



**THE ATTORNEY GENERAL  
OF TEXAS**

**CRAWFORD C. MARTIN  
ATTORNEY GENERAL**

**AUSTIN, TEXAS 78711**

August 17, 1967

Honorable George A. Day  
County Attorney  
Brown County  
308B North Broadway  
Brownwood, Texas

Opinion No. M-129

Re: Whether a Municipal Gas Corporation, created as a non-profit corporation to serve a municipality, is exempt from city, State, county and school taxes.

Dear Mr. Day:

We quote the following excerpt from your letter requesting the opinion of this Office on the above captioned matter:

"The Brady, Texas, Municipal Gas Corporation has claimed exemption from ad valorem taxation for county, city and school purposes. The question to be determined is whether or not from and after January 1st, 1967, the natural gas utility serving the City of Brady, Texas, and its environs will be subject to ad valorem taxation by Brown County, Texas, and for city and school purposes?

"On September 24, 1965, the City Council of the City of Brady, Texas, adopted a resolution requesting five individuals to act as initial directors of a corporation to be established (under the Texas Non-Profit Corporation Act) for the purpose of acquiring the existing natural gas utility system operating within the City of Brady and its environs.

"The Corporation was established under the name 'BRADY, TEXAS, MUNICIPAL GAS CORPORATION.' The Articles of Incorporation were filed in the office of the Secretary of State on November 12, 1965. The Articles read in part as follows:

"The purpose or purposes for which the corporation is organized is to promote the public interests of the City of Brady, Texas, by

constructing, acquiring, owning, leasing and operating municipal natural gas utility facilities in behalf of and for the benefit of the City of Brady, Texas, and its inhabitants. . . . All properties of the corporation shall be for the use and benefit of the public and no part of the income or revenues of the corporation shall ever be paid to or inure to the benefit of any director or officer of the corporation except for reimbursement of actual expenses incurred in connection with the business affairs of the corporation. . . . Nothing herein shall prohibit the employment of a general manager in accordance with the provisions of Article 1396-2.24 of the Texas Non-Profit Corporation Act. Upon dissolution or liquidation of the corporation (after satisfaction of all debts and claims) [sic] shall be distributed, transferred and conveyed to or for the benefit of the City of Brady, Texas.'

"A franchise has been granted to the Corporation for the use of public streets, alleys, public grounds, etc. by the Corporation. The franchise contains a provision whereby at any time the City may purchase the properties of the Corporation by paying the indebtedness of the Corporation in the manner prescribed. This provision is intended to provide a procedure whereby the City may acquire full legal and equitable title to the properties at any time it desires to do so. . . . The franchise with the City provides for certain payments to be made the City in lieu of all other taxes. . . .

"The phrasing of this portion of the franchise is attempted compliance with Article 1038, V.A.T.C.S. which reads as follows:

"The City Council may, by ordinance, provide for the exemption from taxation of such property as they may deem just and proper.'

"The Indenture of Mortgage and Deed of Trust to be executed by and between the Corporation and the Mercantile National Bank at

Honorable George A. Day, page 3 (M-129)

Dallas, Dallas, Texas, Trustee, contains several provisions relating to acquisition of the properties by the City . . ."

The company, prior to the final payment of the bonds, may assign or convey all or part of the System and or part of the Trust Estate to the City upon the terms and conditions expressed in the indenture of mortgage and deed of trust. The rights of the City are limited should such a conveyance occur, until the time the outstanding indebtedness (secured by the indenture) is retired. Furthermore, all obligations assumed by the company would not be affected by any conveyance.

The City during the time bonds, refunding bonds and additional bonds are outstanding has an option to purchase the System, subject to stated terms and conditions.

Unless the City proceeds to purchase the System as provided in the indenture, all covenants of the company shall remain the obligation and responsibility of the company, but in all other respects the City may have such possessory rights as expressed either in the instrument of conveyance or in a contract by and between the company and the City.

When all of the bonds and coupons secured have been paid or redeemed, all of the System and Trust Estate shall revert to the company or the City, if the City is entitled to receive same under the provisions of the indenture.

At page 7 of the brief submitted in connection with your request, the following statement appears:

"After the Indenture has been executed and the bonds authenticated and delivered, it is contemplated that the Corporation will make a conveyance of properties to the City of Brady (in substantially the form attached) as contemplated by the provision of the Indenture quoted."

We have concluded that under the facts of this case, the property in question is not exempt from ad valorem taxes by virtue of Article XI, Section 9<sup>1</sup> of the Constitution of the

---

1/ Section 9 of Article XI reads, in part, as follows:

State of Texas, which exempts from ad valorem taxes various political subdivisions of the State. We base our holding on Texas Turnpike Company v. Dallas County, 153 Tex. 474, 271 S.W.2d 400 (1954).

In Texas Turnpike, the corporations were chartered under Article 1302, subdivision 61, Vernon's Civil Statutes, for the purpose of building, **operating** and maintaining toll roads within the State of Texas. The corporations based their claim for exemption on certain provisions of Article 6674v, Vernon's Civil Statutes. This Article created Texas Turnpike Authority as a State agency. Their position was that when certain by-laws of these corporations and certain escrow agreements were considered together, the result was a placing of taxable title to the property in the State. The court rejected this contention even though the corporations were obligated to make an irrevocable gift of all of their assets to the State of Texas and bind themselves to use all of their net income to retire indebtedness. Upon acquisition of real property, the corporations were to execute conveyances thereof to the State of Texas and place same in escrow with an agreement that the escrow agent deliver the instruments to the Authority upon compliance with the requirements.

