

Opinion No. 17-2050

August 28, 1917

BY: HARRY L. PATTON,

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

Chapter 55, Laws of 1915, Known as the Mine Tax Law Is Invalid.

OPINION

I am writing this letter confirming my views heretofore orally expressed to you construing Chapter 55, Laws 1915. The act referred to provides for the assessment and taxation of mines and mineral lands. It provides for the taxation of the net value of the output of mines operated in the State and provides that the valuation of such output shall be taken and considered and assessed as in lieu of the assessable value of the mineral in such mine. The act further makes provision as to how the net value of such mineral output may be determined by taking the difference between the actual cost of production, transportation, treatment, shipment, and sale of such output and the amount realized if sold, or which could be realized at the time of making such report by the sale of same. Provision is also made for making a report to your Commission which shall disclose the facts necessary to determine such net value of the product of the mine. In other words, the net product of the mine is assessed and taxed in lieu of the mineral value of the mine. From reports which have been made to your Board for taxation purposes, and from information available, I find that such net product very closely approximates the net profit of the mine. The act also makes provisions for the taxation of improvements, buildings, machinery, etc., and for the taxation of lands at their grazing or surface values. It may be noted that the method provided for the assessment and taxation of mines under said act is different from that pursued in the taxation of ordinary property in the States by the assessors of the various counties. The determination of the value of mines is a duty imposed upon your Commission. Your Commission is also authorized to fix the value of property belonging to railroads, telegraph, telephone, express, sleeping car, and transmission companies, under the provisions of Chapter 54, Laws of 1915. The statute last referred to bears no relation to the one under consideration, but I cite it for the purpose of showing that the method of assessment by assessors is not the exclusive method employed under our laws.

Section 1 of Article VIII of our Constitution reads as follows:

"Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class."

Section 12, Chapter 54, Laws of 1915, contains the following provision:

"All tangible property shall be assessed and taxed upon its actual value."

Under the method employed for the taxation of ordinary property by assessors in this State, all property is assessed and taxed at its actual value. As I have before stated, the taxation of the net product of mines so closely approaches the taxation of the net profit of the mines that a serious question is presented as to whether or not, under the act of 1915, mines are assessed at their actual value, and the question is hereby presented as to whether or not such act violates the provisions of the section of the Constitution above quoted. Lands and improvements thereon, livestock, merchandise, railroads, telegraph, telephone, express, sleeping car, and transmission companies, and all other classes of real and personal property are presumed to be assessed and taxed at their actual value, regardless of the amount of the net product, and regardless of whether or not any profit is realized by the owners of such property. Not so with the owners of mines, however, for the law discriminates in their favor to the extent that they pay taxes only upon the net value of the mineral output of the mines. The courts are practically unanimous to the effect that different methods of assessment may be resorted to under legislative authority for determining the value of different classes of property, but it is held under constitutional provisions similar to ours that such methods must substantially result in assessing such classes of property according to their true value. So long as classification is based upon the nature of property justifying it, there is nothing to forbid legislative classification for the purpose of taxation, or to prevent the fixing of valuation of different classes by different methods, provided that by the method prescribed for a particular class of property the burden of taxation is uniformly imposed upon that class, is just and equitable, and does not exempt it from bearing its fair proportion of the burden of taxation, as compared with other classes of property. The courts have held that it is impossible to obtain an exact equality of valuation, but that the spirit of the law is satisfied so long as the result obtained approximates an equality of valuation. If the method provided by our legislature resulted in fixing the values of mining properties at anything like their true value, I should not question the constitutionality of the act, but it is a matter of common knowledge that any producing property exceeds in value the net product of such property. If the legislature can arbitrarily say that the valuation of mines shall be based upon the net product, it could with equal propriety provide that such valuation should be based upon one-half the net product, or one-tenth the net product of such mines. There is such a glaring difference between the actual value of property and the value of the net product of such property that it might be said that a law which fixes such rule was nothing short of unconscionable.

I am not citing authority in support of my position, but am submitting a separate list of authorities for your information.

