Opinion No. 14-1348

October 5, 1914

BY: F. W. CLANCY, Attorney General

TO: Mr. S. D. Stennis, Jr., Carlsbad, New Mexico.

TAXATION.

Debts due to non-residents not taxable. Taxation of mortgages.

OPINION

*{*209}* I have received your letter of the 2nd inst., in which you ask two questions as to the recent action of the State Board of Equalization, in calling the attention of assessors to the omission of assessments of mortgages or credits for money loaned, and directing them to ascertain the existence and amount of this class of property and to put the same upon the tax rolls as omitted property, in accordance with Section 18 of Chapter 84 of the Laws of 1913.

You ask, first, whether the State Board of Equalization intends that the assessors list for taxation, mortgages held by non-residents. The general rule is as laid down in 1 Cooley, on taxation at page 84, that persons and property, not within the territorial limits of a state, cannot be taxed by it. Under this general rule, it appears to me that we could not, in New Mexico in the absence of any direct legislation on the subject, here tax debts due to non-residents. In the case of Kirtland vs. Hotchkiss, 100 U.S. 491, the taxation in Connecticut of evidences of indebtedness, secured by mortgage on property in another state was upheld.

You further ask if it is intended by the State Board of Equalization to direct the assessors to list for taxation all mortgages at the face value of the mortgage, regardless of the actual value of such notes and mortgages, and regardless of any bona fide indebtedness of the holder of such mortgage as contemplated by Section 7, Chapter 84 of the Laws of 1913.

This is really two questions in one. My opinion is that where the assessor can ascertain the actual value, the assessment should be made accordingly, but where this is not practicable, his only guide necessarily would be the face value. As to the deduction of bona fide debts owing by the holder of a mortgage, as specified in Section 7 of Chapter 84 of the Laws of 1913, I am unable to see how the assessor now can take that matter into account. The holders of mortgages, having failed to list their money, notes and credits as required by that section, together with a statement of the bona fide debts owing by him, his failure to comply with the law, puts him in such position that the assessor could not now properly receive such a statement. You say that you "think it hardly fair that the assessors be instructed to list for taxation all mortgages

indiscriminately, now that the time has passed (if it has) within which the offset may be claimed." I think, however, you will also agree that it is not fair that this claim of property should go untaxed when the holders of it have failed to comply with the law at the proper time by listing it with the statement of their bona fide debts. That such property is *{*210}* taxable, has been distinctly held in the case of Territory vs. Building and Loan Association, 10 N.M. 337, and recently in cases in the Supreme Court of the state, complaint was made of inequality and discrimination because an assessor had not assessed this class of property.

I appreciate fully the sort of equitable argument to be made, based upon the general failure of assessors to assess this kind of property, and the consequent disregard of the law by tax-papers who ought to have listed it, but as far as the action of the assessor is concerned, I do not see that the tax-payer, who has not complied with the law is in any position to dispute the propriety of the assessor now putting this omitted property on the tax roll as the statute makes it his duty to do. I will not venture to predict what, if any, relief the courts might give if the collection of the tax be resisted.