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Gross Products Tax

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the complainant.⁷⁴ In a case of the latter type, the owner must be prejudiced in some way or misled by the mistake in the description before he can complain of the assessment.

ROBERT A. MCKAY.

GROSS PRODUCTS TAX

According to the weight of authority, a tax imposed on persons for severing natural resources from the soil, based upon either the quantity or the value of the product severed, is valid. Such a tax, according to the majority view, is a privilege or occupation tax and not subject to the constitutional requirements relating to the imposition of property taxes.¹

In Wyoming, a tax upon mineral products has been specifically provided for by the State Constitution.² This provision expressly gives the legislature power to impose a tax upon all mines and mining claims, based upon the gross products thereof. It further provides that this tax is to be in lieu of all taxes on the lands upon which the mine is located. The tax is to be levied only while the mines are being worked or operated and should be in addition to any tax which may be assessed upon the surface improvements of the claim.³

The question arises in Wyoming, under the Constitutional and statutory provisions referred to,⁴ as to what the nature of the tax upon mine products may be. The question first arose in *Miller v. Buck Creek Oil Co.*,⁵ where it was stated that the tax is evidently a property tax rather than a license, privilege or occupation tax. However, the discussion by the court on this point was merely by way of dictum and by no means conclusive, which fact was recognized when the issue arose for the second time in the Federal Court.⁶ In referring to the *Buck Creek* case, the court was of the opinion that the Wyoming Supreme Court leans toward the doctrine announced by so many other courts, that minerals when severed from the land become personal property and are taxable as such.⁷ Perhaps this is a logical conclusion in view of the holding in the *Buck Creek* case that a portion of the products tax should be paid by the lessee of the property, which indicates that the tax is upon the property after it becomes severed from the land.

The latest and most conclusive argument holding the gross products tax to be a personal property tax was set forth in *Board of Com'rs of Sweetwater County, Wyo., et al. v. Bernardin et al.*⁸ In this case, it was urged that the gross products tax was a tax on the realty measured by the gross mineral product thereof. It was here pointed out⁹ that if this were true, the amended section of the gross products

74. *Ricketts v. Crewdson*, see note 5 *supra*.

1. 32 A.L.R. 827.

2. Wyo. State Const. Art. 15, sec. 3.

3. Wyo. Comp. Stat. 1945 sec. 32-1001.

4. *Ibid.* 2 and 3.

5. 38 Wyo. 505, 269 Pac. 43 (1928).

6. *First Nat. Bank of Chicago v. Central Coal & Coke Co. et al.*, 3 F. Supp. 433 (D. Wyo. 1933).

7. *Ibid.* at 436.

8. 74 F. (2d) 809 (D. Wyo. 1934).

9. *Ibid.* at 813.

tax statute,¹⁰ providing that the tax could be enforced against the land was wholly unnecessary, and the amended section therefore amounted to a legislative construction of section 3, art. 15, Wyo. Const.,¹¹ that the tax is upon the severed products. The court felt this construction would be more beneficial to the state because much oil and other minerals produced in Wyoming are derived from lands of the United States and of this state, which are exempt from taxation.

This argument carries much weight and has been applied in other states¹² as a basis for holding a tax on mineral production to be a property tax. The *Illuminating Oil* case arose after Oklahoma had attempted to levy its gross production tax upon mines being operated by the Choctaw Indians.¹³ The Oklahoma courts held this to be an occupation tax and a valid levy. However, upon appeal to the Supreme Court of the United States the Oklahoma decision was reversed and it was held that a Federal Agency could not be subjected to an occupation or privilege tax by a state, but on the other hand, the right of the state to levy an ad valorem tax on the personal property of such instrumentality was expressly recognized.

In view of this opinion, the State of Oklahoma revised their gross products tax and when the question as to its nature again arose in the *Illuminating Oil* case, it was held to be a property rather than a privilege or occupation tax. This decision was obviously necessary due to the fact that Oklahoma is the situs of numerous Federal Agencies and the gross products tax, as a revenue measure, could only be effective if classified as a property tax.

