

No. 409

**TAXATION—UNPATENTED MINING CLAIMS—  
ASSESSABLE—SALES—DELINQUENCY—  
REAL ESTATE**

**Held:** Unpatented mining claims are real estate and represent property of value and are taxable under the constitution, statutes and court decisions. Where it becomes necessary to sell such property for delinquent taxes, it is to be sold as real estate.

May 4, 1942.

Mr. John M. Comfort  
County Attorney  
Madison County  
Virginia City, Montana

Dear Mr. Comfort:

You have submitted for my opinion the following questions:

“Are . . . unperfected or unpatented mining claims and the fixtures, mining machinery and other personal property used thereon assessable and taxable as real estate?”

“Where it becomes necessary to sell such property for delinquent taxes, is it to be sold as real estate?”

In answering your questions it is necessary to examine carefully our constitution, the statutes applicable and the court decisions.

Section 16 of Article XII of our State Constitution provides in part:

“All property shall be assessed in the manner prescribed by law except as is otherwise provided in this constitution . . .”

Section 17 of Article XII provides:

“The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed.”

Our Supreme Court, in commenting on Section 17 of Article XII, *supra*, stated:

“. . . its definition of that which may be made subject to taxation, is sufficiently comprehensive to include all matters and things, visible and invisible, tangible and intangible, corporeal and incorporeal, capable of private ownership.”

*Northwestern Life Ins. Co. v. Lewis and Clark County*, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.

Again our Supreme Court, interpreting Section 17 of Article XII, and commenting on the last above decision, stated:

“We can conceive of no more comprehensive definition. It includes everything capable of private ownership. Whatever, therefore, is not exempt, is taxable.”

*Cobban v. Meagher*, 42 Mont. 399, 407, 113 Pac. 290.

Judge John B. Clayberg, in his article on “Mines and Mining,” states:

“By virtue of a valid location, the ground included within its boundaries is segregated from the public domain, and the exclusive right of possession thereof becomes vested in the locator, and so

remains as long as he complies with the acts of Congress. The courts have declared it property in the highest sense of that term, which may be bought, sold and conveyed and which passes by decedent."

27 Cyc. 580;

Hughes v. Devlin, 23 Cal. 502;

Suessenbach v. Bank, 5 Dak. 477, 41 N. W. 662;

Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311.

Our Supreme Court, speaking through Chief Justice Brantly in the case of *State ex rel. Baker v. District Court*, 24 Mont. 330, 61 Pac. 882, held:

"Neither the statutes nor the courts in this state recognize any distinction between possessory rights to mining claims upon public lands, and real estate held under other titles. While recognizing the United States as the paramount proprietor, the legislature, and the courts have always treated the claimant under a perfected location as the owner of the fee. Indeed the location operates as a grant from the government and the estate acquired under it is a vested right to the fee, which becomes absolute upon the performance of the required conditions. It can be lost only by abandonment, or by forfeiture and location by another. It is property in every sense of the term, and except in the particular just noted, it has all the attributes of real estate. It may be transferred by sale, as other real estate; it may be mortgaged; it may descend to the heir or be held by the administrator or executor as assets to pay debts; it may be made liable to the payment of taxes; it is subject to statutory liens; in some instances it may be subject to claim of homestead; and it is subject to levy and sale as other lands for the satisfaction of judgments."

Our Supreme Court has stated and held:

"Is an unpatented mining claim real property? This question must be answered in the affirmative. There is no need to argue this point, as it seems to be settled by authority that unpatented mining claims are real estate."

Robertson v. Smith, 1 Mont. 410;

Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280;

Tibbitts v. Ah Tong, 4 Mont. 536, 2 Pac. 759.

"They are property in the fullest sense of the word. They may be sold, transferred, mortgaged and inherited without impinging the title of the government. They may be sold to enforce a lien for taxes."

*Butte Hardware Co. v. Frank*, 25 Mont. 344, 348, 65 Pac. 1, 2, 3.

An examination of our statutes relative to this question reveals property is taxable and exempt as follows:

Section 1997, Revised Codes of Montana, 1935, provides:

"All property in this state is subject to taxation, except as provided in the next section."

Section 1998, Revised Codes of Montana, 1935, provides:

"The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, evidence of debt secured by mortgages of record upon real or personal property in the state of Montana, and public art galleries and public observatories

not used or held for private or corporate profit, are exempt from taxation, but no more land than is necessary for such purpose is exempt; provided, that the terms public art galleries and public observatories used in this act shall mean only such art galleries and observatories whether of public or private ownership, as are open to the public, without charge or fee at all reasonable hours, and are used for the purpose of education only, and also when a clubhouse or building erected by or belonging to any society or organization of honorably discharged United States soldiers, sailors or marines who served in army or navy of United States, is used exclusively for educational, fraternal, benevolent or purely public charitable purposes, rather than for gain or profit, together with the library and furniture necessarily used in any such building, and all property, real or personal, in the possession of legal guardians of incompetent veterans of the World War or minor dependents of such veterans, where such property is funds or derived from funds received from the United States as pension, compensation, insurance, adjusted compensation, or gratuity, shall be exempt from all taxation as property of the United States while held by the guardian, but not after title passes to the veteran or minor in his or her own right on account of removal of legal disability."

