TAXATION: Coal or other minerals in place subject to taxation as real estate, and when owned separately from surface estate must be separately assessed. Assessor should assess omitted property for all years it was omitted. County Board of Equalization can only assess omitted property for current year.

April 28, 1937.

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Honorable Richard Chamier,
Prosecuting Attorney,
Moberly, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion, which reads as follows:

> "The County Court of this County has asked that you advise them of their right to assess coal that has been sold where the owners retain the surface land.
>
> "If the coal can be assessed against the owners thereof, the Court desires further information as to how far back the assessments can be run."

Section 9742, R. S. Mo. 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9977 of Article 11, Chapter 59, R. S. Mo. 1929, which relates to taxation and revenue, provides in part as follows:

> "The term 'real property,' 'real estate,' 'land' or 'lot,' wherever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon."

Section 9779, R. S. Mo. 1929, reads:

> "Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

Section 9780, R. S. Mo. 1929, reads in part as follows:

> "In all counties, except in the city of St. Louis, the assessor's books shall be arranged or divided into two parts only, part first to be known and denominated 'the land list,' which shall contain all lands by him assessed * * * with the owner's name."

It is well settled in Missouri that the owner of land containing minerals may segregate one from the other by a proper conveyance so that there is a complete severance of title and separate estates are created.

> Gordon v. Million, 248 Mo. 155, 154 S.W. 99;
> Snoddy v. Bolen, 122 Mo. 479, 25 S.W. 933;
> Gordon v. Park, 219 Mo. 612, 117 S.W. 1167;
> Wardell v. Watson, 93 Mo. 107, 5 S.W. 605.

As was said in Young v. Young, 307 Mo. 218, 270 S. W. 653:

> "Coal and other minerals in place are land and may be conveyed as such, and, when thus conveyed constitute a separate and distinct estate and inheritance."

As was aptly stated in Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 99 Pac. 483:

> "For the purpose of separate ownership, land may be divided horizontally as well as superficially and vertically."

However, whether the coal and coal rights may be assessed and taxed separately from the surface land when such minerals are owned by a different person than the one who owns the surface, has not been decided in Missouri.

We have been informed and take cognizance of the fact, in view of an opinion rendered by this department to G. C. Beckham, Prosecuting Attorney of Crawford County, which is titled, "The procedure for the sale of mineral rights for delinquent taxes," that such a practice has been carried on in this state. A copy of said opinion is herewith enclosed for your information. Also, in the Assessor's Manual issued by the Missouri State Tax Commission in 1931, the following may be found on page 35:

> "Q. How is a mineral reservation assessed--as real or personal property?
>
> A. If mineral reservations have been reserved in a deed of conveyance or if a person is the grantee of mineral reservations by deed of conveyance, the reservation is to be valued and assessed to the owner thereof as real estate."

In State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S. W. 998, the Supreme Court upheld the right to tax as realty a building which was owned by a person other than the one who owned the land. The court said:

> "It is thus evident that, as between the said Mission School and said Thompson, Thompson is the owner of the leasehold and building and is liable for the taxes thereon * * * . All property except such as is specifically exempted by the Constitution and the statute made in

> pursuance thereof, is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building any more than would be encountered in assessing the property of any other individual. * * * * The assessment against the Mission Free School of the value of Thompson's building, in which it has no interest under its lease, is illegal."

The fact that our statutes do not specifically provide for the assessment and taxing of the severed estate does not in any way militate against the contention that such separate interest is taxable. As was stated in State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S. W. 998, supra, a building owned by one other than the person who owns the land is assessable and can be taxed. This procedure is not specifically provided for by the statutes. The Circuit Court of Appeals of the Tenth Circuit, in the case of Central Coal & Coke Co. v. Carseloway, 45 Fed. (2d) 744, l. c. 746, pointed out:

> "And, if the mineral estate is exempt from tax because the taxing statutes are silent as to severed estates, why not the surface? No reason appears why one interest, the surface, should be taxed, and the other, the coal, should escape. The truth is that, if the contention of plaintiffs is sound, all interests in real estate, the surface, the minerals, the improvements, are automatically exempted from any taxation the moment a severance of the interest therein occurs, either by grant or reservation, for there is no more statutory authority for taxing the surface estate, after severance, than there is the mineral estate, after severance."

Taking all the above statutes and cases into consideration, we find that all real property must be assessed and taxed (Sections 9742 and 9779), the same to be in the name of the owner (Section 9780). Real property is defined as land

with all the things contained therein (Section 9977), including coal in place, which may be owned as a separate estate and distinct from the surface estate (Cases cited, supra). Therefore, coal in place owned separate from the surface would be assessable and taxable as real property.

This seems to be the universal rule in other jurisdictions, that mineral and mineral rights in land are real property, and when segregated by the owner from the surface estate by proper conveyance, the same become the subject of taxation separate and apart from the surface estate.