As pointed out in the *Bernardin* case, Wyoming's problem in classifying their gross products tax was similar to that of Oklahoma's. The court, being well aware of the fact that much of Wyoming's land was controlled by the Federal and State instrumentalities, wished to construe the tax in such a manner as to be most beneficial to the state as a revenue producer. Since Federal and State lands are exempt from taxation and a state cannot subject a Federal Agency to a privilege or occupation tax, the obvious conclusion was to hold it to be a personal property tax. This result allows a valid imposition upon all minerals after being extracted from the realty, regardless of the nature or ownership of the land.

However, the fact still remains that a majority of jurisdictions hold such a tax to be a privilege, occupation or license tax and it will be well worth while to consider some of these opinions and the reasons for reaching a different result than that found to exist in Wyoming.

10. The Special Session of the Wyoming Legislature in Dec., 1933 (Chapter 54), amended section 115-601, Wyo. Rev. St. 1931, now section 32-1001 W.C.S., 1945, by adding: "And said tax shall be a first and prior lien upon the products so levied upon, and the tax thus levied shall be collected from the person against whom the same was levied, if such person has real or personal property within the State, out of which payment may be enforced, and it shall be the duty of the County Treasurer by distraint, attachment or otherwise, to first endeavor to collect the tax from the person assessed therefore; provided, however, that if the tax cannot be so collected, said tax may be enforced against the land from which such products shall be extracted, and said tax from the date of its assessment shall be a lien on the land."

11. See note 2, supra.

12. In *Re Indian Territory Illuminating Oil Co.*, 43 Okla. 307, 142 Pac. 997 (1914). Reversed on other grounds.

13. *Chotaw, Oklahoma & Gulf Ry. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27 (1914).

In Louisiana, the state Constitution expressly provided for a tax upon natural resources.¹⁴ It provided that such natural resources may be classified for the purposes of taxation and rate of taxation could be predicated upon the quantity or value of the product at the time and place of severance. The Louisiana Legislature thereafter enacted a statute¹⁵ which provided in substance that taxes on natural resources shall be predicated on the quantity severed; and for the purpose of oil, the rate was based upon the gravity of the oil. This statute was attacked on the ground that this attempted classification of oil, for the purpose of taxation, was wholly arbitrary, unreasonable and that it completely ignored the market value of the oil produced which varies widely in different oil fields of the state. The court held¹⁶ that the tax was undoubtedly an excise or privilege tax as distinguished from an ad valorem or property tax and was not affected by general constitutional requirements for equality and uniformity. The court felt this point to be so well settled that the remaining portion of the opinion was spent in upholding gravity as a basis of classification for the purpose of taxation.

The New Mexico Constitution¹⁷ reads, "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of the same class." The New Mexico Legislature¹⁸ levied a tax upon oil and gas severed from the soil and provided that the tax so levied should be predicated upon the quantity severed. It was alleged¹⁹ that this statute was unconstitutional because the tax was measured by quantity rather than value, as prescribed by the New Mexico Constitution. The court thereon²⁰ defined an excise tax as follows: "Any tax is an 'excise,' which is not a capitation tax, or a direct tax on land or personalty, considered as the permanent fortune of the individual taxed, and laid thereon solely by reason of ownership without regard to origin or the actual or intended use to which it may be put; in other words, a perennial tax upon property as such."

In view of this definition it was held that the oil may remain underground forever as part of the landowner's permanent wealth and of the states permanent taxable resource, without being affected by this tax. The producer or severer, after once suffering the exaction, may hold it as long as he will without a recurrence of it. The tax is tied absolutely to the act or privilege of producing or severing. It is not imposed because of ownership. True, it burdens ownership, but for that matter, so does a sale, a use or a consumption tax. The tax is an excise tax and well within the state's large powers in matters of taxation. Therefore, the Constitutional limitations relating to property taxes did not apply and if the legislature desired to use quantity rather than values as a basis for the tax, they were justified in so doing.

In view of the holdings in the *Buck Creek* and *Bernardin* cases, it is unneces-

14. Sec. 21 Art. 10 Const. of La.

15. Act. No. 140 of 1922.

16. *Ohio Oil Co. v. McFarland*, 28 F. (2d) 441 (E. D. La. 1928). Reversed in the opinion of *Ohio Oil Co. v. Conway*, 279 U. S. 813, on a practice question.

