Opinion No. 95

Taxation—Retroactive Statutes—State Board of Equalization.

Held: 1. Chapter 137, Montana Session Laws of 1949, providing for the assessing and taxing of the gross earnings of freight line companies shall be effective from and after July 1st, 1949.
2. A statute shall not be given retroactive operation unless the statute expressly so declares.

March 3rd, 1950.

The State Board of Equalization
Helena, Montana
Attention: Hon. John A. Matthews, Chairman

Gentlemen:

You have requested my written opinion whether the Freight Line Tax Act, being Chapter 137, Laws of 1949, is effective from and after January 1st, 1949, for purpose of assessing and taxing the gross earnings of the freight line companies therein mentioned, or only from and after July 1st of that year.

Upon this matter you are advised as follows:

This opinion is concerned only with the question whether or not said Act is retroactive for the period January 1st, 1949, there being no question concerning the period thereafter.

The question arises by reason of the fact that said Chapter 137 became effective July 1st, 1949, under the provisions of Section 90, Revised Codes, 1935, Section 43-507, Revised Codes, 1947, since a different time was not prescribed in said chapter. Nevertheless, said Act contains the following in Section 3:

> "Every **railroad company** so using or leasing said cars, **upon payment therefor** to such company **shall withhold** from such payment five per cent (5%) of as much thereof as shall constitute gross earnings of such freight line company within this State. On or before March 1, 1950, such **railroad company** shall make and file with the board a consolidated statement in a form to be prescribed by the board, **showing the amount of such payments for the next preceding calendar year ending December 31, 1949, and the amounts so withheld** and **due** the State of Montana. A like report shall be made on or before March 1st, of each year thereafter." (Emphasis supplied).

It is to be noticed that this provision pertains to every "railroad company," the user or lessee, as distinguished from the freight line company, the owner or lessor of said cars. The lessee is required to withhold from the rental to be paid 5% of lessor's gross earnings within the State. It is significant that said provision does not use the past tense, as "withheld," in view of the fact that the Act did not go into effect till July 1st. It uses the future tense, to-wit, "shall withhold" from such payment, thereby indicating the prospective application of the Act. Mention will be made hereinafter as to the effect of retroactive taxation involving contracts existing at effective date of a law.

Since no other part of said Chapter 137 contains a similar provision, nor a specific declaration that said Act is retroactive, the focal portion is the above quoted part of Section 3. The crucial question is: Does that portion expressly declare the Act to be retroactive, within meaning of Section 3, Revised Codes, 1935, Section 12-201, Revised Codes, 1947?

Said Section provides that:

> "No law contained in any of the codes or other statutes of Montana is retroactive unless expressly so declared."

The adverb "expressly" has received judicial cognizance on two occasions by the Supreme Court of Montana, first in McKeever v. Oregon Mtg. Co., 60 Mont. 270, 274, 198 Pac. 752, and next in Martin v. American Surety Co., 74 Mont. 43, 49, 238 Pac. 877. It was determined that the word means, "in direct terms."

In Webster's International Dictionary the term "expressly" is defined as an adverb meaning: "in an express manner; in direct or unmistakable terms; explicity; definitely; directly."

As indicated by other authorities, included within its meaning are the following: Clear, definite, plain, direct, in direct terms, pointed man-

ner, made unambiguous by special mention, precision of statement as opposed to ambiguity, implication, or inference.

> State v. Zangerle, 128 N. E. 165, 167, 101 Ohio St. 235; Hawkins v. Mattes, 41 P. (2d) 880, 891, 171 Okl. 186; State ex rel Ashauer v. Hostetter, 127 S. W. (2d) 697, 699; Hovey v. State, 21 N. E. 21, 27, 119 Ind. 395; Magone v. Heller, 150 U. S. 70; 15 Words & Phrases, 766-768.

In the absence of express declarations in an act to the contrary, it is presumed to operate prospectively only. The general rule stated in 25 R.C.L. 787, was quoted with approval in State ex rel. Mills v. Dixon (denominated "Educational Bonds Case"), 68 Mont. 526, 528, 219 Pac. 637, to-wit:

> "There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retroactive operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute."

