

1955
HB 7

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April 2, 1955

Honorable Kenneth C. Johnson
House of Representatives
Juneau, Alaska

Dear Mr. Johnson:

This is in reply to your oral request for an opinion as to the constitutionality of House Bill No. 7, introduced in the First Extraordinary Session of the Twenty-second Alaska Legislature, insofar as it levies a gross production tax of one percent on "every person producing oil and gas" in Alaska. It is apparent that the language of the bill includes oil and gas produced by lessees of Federal lands within the Territory.

The main constitutional question anticipated to be raised by such lessees in the event the bill becomes law is as follows:

- I. Under House Bill No. 7, would the Territory be levying a direct tax on a Federal agency or instrumentality?
- II. May the Territory enact legislation imposing a gross production tax on oil and gas produced on Federal lands within the Territory?

I.

Earlier cases extended sovereign immunity to persons engaged in "governmental functions." Pittman v. Home Owners Loan Corp., 308 U.S. 21. This immunity was held to protect a lessee under a lease of Federal lands. Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522; and Choctaw O. & G. R. Co. v. Harrison, 235 U.S. 292. However, later decisions have pushed the pendulum to the other side, limiting immunity.

In Taber v. Indian Territory Illuminating Oil Co., 300 U.S. 1, the State of Oklahoma imposed a nondiscriminatory ad valorem tax on property used by the lessee in operations under an oil and gas lease covering Indian lands. The taxpayer contended that the tax was imposed upon an agency controlled by the Federal Government and created to enable development of oil and gas on restricted Indian lands. It

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was contended that the "agency" was of such a character and so intimately connected with the performance of the functions of government that it was immune from state taxation, and the immunity extended to the property used in its operations. The Court refused to accept this argument and stated:

"Our decisions distinguish between a non-discriminatory tax upon the property of an agent of government and one which imposes a direct burden upon the exertion of governmental powers. In the former case where there is only a remote, if any, influence upon the exercise of governmental functions, we have held that a non-discriminatory ad valorem tax is valid, although the property is used in the operations of the governmental agency."

In Indian Territory Illuminating Oil Co. v. Board of Equalization, 288 U.S. 325, the same taxpayer contested an ad valorem tax upon crude oil held by it in storage tanks. The tax was sustained against the claim that the oil was exempt because in its production the taxpayer was operating as "an instrumentality" of the United States.

The Court, in New Brunswick v. U. S., 276 U.S. 547, refused to allow the government's immunity to extend to property sold by it despite the possibility that the prospect of taxation by the state might reduce the amount the United States would receive from the sale of the property. The Court said, in substance, that property purchased from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government. The theoretical burden which state ad valorem property taxation thus imposes upon the Federal Government is regarded as too remote and indirect to justify tax immunity for property purchased from the Government.

In Thomas v. Gay, 169 U.S. 264, a state tax on cattle grazing land was sustained, although it involved tribal lands leased from Indians.

Prior to 1949, a series of Supreme Court decisions, including Choctaw, O. & G. R. Co. v. Harrison, supra, Indian Territory Illuminating Oil Co. v. Oklahoma, supra, Howard v. Gipsy Oil Co., 247 U.S. 503, and Large Oil Co. v. Howard, 248 U.S. 549, existed as authority for the legal proposition that states could not tax lessors under such circumstances

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as would exist under House Bill No. 7. The language employed in these cases was that "a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." Indian Territory Illuminating Oil Co. v. Oklahoma, supra, p. 530.

However, these cases were all expressly overruled in Oklahoma Tax Commission v. Texas Company, 336 U.S. 342. In that case, a lessee of mineral rights in allotted and restricted Indian lands in Oklahoma contended that certain Oklahoma statutes imposing two separate taxes upon the production of petroleum within the state--one a tax on the gross value of production, which is in lieu of all other local ad valorem property taxes; and the other an excise tax on every barrel of petroleum produced--were invalid because they were taxes upon the functioning of a Federal instrumentality and therefore immune from state taxation under the Constitution. Following are important excerpts from the Court's decision:

- (1) "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions--to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one."
- (2) "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government.'" (Citing Helvering v. Producers Corp., 303 U.S. 376, 384, 385.)
- (3) "These decisions in a variety of applications

enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects." (Again citing the Helvering case.)

- (4) "True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. In the light of the broad groundings of the Mountain Producers decision and of later decisions, we cannot say that the Gipsy Oil, Large Oil and Barnsdall Refineries decisions remain immune to the effects of the Mountain Producers decision and others which have followed it. They 'are out of harmony with correct principle,' as were the Gillespie and Coronado decisions and, accordingly, they should be, and they now are, overruled."

The Court unanimously held that both Oklahoma assessments were valid. 1/

The one Alaskan case directly in point follows the earlier Supreme Court decisions. In Territory of Alaska v. Annette Packing Co., 289 F. 671, it was held that an act passed by the Territorial Legislature compelling a salmon-canning corporation, located on lands leased from the United States, to pay a Territorial business license tax was unconstitutional, since the tax was levied on an instrumentality

1/ In passing, it is to be noted that the Court repeatedly emphasized that the Oklahoma gross production tax was levied "expressly in lieu of all property taxes which the state might constitutionally impose in ad valorem form, the gross production levy being a tentative measure for the value of that

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of the United States Government. This case was expressly founded upon Choctaw, O. & G. R. Co. v. Harrison, supra, which in turn was unequivocally overruled by Oklahoma Tax Commission v. Texas Company, supra. For this reason, the validity of the decision in the Annette Packing Company case is in grave doubt, and there is little question but that it has been overruled by implication.

