

99-088

**TAXATION: REAL PROPERTY TAX – TAXABLE REAL ESTATE.**

**Commissioner of revenue is officer responsible for making factual determination whether facility use agreement between private business and federal government and attendant fee indicate lessor/lessee relationship that would subject lessee to imposition of real property tax.**

The Honorable Nancy W. Miller  
Commissioner of the Revenue for Montgomery County  
June 9, 2000

You inquire regarding the tax exempt status of certain property in your county. Specifically, you ask whether § 58.1-3203 of the *Code of Virginia* permits the assessment of local taxes on private businesses conducted on federal property leased from the federal government.

You advise that the Radford Army Ammunition Plant is located in Montgomery County. You advise further that, in the past, the entire property has been exempt from taxation because it was owned and operated by the federal government for the manufacture of munitions. You also relate that, in recent years, portions of the plant have been leased by private businesses for purposes other than tax exempt activities.

You have provided a basic outline of facts for consideration. Under the Armament Retooling and Manufacturing Support Act of 1992<sup>1</sup> (the "ARMS Act"), privately owned businesses occupy portions of the Radford Army Ammunition Plant pursuant to facility use agreements. The fee for the use of a particular facility is based on the amortization of a loan extended by the United States Department of Defense. Private businesses use such loans to convert the facility to their needs, although some expend their own funds to modify a particular facility. Consequently, such fees are not characterized as "rent," and there is no lessor/lessee relationship between the individual businesses and the federal government.

Ultimately, the determination of whether such an arrangement constitutes a lessor/lessee relationship depends on a complete and detailed set of facts. Your request, however, does not contain many specific facts upon which a precise conclusion may be drawn, so I am unable to render a completely definitive opinion in response to your question.

When a commissioner of the revenue makes a factual determination that an owner of property is exempt from taxation and that there is a lessor/lessee relationship with a tenant, the leasehold interest is taxable to the tenant pursuant to § 58.1-3203.<sup>2</sup> The terms of the specific lease will determine whether all or only a portion of the assessed value will be taxable to the tenant.

The purposes of the ARMS Act are (1) to encourage nondefense commercial businesses to use government-owned, contractor-operated ammunition manufacturing facilities of the Department of the Army for commercial purposes;<sup>3</sup> (2) to reduce the adverse effects of reduced spending by the Army that are experienced by communities, by providing such facilities to be used for commercial purposes that create employment opportunities;<sup>4</sup> and (3) to enter into multiyear subcontracts with privately owned businesses for the commercial use of their facilities.<sup>5</sup>

As a general rule, the states may not impose taxes directly on the federal government, nor may the states impose taxes the legal incidence of which falls on the federal government.<sup>6</sup> "[T]he economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State."<sup>7</sup> A state may not single out contractors who

work for the United States for discriminatory treatment. It may, however, accommodate for the fact that it may not impose a tax directly on the United States as a project owner. As was noted by the Supreme Court of the United States in the case of *United States v. New Mexico*:

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. But absent congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate."<sup>[8]</sup>

There is no mention of state or local tax immunity in the ARMS Act. Therefore, the businesses in question are not automatically immune from local taxation. A determination must, however, be made as to whether such business is taxable pursuant to § 58.1-3203, which provides:

All leasehold interests in real property which is exempt from assessment for taxation from the owner shall be assessed for local taxation to the lessee. If the remaining term of the lease is fifty years or more, or the lease permits the lessee to acquire the real property for a nominal sum at the completion of the term, such leasehold interest shall be assessed as if the lessee were the owner. Otherwise, such assessment shall be reduced two percent for each year that the remainder of such term is less than fifty years; however, no such assessment shall be reduced more than eighty-five percent. If the lessee has a right to renew without the consent of the lessor, the term of such lease shall be the sum of the original lease term plus all such renewal terms.

When any real property is exempt from taxation under Section 6(a)(1) or (2) or by designation under Section 6(a)(6) of Article X of the Constitution of Virginia, the leasehold interest in such property may also be exempt from taxation, provided that the property is leased to a lessee who is exempt from taxation pursuant to § 501 (c) of the Internal Revenue Code and is used exclusively by such lessee primarily for charitable, literary, scientific, or educational purposes. No leasehold interest of tax exempt property of a governmental agency shall be subject to assessment for local property tax purposes where the property is leased to a public service corporation or subsidiary thereof or a nonstock, nonprofit corporation whose occupation, use or operation of the tax exempt property is in aid of or promotes the governmental purposes set out in Chapter 10 (§ 62.1-128 et seq.) of Title 62.1. The provisions of this section shall not apply to any leasehold interests exempted or partially exempted by other provisions of law.

