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B-184146 August 29, 1975

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The Honorable Mike Manfield Majority Leader United States Senate

Dear Mr. Mansfield:

Refernce is made to your letter dated June 6, 1975, concerning the responsibility of the Department of the Army to pay for its share to street improvement costs in and around their reserve facility in the city of Helena, Montana. Apparently, the city has been negotiating for some time for the payment of such costs. Your letter indicates:

"The Department of the Army states they have issued a ruling stating that the use of public roads by vehicles of a Federal agency does not justify the expenditure of Federal funds. I do not quarrel with this ruling as it reads; however, I do believe that where the Federal Government is the owner of real estate, it should participate in the cost of street improvements and services adjacent to their building jsut as any other owner of real estate, private or public."

Therefore, you request a report from our Office as to the general policy that applies to the Department of the Army (DOA) and the General Services Administration (GSA).

The general policy applicable to DOA and GSA in this matter, as well as other Governmnet agencies and departments, is set forth in our decision, 49 Comp. Gen. 72, 75-76 (1969), wherein we stated:

"In the absence of congressional authorization, the property of the United States is exempt by the Constitution from taxation under the authority of a State. Van Brocklin v. State of Tennessee, 117 U. S. 151, 180; Lea v. Oscsola Improvement District, 268 U.S. 643. Assessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes. Hager v. Reclamation District No. 108, 111 U.S. 701, 707. In the case of Wisconsin Railroad Co. v. Price County, 133 U.S. 496, 304, the court,

"It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from state taxation-and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes or for more local and special objects-is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another

government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to dispose of and make all neeful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. Van Brocklin v. State of Tennessee, 117 U.S. 151, 168.

"See, also, Mullse Benevolent Corporation v. United States, 290 U.S. 69; United States v. Alleghany County, 322 U.S. 174; and People of Puerto Rico v. United States, 134 F.24 267.

"In line with the decisions of the courts the accounting officers of the Government have also held over the years that the United States is exempt by the Constitution from taxation under authority of a State. See 2 Comp. Dec. 375 (1896(; 4 id. 116 (1897); 9 id. 181 (1902); 11 id. 629 (1905); 15 id. 231 (1908); 23 id. 386 (1917); 1 Comp. Gen. 150 (1921); 3 id. 416 (1924); 15 id. 380 (1935); 27 id. 20 (1947); and 29 id. 18 (1949).

"It has also been held that a charge made by a State of a political subdivision of a State for a service rendered or a conveniences provided is not a tax. Fair and reasonable conpensation for a service rendered or a facility used is not a tax. See Packet Co. v. Keokuk, 95 U.S. 80; Transportation Co. v. Parkersburg, 107 U.S. 691; Huse v. Glover, 119 U.S. 543, Sands v. Manistee River Improvements Co., 123 U.S. 288; 24 Comp. Dec. 45 (1917); 1 Comp. Gen. 560 (1922); 9 id. 41 (1929); 18 id. 562 (1938); 29 id. 120 (1949); 31 id 405 (1952); 34 id. 398 (1955); and 42 id. 246 (1962). Cf. 42 id. 653 (1963)."

In accord with this policy, we have held that a voucher in favor of the city of burling, Idaho, representing assessments for street improvements levied by a municial improvement district created under State law against land owned by the United States within such district, could not be certified for payment since the assessment was an involuntary exaction and constituted a tax with the United States is not required to pay. 27 Comp. Gen 20 (1947); see also our unpublished decision B-155274, May 8, 1967 (copy enclosed).

Although, as indicated above, it has been held that a charge made by a State representing fair and reasonable compensation for services rendered, convenience provided, or facilities used is not a tax and therefore may be paid, this does not include assessments for road improvements. 27 Comp. Gen. 20; supra, at 22; see also 51 id. 135, 136 (1971). Additionally, except upon authorization of the Congress, no official of the Federal Government has the authority to consent to waiving the immunity of the Federal Government to taxation or to the making of payments in lieu thereof. 31 Comp. Gen. 405, 408 (1952).