17. N. M. Const. Art. 8 sec. 1.

18. Ch. 72 N. M. Session Laws of 1933.

19. *Flynn, Welch and Yates, Inc. v. State Tax Comm. et al.*, 38 N. M. 131, 28 P. (2d) 889 (1934).

20. *Ibid* at 892.

sary to pursue this question any further. Many other cases²¹ could be discussed at length which uphold the majority view that a tax upon natural resources is a privilege or occupation tax. The obvious purpose of these latter decisions is to circumvent the strict constitutional limitations placed upon the levy and assessment of property taxes; and in some states, due to the strict construction placed upon constitutional provisions relating to taxation by the various courts,²² such resort is absolutely necessary because these courts regard all property as homogeneous for the purpose of taxation. This has the effect of precluding the legislatures from classifying minerals for tax purposes and due to the fact that mines and mining claims are wasting assets they must be separately classified or removed altogether from the broad field of a property tax in order to fairly and adequately bear their just proportions of the revenue required by a state. Wyoming is not within this latter class; that fact coupled with the reasoning of the *Bernardin* case may well justify the conclusion that the gross products tax is a personal property tax in Wyoming.

With this conclusion in mind, it will be convenient at this point to examine and determine what constitutional provisions must be complied with in taxing mine products as personal property.

The Wyoming Constitution sets forth two limitations upon uniformity, . . . "all taxation shall be equal and uniform . . . ;"²³ it further provides that "all property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."²⁴

Under provisions similar to these, statutes classifying property on the basis of the clearest distinction possible, real and personal, may be unconstitutional for want of uniformity in one jurisdiction and valid in another. This result comes about by some courts taking the view that all property is homogeneous for the purpose of taxation, and that exemption or classification of one kind of property creates an undue burden on the type of property taxed.²⁵ Therefore, the jurisdictions have been split into two distinct groups by the different construction placed upon constitutional provisions relating to uniformity. For the purpose of convenience, they may be labeled as the "strict" and "liberal" types.

Under the "strict" type, the following regulations and provisions have been held to be void for want of uniformity: a provision attempting to exempt all personal property belonging to interurban railroad companies from the general tax list;²⁶ a proposed tax imposing a different rate of taxation of certain intangibles than on other types of property;²⁷ an assessment of bank shares at 90 per cent of cash value, where other property was assessed at 75 per cent of cash value.²⁸

21. *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 43 Sup. Ct. 526 (1923); *State v. Parker*, 5 Ala. App. 231, 59 So. 741 (1912); *Floyd et al. v. Miller Lumber Co. et al.*, 160 Ark. 17, 254 S. W. 450 (1923); *Mid-Northern Oil Co. v. Walker*, 65 Mont. 414, 211 Pac. 353 (1922). These cases are merely representative and not an exhaustive list.

22. See note 25, *infra*.

23. Wyo. Const. Art. 1, sec. 28.

24. Wyo. Const. Art. 15, sec. 11.

25. 2 Ky. L. J. 198 (1950).

26. *State v. Davis*, 132 Ohio St. 555, 9 N. E. (2d) 684 (1937).

27. *Opinion of the Justices*, 195 Mass. 607, 84 N. E. 499 (1908).

28. *Boonville Nat. Bank v. Schlotzhauer*, 317 Mo. 1298, 298 S. W. 732 (1927).

The consequences of such decisions can be avoided only by amending the constitution or by finding that the purpose of uniformity is not to require that all property be taxed, but rather that it contemplates exemptions and classifications.

Wyoming may be used as a typical example of those jurisdictions following the "liberal" type of classification. Within a few years after the ratification of the Wyoming Constitution, the Supreme Court, in construing the uniformity provisions of our constitution,²⁹ held, "The sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, it may select any particular species of property, and tax that only, if, in the opinion of the legislature, that course will be wiser. This is true not only of property but of privileges and occupations also. The state may tax all, or it may select for taxation certain classes and leave others untaxed . . . to be uniform, taxation need not be universal. Certain objects may be made its subject, and others may be exempted from its operation. Uniformity merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class."³⁰

It necessarily follows that Wyoming is justified in placing mining property as well as the business of mining in a class by itself and taxing it by some method peculiarly appropriate to that class; such is a valid exercise of the constitutional right on the part of the legislature, and needs the citation of no authorities in its support.

