

“for the purpose of replacing property taxes,” and the fact that the Legislature has provided for the imposition of an income tax, may the property tax provided in Article XII, Section 9, be imposed?

To answer this question it is necessary to determine: first, whether there is a conflict between Article XII, Section 1 (a) and Article XII, Section 9; and, second, whether the legislature and the people, in passing and approving Section 1 (a) of Article XII, intended any change in Section 9.

All legal presumptions are against the existence of a conflict between two constitutional provisions. Constitutional provisions relating to the same subject, but making different provision concerning it, should be read together and reconciled, if possible. (*Hilger v. Moore*, 56 Mont. 146, 182 Pac. 477). In construing constitutional provisions, courts must seek to harmonize the various sections and, if possible, give effect to all of them. (*Martien v. Porter*, 68 Mont. 450, 219 Pac. 817; *State v. Cooney*, 70 Mont. 355, 225 Pac. 1007).

No conflict exists between Sections 1 (a) and 9 of Article XII unless it is raised by the words “for the purpose of replacing property taxes” in Section 1 (a). These words can be taken to mean either that property taxes are to be completely excluded and replaced in toto by the income tax, or that property taxes are to be lowered by the amount of revenue raised by an income tax. The interpretation most in harmony with the established principles of construction is that the income tax is to replace property taxes only insofar as the income tax revenues permit the lowering of property taxes. In the years since the passage of the income tax amendment, the state property tax levy under Section 9 of Article XII has sometimes been authorized by the legislature and levied for the full authorized amount of two mills, sometimes less than two mills, and in many years it has been authorized but not levied at all.

Since there is no clear-cut inconsistency between the provisions, the intent of the legislative assembly and the people must be looked to.

Opinion No. 29

Taxation—Income Tax Amendment —Effect of Income Tax Amendment on Property Tax.

HELD: Both Article XII, Section 1 (a) and Article XII, Section 9 of the Montana Constitution are fully operative, and the adoption of Article XII, Section 1 (a) did not limit the legislative power to levy the property tax referred to in Article XII, Section 9.

July 20, 1955.

Honorable J. S. Brenner, Chairman
Special Joint Committee on Taxation
Montana State Senate
State Capitol Building
Helena, Montana
Dear Senator Brenner:

This is in reply to your request of January 19, 1955, for an opinion upon the following question:

In view of the provision of Article XII, Section 1 (a) of the Constitution of Montana, authorizing the imposition of an income tax

If an amendment to the Constitution is to change an existing provision, the intent to do so, which is to be gathered from the language employed, must be clear and unmistakable. (*People v. Field*, 66 Colo. 367, 181 Pac. 526.)

It is well to remember that Section 9 of Article XII, like all of the provisions of our Constitution, is a limitation and not a grant of power. (In *re Pomeroy*, 51 Mont. 119, 151 Pac. 333.) Section 9 does not authorize the legislative assembly to levy a two mill property tax, but limits the otherwise plenary taxing power of the assembly to two mills. In order to nullify the legislative power to inflict the two mill levy under Article XII, Section 9, the income tax amendment to the Constitution would have to cut off completely all legislative power to levy property taxes.

The history and circumstances surrounding the enactment of a constitutional provision are frequently resorted to by the Supreme Court in determining its meaning. (See *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 293 Pac. 294.) This has been particularly true of the income tax amendment. Our Supreme Court, in the cases of *O'Connell v. State Board of Equalization*, 95 Mont. 91, 25 Pac. (2d) 114, and *Mills v. State Board of Equalization*, 97 Mont. 13, 33 Pac. (2d) 563, said that the amendment can be understood properly only in the light of the conditions under which it was passed. The pertinent circumstances were these:

Throughout the 1920's the state property tax levy was in effect every year, and was increased by vote of the people to 3½ mills in the years between 1925 and 1930. The full two mills was levied in 1931 and 1932. In 1932 the specially appointed Montana Tax and Consolidation Commission recommended that a state income tax be enacted. This recommendation was adopted by Governor Erickson, and incorporated into his message to the legislature in 1933. Both the Commission and the Governor noted that there was some division of legal opinion as to

whether our Constitution permitted the adoption of an income tax statute. Their recommended solution to the problem was the immediate adoption of an income tax statute, and passage of a constitutional amendment which would specifically permit such a statute. If the statute were found to be unconstitutional, the subsequent adoption of the amendment would permit re-enactment of the income tax at the next session. This procedure had been followed by the State of Idaho, and, finally, was adopted by the Montana legislature. Both the Commission and the Governor favored the complete replacement of the property levy by the income tax. However, the legislature placed both in effect, the income tax by Chapter 181 of the Laws of 1933, the property levy, (reduced to 1½ mills) by Chapter 154, Laws of 1933. The constitutional amendment was approved at the general election of Nov. 6, 1934, and became effective by governor's proclamation Dec. 6, 1934.

The Supreme Court had decided on July 19, 1933, before the ratification of the income tax amendment by the electorate, that the income tax statute was constitutional even in the absence of an amendment to the constitution. The property tax levy was placed in effect by each following legislative session until 1941, although not always for the full authorized amount of two mills. Since 1941 it has never been used.

It is evident from the history of the income tax that the amendment was proposed primarily to safeguard the income tax law which was already in effect. Further, it is plain that the question whether the income tax should completely supplant the property levy, or whether it should merely supplement it, was placed squarely before the legislative assembly by Governor Erickson. The same session which voted to submit the constitutional amendment to the people also voted to continue the property levy. Subsequent sessions also authorized the levy of the property tax.

The contemporaneous construction of a questioned article by the same legislative assembly which enacted

the article is given great weight by our Supreme Court. (See *Wells Fargo & Co. v. Harrington*, 54 Mont. 235, 163 Pac. 463.) The approval of this construction by the following sessions makes the presumption so strong as to be almost irrefutable. (See *Northern Pacific Railway Company v. Brogan*, 52 Mont. 561, 158 Pac. 820.) The weight given to the legislative history of the income tax amendment by our court in the *O'Connell* and *Mills* cases, *supra*, also points to the conclusion that there was never any intention that the income tax amendment, Article XII, Section 1 (a) of the Montana Constitution should repeal or affect in any way the provisions of Article XII, Section 9, which limits the allowable property tax levy.

It is therefore my opinion that both Article XII, Section 1 (a) and Article XII, Section 9, of the Montana Constitution are fully operative, and the adoption of Article XII, Section 1 (a) did not limit the legislative power to levy the property tax referred to in Article XII, Section 9.

Very truly yours,
ARNOLD H. OLSEN
Attorney General