OPINION
69-441

August 1, 1969 (OPINION)

Mr. Bruce L. Bartch, Director

Business and Industrial Development Department

RE: Taxation - Municipal Industrial Development Act - Leasehold as Personal Property

This is in reply to your letter of July 18, 1969, in which you ask several questions relative to the Municipal Industrial Development Act of 1955, as amended by the 1969 Legislative Assembly. Your questions will be considered in the order presented in your letter.

Your first question is concerned with section 40-57-17 of the North Dakota Century Code. You note this section classifies as personal property the leasehold granted by a municipality in a project financed by it under the Act and it further provides a five-year leasehold exemption to the lessee from personal property taxation of the leasehold. You further note section 1 of chapter 528, 1969 Session Laws, the personal property tax repeal bill, provides that locally assessed personal property will become exempt from personal property taxation beginning in the year 1970. You ask whether the leasehold that is classified by section 40-57-17 as personal property and exempted from personal property taxation for five years will continue after the five-year period to be exempt from all property taxes, both real estate and personal property taxes, because of the personal property exemption that is provided by section 1 of chapter 538, 1969 Session Laws, and because the leasehold is classified as personal property by section 40-57-17.

Section 40-57-17 of the North Dakota Century Code, as amended, provides in part:

> "* * * The leasehold granted by a municipality under this chapter is hereby classified as personal property. Upon application by the project lessee to the governing body of the municipality and approval the leasehold and all other personal property used by the lessee in connection with the project and located on the premises of the leasehold shall be exempt from personal property taxation for a period of five years from the granting of the leasehold and execution of any instrument evidencing that grant. * * *."

We would note the above statute classifies the leasehold as personal property without any exception. It is not classified s personal property only for the period of five years. Although the legislature may have contemplated that such leasehold estate would be taxable as personal property after the five-year exemption period had expired, they did not make the classification contingent upon that fact. The leasehold is apparently classified as personal property for the entire time such lease is in existence. Since the legislature has determined to exempt personal property from taxation after the year

1970, it is our opinion that the leasehold referred to in section 40-57-17 will continue to be exempt from all property taxes, both real estate and personal property taxes, after the expiration of the initial five-year period provided for in section 40-57-17.

In arriving at this conclusion we have considered the provisions of section 176 of the North Dakota Constitution which does not appear to permit legislative exemption of real property from taxation except as provided therein. However, if we consider that the legislature did not have the authority to classify the leasehold as personal property, we must consider the real property as owned by the city, thus exempt from taxation. The conclusion in either event would be the same, since city-owned property is exempt from taxation. Presumably the legislature, by classifying the leasehold as personal property, intended same would be taxable as personal property after the expiration of the five-year period. However, the repeal of the personal property tax would thwart that intent in view of the legislature's absolute classification of the leasehold as personal property. We assume, for purposes of this answer, that the municipality would grant the exemption as provided in section 40-57-17, as amended.

Your second question is whether a municipality in acquiring a "project" under the Municipal Industrial Development Act by the issuance of revenue bonds may use a part of the proceeds of such bonds to acquire personal property for the project. You note that the North Dakota Supreme Court in Gripentrog v. City of Wahpeton, 126 N.W.2d 230, (1964), held that the proceeds of such bonds cannot be used to acquire equipment which is not affixed to the land or to buildings on the land, even though such equipment is used in connection with the project. You further note that subsequent to that decision the 1969 Legislature amended the definition of the term "project" contained in section 40-57-02 to include "personal property which is used or useful in connection with revenue-producing enterprises" therein. The 1969 Legislature further deleted the term "permanently" from that part of the definition of the term "project" which included "any equipment permanently located on such real property or in such buildings" within such definition. It should be noted, however, that the latter phrase was not a part of the definition of the term "project" when the Gripentrog case, supra, was decided. That phrase was inserted by the 1965 Legislature. (See chapter 294, 1965 Session Laws.)

We also note, however, that the powers of a municipality to acquire property for a project by using the proceeds from issuance of revenue bonds as provided in subsections 1 and 2 of section 40-57-03 were not amended by the 1969 Legislature. The question you present is whether the 1969 amendment to section 40-57-02, defining project as including certain personal property, authorizes the municipality to acquire personal property for the project by using the proceeds of revenue bonds issued to finance the project.

