

**OPINION
72-400**

April 21, 1972 (OPINION)

The Honorable William L. Guy

Governor

RE: Signal Oil and Gas Company v. Williams County

This is in response to your letter in which you ask that we join with the Tax Department to evaluate the impact of the Court's ruling in the above matter in terms of diminished tax collections and also what legal steps might be taken to remedy any tax loss which would result from this decision if it is upheld by the Supreme Court.

You specifically ask for an opinion as to whether the new Constitution if adopted on April 28 would permit the next session of the Legislature to reclassify property such as that removed from real property rolls by the Burdick decision so that it could continue to be taxed as before.

The court issued its findings of fact, conclusions of law and judgment on April 11, 1972. On April 18 the Court issued a supplemental memorandum decision. The supplemental memorandum decision modifies the original judgment substantially, particularly as to buildings and improvements.

The ultimate decision of the Court rests basically upon the construction of a portion of Section 176 which is quoted as follows:

"Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax. The legislature may by law exempt any or all classes of personal property from taxation and within the meaning of this section, fixtures, buildings and improvements of every character, whatsoever, upon land shall be deemed personal property. * * * "

The Court in its supplemental memorandum decision construed the underscored language to mean that the Legislature had a relatively free hand in determining what classes of personal property should be exempt from taxation and for purposes of exempting property from taxation, the Legislature could even exempt buildings, fixtures and improvements which are normally considered part of real property to which it is attached. In effect, this construction placed on the underscored language permits the Legislature to classify buildings, fixtures and improvements as personal property, for the purposes of exempting same from taxation.

It was not the intent of this language to create a general definition applicable to all property in all cases. The qualifying phrase "within the meaning of this section" limits it to the preceding language. The Court states it was misled in the first decision by the erroneous recitation of only Chapter 334 in the Century Code but not the provisions of Chapter 536. Both of these measures were

passed in the 1971 Session. Chapter 534 was approved on March 29, whereas Chapter 536 was approved on March 31. Both of these chapters amended and reenacted subsection 25 of Section 57-02-08. The version in Chapter 536 contained the following pertinent language:

" * * * nor shall it exempt from assessment and taxation fixtures, buildings, and improvements upon land which are now assessed as real estate."

This language erroneously was omitted in the supplement to the revised code. Both the Court and counsel apparently were misled by this erroneous omission. However, the subsequent memorandum decision has taken this into account and the necessary corrections have been made. Because of the language in Chapter 536, the Court concluded that the Legislature had not excluded fixtures, buildings and improvements from taxation. In fact, the Legislature excluded same from the exemption of personal property tax.

As a result of the modified decision, fixtures, buildings and improvements are continued to be taxed and this question is not up for consideration unless the plaintiffs cross-appeal to the Supreme Court. Should this be accomplished and if the Supreme Court were to say that Section 176 classifies fixtures, buildings and improvements as personal property, there would be nothing under the present Constitution to prevent the Legislature from taxing such property as personal property. The ability of the Legislature to classify and tax property would not be hampered under the present Constitution. It would merely involve the method by which the Legislature would accomplish it.

The main thrust of the modified decision pertains to the classification of property. The Court concluded that the classification of property under Section 57-02-04(3) as amended by Chapter 534 of the 1971 Session Laws was invalid because it was discriminatory, unreasonable and arbitrary. The Court held that this classification was violative of Section 176 of the present Constitution and the Fourteenth Amendment of the United States Constitution. This question, however, will be appealed and presented to the Supreme Court, at which time valid arguments will be presented that the classification was not discriminatory, unreasonable or arbitrary. By comparing the language of the proposed Constitution Article 10, Section 5, we find that the opening sentence which pertains to uniformity of taxes provides as follows:

"Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax."

We further note that this language is identical to the language in Section 176. The question of uniformity is required in both the current Constitution and the proposed Constitution. The problem, if any, will be present in either the present or proposed Constitution.

We might add that on February 19, 1971, in an opinion to Representative Don Halcrow, with reference to the statute in question which was Senate Bill 2045, we observed that the classification may have difficulty withstanding a judicial test depending on the factual

situation even though the statute has the presumption of validity.

In conclusion, we do not believe that the Legislature would be prevented from reclassifying property if done on a uniform basis under the current Constitution or proposed Constitution.

As to the diminished tax collections resulting from the modified court ruling if upheld, we would have to take into account the following:

Signal Oil and Gas Company's total tax for 1971 was \$184,944.58. All of this was paid under protest. In accordance with the modified court decision, the property which is generally considered personal property would not be taxable. Roughly such property produced 90 percent of the total tax. This results in a loss of approximately \$166,500.00 in this instance. As to what effect it may have statewide, we do not have adequate information to make a reliable estimate at this time.

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Attorney General