In some states such taxation is expressly provided for by statute.

Big Creek Co. v. Tanner, 303 Ill. 297, 135 N.E. 433;
Cherokee v. Pittsburgh Coal & Mining Co. v. Crawford County, 71 Kan. 276, 80 Pac. 601;
Stuart v. The Commonwealth, 94 Ky. 595, 23 S.W. 367;
Washburn v. Gregory Co., 125 Minn. 491, 147 N.W. 706;
Hadley v. Hadley, 114 Tenn. 156, 87 S. W. 250;
Tiller v. Excelsior Coal Corp., 110 Va. 151, 65 S. E. 507;
Low v. County Court, 27 W. Va. 785.

In other jurisdictions the taxation of the separate estate has been upheld because the statute stating what is to be considered real property or land for the purpose of taxation defines land as including minerals or mineral rights.

Central Coal & Coke Co. v. Carseloway, 45 Fed. (2d) 744, which interprets the Oklahoma statute;
Mercantile Trust Co. v. Hopkins, 103 Cal. App. 473, 284 Pac. 1072;
Union Pac. R. Co. v. Hanna, 73 Colo. 162, 214 Pac. 550;
Smith v. New York, 68 N. Y. 552;
State v. Downman, 134 S. W. 785.

However, other jurisdictions hold that even where it is not so provided by statute, that a separate mineral interest owned separate from the other part of the land is independently taxable as real estate.

Board of Commissioners of Greene Co. v. Lattas Creek Coal Co., 179 Ind. 212, 100 N.E. 561;
In re Colby, 184 Ia. 1104, 169 N.W. 443;
Washburn v. Gregory Co., 125 Minn. 491, 147 N.W. 706;
Rockwell v. Warren County, 228 Pa. 430, 77 Atl. 665;
Waterman v. Davis, 66 Vt. 83, 28 Atl. 664.

In re Colby, 184 Ia. 1104, 169 N. W. 443, cited above, the court said:

> "Section 1308 of the Code declares that all property, real and personal, is subject to taxation, and paragraph 8 of section 48 of the Code defines land, real estate, and real property as including 'lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal.'
>
> "2. It is equally well sett led that, when the fee in the mineral has been separated from the fee in the surface, the fee or interest in the former is assessable and taxable to the owner thereof as real estate. This much is settled by the statutes heretofore referred to, for surely the title to minerals in situ constitutes an interest in the land. See In re Major, 134 Ill. 19, 24 N. E. 973; Kansas Natural Gas Co. v. Board of Commissioners, 75 Kan. 335, 89 Pac. 750; Wolfe County v. Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. Law Rep. 167, 17 L. R. A. (N.S.) 688, and note collecting cases."

In Board of Commissioners of Greene County v. Lattas Creek Coal Co., 179 Ind. 212, 100 N. E. 561, the Supreme Court of Indiana held:

> * * * * where there has been a severance, resulting in a divided ownership, the owner of the fee is properly assessable with the value of the surface, and owner of the mineral with its value." (Citing cases.)

This view is upheld by most of the authorities.

Judge Cooley, in his excellent work on Taxation, says (4th Ed., Vol. 2, par. 566):

> "Sometimes one person owns or holds the surface rights of land while another owns or holds the mineral rights. This may result from a deed, lease, or other transfer of greater or less rights. In such a case, the question arises as to whether the holder or owner of the mineral rights can be separately taxed because of such interest. Sometimes such taxation is expressly provided for by statute, but even where not so provided, it is generally held that the separate mineral interest, where transferred, is independently taxable as real estate, and payment of a tax on the land does not preclude a tax against another person on a mining right in such land. This separate ownership of mineral interests, so as to be taxable, may result from a reservation to the grantor of the mineral interests, on conveying the land as well as from a conveyance by the owner of the surface to another of the minerals."

The same rule is stated in 61 C. J. 180; Morrison's Mining Rights, par. 322; Barringer & Adams Law of Mines and Mining, par. 115, and White Mines and Mining Remedies, par. 410. The reason behind this rule, as suggested in the case of State ex rel. v. Mission Free School, supra, is that everyone should pay taxes on his property, and no one should be forced to pay taxes upon the property of someone else.

As the Circuit Court of Appeals said in Central Coal & Coke Co. v. Carseloway, 45 Fed. (2d) 744:

> "The plaintiffs own the coal in question; it cannot be taxed to the owner of the surface, because he does not own it, any more than the plaintiffs can be taxed for the surface which they do not own. Either this valuable property must be taxed to plaintiffs or not be taxed

> at all. * * * No reason appears why one interest, the surface, should be taxed, and the other, the coal, should escape."

As was said in Board of Commissioners of Greene County v. Lattas Creek Coal Co., 179 Ind. 212, 100 N. E. 561:

> "We think that our legislation contemplates that no one shall be required to pay taxes on property that he does not own, and that no one shall escape taxation on property he does own."