At page 402 of the opinion, the Court said:

"Under the foregoing facts is the property in question 'publicly owned' so as to be exempt from taxes under Article XI, Section 9 of the constitution? Public ownership, for tax-exemption purposes, must grow out of the facts; it is a legal status, based on facts, that may not be created or conferred by mere legislative, or

---

1/ (continued)

"The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, . . ."

even contractual, declaration. If the state does not in fact own the taxable title to the property, neither the Legislature by statute, nor the petitioners and the Authority by contract, may make the state the owner thereof by simply saying that it is the owner.

"The petitioners own and will own the legal title to the property acquired and to be acquired. They are, and will be, in possession and control of the property. They have placed, and will place, deeds conveying the legal title to the state in escrow, but the deeds are to be delivered and to take effect only upon certain conditions, some one or more of which may never occur or exist. Under these facts petitioners contend that the state is the owner of the equitable title to the property and that the equitable title is the taxable title. Undoubtedly the equitable title is the taxable title in those situations in which the grantee takes possession under a deed in which a vendor's lien is reserved or under a contract of sale by which the vendee is obligated to pay the purchase price. *Taber v. State*, 38 Tex.Civ.App. 235, 85 S.W. 835, writ refused; *Harvey v. Provident Inv. Co.*, Tex.Civ. App., 156 S.W. 1127, writ refused; *Leonard v. Kendall*, Tex.Civ.App., 5 S.W.2d 197, writ dismissed. Undoubtedly, also, this court has said that the grantee in a conveyance held in escrow is the owner of the equitable title to the property conveyed. *Cowden v. Broderick & Calvert*, 131 Tex. 434, 114 S.W.2d 1166, 117 A.L.R. 61; *Alworth v. Ellison*, Tex.Civ.App., 27 S.W.2d 639, writ refused. But in the latter cases taxable ownership was not the issue. Moreover, in such cases delivery of the conveyance by the escrow agent was dependent upon performance of certain conditions by the grantee; the grantee had it within his power to perform the conditions and compel the delivery of the conveyance transferring legal title. That is not true in this case. Here, the right of the state, as grantee, to acquire the deeds and the legal title they convey is entirely dependent upon performance of conditions by the grantors. The state owns

neither the legal nor the equitable title. It holds at most a right to become the owner of the legal title under certain conditions. Its interest in the property is not a vested interest; it is purely contingent. If, instead of the state, another private corporation were the grantee in the deeds, would the grantee's interest in the property be taxable? It would not because the grantee's interest would be purely contingent. Thus it is held that a contingent remainder in property is not a taxable title. *Nation v. Green*, 188 Ind. 697, 123 N.E. 163. Neither is a possibility of reverter. *Mayor and council of City of Gainesville v. Brenau College*, 150 Ga. 156, 103 S.E. 164. If the agreements made by petitioners would not create a taxable ownership in a private grantee, it is difficult to see how they could create a tax-exempt ownership in the State of Texas.

"The toll roads proposed by petitioners are mammoth projects which will cost many millions of dollars. If their construction is begun but abandoned, or if bondholders should be compelled to foreclose their liens and take over the properties, or if the methods and procedures of the State Highway Department are not followed in the letting of contracts for construction and maintenance, or if the roads are not constructed and maintained in a manner equal or superior to the standards of the State Highway Commission, or if the roads are not kept in good condition and repair to the satisfaction of the State Highway Commission — in any of these possible situations, the State could not become the owner of the roads under the express provisions of the statute. It is not enough that petitioners' officers and directors assure us that these contingencies will not happen, or even that they have taken all possible steps to guard against their happening; they yet remain possibilities and as long as this is so the state's interest in the property is purely contingent and the taxable ownership is in petitioners."

Honorable George A. Day, page 7 (M-129)

The holding in Texas Turnpike has been followed in Dickison v. Woodmen of the World Life Ins. Soc., 280 S.W.2d 315, 318 (Tex.Civ.App. 1955, error ref.); Maher v. Lasater, 163 Tex. 356, 354 S.W.2d 923, 925 (1962); and Tarrant County Water Supply Corp. v. Hurst-Eules-Bedford ISD, 391 S.W.2d 162 (Tex.Civ.App. 1965, error ref., n.r.e.). We think the facts in Texas Turnpike and the facts submitted to us are so clearly analogous that further analysis would be superfluous. You are therefore advised that since the City of Brady would not have title to the properties involved, the property in question is not entitled to the exemption accorded by Article XI, Section 9 of the Constitution of Texas.

SUMMARY

Under submitted facts, a Municipal Gas Corporation, created as a non-profit corporation to serve a municipality, would not be exempt from city, State, county and school district ad valorem taxes by the provisions of Section 9 of Article XI of the Constitution of Texas.

Yours very truly,

  
CRAWFORD C. MARTIN  
Attorney General of Texas

MMP:ms

Prepared by Marietta McGregor Payne  
Assistant Attorney General

APPROVED:  
OPINION COMMITTEE  
Kerns B. Taylor, Chairman  
W. O. Shultz, Co-Chairman  
John R. Grace  
John Banks  
John Duren  
Robert Flowers

STAFF LEGAL ASSISTANT  
A. J. Carubbi, Jr.