Opinion No. 70

Taxation—Classification—Personal Property—Counties—County Assessors —Constitutional Law—Statutes— Chapter 178, Laws of 1951——Article XII, Section II, Constitution of Montana——Courts.

Held: (1) Chapter 178, Laws of 1951, which places industrial property included in class 4 into a class 5 (d) for a 3 year period after first assessment is a discrimination among taxpayers possessing property within the same classification.

(2) The 1951 amendment is of extremely doubtful constitutionality in view of the provisions of article XII, Section II of the Constitution of the State of Montana.

(3) Only the Supreme Court of the State of Montana and the United States has the power to declare any statute to be unconstitutional and in view of the doubtful validity of the amendment, the county assessors should follow a uniform assessment policy with regard to it.

February 29, 1952.

State Board of Equalization
Capitol Building
Helena, Montana

In re: Taxation of Industrial Property, Class Five (d), Chapter 178, Laws of 1951.

Gentlemen:

You have handed me a letter you received from one of the county assessors of Montana, concerning assessment of "industrial property" under the Classification Act, Section 84-301, Revised Codes of Montana, 1947, as amended by Chapter 178, Laws of 1951. The amendment in question reads as follows:

> "Class Five. (d) Industrial property included in class four, for a period of three years after such property is first assessed. Industrial property for the purposes of this act shall not be construed to include agricultural or commercial property."

You ask my opinion whether said amendment violates the constitutional provisions of Montana, or if the act is valid and ought to be followed.

You state said amendment has caused concern among the county assessors since newly acquired "industrial property", taxable for the first time the first Monday of March 1952, is to be assessed under Class Five (d) at 7% of its full and true value, but "industrial property" heretofore assessed in past years remains assessable in Class Four at 30% of its full and true value, although both the old and the new industrial property are used for the same purpose. You have invited my attention to some of the arbitrary and unreasonable features involved.

In considering this question good reason appears why the county assessors and your board are concerned over the amendment above quoted particularly in view of Section 11, Article XII of the Montana Constitution which reads as follows:

> "Taxes shall be levied and collected by general laws and for public purposes only. **They shall be uniform upon the same class of subjects** within the territorial limits of the authority levying the tax." (Emphasis supplied)

And the Fourteenth Amendment to the Constitution of the United States provides that no State shall deprive any person of the "equal protection of the laws."

In Hilger vs. Moore, 56 Mont. 146, 182 Pac. 477 the Supreme Court held that Section 11 of Article XII above mentioned refers to classes of property subject to taxation. The Court in that case upheld the right of the Legislature to classify property for taxation

purposes. The Court in support thereof quoted from Mich. Central R. Co. vs. Powers, 201 U. S. 245 wherein the Supreme Court of the United States held that the Fourteenth Amendment was not designed to prevent the classification of property for purposes of taxation and that **"It is enough that there is no discrimination in favor of one as against another of the same class."** (Emphasis supplied)

The Montana Court quoted from a later case of the United States Supreme Court, in part, the following from Northwestern Life Ins. Co. vs. Wisconsin, 247 U. S. 132:

> "The classification may not be arbitrary and must rest upon real differences—subject to these qualifications the state has a wide discretion."

In the Hilger case, our Supreme Court made the further pertinent statement:

> "It is to be presumed, however, that in providing for its public revenues, this state had no favors to bestow, and did not intend arbitrarily to deprive anyone of his rights. Special privileges are always obnoxious, and discrimination against any person or class still more so, and no presumption will be indulged that the legislature intended to create either."

The rule is also well established that an act of the Legislature is presumed to be constitutional, and that all doubt will be resolved in favor of its validity, if possible to do so; and that the invalidity of a statute must be shown beyond a reasonable doubt before the Court will declare it to be unconstitutional. It must be shown to violate the fundamental law.

In the case of Bank of Miles City vs. Custer County, 93 Mont. 291, 19 Pac. (2d) 885, the Court repeated what it had announced once before, that "The use to which property is devoted and its productivity constitutes the measuring stick in determining its proper classification."

In the light of the foregoing constitutional provisions and pronouncements of the Supreme Court, it is necessary to consider the effect or possible effect of the above amendment, Class Five (d), to determine if it violates the fundamental laws.

A reading of the amendatory act shows clearly, I think, that it discriminates among taxpayers possessing property within that same classification. In so doing, it is contrary to the holding of the United States Supreme Court, as above quoted, and as cited with approval by the Montana Supreme Court. Moreover, such classification is clearly beyond the area of classification set forth by the Montana Supreme Court. To illustrate briefly: Assuming that two taxpayers, each the owner of industrial property, are subject to assessment for taxation as of the first Monday of March, 1952; that one taxpayer as owner of his industrial property was assessed thereon for the year 1951. Under the amendatory act his property must be assessed under Class Four, or on the basis of 30% of its full and true value; but the other taxpayer who is assessed upon his commercial property for the first time on the first Monday of March, 1952, is to be assessed under Class Five (d) or upon only 7% of the full and true value thereof, although both taxpayers use their respective industrial property for the same identical purpose. That clearly appears to be an arbitrary and unreasonable discrimination, and a discrimination of property within the same class. In such case there is no real difference in the use and productivity of the property. It runs counter to Mich. Central R. Co. vs. Powers, 201 U. S. 245, above referred to, that "It is enough that there is no discrimination in favor of one as against another of the same class." Under this illustration there is clearly a discrimination in favor of one taxpayer as against the other. The illustrations can be multiplied almost without end because it will involve the replacement of industrial machinery in whole or in part so that one taxpayer may continue to keep his industrial property in Class Five (d) and taxable upon the basis of 7% of the value thereof, whereas another taxpayer with the same identical property and used for the same purpose, does not replace or repair his property and he is to be taxed under Class Four at 30% of the value thereof.

For those reasons, I have grave doubt about the validity of said amendatory act, and it is a question to be resolved by the Courts.

It further appears to me to be only good sense to advise that the county as-

sessors ought not to attempt assessment of industrial property under said sub-Paragraph Class Five (d); in other words, they should disregard said sub-Paragraph (d) and assess such property under one of the other appropriate classes specified in said Chapter 178, Laws of 1951. This will avoid the imposition upon any taxpayer of a tax that appears clearly to be the result of an arbitrary, unreasonable, and unequal classification of property within the same class. An attempt to observe the provisions of said sub-Paragraph (d) would but lead to distortion of the theory of "tax equality". the achievement of which is a perpetual struggle. Any taxpayer feeling aggrieved by the assessment may have his day in court where the validity of said act may be properly determined.

It it therefore my opinion that the 1951 amendment establishes a discrimination among taxpayers possessing property within the same classification and is of doubtful validity in view of the provisions of Article XII, Section 11 of the Montana Constitution. Since only the Supreme Court has the power to declare any statute finally un-constitutional, in view of the doubtful validity of the 1951 amendment, county assessors should follow a uniform assessment policy with regard to it.

The only equitable policy that can be followed in such a case is the one which will not itself result in a discrimination throughout the state, and therefore, it is my opinion that the assessors should uniformly assess industrial properties under class IV.

Very truly yours,
ARNOLD H. OLSEN
Attorney General