Opinion No. 71-16

February 8, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Columbus Ferguson Chairman State Corporation Commission P.E.R.A. Building Santa Fe, New Mexico 87501

QUESTIONS

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Would a statute allowing the State Corporation Commission to compromise civil penalties assessed for violations of the Pipeline Safety Act violate Article IV, § 32 of the New Mexico Constitution?

CONCLUSION

No, but see analysis.

OPINION

*{*26}* **ANALYSIS**

Article IV, § 32 provides:

"No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court. Provided that the obligations created by Special Session Laws 1955, Chapter 5 running to the state or any of its agencies, remaining unpaid on the effective date of this amendment are void."

Cases examining the constitutionality of statutes allowing compromises of certain claims owed the state are few in number and confused in rationale. Early cases tended to focus their analysis on whether or not the claim was an "obligation or liability" owed the state. These cases employed nebulous, sometimes questionable, distinctions between various kinds of property interests in money, and they are of little utility as guides to resolution of this question.

A more useful approach was adopted by the Supreme Court of Oklahoma in **National Bank of Commerce v. State,** 368 P. 2d 997 (Okla. 1962). The National Bank had incurred civil penalties for holding real estate in violation of state statutes. There was a question on the extent of the Bank's liability because there was a dispute over what percentage of the property the Bank actually owned. The Bank and the state agreed on a compromise settlement based on an estimate of the Bank's percentage of ownership. The state subsequently sued the Bank for the remainder of the civil penalty. On appeal the state defended its action by saying that the compromise violated a provision of the state constitution which, as ours does, prohibited diminution of liabilities owed the state.

The Oklahoma Supreme Court rejected the state's argument. The court held that the constitutional prohibition did not embrace "release of claims doubtful or hazardous which the state might hold . . . and so claims which are unliquidated and uncertain in amount may be compromised by the state at any time before final judgment." **National Bank of Commerce v. State, supra.** The court said, in effect, that if the amount of a claim is uncertain, fixing the amount of liability cannot be considered a diminution of liability. Liability is diminished, and the Constitution violated, only if the state accepts less than the agreed amount once liability has been ascertained. Thus, the Legislature can provide for the ascertainment of uncertain claims, but it cannot provide for diminution of a claim once it is ascertained.

The New Mexico Legislature has adopted this approach in providing for compromise of disputed tax claims:

"At any time after the assessment of any tax, if the commissioner in good faith is in doubt of the liability for the payment thereof, he may, with the written approval of the attorney general, compromise the asserted liability for taxes by entering, with the taxpayer, into a written agreement that adequately protects the interests of the state."

Section 72-13-34, N.M.S.A., 1953 Comp. (1969 P.S.).

We conclude that a similarly worded statute allowing compromise of civil penalties where there is a good faith doubt as to the extent of liability of the offender would not violate Article IV, § 32. We emphasize, however, that such a statute can only allow for compromise or ascertainment of the amount of fine when the extent of liability is dubious. A provision allowing compromise after the fine has been fixed would be unconstitutional. Thus if there is a flat fine assessed for violation of a regulation, that amount cannot be compromised once the violation has been established.

By: Thomas Patrick Whelan, Jr.

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