TAXATION: Buildings owned by lessees are subject to taxation separate from the land.

April 15th, 1939.

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Hon. Robert A. McIlrath,
Prosecuting Attorney,
St. Francois County,
Farmington, Missouri.

Dear Mr. McIlrath:

This will acknowledge receipt of your inquiry of April 7th, 1939, which reads as follows:

"Enclosed herewith please find a blank form, the usual form of a lease agreement between St. Joseph Lead Company, who now owns the land generally in the Lead Belt towns of this county, to persons who have leased the surface right for home building purposes and for building sites for commercial purposes throughout the Lead Belt.

The members of the County Court are in a quandary. Some of them desire that the value of buildings and inprovements built on these lease-holds within the term of the lease, which is usually from twenty to thirty years, should be assessed against the lessee.

Many of these buildings and improvements are valuable commercial buildings and some are moderately expensive dwellings. Some members of the court and Board of Equalization think that the buildings and improvements should be assessed to the

lessee instead of to the lessor.

We desire from your office to determine whether the improvements on these lease-holds should be assessed to the lessor or lessee under the terms in conditions set forth in the enclosed sample copy.

Generally the lease rent on dwellings is twenty dollars per year and on commercial buildings fifty dollars per year, payable quarterly."

Section 9742, Revised Statutes, 1929, reads 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 9746, Revised Statutes, 1929, reads as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

The two foregoing sections lay down two premises from which we must start, viz:

(1) That all property except such as is specifically exempted is subject to taxation; (2) That the owner of property is the one to whom taxes should be assessed, and who should pay the taxes. There is no claim that the buildings are not property, nor is there any claim that the buildings inquired about in your letter are exempt from taxation. The only question to be determined is to whom should the buildings be assessed and who should pay the taxes thereon.

While, generally speaking, permanent improvements erected upon the land become a part of the real estate, yet parties can contract in such a manner as to have the ownership of the improvements in one person and the ownership of the land in another. This doctrine of law has been stated thus, in the case of People v. Board of Assessors, 93 N. Y. l. c. 311:

> "The title and ownership of permanent erections by one person upon the land of another, in the absence of contract rights, regulating the interests of the respective parties, generally follows and accrues to the holder of the title of the land, but it is perfectly competent for parties by contract to so regulate their respective interests that one may be the owner of the buildings and another of the land.

In determining whether the lease involved in the foregoing case was such a one as treated ownership of the buildings in the lessee, the court said, l. c. 312:

"It remains to inquire whether by the lease in question the relators have a legal interest in the buildings erected by them, which the law will regard as property, and to the possession and enjoyment of which they are lawfully entitled.

They are now in possession of the property rented by them and have been for a period of upwards of twenty-five years, subject only to the annual payment of ground rent to their lessors. By their lease they are entitled to retain this possession for all time, unless in the meanwhile their lessors elect to pay for their property, and thus terminate their ownership.

The lessees have simply entered into an executory contract of sale of their buildings, optional with their vendees as to whether it shall be executed at some future time, or the erections shall continue to be possessed by and remain the property of the lessees.

Until the exercise of this option on the part of the lessors the buildings undoubtedly continue the property of the lessees with all of the rights and obligations which pertain to such ownership. The circumstance that the interest of the lessees may be forfeited for any cause by their own act does not affect the status of the property as to its present ownership.

> In a general sense all property is liable to be forfeited in some way through the acts of the owners, but this fact does not affect the title to the property until the cause of forfeiture be committed and the penalty enforced. Conditions more or less onerous are frequently inserted in conveyances of property, but when a grantee enters into possession of the property conveyed and while he continues in possession he is the legal owner of whatever the conveyance purports to grant him."