If I am correct in my position that property under this act is not bearing its just proportion of taxation, it amounts to a partial exemption or commutation of taxes upon mining property. Section 3, Article VIII of our State Constitution exempts certain property from taxation. I call attention to the fact that, by this section of the Constitution, the legislature is not authorized to exempt this property, but the same is exempted by the Constitution itself, and such provisions are self-executing. I find authority to the effect that where the Constitution of a State exempts certain property from taxation, the legislature is without power to make further exemptions.

New Orleans v. People's Ins. Co., 27 La. Ann. 519;

New Orleans v. New Orleans Sugar Shed Co., 35 La. Ann. 548;

Georgia Building & Loan Co. v. Savannah, 109 Ga. 63, 35 S. E. 67.

In my opinion, a partial exemption or commutation from taxation without constitutional authority would be as invalid as a total exemption. The provisions of the Chapter under discussion, in my opinion, discriminate in favor of mines as against other property, and amount to a commutation or partial exemption, and for that reason the act is further unconstitutional.

When I appeared before your Commission, the question was asked as to the power or propriety of a ministerial board to declare an act of the legislature unconstitutional. In reply to such question, I cite you to the case of Little Rock and Fort Smith Railway v. Worthen, 120 U.S. 97, 30 L. Ed. 588. I find the facts in that case to be that an act of the legislature of the State of Arkansas, relating to the valuation of railroad property for purposes of assessment, excluded "embankments, tunnels, cuts, ties, trestles, or bridges." The Constitution of that State contains a provision that "All laws exempting property from taxation, other than is provided (therein) shall be void." Upon the advice of the Attorney General, the Board of Railroad Commissioners treated as invalid the direction of the statute which provided that the value of embankments, tunnels, cuts, ties, trestles, and bridges should not be included in the estimate of the value of the railroad track, and proceeded to tax the railroad property as though such provision had not been embraced in the act. Passing upon such question, the court, in its opinion, said:

"An unconstitutional act is not a law; it binds no one, and protects no one. Here the conflict between the constitution and the statute was obvious, and the board had the advice of the highest legal officer of the State; and his conclusion was sustained by the judgment of the Supreme Court of the State."

In my opinion, your Commission would be authorized to disregard Chapter 55, Laws 1915, and I believe you would be warranted in treating mining properties in the various counties of the State as omitted property, and in proceeding accordingly. By pursuing such course, you would render great service to the State by placing several millions of additional property upon the tax books, which should bear its just proportion of taxation.

Authorities in Opinion Addressed to the State Tax Commission, Construing Chapter 55, Laws of 1917.

"The rule of taxation according to value has no direct relation to the methods prescribed for appraising and assessing property, and is satisfied by any plan or system which is intended and calculated to result in fixing the fair and true value of the property. Nor does it prevent the legislature from directing that the value of property for the purpose of assessment shall be taken at less than its market value, unless this would be contrary

to the explicit terms of the constitution, provided such rule is applied without discrimination."

37 Cyc. 762.

In Tallon v. Vindicator Consol. Mining Co. (Colo.) 149 Pac. 108, the court upheld a statute which provided for taxing all producing mines upon a basis of one-half the gross production plus all the net proceeds. In its opinion the court said:

"It is neither the net nor gross proceeds that are taxed. It is the mine. They are only employed in formulating a rule by which the value of the mine may be estimated or approximated for the purpose of taxation."

"Under the subject of 'Revenue and Finances,' section 1, art. 9, of the constitution, ordains that 'the legislature shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its properties or franchises, the value to be ascertained in such manner as the legislature shall direct.' The dominant idea of the organic law which we have just quoted is that needful revenues for the purpose of defraying expenses of state and municipal government shall be raised by levying a tax on property by valuation in such manner as that every owner of property subject to taxation shall pay taxes in proportion to the value of the property owned."

State v. Savage, 91 N. W. 715.