With regard to possible congressional authorization for DOA or GSA to amke the payment in quetion, section 210 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. Sec 490(i)(1970), authorizes executive agencies to install, repair, and replace sidewalks around federally owned or constructed buildings by reinbursement to States and political subdivisions. However, such reimbursement authority extends only to charges fro

sidewalks and does not include charges for the repair and improvement of streets. Absent any other authorization by Congress, payments in lieu of assessments for street improvements by the city of Helena by DOA or GMA would appear to be unauthorized.

The principles set forth herein have long been recognized and accepted by the legislative and judicial branches of the Government of the State of Montana. Article VIII, section 5, of the constitution of the State of Montata (1972) authorizes the State Legislature to exempt, inter alia, property of the United States from taxation; and the legislature has done so. See Revised Code of Montana Annotated (RCMA), Sect 84-202 (197 pocket pt.)

Additionally, in Ford v. City of Great Falls, 46 Mont. 292, 127 P. 1004 (19192), a case involving the question of the validity of an ordinance imposing on the city of Great Falls the obligation to pay the cost of roaod improvemnts is from the property beling toe thee united the Supreme Court of Montana states:

"Nor do we thing the odrinance void because it provides that the expense of paving a fron of the late owned by the federal government shall be paid out of the street fund instead of being assessed against this property. It is true that the statute (section 3386) declares that the entire expense of paying, with the exception names therein, shall be assessed against the property upon the street in proportion to the linear feet abutting or bordering thereon. In terms this includes all the abutting property. The Legislature, however, has no power to impose a tax of any character upon any property or instrumentality of the federal government. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Osborn v. Bank kof the United States, 9 Wheat, 739, 6 L. Ed. 204; Constitution, Mont., Ord. I. subd. 2; Id. art. 12, Sect 2; Rev, Codes, Sect 2499. This immunity includes special assessments. Fagan v. City of Chicago, 84 Ill. 227; Whittaker v. Deadwood, 23 B. D. 538, 122 N. W. 590. 139 Ax. St. Rep. 1076. * * *

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"* * * Though property belonging to the federal government is exempted in the same terms as is the other property enumerated and would otherwise fall within the letter of the decision, yet for the reason that the federal government is supreme within the purview of the powers granted to it by the Constitution, and cannot be subject to any state, its property is exempt from special assessments, as well as ordinary taxes, and this even in the absence of any such provisions as those found in Constitution or state laws. McCulloch v. State of Maryland, supra." 127 F. 1008, 1009. (Emphasis supplied.)

Finally, the Helena city council has the power to "lay out, establish, open, alter, video, extend, grade, pava, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds and vacate the same." RCMA Sec 11-906. The means provided by the legislature to carry out such authority is the creation of a special improvement district, RCMA Sect 11-2201, and special assessments. RCMA Sect 11-2214. See Districh v. City of Deer Lodge, 124 Mont. 8, 218 P. 2d 708 (1950). RCMA Sect 11- 2214(3) provides that!

"Whenever any lot, piece or parcel of land belonging to the United States, or mandatory of the government, shall front upon the proposed work or improvement, or be included within the district declared by the city council in its resolution of intention to be the district to be assessed to opay the costs and expenses thereof, said council shall, in the resolution of intention, declare

that said lots, peices or parcels of land, or any of them, shall be omitted from the assessment thereafter to be made to cover the cost of said work or improvement in front of said lots, pieces or parcels of land shall be paid by the city from its general fund."

Thus it would appear that under the applicable law of the State of Montana, not only is it recognized that the property of the United States is not subject to taxation or assessment by the State or political sub- division thereof, but also, that under RCMA section 11-2214(3) the city of Helena is required to omit property of the United States from assessments for road improvements and to pay for such improvement fro the city's general fund.

We trust that the foregoing is responsive to your request.

Sincerely yours,

R. F. Keller Deputy Comptroller General United States

Enclosure