We think the terms of the lease submitted with your request make the lessee of the land in question the owner of the buildings and improvements. The lease requires the lessee to erect a building on the land within a certain time and in excess of a certain cost, and also provides that if the lessor elects to conduct its mining operations from the leased tract, it will compensate the lessee for damages to his buildings or improvements. It further provides that at the expiration of the term of the lease the lessee may remove the buildings from the said leased tract. All of these provisions clearly indicate an intention on the part of the contracting parties that the ownership of the buildings should be in the lessees, whereas the ownership of the land is in the lessors.

Cases involving the taxation of buildings separate from the land upon which they rest, have heretofore been before the Courts of Missouri. In the early case of Leach v. Goode, 19 Mo. 502, the court said:

> "When a lease is made, without any stipulation about taxes the landlord is bound to pay the taxes upon the property; but if the tenant, by the erection of buildings, which, by the terms of lease, continue his property, and which he is either authorized to remove, or is entitled to be compensated for by the landlord, enhances the taxes, the landlord is not bound to pay taxes upon the improvements."

The case of State ex rel. v. Mission Free School, 162 Mo. 332, was a case where land owned by charitable organization was leased to a party who subsequently erected a large and valuable building upon it. Suit was brought against the charitable organization and the lessee seeking to have the land and the leasehold interest of the lessee sold for taxation. There was no assessment of the separate interest of the lessee in the lease-hold and the building. In the course of the opinion the court said, l. c. 336:

> "As there was no assessment of Thompson's building by the assessor, and as his ownership is distinct from that of the Mission Free School, the assessment of his building as a part of the school's lot was clearly erroneous, as the law requires all property in this State to be assessed to the owner if known, and this lease was open to the assessor. As said on the former appeal, Thompson is not to be subjected to the tax on the ground, nor the school, even if not wholly exempt, to pay the tax on his building. The fact that the lot of the Mission Free School is

or was exempted under its articles of incorporation will not exempt the building of Thompson, in which the school has no interest, or title under its lease. It is true, counsel for Thompson insists that Thompson's interest can not be taxed bacause there is no specific statute authorizing his interest in such a case to be taxed.

In this view we do not concur. 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. Whether it is real or personal property, or whether the State is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is. And it is Thompson's duty to list it just as every other taxpayer is required to list his property or suffer the penalties. The point may be new in this court, but has often been solved in other jurisdictions. (People ex rel. Muller v. Board of Assessors, 93 New York, 308; People ex rel. v. Commrs. of Taxes, 82 N. Y. 459; Russell v. City of New Haven, 51 Conn. 259; Smith v. Mayor, 68 N. Y. 552).

> In most states the interest of Thompson under a lease like this is real estate, and as our statute provides that the words "real estate" shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4917 and 4916, Revised Statutes, 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate. As it is obvious he has not been assessed at all, no judgment can be rendered against him in the present action, but the statute supplies the remedy in such cases.
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> We think it is equally clear that 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, and as the judgment is in its nature such an entirety that this court can not separate the respective obligations of the two defendants, it must be held erroneous as to both."

The foregoing case seems to us clearly to hold that where buildings on leased land are owned by the lessee, they should be assessed separately from the land. Where the lease is silent as to taxes, it has been held that the taxes on improvements removable by the tenant must be paid by the tenant.(73 A.L.R. 828n).

The lease submitted with your inquiry provides that the lessee should pay all taxes against the leased land, and clearly shows an intention that the lessor shall not be liable for taxes of any kind. However, the lease indicates that the parties must have assumed that the improvements and the land would be assessed together and the lessee pay the entire taxes.

While it is competent for the parties to so contract that the ownership of the improvements shall be separate from the ownership of the land, yet they could not contract for a different method of assessment than that provided by law, since the assessment and collection of taxes are regulated by law.

CONCLUSION

It is therefore the opinion of this office that where buildings and improvements upon leased lands are owned by the lessee, they should be assessed and taxed separate from the land and that the owner of such buildings and improvements is liable for taxes on the same. It is further our opinion that buildings on land leased in accordance with the form of lease enclosed with your request are owned by the lessee and should be assessed to him.

Yours very truly,

APPROVED:

HARRY H. KAY
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General

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