The unanimous decision in Oklahoma Tax Commission v. Texas Company, supra, requires me to conclude that a gross production tax on a lessee of Federal lands, upon which oil or gas is produced, is not to be regarded as a direct tax on a Federal agency or instrumentality.

property. For this reason, it is suggested that the following section be made a part of the present bill:

"Gross production tax to be in lieu of other taxes.
The payment of the taxes herein imposed shall be in full, and in lieu of all ad valorem taxes existing or hereafter imposed by the Territory of Alaska, its cities, towns, school districts and other municipalities, upon any property rights attached to or inherent in the right to producing oil and/or gas, upon producing oil and/or gas leases, upon machinery, appliances and equipment used in and around any well producing oil and/or gas and actually used in the operation of such well, and also upon oil and gas produced in the Territory upon which gross production taxes have been paid, and upon any investment in any property hereinbefore in this paragraph mentioned or described. Any interest in the land, other than that herein enumerated, shall be assessed and taxed as other property within the taxing district in which such property is situated. It is expressly provided that the gross production tax shall not be in lieu of income taxes nor excise taxes upon the sale of oil and gas products as retail."

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II.

Under the Organic Act, the Territorial Legislature has power extending to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Among other things, it may levy taxes, provided "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof." This power, which Congress constitutionally may delegate to a territory (subject, of course, to the right of Congress to revise, alter and revoke), covers all matters "which within the limits of a state are regulated by the laws of the state only." Simms v. Simms, 175 U.S. 162; District of Columbia v. Thompson, 346 U.S. 100.

That Congress has the power to immunize lessees from the taxes imposed by House Bill No. 7 cannot be disputed. But no such immunity has been enacted by Congress. Immunity will not be presumed to exist by the courts, for the reason that it is essentially a legislative matter. As stated in Oklahoma Tax Commission v. Texas Company, supra, "...but Congress has not created an immunity...by affirmative action, and 'the immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.' Oklahoma Tax Commission v. United States, 319 U.S. 598, 604. And see Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 480: "...if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

If a Territorial legislature has legislative power "over all rightful subjects of legislation," limited only by the Constitution and laws of Congress, any law enacted by it must be held valid, if it is constitutional and does not contravene any Federal law. Baldrige v. Morgan, 105 P. 342.

In Wilson v. Cook, 327 U.S. 474, the State of Arkansas imposed a "privilege or license...tax upon each person...engaged in the business of...severing from the soil...for commercial purposes natural resources...including...timber." Certain timber was severed from lands within the national forest reserve. The taxpayer contended that the State of Arkansas could not recover any taxes on timber severed from Federal lands. The Supreme Court initially observed that the tax imposed no unconstitutional burden on the Federal Government. The Court then concluded that Arkansas had legislative juris-

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diction over public lands within the state, including forest reserve lands:

"We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States, or were acquired by the United States by purchase, and that the tax assessed against plaintiffs is not subject to any constitutional infirmity, or to any want of taxing jurisdiction of the state to lay it with respect to transactions on the federal forest reserve located within the state." (P. 488)

One portion of the opinion might be regarded as excluding the application to the Territory of the ruling in the case. In the course of its discussion, the Court made this statement:

"Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c 100, 5 Stat 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution." (P. 487)

Although this may appear to limit the decision in the Wilson case to states alone, I am of the belief that the broad language used in other parts of the opinion, considered in conjunction with the cases of District of Columbia v. Thompson, supra, and Oklahoma Tax Commission v. Texas Company, gives sufficient legal support to the Territory in imposing such a tax. Persons residing on lands owned by the United States and their personal property may not, for that reason alone, be exempt from Territorial taxation. Cf. 84 C.J.S. 62. Congress authorized the Territory to impose taxes, and therefore no type of privately-owned property, including oil and gas, may escape the Territory's taxing power merely because it is owned or held on lands within federal control. Cf. Superior Bath House Co. v. McCarroll, 312 U.S. 176.

Attention is called to another important fact. In

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the cases of Wilson v. Cook and Oklahoma Tax Commission v. Texas Company, supra, the Attorney General of the United States appeared, in both instances, as amicus curiae and supported the states' contention that they were entitled to impose a tax. In the Wilson case, the Solicitor General, on behalf of the Attorney General, stated:

"The national forest is not an area over which the United States has exclusive jurisdiction."

In Oklahoma Tax Commission v. Texas Company, the Attorney General asserted as follows:

"Lessees of restricted, allotted Indian lands are not immune from the Oklahoma gross production and petroleum excise taxes... No constitutional immunity exists and the taxes are constitutional... Cases to the contrary, previously supporting such immunity, should be expressly overruled... Congress has imposed no statutory immunity for these lessees, and none is to be implied from its legislative silence..."

If the Federal Government is to be consistent with its position in these cases, I do not believe it would resist or oppose the imposition of a gross production tax on persons not clothed with sovereign immunity. Cf. 39 Opinions of the Attorney General of the United States 316, 321.

In view of the above Supreme Court decisions severely restricting tax immunities on private operations, it is my opinion that House Bill No. 7 contains no constitutional objection and is legally sufficient.

Sincerely yours,

J. GERALD WILLIAMS
Attorney General