Opinion No. 16-1747

February 29, 1916

BY: FRANK W. CLANCY, Attorney General

TO: State Tax Commission, Santa Fe, New Mexico.

Construction of the law taxing the output of mines.

OPINION

*{*317}* Referring to the mine tax law, which is published as Chapter 55 of the Laws of 1915, concerning which I had a somewhat extended conference with you and Mr. Guilfoil yesterday, and another this morning with Mr. James, I will try, as briefly as possible, to state my views on the matters concerning which there appear to be some differences of opinion and some controversy.

I believe that those differences of opinion are, in great part, due to previously acquired knowledge as to proper business methods in use by mining companies, which tends to lead some of us away from a due regard to the provisions contained in the statute. I am quite willing to admit that some of the things which I believe the statute means, do not harmonize with the best business methods, or with the sound ideas of practical men as to how this class of business ought to be regarded and conducted, but we should not lose sight of the fact that we must be guided by the language which the legislature has seen fit to employ, and to disregard no part of it.

We all can agree that the clear legislative intent was to impose a tax upon the net value of the mine product, and at the same time to tax the property of the mine operators the same as other property is taxed. The statute attempts to point out how the net value of the mine product is to be ascertained, and to that end authorizes the deduction from the gross value of the output, of the cost of creating that output, with certain limitations. Any differences of opinion which may exist appear to be as to what can be included in the deduction to be made from the gross value of the output. Section 2 of the act provides for the rendition, to the State Tax Commission, of an annual statement containing certain information specified in different subdivisions of the section, the fifth of which reads as follows:

"A true and correct statement and account of the actual expenditures of money and labor in extracting such ore or mineral from the mine or mineral lands and of transporting the same to the mill or other treatment or reduction or refining works, the cost of the preparation, treatment, reduction, refining and handling of the same and conversion thereof into money, or its equivalent."

Section 3 of the act forbids the inclusion, in the statement of expenditures required by the paragraph above quoted, of certain kinds of expenditures, and it may be well to quote that section also to be read in connection with the other portions of this letter:

"In making the statement of expenditures mentioned in the preceding section there shall not be included therein any amounts expended for machinery, or other improvements, or appliances for such mining operation or for improvements made *{*318}* for the purposes of reducing or refining such mineral, or for the construction of mills or other reduction works, including coke ovens, and washeries, or improvements made for transporting of such mineral; but all expenditures made for any and all such improvements, structures, buildings, or other facilities shall be considered as part of the capital account of such mining operations and as no part of the operating expense thereof. Such expenditures shall not include the salaries, or any portion thereof, of any person, or officer, not actually engaged in the working of such mine, or in the reduction, transportation, sale or refinement of such mineral, or personally superintending the management thereof."

Section 7 of the act provides for the taxation of improvements, buildings, erections, structures or machinery placed upon any mine or mining claim, and all grazing, building or other surface value of lands, in the same manner as other property of like kind. This appears to indicate the legislative intent not to exempt any property of mining companies from taxation because of the tax upon the net production, and should be considered in connection with the prohibitory provision in Section 3, already quoted. It is clear that the things enumerated in Section 3 are not to be included in the deductions to be made from the gross value of the output because they are set off in a class by themselves to be taxed the same as other property of like kind.

It has been suggested, however, that the taxes levied upon such other property, in accordance with Section 7 of the act, should be deducted from the gross value of the output of the mine, and considered as a part of the actual expenditures of money mentioned in the fifth subdivision of Section 2. I am unable to agree that this can be correct. It is true that the payment of such taxes is an actual expenditure of money, but it is not an expenditure of money in extracting the ore from the mine, or of transporting the same to reduction works, or of the cost of preparation and handling of the product and the conversion thereof into money, and taking the whole act together, it seems plain that the legislature did not contemplate any such connection between the taxation of other property and the taxation of the net value of the mine product.

It has also been urged that repairs and replacements of machinery and equipment ought also to be deducted from the gross value of the mine product as a part of the expenditures mentioned in paragraph five of Section 2 of the act, or as a part of the actual cost of production mentioned in the second paragraph of Section 4. As far as I can understand, this idea is largely based upon the language in Section 3, which says that the expenditures therein mentioned, which cannot be included in the statement of expenditures required by Section 2, "shall be considered as part of the capital account of such mine operations and as no part of the operating expense thereof." It is urged