Therefore, by authority of the *Willingham* case, it is quite clear that if the legislature so desires, they may divide all the minerals and natural resources referred to in the gross products statute³¹ into different classes for the purpose of taxation, including a class which exempts them from taxation altogether. Thus, in determining whether or not gypsite should be subject to the gross products tax³² it was held, "Whether a mineral deposit is subject to the production tax should be determined by whether it can reasonably be said, considering all economic factors, that the value of the material is, in the long run and not for one year merely, such as to be able to reasonably bear the production tax in addition to taxes assessed against the manufacturer."³³ The court recognized that such determination should lie wholly within the power of the legislature, but because of their lack of initiative to act upon the matter, the case was disposed of by the court on the ground that the assessment on gypsite was so high as to result in constructive fraud.

It is readily seen that if this case had arisen in one of the "strict" jurisdictions, a gross injustice would have resulted merely because the courts and legislatures refuse to exempt from taxation any property, regardless of the so called "public interests" involved.

The decision in the *Certain-Teed* case is illustrative of the proposition that no definite rule can be laid down for determining whether a particular classifica-

29. *State v. Willingham*, 9 Wyo. 290, 62 Pac. 797 (1900).

30. *Ibid* at 798.

31. See note 3, *supra*.

32. *Certain-Teed Products Corp. v. Comly, County Assessor et al.*, 54 Wyo. 79, 87 P. (2d) 21 (1939).

33. *Ibid* at 26.

tion for tax purposes in reasonable or arbitrary, and this question must be decided upon the facts and circumstances appearing in each particular case. It is, however, important to note that in making such determination the legislature has the judicial sanction to taking into consideration such elements as "public interest" and "public policy." These elements, standing alone, give the legislature a wide latitude of discretion in determining the subjects of taxation, the kinds of property to be taxed, the rates to be levied and the methods of assessment, valuation and collection; all of which are included within the power to classify.

Perhaps the legislature's right to classify may best be illustrated by *Heisler v. Thomas Colliery Co.*,³⁴ in which it was held that the difference between anthracite and bituminous coal warrants a state in placing them in different classes for the purpose of taxation. This distinction presents a close question and the exact point has been decided contrary to the holding of the *Heisler* case.³⁵

It is unnecessary to discuss the decisions of these two cases, but it should be noted that while the legislative classification must be based upon real and substantial differences, they do not, however, need to be great or conspicuous.

As already pointed out earlier, the courts have substantially justified their decisions that the gross products tax is a personal property tax, and in view of the liberal construction placed upon the constitutional limitations regarding property taxes and the wide discretion given to the legislature in taxing property, it may reasonably be concluded that this type of tax on mine products has adequately met the desired end of enhancing the state's revenue while its natural wealth is being depleted.

HARRY L. HARRIS.

TAX LIEN PRIORITY IN WYOMING

Tax liens were unknown to the common law of the United States and England.¹ Today they do not exist unless they are expressly provided for by statute or constitution,² and being creatures of express legislative intent and action are not to be enlarged by construction.³ The Constitution of the State of Wyoming makes no provision for a tax lien. However, such a tax lien is expressly provided for by statute.⁴ The legislature of the State of Wyoming has seen fit to go further than the mere creation of a tax lien.

It has granted to the lien which attaches to personalty and realty as security for the collection of general state, county, and school taxes priority over all other outstanding encumbrances as against all persons except the United States and the State of Wyoming itself.⁵ Such a provision that the lien for general taxes shall

34. 260 U. S. 245, 43 Sup. Ct. 83 (1923).

35. *Commonwealth v. Alden Coal Co.*, 251 Pa. 134, 96 A. 246 (1915).

1. *Ingraham v. Forman*, 49 Ariz. 29, 63 P.(2d) 998 (1937).

2. *Lobban v. State ex. rel. Carpenter*, 9 Wyo. 377, 64 Pac. 82 (1901); *Wakeman v. Board of Comm'rs of Weston County*, 40 Wyo. 53, 274 Pac. 12 (1929).

3. *Lobban v. State ex. rel. Carpenter*, supra note 2.

4. Wyo. Comp. Stat. 1945, sec. 32-601.

5. Wyo. Comp. Stat. 1945, sec. 32-1603.