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C-6876

TERRITORY OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

September 4, 1953

OPINION NO. 1860

TAXATION, REAL PROPERTY; LEASES MADE BY THE
UNITED STATES:

The lessee of United States land, erecting military housing, thereon pursuant to a lease made under 12 U.S.C. 1748d, incorporating by reference 5 U.S.C. 626s-6, 10 U.S.C. 127Cd, and 34 U.S.C. 522e, is subject to real property taxes on the value of the lessee's interest.

Honorable Earl W. Fase
Tax Commissioner
Territory of Hawaii
Honolulu, Hawaii

Dear Sir:

Reference is made to your request for an opinion as to the incidence of real property taxes of the Territory in respect of the Radford Terrace project. This occasioned review by this office of our letter of March 3, 1951 concerning the Barber's Point project. Our study has included section 6 of the Act of Congress of August 5, 1947 (5 U.S.C. 626s-6, 10 U.S.C. 1270d, 34 U.S.C. 522e), which was not noted or discussed in the 1951 letter. Had said Act been considered, a different conclusion would have been reached at that time. Therefore, we are issuing this opinion to supersede our March 3, 1951 letter. It is necessary that we correct the advice previously given you even though the sponsors of the Radford Terrace project have withdrawn the request to you which occasioned our restudy of this matter. In this

opinion the Radford Terrace project will be used as an example; a number of projects are involved.

In our restudy of this matter we have carefully considered the arguments presented at the conference held August 25, 1953 with attorneys for interested parties, at which time we outlined the points we were considering.

The Radford Terrace project is to be constructed under Title VIII of the National Housing Act (12 U.S.C. 1748 at seq.), which relates to military housing insurance and provides inter alia:

A mortgage which meets the requirements of this title may be insured by the Federal Housing Commissioner. Pursuant to 12 U.S.C. 1748f, nothing in Title VIII "shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

The term "state" includes Alaska, Hawaii, Puerto Rico, the District of Columbia, Guam and the Virgin Islands, as well as the several states.

Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable, real property may be leased, without the lease being subject to revocation in the event of a national emergency, for housing accommodations which are to be available to military and civilian personnel

at military installations. 12 U.S.C. 1748d provides that such lease may be made under the authority of cited sections of Titles 5, 10, and 34. Included in the sections so cited are 5 U.S.C. 626s-6, 10 U.S.C. 1270d, and 34 U.S.C. 522e. Each of those sections provides as follows (quoted from Title 34, which relates to the Navy):

“§522e. Same; State or local taxation; renegotiation of leases

The lessee's interest, made or created pursuant to the provisions of sections 522a-522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress in such event the terms of such lease shall be renegotiated. Aug. 5, 1947, c. 493, §6, 61 Stat. 775.”

As above noted, these sections (5 U.S.C. 626s-6, 10 U. S. C. 1270d, 34 U.S.C. 522e) are derived from the Act of August 5, 1947, c. 493, §6, 61 Stat. 775. This statute was cited and applied by the Court of Appeals of Maryland in Meade Heights vs. State Tax Commission, 95 Atl. 2d 280, March 13, 1953, where it is pointed out that by this statute Congress provides for taxation of the lessee's interest, and further provides for renegotiation of the lease should Congress at later date consent to taxation of the government's interest.

The Radford Terrace project is to be erected on land owned by the United States, which was aquired by condemnation

and is not ceded land. The lease covers a term of seventy-five years, subject to revocation upon sixty days' notice after fifty and one-quarter years, and subject also to certain provisions safeguarding the mortgage. Ninety per cent of the cost is to be provided by an insured mortgage. As presently drawn, the mortgage is to be amortized over a period of thirty-two years and seven months. The rental units are to be leased to military and civilian personnel assigned to duty in the area, but under certain circumstances may be leased to other persons. The rent schedule is to be set by mutual agreement between the lessee and the Navy. The rent schedule also must meet the Federal Housing Commissioner's requirements, at least during the term of the insured mortgage. As of the date involved, the Federal Housing Commissioner required that the rent schedule be based on a net return not exceeding six and one-half per cent of replacement cost, replacement cost being as determined by the lessee or the Federal Housing Commissioner, whichever is lower. While other terms and provisions governing the project may be relevant to the valuation of the lessee's interest, they need not be reviewed at this time, save for the following provision of the lease:

"8. That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments or similar charges are imposed with the consent of the

Congress of the United States upon the interest of the Government in the leased premises (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated ..."

Section 5154, Revised Laws of Hawaii 1945, paragraph 1, provides as follows:

"Sec. 5154. Public property, etc. The following real property shall be exempt from taxation:

1. Real property belonging to the United States, to the territory, or to any county; provided, that real property belonging to the United States shall be taxed if and when the Congress of the United States shall so permit, to the extent so permitted and in accordance with any conditions or provisions prescribed in such act of Congress; ..."

The above quoted proviso was first enacted by Act 165 of the Session Laws of 1943. It was reenacted upon the enactment of the Revised Laws of Hawaii 1945. It again was reenacted by Act 151 of the Session Laws of 1951. This provision of section 5154 constitutes an express direction to the assessor to tax real property belonging to the United States "to the extent" permitted by Congress and "in accordance with any conditions or provisions prescribed in such Act of Congress". "Real property", as defined by section 5101, includes land and appurtenances thereof and buildings. The above quoted section 6 of the Act of August 5, 1947, is an act of Congress which permits the taxation of land and appurtenances thereof and buildings owned by the United States, to the extent of the lessee's interest therein. It is just such an act of Congress as was referred to in section 5154.

