OFFICIAL OPINION NO. 78-10, Jurisdictional status of Fort Meade and other areas

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Mr. William Coacher
Meade County State's Attorney
Sturgis, South Dakota 57785

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Jurisdictional status of Fort Meade and other areas

Dear Mr. Coacher:

You have requested my official opinion on the following factual situation:

FACTS:

Within the boundaries of Meade County, South Dakota, there are located two government installations. One, the Ft. Meade Veterans Hospital, is located on land that formerly comprised the Ft. Meade Military Reservation. At one time the Ft. Meade Military Reservation was ceded to the United State Government, and exclusive federal jursidiction existed. I am now told that recently an agreement was entered into between the Governor of the State of South Dakota and the Veterans Administration rescinding the exclusive federal jurisdiction and imposing concurrent jurisdiction upon the land of the Ft. Meade Military Reservation upon which Ft. Meade Veterans Hospital sits to both the Federal Government and the State Government of South Dakota. At this hospital there are numerous family residences that are occupied by Veterans Administration staff personnel. The real estate is owned by the United States of America, but all of the personal property located in said residences belongs to the individual occupying said house. In addition to personal property located in the house, many of the personnel own such items as snowmobiles, horses, boats and other items of personal property. Up to this time, the property has not been subject to personal property taxes in the State of South Dakota. The real property, or the houses, occupied by the various staff members are rented at a very nominal rental. The amount of this rental is subject periodically to a review and supposedly the amount of rent is somewhat based upon rent paid for comparable facilities in the community of Sturgis.

Nevertheless, the staff members who are authorized such housing live in the houses and have all utilities furnished. However, their possessory interest in said house is a valuable consideration, and likewise has not been taxed.

In addition, at the Ft. Meade Veterans Hospital there is operated in conjunction with the hospital a canteen and cafeteria. These facilities are made available not only to the Veterans Administration patients in the hospital but as well to staff personnel and visitors to the center. The canteen is not limited to such items as toothpaste and cigarettes, but is in fact a small general department store selling such items as clothing, shoes and other dry goods. The cafeteria furnishes a full line of food services from sandwiches to prepared meals. Up to the present time no sales or use tax is being collected on any of the sales and purchases made in this operation.

You have also inquired as to jurisdictional status at Ellsworth Air Force Base and that portion of Ellsworth Air Force Base located in Meade County. The situation with regard to Ellsworth is different than the Ft. Meade situation as will become apparent in this opinion;

Concerning these facts you have raised the following questions:

QUESTIONS:

1. Can Meade County assess and levy on the personal property of Veterans Administration staff members living on the Ft. Meade Veterans Hospital compound?

2. Under present law, can the possessory interest in government housing be taxed by Meade County?

3. Can sales and use tax be collected on sales and purchases at the Veterans Administration canteen at Ft. Meade, South Dakota?

4. Can Meade County assess and levy personal property taxes on personal property of air force personnel residing at Ellsworth Air Force Base in government housing located on land where concurrent jurisdiction exists?

5. Can Meade County assess and levy personal property taxes on personal property leased to the United States Government by private corporations and located in federal buildings

located on land where concurrent jurisdiction exists?

6. Can sales and use tax be collected on sales and purchases made at the base BX or commissary located on land where concurrent jurisdiction exists between the United States Government and the State of South Dakota?

A short discussion of federal jurisdiction vis-a-vis state or concurrent jurisdiction is necessary. It must be kept in mind that the word jurisdiction when used in connection with land areas means the authority to legislate within such areas. (U.S. Constitution, article 1, section 8, clause 17.) Basically an area concept is involved. When the United States exercises federal jurisdiction over particular land it has the power and authority to enact general, municipal legislation applying within that land. This is contrasted with other legislative authority of the Congress which is dependent not upon area but upon subject matter and purpose and which must be predicated upon some specific grant in the Constitution such as the power to regulate interstate commerce, the power to declare war, the power to make rules for government and regulations of the land and naval forces. (U.S. Constitution, article I, section 8.) In other words, Congress cannot enact a body of general municipal legislation applicable throughout the United States as this power is reserved to the states, but it can do so with respect to specific land areas over which the United States has jurisdiction.

The fact that the federal government has jurisdiction over an area does not necessarily mean that its power is complete in all respects or that state legislative authority is entirely excluded. There are primarily four types of federal jurisdiction ranging from exclusive legislative jurisdiction, concurrent legislative jurisdiction, partial legislative jurisdiction and proprietorial interest only. So far as we are concerned here, the first two, exclusive and concurrent, are the only two involved.