Under § 58.1-3203, the holders of leasehold interests in real property which is exempt from assessment for taxation from the owner are to be taxed "as if the lessees of such interests were the owners of the property."<sup>9</sup> Accordingly, "[a] leasehold is taxable in Virginia if the fee is exempt from assessment to the owner."<sup>10</sup> "If the commissioner of the revenue makes a factual determination that the owner of the property is exempt from taxation, then the leasehold interest is taxable to the tenant pursuant to § 58.1-3203. The terms of the specific lease will determine whether all or only a portion of the assessed value will be taxable to the tenant."<sup>11</sup>

Whether the private businesses in this matter possess leasehold interests is a question of fact for the commissioner of the revenue to determine, based on all the facts and circumstances of the case.<sup>12</sup> A 1970 opinion notes that there is no requirement that a lease be in writing.<sup>13</sup> Furthermore, a 1978 opinion stipulates that a "loan" of [personal] property from a federal agency to a contractor for its use on a government construction project constitutes a lease for purposes of local personal property taxation.<sup>14</sup> Under the facts presented in the 1978 opinion, the "loan" of the property is a lease in that it is "a contractual letting out of property for use during an ascertainable period, always for a shorter term than the lessor has in the property."<sup>15</sup>

Since the ultimate question here is essentially one of fact, the commissioner of the revenue must ultimately determine whether, under the particular facts with which the commissioner is dealing, the facility use agreements between the private businesses and the federal government and the attendant fee, along with any other relevant information, indicate a lessor/lessee relationship such that local taxes may be imposed pursuant to § 58.1-3203.

<sup>1</sup> See §§ 191 to 196 of Pub. L. No. 102-484, set out as note in 10 U.S.C.A. § 2501 (West Supp. 2000) (originally enacted as Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Tit. I, Subtit. H, §§ 191 to 195, 106 Stat. 2315, 2347-49, *as amended by* Act of May 31, 1993, Pub. L. No. 103-35, Tit. II, § 202(a)(1), 107 Stat. 97, 101; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div. A, Tit. XI, Subtit. D, § 1141, 108 Stat. 2663, 2879-80; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. A, Tit. I, Subtit. E, § 143, 110 Stat. 2422, 2449; Act of Oct. 17, 1998, Pub. L. No. 105-261, Div. A., Tit. I, Subtit. B, § 115, 112 Stat. 1920, 1939; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Tit. I, Subtit. B, § 116, 113 Stat. 512, 533).

<sup>2</sup> See 1975-1976 Op. Va. Att'y Gen. 339, 340 (concluding that, if commissioner of revenue finds college to be exempt from taxation on land and building leased by fraternity, fraternity will be liable for all assessed taxes since inception of lease).

<sup>3</sup> 10 U.S.C.A. § 2501 note (citing § 193(b)(1)).

<sup>4</sup> *Id.* (citing § 193(b)(3)).

<sup>5</sup> *Id.* (citing § 194(a)(2)).

<sup>6</sup> The Supreme Court of the United States invalidated a Mississippi tax regulation which required out-of-state liquor distillers and suppliers to collect a markup—the practical equivalent of a tax—on liquor sold to military posts for remittance to the Tax Commission. *United States v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975). Although the tax was nominally collected from the out-of-state sellers, the legal incidence of the tax was said to fall on the United States because the tax regulation required the sellers to charge and collect it from the military purchasers. *Id.* at 607-09 (citing *First Agricultural Nat. Bank v. Tax Comm'n*, 392 U.S. 339, 346-48 (1968)).

<sup>7</sup> *United States v. County of Fresno*, 429 U.S. 452, 462 (1977); *see also City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958) (holding that there can be no discrimination against federal government, its property or those with whom it does business).

<sup>8</sup> 455 U.S. 720, 737-38 (1982) (citations omitted) (quoting *Massachusetts v. United States*, 435 U.S. 444, 456 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976)).

<sup>9</sup> 1978-1979 Op. Va. Att'y Gen. 285, 286.

<sup>10</sup> 1969-1970 Op. Va. Att'y Gen. 279, 279.

<sup>11</sup> 1987-1988 Op. Va. Att'y Gen. 601, 602 (footnote & citation omitted).

<sup>12</sup> See Op. Va. Att'y Gen.: 1969-1970, *supra*, at 279; 1965-1966 at 269 (authority of county to tax leasehold interests in city-owned property, provided property is exempt from assessment for taxation to city).

<sup>13</sup> *Id.* (citing *Smith v. Payne*, 153 Va. 746, 756, 151 S.E. 295, 298 (1930)).

<sup>14</sup> 1978-1979 Op. Va. Att'y Gen., *supra* note 9, at 286-87.

<sup>15</sup>*Id.* at 286.