

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

March 23, 1982

Honorable John L. Martin
Speaker of the House
State of Maine
State House
Augusta, Maine 04333

Dear Speaker Martin:

This will respond to your inquiry as to whether the mining excise tax contained in L.D. 2043 ("AN ACT to Create an Excise Tax on Mining Companies") will violate art. IX, § 8 of the Maine Constitution if the bill is enacted. It is our opinion that no such violation will occur.

Art. IX, § 8 of the Maine Constitution provides in pertinent part:

All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof.

Since an excise tax is not a property tax, but is rather a tax imposed on the "performance of an act, the engaging in an occupation or the enjoyment of a privilege," State v. Western Union Telegraph Co., 73 Me. 518, 531 (1882), it is not subject to the limitations of art. IX, § 8. Of course the mere labeling of a tax as an excise tax is not determinative of its nature, and thus, if a court should decide that the proposed levy is really a property tax, there would have to be compliance with the constitutional provision.

L.D. 2043 would impose an annual excise tax on mining companies, in lieu of property taxes, for the privilege of conducting mining within the State. Proposed 36 M.R.S.A. § 2854. The tax is expressly intended to be an excise and not a property tax. Proposed 36 M.R.S.A. § 2852(4). The

tax is the greater of two figures, one calculated using mining income,^{1/} and the other calculated using mining property. Proposed 36 M.R.S.A. § 2857. The tax as calculated on mining property is the valuation of mining property multiplied by 0.005. The "valuation of mining property" is defined as

. . . the value of all mining property excluding land on or within a mine site in an amount equal to the installed cost of mining property in place on the last day of the tax year, which would be subject to property tax except for the exemption provided in section 2854. Proposed 36 M.R.S.A. § 2855(18).

Since this valuation would not always reflect the just valuation, the tax does not meet the requirements of art. IX, § 8. Therefore, if the tax is a disguised property tax and not an excise, the tax is unconstitutional.

In determining whether an excise tax is a disguised property tax, the Law Court has said that the tax measuring criteria must have a "rational relationship to the activity on which the excise tax is imposed." Opinion of the Justices, Me., 335 A.2d 904, 912 (1975). In the Western Union case, supra, the tax was an excise imposed upon the privilege of conducting the telegraph business. The tax was measured by the value of the property used in the telegraph business. The tax was a valid excise and not a property tax, because it was allowable that an excise be imposed "upon the use of the property and upon the use of that which in some degree represents the extent of its business." Id., at 527.

A similar result was reached when the railroad excise tax was challenged. State v. Maine Central Railroad Co., 74 Me. 376 (1883). The Court held that the railroad tax was a valid franchise tax, imposed upon the powers and privileges of the corporations, and not a tax upon the real or personal estate. The railroad tax was measured by the value of the capital stock and the railroad property exclusive of the real estate. The Law Court stated that a franchise tax (which is an excise) may be measured by an appraisal of the whole or any portion of the corporate property without making it a property tax. The legislative intent was obviously to impose an excise, since the capital stock and rolling stock of the railroad

^{1/} "Mining income" is defined as:

. . . gross income from mining for each mine site, reduced by allowable deductions attributable to each such mine site, whether the cost or event giving rise to the deduction occurred before or after the effective date of this chapter.

could not be constitutionally reached by a property tax. The value of real estate was not included in the franchise tax because it was taxed by the municipality where located. Thus, a tax is an excise rather than a property tax "where it is not a tax on property as such, but upon certain kinds of property, having reference to their origin and their intended use."
1 Cooley, The Law of Taxation, § 46, at 132 (1924).

As explained previously, the alternative measurement of the proposed mining excise tax is the value of "mining property" excluding land.^{2/} Mining property means "all real estate. . . and all tangible personal property on, under or within a mine site which is owned, leased or otherwise subject to possessory control by a mining company. . . ." Proposed 36 M.R.S.A. § 2855(14). In light of the existing precedent, we believe a court would find a rational relationship between the value of the privilege of engaging in mining and the value of the buildings, surface improvements and the tangible personal property of the mining company at the mine site.

Our conclusion that the proposed levy would not be deemed a disguised property tax is supported by the fact that the value of the mining property is only an alternative measuring criterion. The taxing scheme seems to recognize that mining income is the best way to value the privilege, in that

2/ Land includes the minerals in the real estate. The definition of land is:

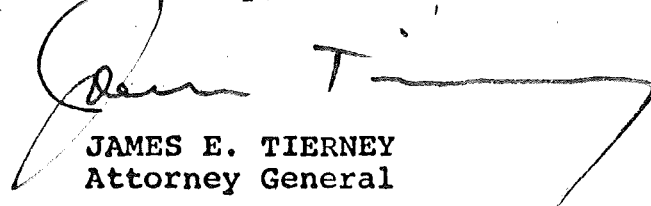
. . . real estate and all natural resources and any interest in or right involving such real estate or natural resources, including, without limitation, minerals and mineral rights, timber and timber rights and water and water rights. The term "land" does not include structures constructed, placed or located within a mine site by a person or machine, such as buildings, structures, fixtures, fences, bridges, dikes, canals or other improvements within a mine site. Proposed 36 M.R.S.A. § 2855(8).

minerals can be included in the value.^{3/} In years of high mining income, that will be the measure of the value of the privilege. The proposed legislation recognizes, however, that even in years of little or no mining income, a valuable privilege is still exercised by a mining company. Therefore, an alternative method of measuring the value, rationally related to the conducting of mining, is provided. That the bill provides for alternative measures of the privilege is further evidence that the legislation would tax the privilege of mining, and not the property of the mining company.

In closing, we would note that your original opinion request also asked about the constitutionality of proposed 36 M.R.S.A. § 2863(1)(B)(1), which would provide that, for purposes of calculating municipal reimbursement, the valuation of minerals shall be the gross income from mining. Subsequent to your request, the State Planning Office recommended, in a letter from Richard E. Barringer to the Committee on Taxation, that the provision be deleted from the bill. Since it appears that this recommendation is likely to be accepted, it is unnecessary for us to answer this question. In the event that it may prove useful, however, we would point out that we agree with the observation in Mr. Barringer's letter that the provision raises "constitutional questions."

I hope that this information is helpful. Please feel free to contact this office if we may be of further service.

Sincerely,



JAMES E. TIERNEY
Attorney General

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3/ It is rational for the Legislature to decide that minerals should be valued for purposes of the excise only when they are extracted and income is derived. Until that time, any valuation of the minerals is necessarily an estimate of the nature and extent of the find. Indeed, one reason for an excise rather than property tax is that property tax valuation of minerals is so difficult and imprecise.