

Opinion No. 68-09

January 26, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable J. Gregory Merrion State Representative Legislative-Executive Building
Santa Fe, New Mexico

QUESTIONS

Do the provisions of the income tax act, being Sections 72-15A-1, et seq., N.M.S.A., 1953 Compilation (P.S.) providing for a graduated tax on income, violate the provisions of Article II, Section 4, 18 and 20 of the New Mexico Constitution?

CONCLUSIONS

No.

OPINION

{*17} ANALYSIS

Article II, Section 4 provides:

"All persons are born equally free and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

Article II, Section 18 provides:

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Article II, Section 20 provides:

"Private property shall not be taken or damaged for public use without just compensation."

{*18} The issue you present is whether or not the graduated tax provisions contained in the New Mexico State Income Tax laws, Sections 72-15A-1, et seq., N.M.S.A., 1953 Compilation (P.S.), conflict with the above provisions. In actuality it appears that there are essentially four sub parts to your question. The first would be whether or not these laws violate the provisions of Article II, Section 4. The second question is whether the graduated tax provisions constitute taking of property without due process of law. The

third question is whether the graduated tax provisions constitute a denial of equal protection of the laws and the fourth question is whether the graduated tax provisions constitute the taking of property for public use without just compensation.

There are no New Mexico decisions construing or deciding the questions which you have presented to this office. It is therefore, necessary for us to turn to authority from other jurisdictions in order to ascertain the validity of the graduated income tax provisions.

Progressive tax provisions have been the subject of several discussions by the United States Supreme Court. **Knowlton v. Moore**, 178 U.S. 41, 20 S. Ct. 747, 44 L.Ed 969 (1899); **Brushaber v. Union P. R. Coe**, 241 U.S. 1, 36 S. Ct. 236, 60 L. Ed. 493 (1915). In **Knowlton v. Moore**, supra, the issue raised was whether a progressive or graduated rate feature of a tax statute was in conflict with the provisions of the United States Constitution. There without reference to any specific provision of the Constitution the U.S. Supreme Court stated as follows:

"Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the constitution. Without intimating an opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit"

"The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same has been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of a constitutional limitation, the question whether it is or is not is legislative and not judicial"

The consideration given to this question by the United States Supreme Court is pertinent to the question that you have raised. The reason for this is that the Fifth Amendment of the United States Constitution contains provisions prohibiting the taking of property without due process of law or taking private property for public uses without just compensation. Although the Court in that decision did not specifically mention those two provisions it held in the **Knowlton** case that the progressive tax did not violate any provision within the constitution. Furthermore, the Court there stated, that in the absence of such a constitutional limitation, the question was not a judicial question but one for the legislature.

In the **Brushaber**, case, supra, the Court was again faced with the question as to the constitutionality of a graduated tax provision. In that case the court was called to rule upon the question directly in the light of the Fifth Amendment provisions concerning due process and the confiscation of property. The Court held that the question as to whether the graduated tax provision violated ^{*19} the provisions of the Fifth Amendment have

been plainly pointed out in the **Knowlton** case, above, and that the claim of such violation was absolutely without any foundation. There again the Court indicated that the question as to the expediency of levying such taxes was not a matter of judicial concern but was one for the legislature.

In view of the fact that the provisions of Article II, Section 18 concerning due process and Article II, Section 20 concerning the taking of private property without just compensation are worded exactly as those contained in the Fifth Amendment of the United State Constitution, it is our opinion that the holdings of the United States Supreme Court are applicable to the issues presented in your request and that the graduated income tax provided for under our statutes does not violate either the due process clause of Article II, Section 18 or Article II, Section 20 of the New Mexico Constitution.

I will next direct my attention to the question of whether or not the graduated income tax provision violates the equal protection under the laws provision of Article II, Section 18 of the New Mexico Constitution. As pointed out above, there is no New Mexico case law deciding or bearing on this specific question. There have, however, been a number of cases in this state dealing with the meaning of the equal protection of the laws provision contained in Article II, Section 18 of the Constitution. In those cases it is clear that our Court has adopted the interpretation that equal protection does not require identity of treatment but only that persons within the same classification shall be treated equally although persons in different classes or classifications may be treated differently. **Davey vs. McNeill**, 31 N.M. 7, 242 Pac. 482 (1925); **Gruschus vs. Bureau of Revenue**, 74 N.M. 775, 399 P.2d 105 (1965). In the **Davey** case the State Supreme Court stated the question is whether or not the classification adopted by the Legislature is arbitrary or unreasonable. If the classification is reasonable, it is valid. The Court held that in the first instance the question as to whether the classification is reasonable is a legislative question and that the Legislature has necessarily a wide range of discrimination in distinguishing, selecting, and classifying persons into various classes. Furthermore, it concluded that if the classification is practical and not palpably arbitrary it is sufficient to satisfy the demands of the constitution. It should be noted that in the analysis contained in the **Davey** case, the Supreme Court treated the equal protection provision of the United States Constitution identically as the equal protection provision of Article II, Section 18.

As stated there is no case in New Mexico dealing with the specific question as to whether or not graduated income taxes are violative of the equal protection clause. We would, however, refer to **Walters vs. City of St. Louis, Mo.**, 347 U.S. 231, 90, 74 S. Ct. 505, 98 L. Ed. 660 (1954) in which the United States Supreme Court in considering whether or not the certain income tax provision violated the equal protection clause held that such classifications would not be violative of that provision. There the United States Supreme Court stated:

". . . Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some

relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

On the basis of the decisions of the State Supreme Court and of the persuasive opinion of the United States Supreme Court in **Walters vs. City of St. Louis, Mo.**, {20} supra, it is our opinion that the graduated income tax provisions do not conflict with the equal protection clause of Article II, Section 18 of the New Mexico State Constitution.

The final question to be considered is whether the graduated income tax provisions of our laws conflict with Article II, Section 4 concerning the inherent rights of individuals within this state. It is our opinion that graduated income tax provisions are in no way related to or in conflict with the inherent rights provision in Article II, Section 4. There is no way it can be said that the income tax provisions prevent or deny a person's natural inherent and inalienable rights among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property and of seeking and obtaining safety and happiness.

To summarize, it is our opinion that the graduated tax provisions of our income tax laws do not conflict with Article II, Section 4, 18 and 20 of the New Mexico Constitution.

By: Myles E. Flint

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