Opinion No. 20-2510

March 10, 1920

BY: HARRY S. BOWMAN, Assistant Attorney General

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

Leasehold Interests Not Taxable.

OPINION

Referring to the matter of the taxation of lease hold interests, and the letter of Mr. W. A. Hawkins under date of February 4th, addressed to the Chairman of your Commission, which was submitted to us, we wish to advise that upon further investigation we are confirmed in our opinion that the views expressed in our letter to you of January 26th are correct, and that leasehold interests are not subject to taxation in this state.

We have carefully considered the contents of Mr. Hawkins' letter and have read the case of Raydure vs. Board of Supervisors of Estill County, 209 S. W. 19, and we have also examined some other authorities touching upon this matter.

We believe that the Kentucky case in 209 S. W. was decided strictly on the statute of that state, and therefore that it is not authority for the position taken by Mr. Hawkins.

In our opinion, the question has been finally determined by the Supreme Court of the United States in the case of Indian Territory Illuminating Oil Company vs. State of Oklahoma, 240 U.S. 522, 60 L. Ed. 779, which was a case wherein an attempt was made by the State of Oklahoma to tax the oil leases of the plaintiff.

Oklahoma has a statute almost identical in wording with section 5427, Code 1915, which provides that:

"All property in this state whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

Section 7541, Compiled Laws of Oklahoma.

The Supreme Court of the United States held that a lease for oil and gas was neither personal nor real property, and therefore not subject to taxation under this section of the statutes.

This case was followed in Memorandum Opinions of the Supreme Court of the United States, reported at 247 U.S. 504, and 248 U.S. 549.

Statutes conferring authority to impose taxes must be strictly construed and no property may be included within the statute as subject to taxation unless specifically named or intended to be included by necessary implication.

Lott vs. Ross, 38 Ala. 156;

DeWitt vs. Hays, 2 Calif. 463; 56 Amer. Dec. 352;

Moseley vs. Tift, 4 Fla. 402.

In the case of DeWitt vs. Hays, **supra,** the question involved the right to tax wharfage or dockage.

The Constitution of the State of California provided that all property should be taxed, but the Supreme Court of California held that the right to collect wharfage and dockage was neither real estate nor personal property, but a franchise or incorporeal hereditament, and therefore not subject to taxation under the provision of the constitution above mentioned.

The court has further held that the interest of the plaintiffs did not come under the head of personal property or real estate as defined by the statute of California, that the legislature had omitted to provide for any tax upon this species of property and that the naked right cannot be assessed **eo nomine,** or made liable.

In Lott vs. Ross, **supra,** the Supreme Court of Alabama, in passing upon the right of a municipal corporation to levy a tax upon sales of merchandise used the following language in construing a provision that the County of Mobile could levy a tax of not exceeding twenty cents upon each hundred dollars of taxable property within said county:

"A grant of power to a corporation to levy a special tax must be strictly construed, and any doubtful questions as to the extent of the power must be decided against the corporation."

The court held that the words "taxable property" were used in their ordinary signification of things taxed which are subject of ownership and not as "taxables" or "taxable subjects," and that the amount of gross sales of merchandise was not subject to taxation under the authority mentioned in the statute.

As stated in our previous letter to you, there is no statute in this state which would, in our opinion, imply that leasehold interests should be taxed even though they may be held to be "property," and we therefore are constrained to disagree with the position taken by Mr. Hawkins in his letter, and hold that the Tax Commission is not authorized to tax that class of property.

We are returning to you herewith Mr. Hawkins' letter above mentioned, and our letter to you of January 26th, which was left with us by you at the time that you submitted the letter of Mr. Hawkins.