Section 5154 also deals with the treatment of territorial and county land and this is a precedent illustrative of the possibilities as to federal land. See Petition of S.R.A. Incorporated, 7 N.W. 2d 484, 489, 18 N.W. 2d 442, aff'd 327 U.S. 558. If Congress had consented that federal lessees be taxed on the entire value in the same manner as territorial and county lessees the intention of the legislature that federal lessees be so treated would have been clear, and by reason of the inclusion in paragraph 1 of the words "to the extent", "in accordance with any conditions or provisions prescribed in such Act of Congress", the intention is no less clear because the congressional policy in favor of local taxation has not yet been extended to the full value. The carrying out of the respective purposes of Congress and the legislature does not turn upon nice distinctions as to the classification of a lessee's interest under general rules of law. See R.F.C. v. Beaver County, 328 U.S. 204; State v. Central Pacific R.R., 21 Nev. 247, 30 Pac. 686, aff'd 162 U.S. 512, Mid-Northern Co. v. Montana, 268 U.S. 45

The expressed intention of the legislature is to exert its full taxing power within the bounds set by Congress and this intent is to be given effect. See Pan American Airways v. Godbold, 36 Haw. 170, 178; Boeing Aircraft Co. v. Reconstruction Finance Corp., 171 P. 2d 838, Wash. 1946, appeal dismissed 330 U.S. 803 (relating to taxation of United States property). Assuming that the legislature could have decided to tax a leasehold interest in U.S.

lands without the consent of Congress, it did not choose to do so unless and until Congress should express a policy favorable to such taxation. This incorporation by reference of the federal law is valid. In view of the reenactment of paragraph 1 of section 5154 in 1951, it is not necessary to consider whether the proviso would have been valid had the act of Congress been enacted after the territorial law without reenactment of the latter. See Alaska Steamship Co. v. Mullaney, 180 F. 2d 805, 815, C.A. 9th 1950, and cases cited; 63 A.L.R. 1096, 147 A.L.R. 467, and cases cited, together with numerous recent cases to the same effect as these notes (under the line of authority set forth in these notes, the federal law imposing an estate tax determines the scope of the state tax passed to take advantage of the federal law's credit provisions).

Section 5141, Revised Laws of Hawaii 1945, as amended by Act 151 of the Session laws of 1951, provides that:

"... persons holding government property under an agreement for the conveyance of the same to such persons shall be, considered as owners as to any real property held or controlled by them as such. Lessees and other tenants holding under any government lease or other tenancy shall be considered as owners during the time any real property is held or controlled by them as such, as more fully provided in section 5154."

Section 5154 provides that lessees of the Territory and the counties shall pay taxes on the fee simple value of the property

held by them. As to property held by lessees of the United States, the only provision is the above quoted paragraph 1, which when read with the incorporated federal law, has the effect of restricting taxation to the value of the lessee's interest, and of authorizing it to that extent. (Cf. Philadelphia etc. R. R. Co. v. Appeal Tax Court 50 Md. 397). As in the case of leases of territorial and county property, the lessee is to be deemed the owner for the purpose of the assessment and is personally liable for the tax.

In summary, real property, including lands and appurtenances thereof and buildings, in general is to be taxed "in its entirety" to the owner, in the case of leases of territorial and county property is to be taxed in its entirety to the lessee, and in the case of leases of United States property under Title VIII is to be taxed, to the extent of the lessee's interest, to the lessee. The system is similar to that in California, save that territorial and county lessees are taxed more heavily than federal lessees. See for an explanation of the California system, San Pedro L. A. and S. L. R. Co. v. City of Los Angeles, 180 Cal. 18, 179 Pac. 393; Kaiser Co. v. Reid, 30 Cal. 2d 610, 184 P. 2d 879; Tilden v. Orange County, 201 P. 2d 86, D.C.A.

No discrimination against lessees of the United States results from the assessment of the lessee's interest under the

foregoing circumstances, since lessees of territory and county property are required to pay even more, that is, they are taxed on the fee simple value.

Accordingly, you are now advised to assess for taxation as of January 1, 1954, the lessee's interest in the Radford Terrace project. The assessment should be made against Radford Terrace, Ltd., and should be stated to be subject to the rights of the United States, as in the S.R.A. case, supra. The land and buildings should be assessed (i.e. valued) with due consideration of all the circumstances, and then, in determining the actual tax base, there should be deducted from the total of the land and buildings such amount as will exempt the right, title and interest of the United States and leave only the value of the lessee's interest. The letter of March 3, 1951 should not be relied upon as an index to the value of the lessee's interest, as the facts stated therein are not sufficiently complete.

As to the other Title VIII projects, located at Barber's Point, Moanalua and the Peninsula, similar principles apply. Of course you are not obliged to go back over the tax years 1952 and 1953, but you should consider this opinion applicable to said projects as January 1, 1954.

Respectfully,



EDWARD N. SYLVA
Attorney General