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B-105117, FEBRUARY 19, 1952, 31 COMP. GEN. 405

NATIONAL HOUSING AGENCY PROJECTS TRANSFERRED TO DEPARTMENT OF THE AIR FORCE - PAYMENTS IN LIEU OF TAXES - WATER AND SERVICE CHARGES THE PROVISION IN SECTION 306 OF THE ACT OF OCTOBER 14, 1940, AS AMENDED, THAT THE NATIONAL HOUSING ADMINISTRATOR SHALL PAY ANNUAL SUMS IN LIEU OF TAXES TO LOCAL TAXING AUTHORITIES ON REAL PROPERTY ACQUIRED AND "HELD BY HIM," MAY NOT BE REGARDED AS AUTHORIZING OR REQUIRING THE PAYMENT BY THE CORPS OF ENGINEERS OF AMOUNTS FOR MUNICIPAL SERVICES IN LIEU OF TAXES ON A HOUSING PROJECT PERMANENTLY TRANSFERRED BY THE NATIONAL HOUSING ADMINISTRATOR TO THE DEPARTMENT OF THE AIR FORCE, PURSUANT TO SECTION 4 OF THE ACT OF JANUARY 21, 1942, THE CUSTODIAL RESPONSIBILITY OF WHICH WAS TRANSFERRED TO SAID CORPS OF ENGINEERS. ALTHOUGH THE IMMUNITY OF THE UNITED STATES FROM STATE AND LOCAL TAXATION DOES NOT EXTEND TO PAYMENT OF CHARGES FOR WATER OR SEWER SERVICES WHERE THE AMOUNT IS DETERMINED PURSUANT TO STATUTE BY THE QUANTITY OF WATER FURNISHED OR AMOUNT OF SEWAGE DISPOSED OF, AN ASSESSMENT FOR SUCH CHARGES INCLUDED IN REAL ESTATE TAXES LEVIED ON A CITY WIDE BASIS RATHER THAN ON A QUANTUM BASIS FOR SERVICES RENDERED CONSTITUTES A TAX FROM WHICH THE FEDERAL GOVERNMENT IS IMMUNE, THEREFORE, A CONTRACT MAY NOT BE ENTERED INTO TO PAY FOR THE CHARGES ON SAID ASSESSMENT BASIS.

COMPTROLLER GENERAL WARREN TO THE SECRETARY OF THE ARMY, FEBRUARY 19, 1952:

REFERENCE IS MADE TO YOUR LETTER OF AUGUST 11, 1951, REQUESTING A DECISION AS TO WHETHER THE CORPS OF ENGINEERS WHICH WAS CHARGED WITH CUSTODIAL RESPONSIBILITY OF CERTAIN EXCESS REAL PROPERTY KNOWN AS FAIRMONT TERRACE HOUSING PROJECT, BANGOR, MAINE, FOR THE PERIOD DURING WHICH IT HAD SUCH CUSTODY, MAY ENTER INTO A CONTRACT WHEREBY THE CITY OF BANGOR, MAINE, WOULD BE COMPENSATED FOR CERTAIN SERVICES RENDERED THE PROJECT AND ITS TENANTS IN CLEANING, SANDING AND REMOVING SNOW FROM ITS STREETS, IN FURNISHING FIRE PROTECTION, IN THE COLLECTION OF ASHES, GARBAGE AND TRASH AND DISPOSING OF SEWAGE THROUGH THE MUNICIPAL SYSTEM.

THE RECORD SHOWS THAT THE HOUSING PROJECT--- WHICH CONSISTS OF APPROXIMATELY 150 UNITS AND LAND ACQUIRED IN CONNECTION THEREWITH AND IMPROVEMENTS THEREON--- WAS CONSTRUCTED UNDER THE ACT OF OCTOBER 14, 1940, 54 STAT. 1125, THE LANHAM ACT, AND IS SITUATED WITHIN THE CITY LIMITS OF BANGOR, THE LAND HAVING BEEN ACQUIRED THROUGH CONDEMNATION PROCEEDINGS. IT IS STATED IN THE SAID LETTER THAT, DURING THE PERIOD THE PROJECT WAS UNDER THE JURISDICTION OF THE NATIONAL HOUSING AGENCY, THE ADMINISTRATOR ENTERED INTO YEARLY CONTRACTS WITH THE CITY OF BANGOR, UNDER WHICH ANNUAL SUMS IN LIEU OF TAXES WERE PAID FOR THE SERVICES INVOLVED; THAT THE PROJECT LATER WAS TRANSFERRED TO THE DEPARTMENT OF THE AIR FORCE, PURSUANT TO SECTION 4 OF THE ACT OF JANUARY 21, 1942, 56 STAT. 12, AND THAT THE AIR FORCE EXECUTED TWO CONTRACTS, DATED SEPTEMBER 30, 1948, AND JUNE 20, 1949, RESPECTIVELY, UNDER THE TERMS OF WHICH THE CITY FURNISHED TO THE HOUSING