Subsection 1 of section 40-57-03 authorizes a municipality to acquire any "real property, buildings, improvements on real property or buildings, including but not limited to easements, profits, rights in land and water rights deemed necessary in connection therewith * * *." This would apparently not include personal property within

such authority. However, subsection 2 provides the municipality has the power to:

> "Issue revenue bonds, in anticipation of the collection of revenues of such project, to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any project, whether than in existence or not; * * *."

Since the personal property is now part of the "project" as defined by section 40-57-02, as amended by the 1969 Legislature, it would appear subsection 2 of section 40-57-03, quoted herein, would, in fact, give the city the power to purchase personal property. This becomes more evident when we consider the decision of the Supreme Court of North Dakota in the Gripentrog case, supra. That decision, holding a city had no power to purchase personal property, was based primarily on the definition of the term "project" contained in section 40-57-02. (See Page 235 of the reported case.) The Court did not refer to the powers granted the city under section 40-57-03 in reaching its conclusions. As noted, at the time of the decision, the definition of the term "project" did not include personal property. We can only conclude the insertion of personal property into the definition of the term "project" was intended to overcome the decision of the Supreme Court in the Gripentrog case. It is, therefore, our opinion that a municipality is authorized to acquire personal property for the project by using the proceeds of revenue bonds issues to finance the project.

Your third question is related to the two previous questions. You ask if a project that is acquired by a municipality from revenue bond proceeds includes both real and personal property that can be leased to a lessee, and if the leasehold interest therein is not entirely exempt under the personal property tax repeal after the termination of the five year exemption period provided by section 40-57-17, whether that part of the leasehold interest represented by the personal property would be exempt from personal property taxes. As we have noted in our answer to Question No. 1, we believe the leasehold is exempt from personal property taxation, including the real property. It would, therefore, not appear necessary to further consider this question. However, even if the real property would not be exempt that part of the leasehold interest represented by personal property would nevertheless be exempt by virtue of the personal property tax repeal.

Your next three questions are concerned with section 40-57-17. In your fourth question you note that before the 1969 amendment to section 40-57-17, said section classified the lessee's leasehold interest as personal property and provided for two exemptions, the first of which exempted the leasehold interest from personal property taxation for a period of five years and the second of which exempted a corporate lessee from income tax for a period of five years on the income received from the business conducted on leasehold premises. The lessee was entitled to the exemptions without obtaining prior approval of any governmental authority. The 1969 amendment (chapter 384, 1969 Session Laws) provides, insofar as personal property tax exemption for the leasehold interest is concerned, that "Upon application by the project lessee to the governing body of the

municipality and approval" the leasehold is to be exempt from personal property taxation. The section further provides that as to the income tax exemption the corporate lessee "after making application therefor to the state tax commissioner" shall be exempt from corporate income taxes for five years. The 1969 amendments also provide the time within which the application for exemption should be filed and provides the lessee can waive, in writing or by act of making payment, all or any portion of the tax exemption granted under the provisions of the section. You note the 1969 Report of the Legislative Research Committee indicates, Page 37, that these amendments were intended to permit the lessee to claim less than the full amount of exemptions provided. You ask whether the amendments to section 40-57-17, by chapter 384, 1969 Session Laws, provide the governing body of the municipality in the case of personal property exemption or the state tax commissioner in the case of the corporate income tax exemption with any authority to reduce the amount of either exemption claimed by the lessee in its application.

It is our opinion that the governing body of the municipality and the state tax commissioner would not have authority to reduce the amount of either exemption claimed by the lessee in its application. We believe the exemption must either be granted in total or denied completely. This conclusion is based upon the fact section 40-57-17, as amended, provides in part:

> "* * * Upon application by the project lessee to the governing body of the municipality and approval the leasehold and all other personal property used by the lessee in connection with the project and located on the premises of the leasehold shall be exempt from personal property taxation for a period of five years from the granting of the leasehold and execution of any instrument evidencing that grant. Further, that any corporate lessee under such a leasehold referred to shall, after making application therefor to the state tax commissioner, be exempt from the payment of corporate income taxes on any corporate income attributable to the business carried on by the lessee on such leasehold premises for a period of five years from the year in which the corporation lessee commenced business operations on the leased premises, provided, however, that this section shall not have the effect of exempting such corporation lessee from filing an annual income tax return. * * *." (Underscoring ours.)