Section 1996, Revised Codes of Montana, 1935, as amended by Chapter 99, Laws of 1939, and Section 2088, Revised Codes of Montana, 1935, simply put into operation the constitutional provisions.

In view of constitution Article III, Section 29, as to the provisions of the constitution being mandatory and prohibitory, the legislature may extend exemption from taxation to property enumerated by Section 2 of Article XII, but cannot go further or include other property.

Whenever the language of a statute or of a provision of the constitution is plain, simple, direct and unambiguous, it does not require construction—it construes itself.

The taxing power of the state is never presumed to be relinquished but the intention to relinquish must be expressed in clear and unambiguous terms.

"Our Bill of Rights guarantees to everyone the protection of his property, but this protection carries with it the corresponding obligation to support the government which affords the protection. An exemption from taxation is a release from this obligation, and anyone who seeks the immunity must show that his property belongs to a class which is specifically exempt."

*Cruse v. Fischl*, 55 Mont. 258, 175 Pac. 878.

That the definition of "property" in Section 17 of Article XII, of the constitution was intended as a limitation upon the power of the legislature, to extend, by indirection, the exemption from taxation authorized or commended by Section 2 of Article XII.

*Hilger v. Moore*, County Treasurer, 56 Mont. 147, 182 Pac. 477.

In the case of *Northern Pacific Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386, Justice Holloway, quoting Article XII of the Constitution, observed the framers—in enacting Article XII—"caused all private property, except that enumerated in Section 2, to be transferred from the exempt to the taxable class."

Section 2 not only does not exempt either mines or mining claims, but under the maxim "expressio unius est exclusio alterius," excludes exemption of either patented or unpatented mining claims from taxation, unless such unpatented mining claims are held to be the property of the United States and not private property.

The very thought of the Constitutional fathers was to encourage development and the patenting of mining claims. They therefore declared

an arbitrary method of assessment of patented mining claims, permitting the assessment of the surface ground at only the price paid to the United States, which was a distinct advantage over taxability on the basis of full or true value as a speculative or commercial enterprise, thus granting to patented mining claims this special favor.

It is apparent the "framers" intended to favor the owners of patented claims and to furnish an incentive to proceed to patent, rather than to leave any incentive to evade the patenting of their claims—as would be the case if unpatented claims were not taxable at all, while patented claims were taxable as provided in the constitution.

Having accomplished their purpose, "to bring into the class of taxable property mines and mining claims" by eliminating any suggestion of exemption theretofore existing, the "framers" proceeded to provide the method of taxation "after purchase from the United States in order to favor such purchase and patent."

The discussions of the constitutional convention show plainly the foregoing intention and policy of the convention.

The question arises: Is an unpatented mining claim exempt from taxation as being property of the United States?

The Supreme Court of the United States at an early date set this question at rest in the case of *Forbes v. Gracey*, 94 U. S. 762, commenting on this very question of the state's taxing unpatented mining claims as follows:

"Such right as the mining laws allow and as Congress concedes to develop and work the mines, is property in the miner, and property of great value. . . . Those claims are the subject of bargain and sale and constitute very largely the wealth of the Pacific Coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined Code or Codes of Law, and are recognized by the states and the federal government. This claim may be sold, transferred, mortgaged and inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it."

The Supreme Court of the United States has in many decisions reaffirmed the holding in *Forbes v. Gracey*, *supra*. A few are as follows:

In the case of *Manuel v. Wulff*, error to the Supreme Court of Montana, 152 U. S. 505, 510, it was held:

"And by section 2322, it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession." *Forbes v. Gracey*, 94 U. S. 762; *Belk v. Meagher*, 104 U. S. 279; *Gwillim v. Donnellan*, 115 U. S. 45; *Noyes v. Mantle*, 127 U. S. 348."

*St. Louis Mining Co. v. Montana Mining Co.*, 171 U. S. 650, 655; One, Lindly on Mines, paragraphs 535, 542.

The Supreme Court of the United States had under consideration the question of taxation of unperfected mining claims in Colorado, and held:

"The construction of this statute (Colorado) and the conformity to it of the proceedings of the taxing officials are questions exclusively for the Supreme Court of the state, and we have no authority to review its determination of them. That court held that what was

assessed was not the land on which the mining claim was located, but the claim itself, that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock Lode was a 'valid and subsisting mining location' at the time of assessment of the tax. Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable and taxable.

"The state therefore had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest in the United States."

Elder v. Wood, 208 U. S. 226, 232;

Citing Forbes v. Gracey, Bell v. Meagher, Manuel v. Wulff, St. Louis Mining Co. v. Montana Mining Co., supra.

It appears—from the constitution, the applicable statutes, and the court decisions—the property represented by an unpatented mining claim is not exempt. Therefore, it is my opinion the interest and right of possession in unpatented mining claims are assessable and taxable as real estate under the constitution and the statutes of Montana, the taxation of such possessory right and interest of the owner thereof does not infringe or affect the interest or right of the United States, and therefore there is no reason why such property should not be taxed as real estate and sold for delinquent taxes as real estate.

Sincerely yours,

HOWARD M. GULLICKSON  
Attorney General