In State v. Voght, (N. J.) 48 Atl. 580, it is disclosed that the State of New Jersey has a constitutional provision as follows:

"All property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

In construing such constitutional provisions the court says:

"That the constitutional provision does not take away from the legislature the power of selecting the subjects of taxation, but it does require that all the members of the class selected shall be included in the taxing law, and that the rule applied thereto shall be uniform as to the whole class, and that the assessment shall be made at the true value of the property constituting the class. This construction of the provision of the organic law with reference to taxation is not now open to controversy, and in accordance with this interpretation the case in hand must be determined. It is within the legislative discretion to create classes upon a substantial basis for the convenience of effecting the levying and collecting of taxes, and, so long as the mode provided substantially assesses the property of the class at its true value, the legislature is within the exercise of its granted power, and the courts cannot interfere with its action. Different methods of ascertaining true value may be prescribed in such classifications, and, so long as the public burden is imposed substantially and proximately according to true value, there

will be no infirmity in the declaration of the legislative will. The recognition of that rule is necessarily involved in the decision of the Central R. Case, before cited. But when, for a given class, an arbitrary mode of assessment is provided, which subjects to taxation a part only of the true value of the property classified, the constitutional provision is disregarded, and the prescribed method cannot be involved to inhibit a legal assessment. * * * Classification cannot be resorted to for the purpose of justifying evasion of the constitutional mandate."

"So long as classification is based upon the nature of property justifying it, there is nothing to forbid legislative classification for the purposes of taxation, or to prevent the fixing of valuation of different classes by different methods, provided that by the method prescribed for a particular class of property the burden of taxation is uniformly imposed upon that class, is just and equitable, and does not exempt it from bearing its fair proportion of the burden of taxation, as compared with other classes of property."

Forster v. Hart Consol. Mining Co., 122 Pac. 48.

The following authorities also shed light upon this subject:

173 S. W. 1099;

154 Pac. 362;

48 Atl. 580;

164 Pa. 304, 30 Atl. 127, 128;

115 U.S. 321, 29 L. Ed. 414;

97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480;

85 Fed. 302;

120 Fed. 614;

25 Ind. 180, 87 Am. Dec. 358;

120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679;

59 Neb. 417, 81 N. W. 431;

12 Colo. 369, 21 Pac. 144;

60 N. H. 87;

40 Md. 22;

9 Wis. 410;
189 U.S. 325, 47 L. ed.;
11 Wis. 35;
196 Ill. 329, 63 N. H. 745;
14 Minn. 297;
21 Minn. 315;
36 Minn. 467.;
52 N. J. L. 156, 18 Atl. 582;
109 Ga. 63, 35 S. E. 67;
Baxt. 530;
71 Minn. 283, 73 N. W. 970;
49 Mo. 512;
148 U.S. 391, 37 L. ed. 494;
120 U.S. 97, 30 L. ed. 588;
39 Iowa 56;
172 U.S. 647, 43 L. ed. 1182;
85 Fed. 302;
89 S. W. 689;
168 U.S. 651, 42 L. ed. 614;
69 N. H. 35;
204 U.S. 103, 51 L. ed. 393;
35 E. E. 71;
43 S. W. 387;

103 N. W. 84;
85 U.S. 206, 21 L. ed. 888;
29 Am. Rep. 328;
57 Am. Rep. 516;
4 Atl. 578;
11 Wis. 35;
21 Pac. 144;
35 S. E. 73;
63 N. E. 745;
3 Kan. 186;
82 S. W. 1020;
73 N. W. 970;
104 N. W. 567;
103 N. W. 84;
36 Atl. 892;
149 Pac. 108;
154 Pac. 362;
173 S. W. 1099;
214 Fed. 180;
232 U.S. 576, 58 L ed. 737;
Notes 60 L. R. A. 341, 342;
203 Fed. 537;
122 Pac. 48;

98 N. E. 1056;

139 S. W. 453;

131 N. W. 489;

77 Atl. 996;

131 S. W. 1039;

State v. Birmingham So. R. Co., (Ala.) 62 So. 78;

Cummings v. Nat'l Bank, 101 U.S. Rep. 153