PROJECTS THE SERVICES INVOLVED; THAT, ON MARCH 10, 1950, THE PROJECT WAS DECLARED EXCESS TO THE REQUIREMENTS OF THE AIR FORCE AND THE CORPS OF ENGINEERS, ON JULY 1, 1950, ASSUMED CUSTODIAL RESPONSIBILITY THEREOF. IS FURTHER SET FORTH IN THE SAID LETTER THAT THE MUNICIPALITY REQUESTED THAT A CONTRACT SIMILAR TO THOSE EXECUTED BY THE AIR FORCE--- THE LATER OF WHICH EXPIRED ON JUNE 30, 1950--- BE EXECUTED BUT, IN VIEW OF DOUBT AS TO THE PROPRIETY THEREOF, SUCH CONTRACT WAS NOT EXECUTED. IT IS STATED FURTHER IN THE LETTER THAT, WHILE IT IS REALIZED THE DEPARTMENT OF THE ARMY HAS NO AUTHORITY TO MAKE PAYMENTS IN LIEU OF TAXES ON HOUSING PROJECTS TRANSFERRED TO IT BY THE NATIONAL HOUSING AGENCY, THE CITY OF BANGOR CONTENDS THAT THE PROJECT REMAINS ESSENTIALLY A PUBLIC HOUSING PROJECT, AND THAT IT IS ENTITLED TO PAYMENT FOR THE MUNICIPAL SERVICES RENDERED.

SECTION 9 OF THE LANHAM ACT, 54 STAT. 1125, 1127, AS ORIGINALLY ENACTED ON OCTOBER 14, 1940, PROVIDED THAT THE FEDERAL WORKS ADMINISTRATOR MIGHT ENTER INTO AGREEMENTS TO PAY ANNUAL SUMS IN LIEU OF TAXES TO STATES OR POLITICAL SUBDIVISIONS THEREOF, WITH RESPECT TO REAL PROPERTY ACQUIRED AND HELD BY HIM UNDER SUCH ACT. THAT SECTION WAS RENUMBERED BY THE ACT OF JUNE 28, 1941, 55 STAT. 363, BECOMING SECTION 306 OF THE AMENDED ACT AND THE RENUMBERED SECTION WAS AMENDED BY THE ACT OF JANUARY 21, 1942, 56 STAT. 12, SO AS TO PROVIDE AS FOLLOWS:

THE ADMINISTRATOR SHALL PAY FROM RENTALS ANNUAL SUMS IN LIEU OF TAXES TO ANY STATE AND/OR POLITICAL SUBDIVISION THEREOF, WITH RESPECT TO ANY REAL PROPERTY ACQUIRED AND HELD BY HIM UNDER THIS ACT, INCLUDING IMPROVEMENTS THEREON. THE AMOUNT SO PAID FOR ANY YEAR UPON SUCH PROPERTY SHALL APPROXIMATE THE TAXES WHICH WOULD BE PAID TO THE STATE AND/OR SUBDIVISION, AS THE CASE MAY BE, UPON SUCH PROPERTY IF IT WERE NOT EXEMPT FROM TAXATION, WITH SUCH ALLOWANCE AS MAY BE CONSIDERED BY HIM TO BE APPROPRIATE FOR EXPENDITURES BY THE GOVERNMENT FOR STREETS, UTILITIES, AND OTHER PUBLIC SERVICES TO SERVE SUCH PROPERTY.

