Opinion No. 62-72

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BY: OPINION OF EARL E. HARTLEY, Attorney General J. E. Gallegos, Assistant Attorney General

TO: A. J. Krehbiel, Attorney, New Mexico State Tax Commission, State Capitol, Santa Fe, New Mexico

QUESTION

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1. What, if any, of the various improvements on state leased land are taxable?

2. If any such improvements are taxable, what is the basis of valuation for assessment?

CONCLUSIONS

1. See analysis.

2. Same as that for similar improvements on fee land.

OPINION

ANALYSIS

Of the many thousand acres of land owned by the State of New Mexico, the large majority of it is under lease to private individuals for grazing, agricultural, mining or other purposes. In their use of the land the lessees necessarily place improvements of various kinds upon it.

Under the general rule of the common law where one erects improvements on the land of another they become part of the real estate and title to them inures to the owner of the land. **Newton v. Thornton,** 5 P. 257, 3 N.M. 287; **Thompson on Real Property,** Sec. 1310. This rule is stated with particularity as to improvements on state land in **Hubbell Co. v. Curtis,** 40 N.M. 234 at 240, 58 P. 2d 1163 as follows:

"All property placed on state land which became a part of the realty is the property of the state unless otherwise provided by law. The state is a land owner and as such it has the same rights as that of any other owner with reference to ownership of improvements placed upon its property."

Inasmuch as the land owned by the State is exempt from taxation (N.M. Const., Art. VIII, Sec. 3), it would appear that none of the improvements on state land are taxable.

But the law specifically provides otherwise in Section 72-1-2, N.M.S.A., 1953 Comp., which reads:

"IMPROVEMENTS AND OTHER PERSONAL PROPERTY ON STATE LANDS UNDER LEASE OR SALES CONTRACT. -- Improvements and all other personal property located or placed upon lands leased or held under purchase contract from the state or upon the public domain for grazing, agricultural or mining purposes shall be subject to taxation. In case of default of the payment on such improvements, and the sale thereof for such unpaid taxes, only the interest of the lessee shall be sold."

In view of the general rule which makes improvements part of the realty, the problem becomes what, if any, improvements has Section 72 - 1 - 2, N.M.S.A., 1953 Comp., taken out of the exemption given to state land by the Constitution.

Generally speaking, an improvement is "A valuable addition made to property (usually real estate) or an amelioration in its condition . . ." **Black's Law Dictionary,** 4th Ed. We think the word "improvements" as used in the above quoted, Section 72-1-2, N.M.S.A., 1953 Comp., has a narrower meaning.

One is lead quickly to such a conclusion by (a) the phrase "Improvements and all **other personal property . . ."** (Emphasis added), and (b) the provision that upon default in payment of taxes the improvements can be sold to satisfy the levy.

The statute clearly contemplates an improvement that in common parlance is personal property. Though by annexation to realty, personal property technically becomes a part thereof, the intent of the statute should not be defeated by such characterization. It is a general rule that where construction of a constitutional or statutory grant of exemption is in question, all doubts will be resolved against the exemption and in favor of taxation. **Flaska v. State,** 51 N.M. 13, 177 P. 2d 167; **Peisker v. Unemployment Compensation Commission, et al.,** 45 N.M. 307, 115 P. 2d 62; **Church of Holy Faith v. State Tax Commission,** 39 N.M. 403, 48 P. 2d 777.

We therefore construe the taxing statute (Sec. 72-1-2, supra) as succeeding in making taxable all improvements on state leased lands that result from the placing of personal property on the land.

There are certain improvements, however, that do not result from the addition of personal property to the land but rather, are a rearrangement of the land itself. A typical example of this type improvement is an earth or rock dam erected across an arroyo.

We point to **San Pedro Railroad Co. v. City of Los Angeles,** 180 Cal. 18, 179 P. 393, as in point here. The California Supreme Court there considered the taxability of a breakwater and sand fill built by the lessee on land leased from the state of California. The City of Los Angeles assessed the improvement under a law providing that improvements on state land were taxable and defining improvements as "all buildings,

structures, fixtures, fences and improvements erected upon or affixed to the land . . .". The court held that the breakwater and sand fill was not taxable saying:

". . . The fill was not an 'improvement erected upon or affixed to the land,' but, when made, was a part of the realty; indeed, it was the land itself, the surface of which was changed by bringing it to a higher grade. Surely it could not be said the tenant would be entitled to remove this fill at the expiration of the lease by virtue of a provision contained therein to the effect that it might remove all improvements made. . . ."

The California Court aptly stated the reasoning that applies to this type of improvement. The conclusion it reached is, we believe, more readily apparent under the New Mexico Tax Statute (Sec. 72-1-2, supra) which uses the language "Improvements and all other personal property . . .", than it was under the wording of the California statute.

This type of improvement is part of the realty and is the property of the state in keeping with the pronouncement in **Hubbell Co. v. Curtis,** supra, and it is thereby exempt from taxation.

We do not overlook the fact that our Public Land laws give a lessee who loses his leasehold, because of lease or sale to another, the right to be compensated for the value of the improvements belonging to him. Sections 7-8-19, 7-8-35, and 7-8-54, N.M.S.A., 1953 Comp. (PS). This right to be compensated does not signify ownership. **Huebschmann v. McHenry,** 29 Wis. 655; 27 **Am. Jur.,** "Improvements", Sec. 3. But as to certain improvements the lessee has a further right under Sec. 7-8-19, N.M.S.A., 1953 Comp. Under that statute, if dissatisfied with the appraisement of his improvements when the land has been sold to another, the lessee can remove those which are "movable".

As regards movable improvements, the lessee has a right that is unique to unrestricted ownership and is paramount to the rights of the landowner. We can conceive of no movable improvement that is not the type that results from the annexation of personal property to the land. Thus, we believe the rights of the lessee regarding improvements under the Public Land laws support our interpretation of what kind of improvements Sec. 72-1-2, supra, makes taxable. The right of removal indicates ownership in the lessee rather than the state and it is ownership by the state that is the test for exemption under Article XIII, Sec. 3 of our Constitution. **Church of Holy Faith v. State Tax Commission,** supra.

1. **IMPROVEMENTS TAXABLE.**

For the reasons stated we conclude that: (1) Improvements on leased land which result from the erecting or affixing of personal property onto the land are taxable to the lessee; examples of this type of improvement are dwelling houses, barns and outbuildings, windmills, pumping equipment, metal stock tanks, corrals, fences, etc.; (2) Improvements on leased state land which are an alteration of the land itself are not

taxable; examples of this type of improvement are earth or rock dams, roads, wells, ditches, flood and erosion control dikes, land clearing, etc.

2. **BASIS OF VALUATION.**

Those improvements on leased state land which we have concluded are taxable should be declared by the lessee just as any other taxable property. Likewise, as with other taxable property, it is the duty of the county assessor to fix the valuation for tax purposes just as he does for similar improvements on fee lands. Declarations of a lessee as to value of improvements, such as those submitted to the Commissioner of Public Lands, are not to be used to fix values. Sections 72-2-3, 72-2-10.2, N.M.S.A., 1953 Comp.