The term exclusive jurisdiction describes situations where the federal government has received, by whatever method, all the authority of the state to legislate with no reservation made to the state except the right to serve process in cases arising from activities which occurred off the land involved. This term is applied notwithstanding that the state may exercise certain authority over. the property in consonance with the several federal statutes permitting it to do so. Some examples of this include, State Wrongful Death and Injury Laws, 16 U.S.C. § 457 (1970), Unemployment Compensation, 26 U.S.C. § 305d (1970), Health and Quarantine, 42 U.S.C. § 97 (1970), Motor Vehicle Fuel Taxes, 40 U.S.C. § 104

(1970), Use and Sales Taxes, 40 U.S.C. § 105 (1970) (not however including State Taxation of Sales by Federal Instrumentalities, 4 U.S.C. § 107 (1970», Income Taxes, 4 U.S.C. § 106 (1970) (again not authorizing state taxation of income of federal instrumentalities); some private leasehold interests. 10 U.S.C. § 2667(e) (1970).

Jurisdiction to the military reservation of Ft. Meade was ceded to the United States by article XXVI, section 18, clause 5 of the South Dakota Constitution. Jurisdiction was also granted by the Legislature to the federal government for certain lands such as Battle Mountain Sanitarium Reserve in Fall River County, SDCL 1-1-2, and pursuant to Chapter 95, Laws of 1891 (SDCL 1-1-4), jurisdiction was ceded to the United States over any tract of land acquired under the provisions of § 1-1-3 (by purchase or condemnation by the United States) for public buildings, public works or other public purposes provided that in the case of public buildings, the tract does not exceed ten acres in extent. In other words, with regard to public works or public purposes, exclusive legislative jursidiction was ceded to the United States Government.

While a state cannot unilaterally recapture jurisdiction which has previously been transferred by it to the federal government, *United States v. Unzeuta,* 381 U.S. 138 (1930); *Yellowstone Park Transp. Co. v. Gallation County, 31* F.2d 644, 9th Circuit, *cert. denied,* 280 U.S. 555 (1929), since approximately 1876, the right of the United States to surrender its legislative jurisdiction has been established.*Phillips v. Payne,* 92 U.S. 130 (1876). While there are several methods of relinquishing federal jurisdiction, the one with which we are concerned here is what is known as "retrocession" or "recession." It presupposes that the United States has the same rights as a sovereign state to relinquish its legislative jurisdiction by the cession method. This rule has generally applied since the decision in the case of *Ft. Leavenworth Railway v. Lowe,* 114 U.S. 525 (1885). Congress must, however, authorize cession of the legislative jurisdiction to a state.

In the instant case, authority was vested in the administrator of the Veterans Administration pursuant to Public Law 93-82, 38 U.S.C. § 5007 and Public Law 93-43, 38 U.S.C. § l004(g). By Chapter 63, Laws of 1975, the people of South Dakota, speaking through their Legislature, provided that:

By appropriate executive order, the Governor may accept on behalf of the state, retrocession of full or partial jurisdiction, criminal or civil, over any roads, highways, or other lands in federal enclaves excluding Indian Reservations and federal enclaves outside

the boundaries of an Indian Reservation established for Indian use, within the state where such retrocession has been offered by appropriate federal authority. Documents concerning such action shall be filed in the office of the register of deeds of the county wherein such lands are located.

By letter dated August 19, 1975, Richard L. Roudenbush, Administrator of the Veterans Administration, offered retrocession and relinquishment to the State of South Dakota of such measure of legislative jurisdiction as was necessary to establish concurrent jurisdiction over: all lands comprising the Veterans Administration Hospital at Ft. Meade, the Veterans Administration Center at Sioux Falls, the Veterans Administration Center at Hot Springs, including property known as the Hot Springs National Cemetery and the Black Hills National Cemetery. The Governor accepted such retrocession in writing on August 26, 1975, and on September 29, 1975, issued Executive Order 75-7 accepting concurrent jurisdiction over these lands. So far as is material here it is my opinion that the acceptance of retrocession is complete when the provisions of § 1-1-1.1, including the filing in the office of the Register of Deeds in the county wherein the land is located, are complied with.

Turning now to the effect such concurrent jurisdiction has on tax and related matters it is necessary to discuss some recent cases.

A recent United States Supreme Court decision, *United States, et al., v. County of Fresno, et al.,* 429 U.S. 452, 50 L.Ed.2d 683, 97 S.Ct. 699, decided January 25, 1977, held that a state may, consistent with the federal government's immunity from state taxation inherent in the supremacy clause of the United States Constitution, article VI, clause 2, tax federal employees on their possessory interests in housing owned and supplied to them by the federal government as part of their compensation; where the legal incidence of the tax falls on the employees, not the federal government, and where the tax does not discriminate against the government or the employees. In this case, California statutes authorized counties to impose an annual use or property tax on possessory interests in improvements on tax-exempt land. This tax was imposed on the possessory interests of the United States Forest Service employees' housing located in national forests within the counties and supplied to the employees by the Forest Service as part of their compensation. The court held specifically that the tax was not barred by the supremacy clause as a state tax on the federal government or federal property.