SECTION 5 OF THE ACT OF JUNE 28, 1941, 55 STAT. 363, AND SECTION 312 OF THE ACT OF JANUARY 21, 1942, 56 STAT. 13, GAVE TO THE AGENCIES DESIGNATED BY THE PRESIDENT TO PROVIDE TEMPORARY SHELTER, ACQUIRED OR CONSTRUCTED UNDER THE EMERGENCY FUND FOR THE PRESIDENT AS AUTHORIZED BY THE SECOND SUPPLEMENTAL NATIONAL DEFENSE APPROPRIATION ACT, 1941, 54 STAT. 872, 883 AND THE ACTS OF MARCH 1, MAY 24, AND DECEMBER 17, 1941, 55 STAT. 14, 198 AND 818, THE SAME POWERS WITH RESPECT TO SUCH TEMPORARY SHELTER AS ARE GRANTED TO THE FEDERAL WORKS ADMINISTRATOR UNDER SECTION 306 OF THE LANHAM ACT, AS AMENDED. THE LEGISLATIVE HISTORY OF THE SAID SECTIONS 5 AND 312, SHOWS THAT THE PROVISIONS WERE ADDED TO ENABLE THE MAKING OF PAYMENTS IN LIEU OF TAXES ON SUCH TEMPORARY SHELTER IN THE SAME MANNER AS ON REALTY HELD BY THE FEDERAL WORKS ADMINISTRATOR UNDER THE LANHAM ACT. SECTION 4 OF THE ACT OF JANUARY 21, 1942 PROVIDED GENERALLY THAT THE HOUSING WOULD BE DISPOSED OF AS EXPEDITIOUSLY AS POSSIBLE BUT THAT "THE ADMINISTRATOR MAY, IN HIS DISCRETION, UPON THE REQUESTS OF THE SECRETARIES OF WAR OR NAVY, TRANSFER TO THE JURISDICTION OF THE WAR OR NAVY DEPARTMENTS SUCH HOUSING CONSTRUCTED UNDER THE PROVISIONS OF THIS ACT AS MAY BE CONSIDERED TO BE PERMANENTLY USEFUL TO THE ARMY OR NAVY.' THUS, IT APPEARS THAT, WHILE PROVISION WAS MADE FOR PAYMENT IN LIEU OF TAXES AS TO PROPERTY CONSTRUCTED UNDER THE LANHAM ACT WHEN HELD BY THE FEDERAL WORKS ADMINISTRATOR (OR HIS SUCCESSOR THE FEDERAL HOUSING ADMINISTRATOR), AND AS TO THE TEMPORARY DEFENSE HOUSING CONSTRUCTED FROM THE EMERGENCY FUND FOR THE PRESIDENT, NO PROVISION WAS MADE FOR SUCH PAYMENTS AS TO LANHAM ACT PROJECTS TRANSFERRED PURSUANT TO SECTION 4 OF THE ACT OF JANUARY 21, 1942, TO THE WAR OR NAVY DEPARTMENTS (OR THEIR SUCCESSORS, THE DEPARTMENTS OF THE AIR FORCE, ARMY OR NAVY).

THE QUESTION AS TO WHETHER PAYMENTS IN LIEU OF TAXES ON HOUSING CONSTRUCTED UNDER THE LANHAM ACT WERE AUTHORIZED AFTER THE TRANSFER OF THE PROPERTY TO THE DEPARTMENT OF THE NAVY WAS CONSIDERED IN 23 COMP. GEN. 406. IT WAS THERE HELD (QUOTING FROM THE SYLLABUS) THAT "THE PROVISION IN SECTION 306 OF THE ACT OF OCTOBER 14, 1940, AS AMENDED, THAT THE NATIONAL HOUSING ADMINISTRATOR SHALL PAY ANNUAL SUMS IN LIEU OF TAXES TO LOCAL TAXING AUTHORITIES ON REAL PROPERTY ACQUIRED AND "HELD BY IM" MAY NOT BE REGARDED AS AUTHORIZING OR REQUIRING THE PAYMENT BY THE SECRETARY OF THE NAVY OF AMOUNTS IN LIEU OF TAXES WITH RESPECT TO HOUSING UNITS PERMANENTLY TRANSFERRED BY THE ADMINISTRATOR TO THE NAVY DEPARTMENT, PURSUANT TO SECTION 4 OF THE SAID ACT.' ALSO, IT WAS STATED THEREIN (QUOTING FROM PAGE 409) THAT "SINCE ANY AGREEMENTS BETWEEN YOUR DEPARTMENT AND LOCAL TAXING UNITS FOR THE PAYMENT OF SUCH SUMS WOULD BE IN DEROGATION OF THE GOVERNMENT'S SOVEREIGN IMMUNITY FROM TAXATION, IT APPEARS PROPER TO HOLD THAT, IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY THEREFOR, THE MAKING OF SUCH AGREEMENTS IS NOT AUTHORIZED.' THE SAID DECISION OF COURSE, IS EQUALLY APPLICABLE TO THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE AND CONTRACTS TO MAKE PAYMENTS IN LIEU OF TAXES ON SUCH PROPERTY ARE NOT AUTHORIZED. MOREOVER, THERE IS NOTHING IN THE ACT OF JUNE 30, 1949, 63 STAT. 385, UNDER WHICH CUSTODY OF PROPERTY WAS TRANSFERRED FROM THE DEPARTMENT OF THE AIR FORCE TO THE CORPS OF ENGINEERS WHICH WOULD AUTHORIZE SUCH A PAYMENT.

