

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89(49)S
Sales Tax
December 21, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890817B

On August 17, 1989 a Petition for Advisory Opinion was received from Lieutenant Colonel Donald Morgan, Staff Judge Advocate, 10th Mountain Division (LI) and Ft. Drum, Fort Drum, New York 13602-5100.

The issue raised by Petitioner, Lieutenant Colonel Donald Morgan, is whether soldiers who live off-post in federal leased military housing areas constructed and leased under the authority of Section 801 Public Law 98-115, reside on a "military base or reservation" for the purposes of Title 20, New York Code of Rules and Regulations, Section 526.15(d), which defines "resident" as applicable to military personnel for sales tax purposes.

Section 801 Army family housing in the Fort Drum area consists of twelve leased military housing complexes containing a total of 1,700 family housing units. The housing facilities were constructed pursuant to Section 801, Public Law 98-115, which conferred upon the Department of Defense (DoD) the authority to contract with private developers to construct family housing, which the DoD would then lease for a twenty-year term (hence the name, Section 801 Housing). The leases provide that the U.S. Army has the exclusive right of possession of the leased areas which include the housing units, the grounds around the housing units, and the streets and sidewalks within the housing complexes.

The housing complexes are located in Jefferson, Lewis, and St. Lawrence counties. After consulting with State and local officials, the Department of Defense decided to construct Army family housing units in various local communities to spread economic benefit from the expansion of Fort Drum to those communities.

Section 801 Housing areas are Sub-Installations of Fort Drum, and the Army treats the leased housing complexes as part of the military base. No difference exists between the administration or assignment of the Section 801 Housing units and other family housing on Fort Drum. There is a single waiting list for all Army family housing, and assignment of family housing is based solely on the bedroom requirements of the soldier and the next available unit, regardless of location.

The Fort Drum installation commander regulates weapons in quarters, child care, and public access in Section 801 housing just as he does in family housing on Fort Drum. Furthermore, under federal criminal law, leased property is viewed as part of a military reservation, post, fort, or installation. For example, as an element of the offense of unauthorized entry onto a military reservation, 18 U.S. Code section 1382, the government is required to prove absolute ownership or the exclusive right to possession of property upon which the violation occurred. United States v.

Mowat, 582 F.2d 1194 (7th Cir.1978), cert. denied 439 U.S. 967. The exclusive right to possession of the property conveyed by the lease is adequate for this purpose.

While the leases between the developers and the United States provide that the U.S. Army has exclusive right of possession of the leased areas wherein the Section 801 Housing units are located, the developer (owner/lessor of the real property) is responsible for paying the real property taxes due on such leased real property and police protection and fire protection in the Housing units are provided by the localities wherein such Housing units are located.

Pursuant to Section 52-a of the State Law the governor of New York State was "authorized to cede to the United States full concurrent jurisdiction over the tracts of land comprising the Fort Drum military installation and any other lands that may be acquired by the United States for military purposes at or near Fort Drum" Jurisdiction of the leased property upon which the Section 801 Housing units are located has not been ceded to the United States.

"Military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department which is located within any of the several States (10 USCS § 2687(e))

Sec. 801. Section 2828 of Title 10, United States Code, is amended by adding at the end thereof the following subsection:

"(g)(1) Notwithstanding any other provision of law, the Secretary of a military department may enter into a contract for the lease of family housing units to be constructed on or near a military installation within the United States under the Secretary's jurisdiction at which there is a validated deficit in family housing. Housing units leased under this subsection shall be assigned without rental charge as family housing to members of the armed forces who are eligible for assignment to military family housing. . . . (P.L. 98-115)

Section 526.15(d) of the New York State Sales and Use Tax Regulations states:

Military personnel. Any person serving in the Armed Forces of the United States, whose place of abode is situated on a Federal military base or reservation is not a resident of New York, unless he was a resident of New York immediately prior to his entry into service. Any person serving in the armed forces of the United States, whose place of abode is situated off a military base or reservation is deemed a resident of New York.

Therefore, the real property upon which the Section 801 Housing units are located as well as such Section 801 Housing units, are not considered to be part of Fort Drum nor to be situated on or within a Federal military base or reservation not subject to the taxing jurisdiction of New York State for the purposes of Section 526.15(d) of the Sales and Use Tax Regulations since,

a. the Section 801 Housing units are located on privately owned real property located outside the areas of Fort Drum ceded to the United States pursuant to Section 52-a of the State Law;

b. the governor of New York State has not ceded jurisdiction of such real property to the United States;

c. the developer (owner/lessor) of such real property is liable for paying real property taxes due on such real property to the localities; and

d. police and fire protection are provided by the localities wherein such real property is located;

Section 50 of the State Law does not relinquish the right of New York State to impose sales tax on individuals residing on properties acquired by the United States or to treat such individuals as residents for purposes of said tax since said Section does not provide for the ceding of jurisdiction by New York State to the United States over such realty. Military personnel residing within such housing units located "outside" Fort Drum are considered to be maintaining a place of abode situated off a Federal military base or reservation and are considered to be residents of New York State for sales tax purposes, regardless of their resident status at the time of entry into military service. Accordingly, purchases of motor vehicles by such military personnel are subject to New York State and Local Sales and Use Tax.

DATED: December 21, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.