Opinion No. 71-80

June 29, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Terence W. Ross Chairman Joint Executive Committee Colorado and New Mexico Railroad Authorities 1111 Barcelona Lane Santa Fe, N.M. 87501

QUESTIONS

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May the State of New Mexico tax property held by Colorado and New Mexico as tenants in common?

CONCLUSION

See analysis.

OPINION

*{*116}* **ANALYSIS**

On June 30 and July 1, 1970, Colorado and New Mexico signed the Narrow Gauge Railroad Agreement. The agreement's purpose is the preservation and operation of the Chama and Toltec Scenic Railroad. The two states agreed to purchase the real and personal property of the railroad and to hold it as tenants-in-common with a 50% interest in each state. Narrow Gauge Railroad Agreement, Part A, Article I, II (2), III.

The tax status of Colorado's interest in the property located in New Mexico *{*117}* depends upon the legal status of Colorado as a property owner in New Mexico. Colorado holds property in New Mexico as a private person, not as a sovereign. This has been the law since 1924 when the United States Supreme Court decided **Georgia v. Chattanooga,** 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796. In that case the Court upheld the power of the City of Chattanooga, Tennessee, to condemn land owned by the State of Georgia, which Georgia used for a railroad which it operated in Tennessee and Georgia. Observing that the "power of eminent domain is an attribute of sovereignty, and inheres in every independent state," the Court concluded:

"Tennessee . . . did not . . . give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity." **Georgia v. Chattanooga, supra.**

See also, **McLaughlin v. Chattanooga,** 180 Tenn. 638, 177 S.W.2d 823.

The power to tax is also an essential and inherent attribute of sovereignty. **City and County of Denver v. Lewin,** 106 Colo. 331, 105 P.2d 854. Just as property in New Mexico owned by Colorado would be subject to eminent domain, so would it be subject to taxation. We conclude that Colorado's interest in railroad property in New Mexico is subject to taxation.

Colorado owns a fifty per cent interest in all the scenic railroad's property as a tenant-in-common with the State of New Mexico. As a tenant-in-common each state has an undivided interest in the property. **Haden v. Eaves,** 55 N.M. 40, 226 P.2d 457. Normally, a tenant-in-common is obligated to pay the entire assessment on the property with a right of contribution against his cotenant for a proportionate part. **Kaye v. Cooper Grocery;** 63 N.M. 36,312 P.2d 798; **Haden v. Eaves, supra.** In this situation, however, only Colorado's interest is taxable; for New Mexico's interest is exempted by Article VIII, Section 3 of the New Mexico Constitution. Colorado, therefore, is liable for taxes on fifty percent of the full assessed value of the Railroad's property in New Mexico. It has no right of contribution against New Mexico by virtue of the tenancy in common since it must pay only its proportionate share of the taxes.

We note that taxing Colorado's interest is contrary to the spirit if not the letter of Article VIII, Section 3 of the state constitution. Article VIII, Section 3, exempts from taxation the property of the United States, the state, counties, municipal corporations, and school districts. New Mexico Railroad Authority has agreed to pay half of any taxes which Colorado pays to this state. Narrow Gauge Railroad Agreement, Part A, Article IX. A tax on Colorado's interest is in effect a tax on New Mexico. This situation is contrary to the policy underlying Article VIII, Section 3. In **State v. Locke,** 29 N.M. 148, 219 P. 790, the New Mexico Supreme Court articulated the policy of the tax exemption for state property. The court said that the exemption granted state property arises from public policy,

"which repudiates, as being utterly futile, the theory of the state taxing its own property in order to produce the funds with which to operate its own affairs. To tax it would merely require and render it necessary to levy new taxes to meet the demand of those already laid; that the public would thus be taxing itself to produce the money with which to pay to itself the taxes previously assessed thereby benefiting no one except the officers employed to collect and disburse such revenues, whose compensation would merely serve to increase the burden of this useless and idle ceremony. The object of taxing property is to produce the revenues with which to conduct the business of the state; it is entirely inconsistent with our theory of government for the property of the state to be taxed, or sold for taxes, in order to produce the money to be expended by the state. Such a procedure is but *{*118}* taking the money out of one pocket and putting it in the other."

We conclude that Colorado is liable for taxes on its interest in property in New Mexico although the conclusion is admittedly contrary to the spirit of the Article VIII, Section 3 tax exemption.

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