California, however, had a specific statute which defined "possessory interest" and "taxable

possessory interest." It also defined "real estate" as "the possession of, claim to, ownership of, or right to the possession of land." (Section 104, California Revenue and Taxation Code.)

The Constitution of South Dakota, article Xl, sections I and 2, extends the power to tax to "all property." The language employed indicates that the word "property" is used in its generic sense including physical things, moneys and credits and privileges, franchises and licenses. *National Security Co. v. Starkey,* 41 S.D. 356, 170 N.W. 582 (1919). The court there said "[T]he term 'property' as used in our Constitution (see Article Xl), is broad enough to include everything of value, tangible or intangible, capable of being the subject of individual right or ownership, and under our Constitution all property, except such as is expressly exempted therein is declared to be subject to taxation," at 360. The Constitution also provides (article XI, section 5) that "the property of the United States and of the State, county and municipal corporations, both real and personal shall be exempt from taxation. . . ." Property is the interest that either the United States, state or the county has in property and not specifically the land. This section does not exempt private noncharitable interest in land. SDCL 10-4-2 defines real property as follows:

Real property, for the purpose of taxation, shall be construed to include the land itself, ... and all the buildings, structures, ... and improvements, ... and all rights and privileges thereto belonging or in anywise appertaining, ...

Generally speaking in actual practice, taxes are levied on land, buildings, equipment, and other things against the fee or title holders. This presents no problem so long as the fee or title owner is not exempt from taxation. The owner simply passes the tax on to the tenant as part of the rent. When the owner-user is exempt from taxation, all interest in the land, buildings and other things are exempt. However, here the owner and tax exempt entity, the federal government, is not the user of the property.

In *Fresno, supra,* the trial court had sustained the government's claim that among other thing the employees had no taxable possessory interest under state law. The California Court of Appeals, Fifth Appellate District, reversed (50 Cal.App.3d 633); the court held that each appellant had a possessory interest in the houses owned by the Forest Service that was subject to taxation under state law and held that the tax on such possessory interest is not a tax on the federal government on government property or on a "federal function." They said, "Rather it is a tax imposed on 'the private citizen, and it is the private citizen's usufructuary interest in the government land and improvements alone that is being

taxed. *City of Detroit v. Murray Corp. of America,* 355 U.S. 489 [2 L. Ed.2d 441, 78 S.Ct. 458] . . . ;*United States v. Township of Muskegon,* 355 U.S. 484, [2 L.Ed.2d 436, 78 S.Ct. 483] . . . .'" That court held and the United States Supreme Court agreed that the tax was not barred by the supremacy clause of the Federal Constitution.

The Supreme Court of South Dakota has consistently held that it is the nature of the use that determines the tax-exempt character of the land and its attachments, not simply the identity of the fee owner. *South Dakota State Medical Association v. Jones,* 82 S.D. 374, 146 N.W.2d 725 (1966, and cases cited). That interpretation of the charitable exemptions statute, § 10-4-9, is equally applicable to the statute defining real property for the purpose of taxation, § 10-4-2, to include the land itself, the buildings and fixtures on it and all rights and privileges thereto. The basic question is, can the United States Government pass its exemption along to the individuals who hold a leasehold interest or a possessory right to certain residence quarters?

Exemption from taxation may never be presumed. It is well settled "since taxation is a rule and an exception is the exception . . . the presumption is against exemption from taxation and in all cases of doubt as to legislative intention . . . the presumption is in favor of the taxing power. . ." 84 C.J.S. 431-434, *Taxation,* Section 225.

I am not unaware of the difficulties involved in this position. Neither am 1 unaware of the former opinions of this office holding that lease-hold interests and possessory rights in federally owned property are not subject to taxation. Specifically 1951-52 AGR 385, 1953-54 AGR 98. The latter opinion citing section 5 of article XI of the Constitution and American Jurisprudence with regard to taxation of lease-hold interests merely states that no provision is made under the laws of this State for assessing leasehold interests separately except in instances enumerated in SDC 57.0314 (now 10-4-23). That section, however, relates to a certain form of property that is of religious, scientific, benevolent societies or institutions or the State or a railroad company.

I am also aware of the decision of our Supreme Court in the case of *Yadco Inc. v. Yankton County, S.D.,* 237 N.W.2d 665, December 19, 1975. There the owner of the property, while not exempt, was attempting to have the valuation of his property reduced because of a long-term uneconomic lease. The Court, in holding that the full and true value of the property could not take such lease into account, makes the statement, "In South Dakota, as in New York *(People v. Tax Commission of City of New York,* 17 A.D.2d 225,233 N.Y.S.2d

501 (1962», there is no provision for the taxation of the lessee for the value of the lease to him; only the lessor is assessed and taxed." This, of course, is distinguishable since that case dealt with property which was not exempt in any way from taxation and the base question only related to the' method of determining valuation. In *McMannus v. Malloy,* 30 S.D. 373, 138 N.W. 963 (1912), the South Dakota Supreme Court held that, although a lessee has no title to the property, he does possess an estate in the premises for the term of the lease. To the extent that such official opinions are in conflict with this opinion they are specifically overruled. On the matter of state excise taxes, the state law is only determinative where federal supremacy is not involved or where Congress has permitted the state to enforce its tax law.

