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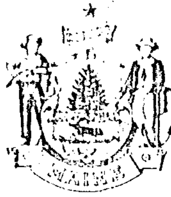
JAMES E. TIERNEY
ATTORNEY GENERAL



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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 4, 1983

The Honorable Joseph E. Brennan
Governor, State of Maine
State House, Station #1
Augusta, Maine 04333

Dear Governor Brennan:

This is in response to your request, conveyed through Mr. David Flanagan of your staff, that this Department review the accuracy, in certain limited respects, of an Opinion issued to you on December 3, 1982, interpreting various provisions of the recently enacted Mining Excise Tax Act, 36 M.R.S.A. § 2851 *et seq* (the "Act"). For the reasons which follow, it is the opinion of this Department that the conclusions expressed in its prior Opinion are generally correct, but that the Opinion did contain one substantive error, and one other misstatement which, while not affecting the Opinion's conclusions, should be corrected.

I. Identity of Property Exempt from Real Estate and Personal Property Taxation (Part I of December 3, 1982 Opinion).

In the December 3 Opinion, this Department concluded that the Mining Excise Tax Act did not expand the range of property to be exempted from local real estate taxation, and that therefore no municipal reimbursement was required pursuant to Article IV, Part 3, Section 23 of the Maine Constitution. *Op. Me. Att'y. Gen.* No 82-51 at 2-4. This conclusion was based on an analysis of the amendment effected by the Act of the section of the tax laws of the State which exempts certain enumerated items from real estate taxation. 36 M.R.S.A. § 656. You have pointed out, however, that the Mining Excise Tax Act contained its own exemption section, 36 M.R.S.A. § 2854, which appears to

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expand the range of property exempted beyond that provided for in Section 656 before the Act.[1/]

As indicated in the December 3 Opinion, Section 656 provided:

> "Mines of gold, silver or baser metals, when opened and in the process of development are exempt from taxation for 10 years from the time of such opening. This exemption does not apply to the taxation of the lands or the surface improvements of such mines."

Section 2854(2) of the Act provides:

> "The excise tax imposed by this chapter shall be in lieu of all property taxes on or with respect to mining property, except for the real property taxes on the following:
>
> A. Buildings, excluding fixtures and equipment; and
>
> B. Land, excluding the value of minerals or mineral rights."

"Land" is further defined by Section 2855(6) of the Act as follows:

> "'Land' means all real estate and all natural resources and any interest in or right involving that real estate or natural resources including, without limitation, minerals, mineral rights, timber, timber rights, water and water rights. 'Land' does not include improvements constructed, placed or located within a mine site, such as building, structures, fixtures, fences, bridges, dikes, canals, dams, roads or other improvements within a mine site."

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1/ Even though it amended the relevant part of section 656, the Act did not include in that section a cross-reference to the additional exemptions contained in 36 M.R.S.A.§ 2854. It would seem advisable that such a cross-reference be included so that future users of the tax code would be sure to be aware of section 2854.

There is no question that, as indicated in the December 3 Opinion, the value of the land over the mine was and remains subject to taxation. A question arises, however, as to the tax treatment, before and after the Act, of "fixtures" and "surface improvements," such as "bridges, dikes, canals, dams [or] roads." Before the Act, fixtures on buildings attached to the land were part of the land and therefore clearly taxable, 36 M.R.S.A. § 551 ("Real estate. . . shall include . . . all buildings . . . and other things affixed to the same"), and surface improvements were expressly not exempted from taxation under Section 656. Under the Act, both are equally clearly not taxable, through the operation of Sections 2854(2) and 2855(6), quoted above. Thus, in this respect, the new Act must be found to have expanded the range of things exempted from taxation to include fixtures and surface improvements, and municipal reimbursement is therefore accordingly required under the Maine Constitution to the extent municipal revenue has been lost. The December 3 Opinion must therefore be corrected in this regard.2/

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2/ The Opinion should also be corrected with regard to a statement made in that portion of it dealing with exemptions from personal property taxation. The Opinion stated:

> "[i]n taking no affirmative action in the Act with regard to the status of the taxation of minerals as personal property, the Legislature simply assumed that minerals were already so exempted." (emphasis added)

Op. Me. Att'y. Gen. No. 82-561 at 4. Since, as indicated above, the Legislature did expressly exempt extracted minerals from the personal property tax (see 36 M.R.S.A. § 2854(2), quoted above, exempting "mining property," defined by § 2855(12)(B) to include such minerals), this statement is strictly incorrect. However, since the Opinion found that the Legislature had impliedly, if not expressly, intended no different tax treatment of these materials, its conclusion that their exemption from taxation under the Act requires no municipal reimbursement remains undisturbed. Nonetheless, as indicated in footnote 1, supra, it would probably be better that a cross-reference to section 2854 be included in 36 M.R.S.A. § 655, the general exemption section for the personal property tax.

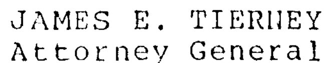
II. Calculation of Municipal Reimbursement (Part II of December 3, 1982 Opinion).

In footnote 3 of the December 3 Opinion, it was suggested that because Article IV, Part 3, Section 23 of the Maine Constitution would require reducing the revenue loss to a municipality occasioned by a new tax exemption by the amount of any increase in a state subsidy occurring as a result of such exception, Section 2861(3)(E), which requires such an adjustment to be made in the case of school subsidies, might be unconstitutional in that it requires a reduction to be made which is already constitutionally required. Op. Me. Att'y. Gen. No. 82-51 at 5, n. 3. You have asked whether this observation is strictly true in that Section 2861 was established for the sole purpose of assisting in the calculation of the constitutionally required municipal reimbursement.

On reflection, it appears that the observation as to unconstitutionality in the footnote may have been unnecessary. However, the conclusion of the Opinion as to the reduction of revenue loss by the amount of any subsidy increase remains the same. Whether such a reduction occurs as a result of the Constitution or of Section 2861 is immaterial, so long as it is made. There is, therefore, little point in resolving whether the Section is unconstitutional because it requires an adjustment that is already constitutionally mandated. Footnote 3 of the December 3 Opinion should, therefore, be deleted.

I hope the foregoing clarifies this Department's earlier Opinion for you. Please feel free to make further inquiry if it does not.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET/ec

cc: Hon. Frank P. Wood, Senate Chairman
Taxation Committee

Hon. C. Craig Higgins, House Chairman
Taxation Committee

Richard Barringer, State Planning Office