Most jurisdictions that have held that such separate estate can not be taxed have done so under express direction of their constitution or statutes.

> Barthold v. Dover, 153 So. 49 (La. App.);
> In re Winton Lumber Co., 63 Pac. (2d) 664 (Ida.);
> Superior Coal Co. v. Mussellshel County, 98 Mont. 501, 41 Pac. (2d) 14.

The only other case that seems to hold that such separate taxation is not permissible is Curry v. Lake Superior Iron Co., 190 Mich. 445, 157 N. W. 19, l. c. 20, in which the court held that:

> "All of the estates in any particular description must be assessed together, and it is unimportant whether the assessment is made to all or to but one of several owning interests or estates therein."

This holding would seem to indicate that the surface estate and the mineral estate must both be assessed in one assessment, and only one tax paid thereon. However, the court recognized that both estates are taxable and it was pointed out at l. c. 20:

> "It must be presumed that the assessing officer, in obedience to the statutory mandate, each year included in the assessment against the complainant the value of the estate owned by the defendant

> in the description. This being true, it was no more the duty of the complainant to pay the entire tax, a portion of which was assessed against the defendant's estate, than it was the duty of the defendant to make such payment of the entire tax a portion of which was properly chargeable against complainant's interest. The owner of neither estate could protect his own property without paying an obligation properly chargeable against the owner of the other."

Therefore, the court held that while the owners are liable for the taxes on their separate estates, yet since both estates are assessed together, that one, in order to protect his own estate, must pay the entire assessment and then seek proportionate part from the other owner. This rule is peculiar to Michigan and is contrary to the great weight of authority, including the Missouri case of State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S. W. 998, supra, and other authorities cited above, especially Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706, in which the court said at l. c. 707:

> " * * * it was not only proper to tax the mineral interest separately, but it was plainly an irregularity to assess to one owner as one property both the surface and the mineral rights, when they were owned separately."

We next turn to your question as to how far back such assessment may run. Section 9789, R. S. Mo. 1929, provides as follows:

> "If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax

> which ought to have been assessed and paid in former years charged thereon."

Section 9961, Laws of Missouri, 1935, page 405, provides:

> "No proceeding for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and-or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

This point is decided in State ex rel. Hammer v. Vogelsang, 183 Mo. 17, 81 S. W. 1087, in which taxes on certain real estate for the years 1885 to 1890, inclusive, had been omitted from the current assessments of those years. The omission was discovered in 1896 and the assessment then made. The court quoted Section 7562, R. S. Mo. 1889, which is the same as Section 9789, R. S. Mo. 1929, cited supra. The court held that:

> "The suit is not barred by the statute of limitations. No right of action accrued until the taxes were assessed and had become delinquent. The assessment was made in 1896, the taxes were

> therefore not delinquent until January, 1897. The five years' limitation expired January 1, 1902. The suit was brought December 16, 1901.
>
> "The case of State ex rel. v. Fullerton, above referred to, was a suit under this statute to collect taxes on land that had been omitted from the assessor's books in former years, just as was the defendant's land in this case, and the court in that case held that the statute of limitations did not begin to run during the years the land was omitted from the assessor's books and not until after the discovery of the omission and the assessment of the taxes as required by section 7562, Revised Statutes 1889, and until they became delinquent after that assessment. And so we now hold."

It is plain from the above that it is the duty of the assessor, when he discovers that real property has been omitted in the assessment of any year or series of years, to assess said property for all the years it has been omitted. The tax on the omitted property does not become delinquent until January 1st, following the year it is assessed, and initial proceedings for the collection of such delinquent tax may be commenced at any time within five years of the date of delinquency.

We have held, however, in an opinion given to Hon. Barker Davis, Prosecuting Attorney of Lewis County, that the County Board of Equalization, under the provisions of Section 9816, R. S. Mo. 1929, can only assess property omitted from the assessor's books for the current year. A copy of said opinion is enclosed.

CONCLUSION

It is therefore the opinion of this department that coal or other mineral rights in place are real property and may by proper conveyance be severed from the land by the owner thereof, and when so severed the same becomes the subject of taxation, separate and apart from the surface estate, and the taxes should be assessed against the owner of said coal or other mineral rights.

It is the further opinion of this department that where coal or other mineral rights owned separately from the surface estate have been omitted in the assessment of any prior year or series of years, that the assessor, when he discovers the omission, should assess said property for all the years it has been omitted. The taxes on said omitted property would not become delinquent until January 1st, following the year it was assessed, and initial proceedings could be commenced at any time within five years of the date of delinquency.

However, it is the opinion of this department that the County Board of Equalization is only authorized, under the provisions of Section 9816, R. S. Mo. 1929, to assess omitted property for the current year only.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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