HOWEVER, A FURTHER QUESTION IS RAISED IN YOUR LETTER, NAMELY, EVEN THOUGH PAYMENT OF TAXES OR PAYMENTS IN LIEU THEREOF ARE NOT AUTHORIZED, MAY SUCH AN AGREEMENT PROPERLY BE MADE TO COMPENSATE THE MUNICIPALITY FOR THE SERVICES INVOLVED. IN THIS CONNECTION, THERE HAS BEEN FURNISHED A COPY OF LETTER DATED FEBRUARY 19, 1951, FROM THE CITY MANAGER, BANGOR, MAINE, TO THE CORPS OF ENGINEERS, IN WHICH IT IS CONCEDED THAT THE SERVICES ARE THOSE NORMALLY FURNISHED PROPERTY OR RESIDENTS OF THE CITY WITHOUT SPECIAL SERVICE OR OTHER CHARGES AND ARE USUALLY COVERED BY TAXES.

IT HAS BEEN HELD THAT THE CONSTITUTIONAL IMMUNITY OF THE FEDERAL GOVERNMENT FROM STATE AND LOCAL TAXATION DOES NOT EXTEND TO PAYMENT OF CHARGES FOR WATER OR SEWER SERVICES WHERE THE AMOUNT THEREOF IS DETERMINED PURSUANT TO STATUTE BY THE QUANTITY OF WATER FURNISHED OR THE AMOUNT OF SEWAGE DISPOSED OF, SUCH CHARGES BEING NEITHER REGARDED AS TAXES OR ASSESSMENTS BUT AS THE PRICE OF THE PRODUCT OR SERVICE RENDERED. STATE V. TAYLOR, 79 N.E.2ND 127, 29 COMP. GEN. 120. HOWEVER, WHERE AN ASSESSMENT IS LEVIED NOT BASED ON THE QUANTUM OF SERVICE RENDERED BUT ON A CITY WIDE BASIS, IT HAS BEEN HELD THAT THE ASSESSMENT CONSTITUTES A TAX SO THAT PERSONS ENTITLED TO A FREEDOM FROM DIRECT PROPERTY TAXATION ARE EXEMPT FROM PAYMENT THEREOF. COOPER UNION V. CITY OF NEW YORK, 71 N.Y.S.2ND 204. ALSO, IT APPEARS TO BE CONCEDED THAT THE AMOUNT OF THE CHARGES IF PAID WOULD BE USED FOR THE GENERAL RUNNING EXPENSES OF THE CITY. THUS, THE AMOUNT APPEARS TO CONSTITUTE A PAYMENT IN LIEU OF TAXES NOT PROVIDED FOR OR CONTEMPLATED BY THE CONGRESS. ALSO, IT APPEARS CLEAR THAT NO OFFICIAL OF THE FEDERAL GOVERNMENT EXCEPT ON AUTHORIZATION OF THE CONGRESS HAS THE AUTHORITY TO CONSENT TO WAIVING THE IMMUNITY OF THE FEDERAL GOVERNMENT TO TAXATION OR TO THE MAKING OF PAYMENTS IN LIEU THEREOF AND WHICH IMMUNITY IS SPECIFICALLY RECOGNIZED BY CHAPTER 1, SECTION 13 AND CHAPTER 81, SECTION 6, PARAGRAPH I OF THE REVISED STATUTES OF MAINE. ACCORDINGLY, I AM REQUIRED TO HOLD THAT NO FEDERAL OFFICIAL, UNDER PRESENT LAW, IS AUTHORIZED TO ENTER INTO SUCH A CONTRACT AS IS HERE PROPOSED.