Opinion No. 49-5239

August 11, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: Victor Salazar Commissioner of Revenue Santa Fe, New Mexico

*{*74}* Reference is made to your letter of June 24, 1949, wherein you make inquiry concerning certain features of the Severance Tax Act as amended by the 1949 Legislature. Your direct question is quoted as follows:

"Will you kindly give me an opinion as to when severance from the soil is actually accomplished?"

In the consideration of this question, let me quote the first amendatory section of Section 1 of the Act and the first amendatory section of Section 2 of the Act, as contained in Chapter 65 of the Laws of 1949:

*{*75}* "Section 76-1301. Taxes Levied on Natural Resource Products -- Lien of Tax. -- That from and after the effective date of this Act, taxes hereby are levied **on all natural resource products severed and saved from the soil of this state;** provided, however, that water shall not be subject to the provisions of this act."

"Section 76-1302. Tax on Gross Value at Severance -- Gross Value Defined -- Rates -- Exemption. Taxes as levied by Section 1 of this act shall be predicated upon a gross value, as hereinafter defined, of such products severed and saved from the soil of this state and shall be paid at the rates provided for hereinafter in this section in the schedule of tax rates upon all such products as of the time when and the place where the same has been severed or taken from the soil immediately after such severance. **The gross value, as hereinafter defined, on all such production shall be computed as of the time when and the place where the same have been severed or taken from the soil immediately after such severance."**

I think the wording of the statute is very clear in indicating the time and place where the severance takes place, quoting "* * * at the rates provided for hereinafter in this section * * * upon all such products **as of the time when and the place where the same has been severed or taken from the soil** immediately after such severance. This wording, in my opinion, means exactly what it says, the tax being an excise tax. See Flyn et al v. State Tax Commission as to constitutionality and cases cited, 38 N.M. 131, 28 P.2d 889, cannot be imposed, levied and thereafter collected until severance has taken place. Severance becomes accomplished when the natural resources are first taken or separated from the soil. This means at the oil well, mine or at the physical property where the act of severing or taking from the soil is being accomplished.

That section of the statute defining gross value as being the sales value * * * at the first marketable point refers to and sets up a method of evaluating the taxable product, and this section should not be construed as attempting to define the place or time of the separation of the product from the soil.

In support of my opinion as above indicated, I wish to refer you to some of the cases reflecting the law on the question as to when severance takes place.

Severance has been briefly defined as removing anything from the realty. See King v. Metropolitan Life Ins. Co., 97 S.W. 2d 651, 653, 20 Tenn. App. 264.

The State of Louisiana has a severance tax law which has been adopted or followed by many of the state legislatures, including our own, in the enactment of a somewhat similar act. The Louisiana Act has been attacked many times in the courts. Several of these cases consider the question submitted by you. One of the most cited cases and always followed as authority is that of the Gulf Refining Company of La. v. McFarland, 97 So. 433, 434, 154, La. 251, which in addition to upholding the constitutionality of the act holds:

"The tax levied upon the production of oil and gas is 3% of the gross market value of the total production thereof. And the act declares that for the purposes of the act, the gross market value of the product or natural resource shall be taken in its unmanufactured state, **as of the time when and at the place where** it was severed or taken **from the soil or water."** See So. 2d 205.

*{*76}* A later case from the same jurisdiction is exactly in point as to the question presented, so I will quote in detail from State vs. Standard Oil Co. of La., 178 So. 601.

"Summary proceeding by the State of Louisiana against Standard Oil Company of Louisiana to recover Severance taxes on oil. From judgment for plaintiff, defendant appeals. Affirmed.

The state contends that for the purpose of computing the amount of the severance tax, the oil should be measured **at the place of severance, that is, as it passes out of the well into what is known as guage tanks.** The State admits that there is no severance tax due on anything except the oil, and therefore, it is proper to make deductions from the gross amount of the oil the percentage of basic sediment, dirt, water and other impurities contained in the oil, and temperature, but that deductions made by the defendant for loss in handling between the place of severance and the point of disteriation of the oil is an arbitrary deduction not authorized by law in computing the severance taxes. This deduction forms the basis of this suit." (Defendants had deducted 2% for loss in handling).

It further held:

"Thus it may be seen that the tax is now, and has been since August 1, 1928, based on the gross production or quantity of the natural resource **at the time and place of severance** and is computed at so many cents per barrel of 429 gallons, depending upon the gravity. The tax increases as the gravity ascends and it was further held that a gallon contains 231 cubic inches in volume. It affirmed judgment for plaintiff, allowing penalties for non-payment of taxes and other fees."

See also Barivise et al v. Shappard, Comptroller of Texas et al, 299 U.S. 33, 57 S. Ct. 70, 71, 81 L. Ed. 23, wherein the Supreme Court upheld the Texas Statutes charging the purchaser with the duty of withholding the tax from the purchase price, the purchaser acting as agent for the state, and cases cited touching on the question presented here.

In view of the law applicable to the question presented by you, it is my opinion that the severance of the product is actually accomplished when and at the time the product is taken from the soil at the place of location in the field where, by mechanical devices or manual labor, the product is separated and taken from the soil or realty. This place of separation then would be at the mine or at the oil well as the case may be.