The rule was applied again in 1948 in City of Phillipsburg v. Porter, 190 Pac. (2d) 676, 679 (Montana).

Ordinarily in the construction of a statute it is the legislative intent that is cotrolling, but in this instance, in face of said Section 3, it is not "intent" alone, but whether there is express provision declaring the act retroactive. Legislative intent to the contrary, if established, would foreclose interpretation in favor of retroactivity in a borderline case. For that reason the negative intention will be considered in the history of this Act. The rule was stated in Murray Hospital v. Angrove, 92 Mont. 101, 116, 10 Pac. (2d) 577, as follows:

> "Under proper circumstances, the court may resort to the history of the bill at the time of its enactment into law, and to the legislative journals of the time for this purpose. . . .
>
> "Also, when an amendment is offered to a pending bill and rejected, the intention of the legislature is manifest that the law shall not read as it would if the amendment had been accepted, and the courts cannot do "by construction what the legislature refused to do by enactment."

In Southern Pacific Co. v. Industrial Accident Commissioner, 113 Pac. (2d) 763, 765, the California court quoted with approval an even broader declaration of the United States Supreme Court in Railroad Commission v. Chicago, B. & O. R. Co., 257 U. S. 563, 589, to-wit:

> "Committee reports and explanatory statements of members in charge made in representing a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure."

The history of the bill, House Bill No. 82 of the 1949 Session, as printed, contained a Section 11 that read as follows:

> "This act is hereby expressly declared to be retroactive and shall apply to, and include all such taxable income of any such company from and after January 1, 1948."

But the whole thereof was stricken by an amendment of the Senate Committee on Taxation, and the final bill as enacted contains no such provision. Had the legislature intended the Act to become effective from and after January 1, 1949, it could be easily have changed the year to read "1949." Having elected not to do so, the conclusion is clear that the legislature did not intend the Act to be retroactive.

In addition thereto, Section 3 originally required the freight line companies to pay the tax for the year 1948 and exempted the lessee railroad companies from making a report as to that year, but did require a report for the calendar year 1949. That was also stricken by the same amendment, and in lieu thereof inserted the provision above quoted. The original provision was in harmony with the express retroactive provision of said Section 11, all of which was stricken as aforesaid. Not a word remains to expressly declare the Act to be retroactive. There is nothing but implication to that effect.

This being a taxing statute, it is clearly subject to two constructions, one favoring taxation for that period, the other not. Under such circumstances the rule to be applied is stated in Shubat v. Glacier County, 93 Mont. 160, 164, 18 Pac. (2d) 614, as follows:

> "Where a taxing statute is susceptible of two constructions and the legislative intent is in doubt, such doubt should be resolved in favor of the taxpayer. . . . As a general rule revenue laws are strictly construed in favor of the taxpayer. The contrary rule applies to exemptions."

In Venekolt v. Lutey, 96 Mont. 72, 77, 28 Pac. (2d) 452, the rule was applied again and the court said further:

> "This court in the case of H. Earl Clack Co. v. Public Service Commission, 94 Mont. 488, 22 Pac. (2d) 1056, 1059, said that, if an act is so vague in its terms "that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law. . . .
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> "What we have said about the ambiguity of this statute is particularly impressive in a tax measure."

California, in Application of Rauer's Collection Co., 196 Pac. (2d) 803, 806, said:

> "It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. . . . The rule that a statute is presumed to operate

prospectively only, unless an intent to the contrary clearly appears **is especially applicable to cases where retroactive operation of the statute would impair the obligation of contracts or interfere with vested rights."** (Emphasis added).

There is grave danger in this instance of interference with contractual rights if the act were construed to be retroactive. Section 11, Article III, Montana Constitution provides that "No . . . law impairing the obligation of contracts . . . shall be passed by the legislative assembly."

In State v. State Board of Equalization, 93 Mont. 19, 30, 17 Pac. (2d) 68, the court said:

". . . it must be presumed that it was not the intention of the lawmakers to violate either the State or Federal Constitutional provisions."

By reason of the facts and the law in the premises, I am of the opinion that the provision of said Chapter 137, Laws of 1949, are not retroactive, and that said Act is effective only from and after July 1st, 1949.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.