

MORTGAGE RECORDING TAX LAW.

October 13, 1933

10-14



Hon. Charles F. Carter
State Budget Officer
Jefferson City, Missouri

Dear Mr. Carter:

We hereby acknowledge your request for an opinion dated September 27, 1933. Your request was in the following form:

"Some of the Democratic leaders were talking with me about raising more revenue and the mortgage recording tax was discussed, and they asked me if I wouldn't ascertain whether it is constitutional or not, so will you please give me your opinion as to whether we can put a tax upon the recording of mortgages in this State?"

I think some years ago we had some sort of a law along that line that was declared unconstitutional, and I don't know on what grounds. I would be glad to be advised by you."

In November 1900 the State of Missouri passed a constitutional amendment by vote of the people which was in the following form:

"SECTION 22. A mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi-public corporations, for which provision has already been made by law; in case of debts so secured, the value of the property affect-

ed by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, in the manner hereinafter to be provided by law, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city or other local subdivision in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; Provided, that in all such cases the interest of the owner of the security, as well as that of the owner of the property affected by such mortgage, deed of trust, contract or obligation shall be assessed on terms equally fair and just. If the note or other obligation secured, is entitled to a credit by payment on the principal thereof, the assessable value of the owner of the security, upon the fact being made known to the assessor prior to the assessment, shall be diminished by the amount of such payment, and the assessable value of the owner of the land or other property, correspondingly increased, the intent hereof being to place those interested in any way in such land or other property, on the plane of absolute equity as to taxation.

"SECTION 23. Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein and as to such tax or assessment, be null and void."

The fourteenth amendment to the United State constitution provides as follows;

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This constitutional amendment was held by our Supreme Court En Banc, in a four to three opinion written by Judge Valliant, to be in violation of the fourteenth amendment to the United States Constitution, above set out, in that; said amendment exempted railroads and other quasi-public corporations from the tax and hence there was an unfair discrimination between the holders of the mortgages executed by natural persons and those holding such securities executed by railroad and other quasi-public corporations. In this case of Russell v. Croy, 164 No. 69 l.c. 97, the majorities of the court made the following observations;

"Under our system as existing before the adoption of this amendment, mortgages on real estate are taxes as personal property and the mortgagee is required to give them in for taxation, while the land is also taxed on its assessed value without deducting the value of the mortgage. Thus, there is, in theory at least, a double taxation on the value of the property.

By this amendment the mortgagee is to be deemed to have taxable interest in the property and the value of that interest is to be deducted from the total assessed value of the property, leaving the mortgagor to pay taxes on the assessed value of the equity of redemption. It was supposed that in this way mortgage securities could be more effectively reached for taxation, then experience shows they have heretofore been. . . . (underscoring ours)

But the constitutional provision in question has been the law of California ever since its adoption in 1879. Why the war against it,

which was so fierce in the beginning, has apparently ceased, and its operation suffered to go on without question, we do not know. Mr. Judson in his recent book on Taxation in Missouri, which was published while the adoption of this amendment was pending in this state, at p. 287-8, says: 'As we are now asked to adopt a system which has been in force in California for over twenty years, it is important to study the experience of California with reference to this very matter. This subject has been carefully investigated by Prof. Carl C. Flehm, professor of history and political science in the University of California, in a recent article.

'As a result of an exhaustive investigation, he finds that the provision against the shifting of the tax back to the mortgagor has proved wholly ineffective. So successful have been the devices to shift the burden of the tax upon the mortgagor, that they have come into practically universal use, and printed blanks are used embodying agreements, which have been sustained by the Supreme Court of the State. Prof. Flehm says: 'Possibly the oldest and certainly the most widely used of the successful devices invented for this purpose, is that of a contract separate and distinct from the mortgage, in which the creditor agrees to reduce the interest, in case the debtor pays the taxes. The method is so common in the south that all stationers carry regular blank forms of these contracts.' And he adds:

'The feeling that the provision of the Constitution which requires the mortgagee to pay the taxes accomplishes no good and really increases the burden of debt, and that its evasion affords the debtor a genuine relief, while working no injustice to the creditor, probably accounts for this far-reaching opinion rendered in the recent

case of the London and San Francisco Bank v. Bandman, 120 Cal. 221 (decided March 31, 1898). In this case, it was held that a valid agreement, not simultaneous with or directly a part of the mortgage, providing for the payment of taxes by the mortgagor does not violate the constitutional provision. This sweeping decision makes the constitutional provision entirely devoid of meaning and brings the California system of taxing mortgages into practical conformity with that of Massachusetts. That is, the two parties to the mortgage can make any agreement they please as to the payment of the tax.