As noted in the case of *Paul v. United States,* 371 U.S. 245 (1963), a state law which is inconsistent with a specific federal statute or implementing regulation having the force of law is inoperative in an exclusive jurisdiction area. In view of the United States Constitution, article VI, any retail operation which is a federal instrumentality, such as base or post exchanges, does not come within the jurisdiction of the state regardless of exclusive or concurrent jurisdiction. However, Congress, by the enacting of the Buck Act, 4 U.S.C. 105, stated in part:

No person shall be relieved from any liability for payment of, collection of, or accounting for any sales or use tax levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such a tax is levied, occurred in whole or in part within the federal area; and such state or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area.

It has been held that the Soldiers and Sailors Civil Relief Act is not in" conflict with this section and therefore the payment of sales tax by independent contractors running concessions on military bases is permissible. *U.S. v. Sullivan,* 270 F.Supp. 236,*affirmed* 393 U.S. 1012.

IN RE QUESTIONS NO. 1 AND 5:

I would answer your questions as follows. Personal property taxes must be levied on any property not owned by an exempt entity located within the area where the State of South

Dakota exercises concurrent jurisdiction. This would apply to personal property of staff members living at the compound as well as property leased by private corporations to the government. The tax in both instances is not upon the government but upon the individual or upon the private corporation.

IN RE QUESTION NO.2:

The possessory interests in government housing in concurrent areas, in my opinion, may be taxed as interest in real property under SDCL 10-4-2 and as required by 10-4 -1.

IN RE QUESTIONS NO.3 AND 6:

It is noted that 4 U.S.C. § 107(a) exempts from the levy or collection of any tax the sale, purchase, storage or use of tangible personal property sold by the United States or any instrumentality thereof to any *authorized puchaser.* (Underscoring supplied.) Authorized purchaser, 4 U.S.C. § 107(b), is a person who is permitted to make purchases from commissaries, ship stores or voluntary unincorporated organizations of personnel of any branch of the armed forces under regulations promulgated by the departmental secretary having jurisdiction over such branch. It would be my opinion, therefore, that the base or post exchanges or commissaries would not be subject to a sales tax and would not be required to collect a use tax from persons authorized to purchase there. However; any unauthorized person making purchases is liable for the use tax and under the doctrine of *Moe, et al., v. Confederated Salish and Kootenai Tribes of Flathead Reservation, et al.,* 425 U.S. 463, 48 L.Ed.2d 96,96 S.Ct. 1634, the exchange or commissary will be required to collect from persons who are not authorized to use those facilities.

It would seem rather obvious, however, that if the persons in charge of such facilities were to make the determination precedent to a tax collection that the purchaser was not entitled to purchase and, therefore, required to pay the tax, then they certainly should not let those persons purchase. However, your statement of facts has indicated that this is not always the case and that in some instances unauthorized persons do make purchases. Any of the canteens or other facilities which are not governmental instrumentalities, but which in fact are concessions, are subject to the state and any local sales tax upon their gross receipts. This is true both with regard to Ft. Meade, where there is concurrent jurisdiction, and Ellsworth, where the jurisdiction is exclusively in the United States.

IN RE QUESTION NO.4:

As to the matter of Ellsworth, I have been able to find nothing to indicate that any condition besides exclusive jurisdiction exists at that installation. The Chief of the Real Estate Division, Corps of Engineers, Omaha District, Department of Army, has advised this office that, with one or two exceptions which are plainly indicated on maps we have furnished you, all lands within the Meade County portion of Ellsworth Air Force Base are under exclusive federal jurisdiction.

In summary then, it is my opinion that the net effect of the recession of a portion of the United States Government at various Veterans Administration hospitals, is that state taxing jurisdiction applies with regard to that property and those functions which are not those of the United States Government or its instrumentalities and as in the case of exchanges permitted under the Buck Act. In no case may the nature of the jurisdiction to be exercised by the state have an effect on federal functions being performed. Such exemptions were first established in the familiar case of *McCulloch v. Mary,* 4 Wheat. 316 (1819). Thus, regardless of the type of jurisdiction the property is under, this state may not impose restrictions, requirements or other burdens on Veterans Administration operations.

I should further note that unless the retrocession order is filed within the office of the Register of Deeds, the jurisdiction of the State is not complete and the above is inapplicable thereto.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

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