

Opinion No. 62-78

June 27, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General L. D. Harris, Assistant Attorney General

TO: Mr. D. D. Monroe, Acting Chairman, State Tax Commission, Santa Fe, New Mexico

QUESTION

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Does Section 72-6-12 (6), N.M.S.A., 1953 Compilation prohibit the Tax Commission from using as evidence the valuation figures of corporations in the same class as the protestant at the hearing on the protested.

CONCLUSION

No, see analysis.

OPINION

ANALYSIS

As we understand the situation, there has been occasion when a corporate tax payer has filed a protest, the basis of which was the inequities of the valuation for ad valorem taxes on their property, as opposed to the property of their competitors. The claim being, in effect, that the protestant is carrying a greater tax burden than the competitors.

As we further understand the situation, upon the filing of a protest, there are provisions for formal and informal hearings, and we will presume that your question concerns the introduction of evidence at a formal hearing.

The Tax Commission desires to introduce evidence of the valuation of the competitors of the protestant to show that the taxes are equal and uniform as to the same class.

The Commission is concerned as to the effect of Section 72-6-12 (6) and as to whether or not it would prohibit the Commission from introducing the evidence of the valuation of the competitors of the protestant. We will not set out the contents of Section 72-6-12 (6). From reading this section it is evident that we are dealing with privileged, confidential information under certain circumstances. It is apparent that the Legislature desires to prevent promiscuity in divulging information relative to the valuation for ad valorem taxes of the taxpayer concerned.

The statute has never been construed by our Supreme Court, and it is therefore necessary to go to other jurisdictions and attempt to find similar statutes which have been construed. In construing the statute, we must consider the entire section 72-6-12, and a careful reading and analysis of paragraph 6 indicates to us that the Legislature has in mind an examination or inspection over and above that which is usually done by the Tax Commission. Ordinarily, as we understand it, the corporate taxpayer will submit a return to the Tax Commission, upon which the said Commission makes its determination. As we read paragraph 5, the Legislature has given the power to the Tax Commission to conduct examinations and investigations when the Tax Commission determines that the tax return does not give sufficient information on which it can make its determination. If this be so, paragraph 6 then is referring specially to the situation of additional information obtained by this examination or inspection, and, therefore, if the evidence which the Tax Commission desires to introduce is only that indicated by the tax return filed by the corporate taxpayer in the ordinary course, section 6 would appear not to be applicable and the evidence could be introduced.

Assuming however that the legislature might have intended for paragraph 6 to be applicable to any information obtained by the Tax Commission, we feel that the following extract from paragraph 6 is authority for the Commission to introduce the evidence: It is as follows:

". . . unless it becomes necessary in the performance of a public duty to disclose the same in any proceedings affecting the assessment or taxation of such property. . . ."

We find in paragraph 1, Section 72-6-12, supra, that the taxes shall be equal and uniform upon subject of taxation of the same class. The attack by the protestant is on the purported inequities of their valuation, and the evidence would be utilized to establish the equal and uniform nature of the valuation. As we read the statute, it is the Tax Commission's duty to establish the nature of the valuation and in a hearing such as is contemplated, the only manner in which they can establish the nature of the valuation is by the evidence relative to all the taxpayers in the same class.

In **Commonwealth v. Mellon Natl. Bank and Trust Co.**, 61 Atl. 2d 430, 360 Pa. 103, we find the following language on page 434:

". . . The purpose of this section is to prohibit voluntary disclosures. It is not intended to defeat justice by prohibiting the production of necessary records in judicial proceedings.

". . . In *Maryland Casualty Co. v. Clintwood Bank*, 155 Va. 181, 154 S.E. 492, a subpoena duces tecum was sought to compel the production of certain letters and reports for examination in court. The production was resisted on the ground that the Virginia Act provided that such information should be kept confidential. The statutory provision was analogous to Sec. 731 of the Pennsylvania Fiscal Code. The Court held:

"These statutory provisions should be construed to relate to information of a confidential nature affecting the business of a bank. They should be strictly construed,

when invoked for the limitation of judicial inquiry, and are subject to the right of every litigant to call for and produce evidence affecting his substantial rights. * * *

"The latter part of the section prohibiting employees or officers of the state from imparting such information clearly means the voluntary imparting of such information * *

"It was not intended to impede the administration of justice in the courts by the suppression of pertinent testimony!" (Emphasis added)

Maryland Casualty Co. v. Clintwood Bank, supra, is also followed in **Marceau v. Orange Realty**, 92 Atl. 656.

In Wigmore on Evidence, Volume 8, Section 2377, page 781 we find the following:

"The existence and extent of the evidentiary privilege accorded is usually expressed or at least implied by the language of the enactment. The words of the particular statute therefore must be very closely examined with awareness that the courts are reluctant to find a privilege where not required by the language and the subject matter to do so . . ."

It is evident that the Legislature did not desire to prevent the Tax Commission from introducing and considering pertinent evidence in sustaining a valuation. Further, following the situation to a most logical possible conclusion, the assessment or taxation of such property of the competitors can be affected by the results of the hearing. Therefore, the wording of the statute, above quoted, is ample authority for the Commission to introduce as evidence the competitor's valuations. There is additional support for this conclusion, as it is well settled that should the protestant disagree with the decision of the Tax Commission it can appeal to the District Court and the District Court can only consider the record made before the Tax Commission. If this evidence as to the equal and uniform nature of the tax is not in the record, it cannot be considered in District Court on appeal and could in all probability result in the District Court overruling the action of the Tax Commission.

An additional point is that from reading the statute the prohibition is only against the persons associated with the Tax Commission. Therefore, it would be entirely permissible for the Tax Commission to have representative of the protestants' competitors testify at the hearing and introduce the pertinent evidence hereby. (While we have used the term "privileged or confidential information" the statute does not appear to benefit the taxpayer to the extent a privilege could be claimed and cannot be used as a basis to refuse to testify.) Therefore, under the circumstances, as we understand, as we have outlined above, it does not appear that it would be a violation of Section 72-6-12 (6) by anyone associated with the Tax Commission if evidence regarding the valuation of the property of a protestants' competitors is introduced at a hearing.