

ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 01-012

This document may not be used or cited as precedent. Code of Alabama 1975, §40-2A-5(a).

TO: XYZ County Housing Finance Corporation
XYZ County HFC-Anyname LLC
2501 7th Street
Anycity, AL 30000

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: February 15, 2002

RE: Whether a low income housing project proposed to be acquired and operated by the XYZ County Housing Finance Corporation, a non-profit corporation, will be exempt from ad valorem taxes under Amendment 373(k) of the Constitution of Alabama 1901 and §40-9-1(1), Code of Alabama 1975, on the grounds that the low income housing project will be used exclusively for charitable purposes?

FACTS

The facts as provided by E. A., Esq., ABC&D, PC, attorney for XYZ County Housing Finance Corporation and XYZ County HFC-Anyname LLC.

The XYZ County Housing Finance Corporation (the "Non-Profit Corporation") has been incorporated by the XYZ County Housing Authority (the "Housing Authority") in order for the Non-Profit Corporation through the XYZ County HFC-Anyname LLC, ("LLC"), as title holder, to acquire and operate as a low income housing project a 000-unit apartment complex known as the Anyname Apartments ("Low Income Housing Project"), located at 11 Some Road, Anycity, Alabama.

The Housing Authority is a county housing authority organized pursuant to §24-1-62, Code of Alabama 1975 for the purpose of ameliorating unsanitary or unsafe housing conditions and providing low income housing. Pursuant to the Articles of Incorporation of the Non-Profit Corporation and the LLC, both entities will act as "instrumentalities" of the Housing Authority and upon payment of the proposed bond indebtedness with respect to the Low Income Housing Project and the dissolution of

both entities, title to the Low Income Housing Project will vest in the Housing Authority.

The Non-Profit Corporation was incorporated pursuant to Title 10, Chapter 3A, Code of Alabama 1975. Under the Articles of Incorporation of the Non-Profit Corporation, the directors are selected by the Housing Authority. The Non-Profit Corporation, in turn, formed the LLC which is a limited liability company of which the Non-Profit Corporation is its sole member.

The particular standards and requirements that will govern the operation of the Low Income Housing Project to establish that it as a low income housing project that fulfils the charitable purposes are the standards set out under Section 501(c)(3) of the Internal Revenue Code. In Rev. Proc. 96-32, 1996-1 C.B. 717, the Internal Revenue Service established safe harbor guidelines for the purpose of determining when low income housing serves the charitable purpose of providing relief to the poor. These standards for a rental housing project require that (a) at least 75% of the units be occupied by residents that qualify as low income and (b) that either at least 20% of the units be occupied by residents that qualify as very low income for the area **or** that 40% of the units be occupied by residents that do not exceed 120% of the area's very low income limit, and that up to 25% of the units may be provided at market rates to persons who have incomes in excess of the low income limit.

To finance the acquisition of the Low Income Housing Project, the Non-Profit Corporation will issue Tax-Exempt Bonds guaranteed by the Department of Housing and Urban Development ("HUD"). The approximate total principal amount of Tax Exempt Bonds to be issued is \$7,200,000. The Housing Authority does not receive contributions or government funding that would allow it to subsidize low income housing projects. Therefore, it will be necessary to charge, and the tenants of the Low Income Housing Project will be charged rent sufficient to pay debt service on the Tax Exempt Bonds and expenses of operation. Tenants will also receive an indirect subsidy in the form of lesser rent than is required to be charged by reason of lesser debt service associated with the Tax Exempt Bonds and the HUD guaranty.

ANALYSIS

Generally, property owned and held by the state and counties for public purposes is exempt from taxation of any description, and is not subject to taxation in any form, unless the legislative intent to render it so clearly appears. See, City of Huntsville v. County of Madison, 52 So. 325 (Ala. 1910); Town of Mulga v. Town of Maytown, 502 So. 2d 731,734 (Ala. 1987). More specifically, the Supreme Court in Town of Mulga held that " Article IV, Section 91, of our Constitution expressly exempts from taxation the property, real or personal, of the state, counties, and municipal corporations. Id. at 732.

Art. IV, §91, Alabama Constitution of 1901 , reads as follows:

The legislature shall not tax the property, real and personal, of the state, counties, or other municipal corporations, or cemeteries; nor lots in incorporated cities or towns, or within one mile of any city or town, to the extent of one acre, nor lots one mile or more distant from such cities or towns, to the extent of five acres, with building thereon, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable.

Art. IV, §91, Alabama Constitution of 1901, is codified at §40-9-1, Code of Alabama 1975.

Section 40-9-1(1), Code of Alabama 1975, reads in relevant part:

The following property and persons shall be exempt from ad valorem taxation and none other:

(1) All bonds of the United States and this state and all county and municipal bonds issued by counties and municipalities in this state, all property, real and personal, of the United States and this state and of county and municipal corporations in this state; all property, real and personal, used exclusively for religious worship, for schools or purposes purely charitable; provided, that property, real or personal, owned by any educational, religious or charitable institution, society or corporation let for rent or hire or for use for business purposes shall not be exempt from taxation. . .

Amendment 373(k), Alabama Constitution of 1901 provides in part:

The following property shall be exempt from all ad valorem taxation: the real and personal property of the state, counties and municipalities **and** property devoted exclusively to religious, educational or charitable purposes, (Emphasis added.)

