TAXATION: Personal property obtained by federal agency through foreclosure not exempt from general property tax.

August 26, 1940

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Honorable Martin L. Neaf
Assessor of St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of August 20, 1940, as follows:

> "I would like to have an opinion from your office as to whether or not personal property of the Federal Housing Administration is taxable.
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> The Federal Housing Administration had to take over the Manhassett Village and Lucas-Hunt Village together with personal property, such as busses, automobiles, furniture, etc., located on these properties.
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> Mr. Minard T. McCarthy, Zone Manager of the Federal Housing Administration agrees that the real estate is taxable but thinks the personal property is not.
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> I am enclosing herewith copy of the letter of Mr. McCarthy on this question, copy of opinion from Mr. John H. Hendren of the legal department of the State Auditor's Office, with reference to sales tax, and also a copy of the National Housing Act as amended."

The only exemptions found in our laws which might bear on the situation presented are Section 1 of Article XIV, of the Missouri Constitution, which relates solely

to real estate owned by the United States, and Section 9743 of the Revised Statutes of Missouri for 1929, the pertinent part of which is as follows:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; * * * "

This statute cannot be applied in the present situation because the buildings in Manhassett Village are not public buildings, having been acquired through foreclosure and consisting entirely of private apartment houses.

We next resort to the National Housing Act, which created the Federal Housing Administration, for any expression by Congress on the question at hand. The following are all the provisions of the Act which we are able to find with regard to taxation by the various states of the property of the Federal Housing Administration:

Under Section 207 of the National Housing Act, in paragraph i, we find:

> " * * * Such debentures as are issued in exchange for mortgages insured after the date of enactment of the National Housing Act Amendments of 1938 shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. * * *

> * * * The Administrator at any sale under foreclosure may, in his discretion, for the protection of the Housing Fund, bid any sum up to but not in excess of the total unpaid indebtedness secured by the mortgage, plus taxes, insurance, foreclosure costs, fees, and other expenses, and may become the purchaser of the property at such sale. * * * "

Section 208 of the same title is as follows:

> "Nothing in this title shall be construed to exempt any real property acquired and held by the Administrator 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."

Section 307 of Title III of the Act is as follows:

> "All notes, bonds, debentures, or other obligations issued by any national mortgage association shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. Every national mortgage association, including its franchise, capital, reserves, surplus, mortgage loans, income, and stock, shall be exempt from taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. Nothing herein shall be construed to exempt

> the real property of such association from taxation by any State, county, municipality, or local taxing authority to the same extent according to its value as other real property is taxed."

The effect of these provisions is to exempt all notes, bonds or other obligations issued by the Federal Housing Administration from taxation. While no mention is made of personal property owned by the Administration, the real estate is specifically subject to real estate taxes imposed by any state or political subdivision. It should be noted also that even the obligations of the Administration are subject to surtaxes, estate taxes, inheritance taxes and gift taxes.

We have made a lengthy search of the authorities, both state and federal, and have found a growing tendency on the part of the federal courts to restrict the immunity of federal agencies and instrumentalities from state taxation. A precedent of many years standing was overruled by the United States Supreme Court in Graves v. The People of the State of New York, 306 U. S. 466, 83 L. E. 927. In the opinion in that case, rendered by Justice Stone, we find the following, which bears on the question at hand (83 L. E. 932, 933):

> "Congress has declared in Section 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, 'including its franchise, its capital, reserves and surplus, and its loans and income,' is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the

Congressional intention is not to be gathered from the statute by implication. Cf. Baltimore Nat. Bank v. State Tax Commission, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417, supra.

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

Following the holding in this case, it is our conclusion that since a tax on personal property is neither permitted nor prohibited, no presumption as to the intent of Congress can arise either way.

A similar question arose in our own state, and was decided in State ex rel. Baumann v. Bowles, 115 S. W. (2d) 805. In the opinion by Judge Gantt, many authorities were reviewed, and we quote at length from the opinion (l. c. 806, 807):

> " * * * It is admitted that the decisions on the immunity of federal and state governmental instrumentalities from taxation are in confusion.
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> However, the states may impose taxes on federal corporations created to carry out essential governmental functions. Union P. Railroad v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp., 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; U. S. v. Strang, 254 U. S. 491, 41 S. Ct. 165, 65 L. Ed. 368.
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> They also may impose taxes on corporations utilized by the federal government to carry out essential governmental functions. Thomson v. Union Pacific R. Co., 9 Wall. 579, 19 L. Ed. 792; Baltimore Shipping & Dry Dock Co. v. Baltimore, 195 U. S. 375, 385, 25 S. Ct. 50, 49 L. Ed. 242; Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469, 78 L. Ed. 918.
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> They also may impose taxes on agencies licensed, chartered, and supervised by the United States for the public benefit. Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622; Broad River Power Co. v.