This section does not appear to permit a partial exemption if an exemption is granted. This is particularly true when compared with section 40-57.1-04, also enacted by the 1969 Legislature, permitting tax exemptions for new industries not financed under the provisions of chapter 40-57. Thus section 40-57.1-03 permits a "partial or complete" exemption from ad valorem taxation on all tangible property used in or necessary to the operation of a project for a period of five years from the date of commencement of project operations. Furthermore, the amendments, as you have noted, were a result of a study by the Legislative Research Committee. Their report, Page 37, while not discussing this question specifically, appears to indicate that the only possibilities under the bill would be the waiving of all or a part of a previously granted tax exemption by the lessee or a decision by the lessee to forego the exemption completely and not

request an exemption. We are also aware that prior to the 1969 amendment the exemption was mandatory.

In Question No. 5 you ask if a lessee which has already received as of July 1, 1969, the benefit of these exemptions for a part of the five-year period must now make application for the exemptions for the balance of the five-year period.

While ordinarily the legislature has the power to grant tax exemptions, within constitutional provisions, and to repeal any such exemptions, in this instance we are aware that the granting of the tax exemption is one of the inducements for a lessee to enter into a contract with a municipality under the provisions of chapter 40-57. However, we are extremely reluctant to state that the legislature may not rescind in whole or in part a tax exemption previously granted by the legislature since such statement would appear contrary to the law. It appears a lessee would be presumed to know that the legislature could entirely repeal the tax exemption or modify same during the exemption period. Furthermore, the Legislative Research Committee Report illustrates that the amendment was, in fact, inserted for the benefit of the lessee rather than the state or municipality involved. Thus, the report (Page 37) notes that it is not always desirable that the tax exemption provided by section 40-57-17 be mandatory upon a firm desiring to finance through use of industrial development revenue bonds and that there may be situations in which the lessee could decide that community acceptance of its presence would be enhanced if the tax exemption were foregone. The firm might also decide that continuation or increase of essential governmental services, such as fire and police protection, would not be possible if the tax revenue generated by assessment of the firm's property was not available. For these reasons the Committee recommended the amendments. These reasons would appear to be applicable to existing lessees as well as to future lessees. It is, therefore, our opinion that a lessee who has already received, as of July 1, 1969, the benefit of these exemptions for a part of the five-year period must make application for the exemptions for the balance of the five-year period.

We are aware that those industries which have been in operation prior to July 1, 1969, and have been entitled to a tax exemption by virtue of the provisions of chapter 40-57, would not, in fact, be able to make application within the time period prescribed in section 40-57-17, as amended, i.e., application for exemption for personal property exemption within thirty days from the date of the granting of the leasehold and application for exemption from corporate income taxes within sixty days from the time the corporate lessee commences business operations on the leased premises. We do not, however, believe it was the intent of the legislature, by virtue of this amendment, to eliminate the tax exemptions for those industries receiving same under the statute prior to its amendment. At least for those industries in operation prior to July 1, 1969, we believe the provisions of section 40-57-17, as amended, relative to application for exemption within the prescribed time period, are directory rather than mandatory. Therefore, we believe such industries may make application for the exemptions within a reasonable time after the effective date of the act, i.e., July 1, 1969.

Your sixth question is concerned with the provisions of section 40-57-17, as amended, which provides that application for exemption of the leasehold interest from personal property taxes must be made "within thirty days from the date of the granting of the leasehold." You ask what date is considered to be "the date of the granting of the leasehold." You ask if there must be a written instrument granting the leasehold and, if so, if the date of the granting of the leasehold is the date expressed in the instrument or the date that it is indicated the parties signed the instrument if that date differs from any other date expressed in the instrument or if it is the date that the acknowledgment or proof of the lease instrument was made before a notary public or other authorized person.

You will note subsection 3 of section 40-57-03 authorizes a municipality to lease projects to any industrial or commercial enterprise under the conditions set forth therein. While not specifically stated, we have no doubt but that the granting of the lease contemplates a written instrument. The conditions to be set forth therein are complex and without question the legislature assumed there would be a written instrument. The term "date of granting of the leasehold" would, therefore, be the date of granting of the leasehold specified in the instrument. In this respect, we would note the date of the instrument itself might not be the actual date of the granting of the leasehold if a different date is specifically provided in the instrument as the date of the granting of the leasehold. If no such date is contained in the instrument then the date of the instrument itself would govern. The date of acknowledgment of the signatures would not be significant.

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