'Thus it is that this famous 'experiment in taxation' has come to an end.'

'As we are now asked to adopt a constitutional provision of another State, which has been construed by the Supreme Court of that State, will we not adopt this construction with the amendment?'

It may be, therefore, that evasion of the law has been found so much easier than contesting its validity, that the legal warfare has ceased and that patient borrower bears the burden as of old.' * * *

The letter and spirit of our Constitution, however, declare for uniformity and equality in taxation of the same kind of property under like circumstances, and this amendment is out of harmony with the general tone of our organic law."

Then again our Supreme Court said in the case of State ex rel v. State Tax Commission, 262 Mo. 213 l.c. 223;

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be

levied and collected by general laws."
(Sec.3, Art. X Constitution of Missouri.)

"All property subject to taxation shall
be taxed in proportion to its value."
(Sec.4, Art.X Constitution of Missouri.)

The Constitution thus declares that taxes shall be uniform and in proportion to the value of the property taxed. (Note that it is the value of the property, not the value of the owner's interest therein, that is to be taxed.) These provisions are intended to secure uniformity and equality in taxation, so far as possible, and they apply to all taxpayers both natural and corporate, and to franchise as well as to property taxes."

In the session laws of 1921 pages 667 to 670 inclusive "A Mortgage Recording Tax" was imposed by the legislature but the same was repealed by the laws of 1925 page 366. I will not set out said law in full in this opinion, as it is lengthy, but will say that under this law, during the time that it was enforced, the question of its constitutionality was never decided by our courts.

Other states have passed Mortgage Recording Tax Laws, said states having almost identical constitutional provisions as our state on matters of taxation and revenue, and said laws have been held constitutional. In the case of Trustees, Executors and Securities Insurance Corporation v. Hooton, 157 Pac. 293, the Supreme Court of Oklahoma passed on the constitutionality of such a law where state and federal constitutional questions were raised and the Oklahoma Mortgage Recording Tax Law was held to be constitutional. In the Case of Wheeler v. Weightman, 149 Pac. 977, the Kansas Supreme Court held such an act to be unconstitutional. The opinions in both of these cases are lengthy and convincing although each reaches an opposite conclusion as to constitutionality. There was some difference in the wording of these acts of Oklahoma and Kansas, but their ultimate purpose was the same. The Oklahoma Court holding such a tax an excise or privilege tax while the Kansas court holding such a tax a property tax subject to constitutional restrictions on taxes as affecting property.

The power of the legislature to tax is inherent. The Missouri constitution is not regarded as a grant of power to tax but rather a restriction or limitation of power to tax. If our Supreme Court regards a Mortgage Recording Tax as an excise or privilege tax then it may be possible to draw up a law that would meet the constitution requirements. If they consider such a tax a property tax, and indirectly that is what it is, then it would be almost if not entirely impossible to draw up a law that would pass the test of constitutionality. Since our constitution provides that property must be taxed in proportion to its value, the owners interest in a mortgage note is not the value of the property secured, complying with Article X, Section 4 of our Constitution and such was the holding in the Tax Commission Case, supra. In the case of Russell v. Croy, supra, the court reasoned that such a tax is a property tax. We hesitate to make any forecast as to what our Supreme Court will do, if confronted with the question of constitutionality of a Mortgage Recording Tax.

It is our opinion that such a Law may be passed eliminating the objectionable feature as ruled upon in Russell v. Croy, supra, and meeting the requirements of the equal protection clause in the Federal Constitution. In fact this seems to have been done in the law which was passed in 1921. It is impossible to say that any Mortgage Recording Tax Law passed by the legislature is bound to be constitutional because it meets the requirements of the Federal Constitution, for the constitutionality of a Mortgage Recording Tax Law in Missouri is at best a gamble under the provisions of the Missouri Constitution, as the same relates to taxation and revenue. We must see the prospectus of the proposed law before we can render an intelligent opinion on constitutionality. In the face of the Russell v. Croy case, our courts will be very slow in declaring any Mortgage Recording Tax Law constitutional. To do so it would almost be necessary for them to reverse themselves in their former ruling. The fact that our 1921 legislature passed such an act and our 1932 legislature repealed the same, would indicate that the 1933 legislature were advised and considered that such an act, as then appeared on the statute books, was unconstitutional.

Respectfully submitted,

Wm. Orr Snyers
Assistant Attorney General.

APPROVED

Roy McKittrick
Attorney General