that this language shows that these expenditures are to be charged on the books of the company to the capital account, and that if they are so charged, that would duplicate charges for the same machinery, improvements or appliances which had already been charged to that account, and would thus make the account *{*319}* an untrue one. The answer to this is that we have no concern with the methods, whether usual or otherwise, in which mining companies may keep their capital account or depreciation account, and that the language just quoted means that for the purposes of this act, such expenditures shall be considered as a part of the capital account. We are told that the usual method is to charge off, at stated intervals, a certain amount of money to what is called a depreciation account, in which money is retained for the purpose of replacing depreciated equipment, and that, therefore, we ought to construe this section of the statute in connection with that ordinary method, and possibly go so far as to deduct everything that was set aside for depreciation from the gross value of the output of the mine. I cannot see that the statute contemplates anything of the sort. All such property is to be returned and taxed like other property, in accordance with Section 7 of the act. That is to say, that property is to be returned at its actual value, and any reasonable person would not imagine for a moment that the mining companies will, under such a law, return that property for any more than its actual worth, or for anything like what it may have originally cost. Upon each item of machinery, improvements or equipment, allowance will undoubtedly be made in those returns for any depreciation which the property has suffered. Now, if we were to deduct from the gross value of the output of the mine anything for depreciation of equipment, and the companies make a like deduction in making their returns of such property at its actual value, the companies would be getting a double advantage in the way of escape from taxation, which we cannot believe that the legislature ever intended.

The language of Section 3 is, to my mind, clear and unmistakable and needs no reference to customs of business men for an explanation of its meaning. The prohibition is absolute that any amounts expended for machinery or other things mentioned in that section cannot be included in the statement of expenditures which are to be deducted from the gross value of the output of the mine, and can cut no figure whatever in the ascertainment of the net value of the product. The legislature has said this so clearly, that I can see no escape from it.

As to the other item of repairs, above spoken of, it strikes my mind that this can be differently regarded. Those things which, in the ordinary course of mine operation, require repairs or replacement of broken parts so as to keep the appliances in a state of efficiency, ought to be considered as part of the cost of the various things mentioned in paragraph five of Section 2. They are current expenses which constitute a part of the cost of production, and practically could not be segregated from that cost. This would cover such things as the expense of sharpening tools, of keeping machinery in working condition, of repairing mine cars, of patching a leaky steam boiler or expanding flues in such a boiler, and hundreds of other such minor operations which I have neither the time nor the ability to enumerate.

Another question which was discussed was as to whether fire insurance upon mining property, or employers' liability insurance should be allowed as a deduction from the gross value of the output *{*320}* of the mine. I am unable to see how insurance upon buildings of mining companies can be considered as an expenditure of money in extracting the ore from the mine, or in any other thing referred to in paragraph five of Section 2. I admit that it is a natural and proper expense, and that, except in unusual cases, it would ordinarily be very bad management not to carry such insurance, but it is not an expenditure such as those mentioned in said paragraph five.

As to employers' liability insurance, the money paid for such insurance certainly cannot be classed among the expenditures which can be deducted from the gross value of the mine product. This insurance is to protect the mining company against any loss from damages to any of its employees. The law is that the employer cannot be held liable for any such damages unless he has been guilty of some negligence or wrong-doing, and it is preposterous to hold that the payment of money for protection from liability on account of wrongful acts, can be considered as a part of the cost of production of the output of the mine.

It has also been urged that office employees at the mine are persons "actually engaged in the working of such mine," and, therefore, their salaries should be deducted from the gross value of the output. I believe that no broad, general rule can be laid down which would cover the case of all such employees, and that whether their salaries, or any part thereof, could be allowed as such deduction, must depend upon the nature of their duties, and probably any claim for such deductions, if made by any of the mine operators, would have to be decided by the circumstances and conditions of each case. Some such office employee might be so connected with the mine work as to be considered as engaged in the working of the mine, while others would be so clearly separated from any mine work that their compensation could not be considered as part of the expenditures mentioned in paragraph five of Section 2.

Another suggestion has been made which, perhaps, requires a little attention, and that is that the method which I recommended, and which I understand has been adopted, of including as a part of the mine output that part of the product which is on hand and unsold at the time of the making of the annual statement, might lead to a species of double taxation, because that unsold portion, when sold later during the year, would produce revenue which would figure in the ascertainment of the production of the mine for the following year. No one would contend that any such double taxation is permissible unless clearly and definitely ordered by the legislature, and we cannot find any definite legislative command to that effect in this statute. It is easy, however, to avoid any such undesirable result by taking into account, at the time of the making of the next annual statement, of what had been charged and on hand at the time of the previous statement and taken up at not less than its true market value, as required by Section 4 of the act. The amount so charged might be deducted from the amount of revenue produced from the sales during the year.

You will understand that I am attempting only to give my views as to what the statute means, without any regard to a consideration of what it ought to be. If my opinion is correct as to the meaning *{*321}* of the statute, and it is found that, practically, the operation of the statute works hardship or injustice, either to the state or to the mine operators, the remedy must be applied by the legislature, and cannot be applied by executive officers, whose only duty is to enforce the law as it exists, and not to attempt to supplement it or modify it, as that would be an invasion of the legislative department of the government.