The statutes designated as the housing authorities law (Title 24, Chapter 1) were enacted for the purpose of enabling the state and its agencies and subdivisions to take advantage of the aid offered by the federal government in providing a better quality of homes for a class of citizens of moderate means and thereby improving living quarters and eradicating what is termed "slum districts" of quarters. Brammer v. Housing Authority of Birmingham Dist., 195 So 256 (Ala. 1940).

In re Opinion of the Justices, 179 So.535 (Ala 1938), then Governor, Bibb Graves asked for an advisory opinion concerning the question of whether the real and personal property owned and administered by Housing Authorities created under the Housing Authorities Law, Act No, 56, Acts of Alabama 1935, p. 126 was subject to taxation. The Court speaking in reference to municipal housing authorities, held as follows:

It is clear that if the power conferred by the act in question were conferred on the city proper, the property made subject to its terms would be exempt under section 91, Constitution. When the city is performing a governmental function, it is none the less so because it is done by the instrumentality of some administrative agency, such as a board, commission, or even a corporation set up for that purpose, created by or for the city's use in that connection...

The Housing Authority is an administrative agency of a city, and its property is therefore for certain purposes that of a municipal corporation and is entitled to the tax exemption of section 91, Constitution.

The Housing Authority incorporated pursuant to §24-1-60 is a public body organized as a body corporate and politic. The powers and duties of the County Housing Authorities, set out in §24-1-66, Code of Alabama 1975, are virtually identical to the powers and duties of Municipal Housing Authorities, set out in §24-1-27, Code of Alabama 1975. It is, therefore, reasonable to assume that the opinion rendered above applies equally to County Housing Authorities.

The crucial question to answer is whether property acquired and titled in the name of the XYZ County HFC-Anyname LLC is considered property of the Housing Authority thereby subjecting it to the provisions of §91, Constitution of Alabama 1901, codified at §40-9-1, Code of Alabama 1975, and Amendment 373(k) of the Constitution of Alabama 1901.

The answer to this question is provided in §24-1-66(c), which provides as follows:

An authority may exercise any or all of the powers conferred upon it in this article, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including

any corporation or corporations which are or shall be formed under the laws of this state, and for such purposes and authority may cause one or more corporations to be formed under the laws of this state or may acquire the capital stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law, exercise any of the powers conferred upon the authority in this article.

If it should be later determined that the property acquired and held in the name of the XYZ County HFC-Anyname LLC is not property owned by the county through the Housing Authority, then the holding in H.E. Monroe, Jr. v. Baptist Health Care Foundation, 772 So. 2d 414 (Ala.2000), will be applicable to this situation.

In this case, Baptist Outreach Services Corporation, a nonprofit corporation, owned and operated a retirement complex known as Bell Oaks, which provided housing for the well-elderly. Baptist Health Care Foundation, which is also a nonprofit corporation, owned a vacant adjacent parcel of land which was being used by Bell Oaks as a sound barrier to insulate it from a heavily traveled thoroughfare. There was no requirement for tenants of Bell Oaks to qualify as low income nor was there any subsidy provided if the tenants became unable to pay the rent charged. Also, the rent charged for the units was comparable to other apartment complexes in the area. However, the Court equated elderly with low-income and fixed income and found that Bell Oaks was being used exclusively for charitable purposes and was thus exempt from ad valorem taxation. The Court defined "charitable" in very broad terms and quoted itself from Mingledorff v. Vaughan Regional Medical Center, 682 So.2d 415, 421 (Ala. 1996), as follows:

"A general trend of authority in cases to determine the charitable character of institutions for tax exemption veers away from the old concept that charity is confined to the "free" care of the indigent, and toward the idea of charity as comprehending all humanitarian activities even though recipients may be able to pay at least in part for the benefits. Thus a charitable institution does not lose its character and consequent tax exemption merely because recipients of its benefits who are able to pay are required to do so, where funds derived in this manner are devoted to the charitable purposes of the institution. The exemption has been held to apply even if all or generally all the beneficiaries are required to pay, at least provided the charges are nominal or below the actual cost of the benefit conferred, but held not to apply, according to some cases, if they are remunerative in character, and, in some instances, if they are set at usual, commercial, or substantial rates. *But even the realization of an operating income in excess of the cost of the services provided has been held not to destroy the tax exempt status where the excess does not inure to the anyone's individual profit, but is devoted to the charitable purposes of the institution.* And in fact it has been said that to hold that because a charitable institution's receipts for a given period exceed its expenditures, this nullifies the tax exemption, would penalize efficiency and cause the institution's eligibility for exemption to vary from year to year." (Emphasis added.)

Ruling

The XYZ County Housing Authority is an administrative agency of the county with the power and authority to form the Non-Profit Corporation and the LLC to carry out its duties and responsibilities under the law. It is, therefore, reasonable to assume for certain purposes that the property of the Low Income Housing Project, is property of the Housing Authority and as such is entitled to the tax exemption of §91, Constitution of Alabama 1901, codified at §40-9-1(1), Code of Alabama 1975 and Amendment 373(k).

ALABAMA DEPARTMENT OF REVENUE

By: _____
Cynthia Underwood
Commissioner of Revenue

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