Query, 288 U. S. 178, 53 S. Ct. 326, 77 L. Ed. 685; Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291, 51 S. Ct. 434, 75 L. Ed. 1042.

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In this connection it should be stated that the immunity of state instrumentalities from federal taxation, and the immunity of federal instrumentalities from state taxation is equal and reciprocal. Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. Ed. 304, 71 A. L. R. 1260; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759; Ambrosini v. U. S., 187 U. S. 1, 7, 23 S. Ct. 1, 47 L. Ed. 49; Indian Motocycle v. U. S., 283 U. S. 570, 577, 51 S. Ct. 601, 603, 75 L. Ed. 1277; Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443, 76 L. Ed. 815; U. S. v. California, 297 U. S. 175, 184, 56 S. Ct. 421, 424, 80 L. Ed. 567.

If the immunity of state and federal instrumentalities is equal, it would seem to follow, under the ruling in the South Carolina Case, supra, that a federal agency engaged 'in a business which is of a private nature' would not be immune from state taxation.

The rule with reference to immunity of federal instrumentalities from state taxation and immunity of state instrumentalities from federal taxation also is stated as follows:

'The very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal

government. * * *

'Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. * * *

'When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

'As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates thoseactivities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the state; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other.' Metcalf & Eddy v. Mitchell, 269 U. S. 514, loc. cit. 521, 525, 46 S. Ct. 172, 174, 70 L. Ed. 384.

Under this rule each case must be determined from its particular facts. In the instant case it is admitted that the four units of the Farm Credit Administration are federal instrumentalities created for a public purpose. Even so, the business of said units is of a private nature. Furthermore, the activities of the Farm Credit Administration are not traditional federal government activities. Indeed, the Supreme Court of the United States, on a consideration of the federal legislation in question, stated as follows:

'It is to be borne in mind that federal land banks, although concededly federal instrumentalities, possess also some of the characteristics of private business corporation. See Federal Land Bank v. Gaines, supra, 290 U. S. 247, 254, 54 S. Ct. 168, 78 L. Ed. 298. The statute does not contemplate that their stock is to be wholly, or even chiefly, government owned. Its acquisition by private investors is permitted, * * * and its subscription by the borrowing national farm loan associations is compulsory. * * * The operations of the federal land banks are, in part at least, for profit. * * * In the conduct of their business they may enter into contracts, * * * borrow money, receive interest and fees, * * * pay the expenses and commissions of agents, * * * and pay dividends on their stock. * * * While they are required to deposit in trust farm mortgages as security for farm loan bonds, * * * they may acquire and dispose of property in their own right, including land. * * * They thus have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose.' Federal Land Bank v. Priddy, 295 U. S. 229, loc. cit. 232, 233, 55 S. Ct. 705, 706, 79 L. Ed. 1408."

In brief, our court seems to apply the test as to whether or not the agency claiming exemption directly exercises the sovereign powers of the government. In the instant case, as in the case above, an admitted federal instrumentality is concerned. The Federal Housing Administration, as well as the Farm Credit Administration, was created for a public purpose. In both instances the business of the administrations is of a private nature. The Federal Housing Administration, through loans to private persons, assists in the erection of dwellings or, in some instances, insures mortgages already existing on privately owned real estate. Either of these functions is that ordinarily carried on by private individuals or institutions, and cannot be said in any sense to be an exercise of the sovereign power of the federal government.

Because of default in a private loan in the instant case, they have taken over as mortgagee a large area of private apartment dwellings. Incident to the repossession, they have taken over, according to the facts given in your opinion request, a considerable amount of personal property, such as furniture with which these apartment dwellings were equipped and busses which had been used to convey the residents of this area to downtown St. Louis. The operation of these busses and the possession of this furniture cannot be said to be an exercise of any of the sovereign powers of government in a democracy. In fact, we fail to find any authority in the National Housing Act for the granting of a mortgage on either of the above classes of personal property or the control of same if ownership is obtained by the Federal Housing Administration.

Under the test laid down, therefore, in State ex rel. v. Bowles, supra, the personal property described in your request for an opinion is not exempt from taxation.

It is our conclusion, therefore, in the light of the foregoing authorities, and in the absence of any statute granting exemption, that the personal property of the Federal Housing Administration located in the Villages of Lucas-Hunt and Manhassett, and not used in the exercise of any of the governmental functions of said administration,

is subject to the general state property tax and the general property tax levied by any political subdivision within whose jurisdiction it is situated.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC