtland Heights v. Board of County Commissioners, supra**. Section 14-31-11 of the Industrial Revenue Bond Act, an existing law, reads as follows:

"The bonds authorized by sections 14-31-1 through 14-31-13, New Mexico Statutes Annotated, 1953 Compilation, and the income from said bonds, all mortgages or other security instrument executed as security for said bonds, **all lease agreements made pursuant to the provisions hereof**, and revenue derived from any lease or sale by the municipality thereof shall be exempt from all taxation by the state of New Mexico, or any subdivision thereof."

However, the Supreme Court indicated that this language includes only a municipality's leasehold interest in **Village of Deming v. Hosdreg Company**, 62, N.M. 18, 303 P.2d 920: "there is nothing in the act exempting the (lessee) from ad valorem taxes on its leasehold interest." See also **Kennecott Copper Corp. v. Town of Hurley**, 84 N.M. 743, 507 P.2d 1074. This interpretation is consistent with other decisions limiting legislative power to exempt property from ad valorem taxation, and those limitations would also prohibit a legislative exemption of the private lessee's interest. **Dillard v. New Mexico State Tax Comm.**, 53 N.M. 12, 201 P.2d 345. Consequently, a private party's leasehold interest in an Industrial Revenue Bond Act project is subject to ad valorem taxation under Section 72-25-4. **Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property, supra**.

Such leasehold interests will also be subject to property tax under Section 72-29-3-(A) and 72-29-4(A)(2), effective January 1, 1975, because each such leasehold interest is "an interest in real property." See **Strong v. Clarke**, 56 Wash.2d 230, 352 P.2d; **Lincoln National Bank and Trust Company v. Nathan**, 215 Ind. 178, 19 N.E.2d 243; **Brenner v. Spiegle**, 116 Ohio St. 631, 157 N.E. 491.

The present standard for valuation of a private party's leasehold interest in an Industrial Revenue Bond Act project is contained in Article VIII, Section 1, Constitution of New Mexico, Section 72-2-2, Section 72-2-3, and Section 72-6-12.1. The guiding standards in those provisions are "value" and "full actual value." In **Hardin v. State Tax Commission**, 78 N.M. 477, 432 P.2d 833, the Supreme Court held as follows:

"Section 1, article VIII of the State Constitution, requires taxes levied upon tangible property to be in proportion to the value thereof. See, also, Section 72-6-12.1, NMSA, 1953. The term 'value' has been variously defined. (citing cases) Generally the

'reasonable cash market value' reflected by sales of comparable property is to be used if there have been such sales. (citing cases)."

See also Section 72-2-16, NMSA, 1953 Comp. (Repl. Vol. 10, Pt. 2). The "lessee's right to use and possess" the bond act project "for the remainder of the lease term" is the proper item to be assessed. **Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property, supra.** The current answer to your third question, then, is that a leasehold interest in an Industrial Revenue Bond Act project must be assessed at the current reasonable cash market value of the lessee's right to use and possess project for the remainder of the lease term.

Sections 72-2-2 and 72-2-3 will be repealed {*23} effective January 1, 1975, and Section 72-29-5(B) will then be the statutory standard to be used in assessment of leasehold interests in projects. Laws 1973, Chapter 258. Under that section a market value method is required to be used for assessment, but if no market value can reasonably be ascertained using the market value method, a method of general use authorized by the Property Appraisal Department must be used. The assessment standard discussed above should also be used by the Property Appraisal Department when Section 72-29-5(B) standard for determining market value of such leasehold interests and also a method of valuation in general use for determining values of leasehold interests. **Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property, supra.**

By: F. Scott MacGillivray

Assistant Attorney General