

Opinion No. 2012-104

October 1, 2012

The Honorable Buddy Lovell
State Representative
201 West Riverside Drive
Marked Tree, Arkansas 72365-2014

Dear Representative Lovell:

I am writing in response to your request for my opinion on the following questions:

1. Are the following entities exempt from ad valorem property taxes upon their producing mineral rights by virtue of Ark. Const. art. 16, sec. 5: public schools, public libraries, public charities, churches, cemeteries, public hospitals, cities, counties, masonic lodges, elks clubs, improvement districts, fire departments, fire protection districts, conservation districts, drainage districts, municipal improvement districts, suburban improvement districts, the State of Arkansas, public institutions of higher education, state agencies, state commissions, state boards, Ark. Game & Fish Commission, Ark. State Highway Commission or Highway Department, the United States of America, Boys & Girls 4-H Houses, Boy Scouts of America, Future Farmers of America?
2. May the entities listed above claim exemption from ad valorem property taxes upon their producing mineral rights in excess of the exemption granted by virtue of Ark. Const. art. 16, sec. 5?
3. May the General Assembly extend an exemption in excess of that afforded an entity or taxpayer by virtue of Ark. Const. art. 16, sec. 5?

4. Are persons afforded the homestead tax protections under Amendment 79 exempt or protected from ad valorem property taxes upon their producing mineral rights?
5. Are disabled veterans exempt from ad valorem property taxes upon their producing mineral rights by virtue of A.C.A. 26-3-306, or otherwise?

RESPONSE

With respect to your first question, in my opinion, producing mineral rights are subject to taxation under Arkansas law unless preemptive federal law dictates otherwise. Of the entities you have mentioned, then, only the United States, which under preemptive federal law is exempt from state and local taxation, is exempt from taxation of its mineral interests. Under the doctrine of sovereign immunity, however, claims for payment of property taxes against the state and its agencies may be pursued only before the Arkansas Claims Commission. Given that Ark. Const. art. 16, § 5 extends no exemption from property taxation to producing mineral interests, question two appears to be moot. Even if it were not moot, the answer would be “no,” since Ark. Const. art. 16, § 6 forbids extending any exemptions from property taxation beyond those recited in Article 16, § 5, which I do not believe covers exploited mineral interests. In my opinion, the answer to your remaining questions is likewise “no.”

Question 1: Are the following entities exempt from ad valorem property taxes upon their producing mineral rights by virtue of Ark. Const. art. 16, sec. 5: public schools, public libraries, public charities, churches, cemeteries, public hospitals, cities, counties, masonic lodges, elks clubs, improvement districts, fire departments, fire protection districts, conservation districts, drainage districts, municipal improvement districts, suburban improvement districts, the State of Arkansas, public institutions of higher education, state agencies, state commissions, state boards, Ark. Game & Fish Commission, Ark. State Highway Commission or Highway Department, the United States of America, Boys & Girls 4-H Houses, Boy Scouts of America, Future Farmers of America?

In my opinion, with the exception of the United States of America, each of the recited entities is subject to ad valorem property taxation of its producing mineral interests. The United States is exempt from such taxation by operation of

preemptive federal law. Moreover, any claims for such taxes imposed upon the State of Arkansas and its agencies can only be pursued before the Arkansas Claims Commission.

In Op. Att’y Gen. No. 2012-010, which addressed the taxability of mineral interests in church and cemetery property, I addressed the application to this question of Ark. Const. art. 16, § 5, which provides in pertinent part:

The following property shall be exempt from taxation: public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity.¹

As I noted in my previous opinion, this subsection “defines the universe of constitutionally exempt uses” applicable to property taxation. I further noted the applicability of Ark. Const. art. 16, § 6, which straightforwardly provides: “All laws exempting property from taxation, other than as provided in this Constitution[,] shall be void.” I concluded that the recited exemptions for church and cemetery properties, which were the focus of the request, did not extend to exploited mineral interests in the properties, since the commercial exploitation of mineral interests can “never fall within the scope of exemptions” articulated in Article 16, § 5.² My opinion, then, was couched in global terms that apply to all mineral interests, which I opined “can never be considered constitutionally exempt from taxation.” I continue to subscribe to this conclusion as applicable in any situation that does not involve the application of a preemptive federal law mandating otherwise.

My conclusion regarding the scope of Article 16, § 5 renders it unnecessary for me to consider seriatim its application to each of the entities you have itemized in your question. As you point out in your summary of my previous opinion, I have opined, and the Arkansas Assessment Coordination Department (the “AACD”) concurs,³ that mineral interests never fall within the scope of the Article 16, § 5

¹ Ark. Const. art. 16, § 5(b).

² I need not here reproduce my extensive discussion of this issue, to which I continue to subscribe.

³ The AACD was formed pursuant to Act 436 of 1997 in order to supervise, *inter alia*, the assessment process in Arkansas. The interpretations of an administrative body are given substantial deference,

exemptions. In lieu of repeating my previous analysis, I will simply reproduce what I consider the AACD's accurate summation of the controlling principle in its *Frequently Asked Questions* internet posting:

If a producing mineral interest is owned by an entity such as a county, church, school, or charity, whose property is ordinarily exempt, is the mineral interest also exempt? No. Arkansas Constitution Article 16 Section 5, and Section 6. To qualify, the mineral interest would have to be used directly and exclusively for the same exempt purpose as that of the entity. In this case the primary use is for business. Even if the income is used to support the exempt entity, it is not exempt because the exempt use of the entity would be secondary. The secondary use, no matter how meritorious, is irrelevant, *Hilger v. Harding College, Inc.*, 231 Ark. 685, 331 S.W. 2d 851 (1960). However, the State of Arkansas is immune from suit in state courts to collect any delinquent tax, Arkansas Constitution Article 5 Sec. 20. If the state refuses to pay the tax on the producing mineral interest the only remedy the county may have is to pursue a claim before the Arkansas Claims Commission. The lien does remain on the property and if the state transfers ownership to someone who does not have sovereign immunity the lien may be enforced as against any other delinquent property, AG Opinion No. 2008-023.⁴

In my opinion, the conclusion stated in this excerpt applies not only to the entities specifically listed in Article 16, § 5, but to any entity subject to taxation. With regard to the taxation of producing mineral interests in properties otherwise falling within the Article 16, § 5 exemptions, I noted as follows in my previous opinion:

With respect specifically to the assessment of mineral interests in property otherwise exempt from taxation, I am inclined to add only that mineral interests by their nature appear particularly suitable for tax consideration apart from the surface estate. Unlike those situations in which a part of an otherwise exempt parcel might be

provided that the decisions are not arbitrary and do not contradict the law which the agency is intended to administer. See *Pledger v. C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994); *Allen v. Ingalls*, 182 Ark. 991, 33 S.W.2d 1099 (1930).

⁴ Arkansas Assessment Coordination Department, *Frequently Asked Questions*, Chapter 9, No. 16 (eff. June 14, 2012), <http://www.arkansas.gov/acd/faqs.html> (last visited Sept. 13, 2012).

used for a taxable purpose or a parcel might be used for a taxable purpose only part of the time, *a mineral estate represents a property interest that can be exploited only for the taxable purpose of generating income* – a condition that does not apply to the entirely distinct surface estate. *It thus appears particularly appropriate to treat producing mineral interests as innately subject to property taxation*, as the AACD does, and to distinguish them entirely from surface interests, which, if not divisible into discrete units for purposes of determining taxability, should be taxed in accordance with the property’s predominant use.

(Emphasis added.) As suggested in the highlighted portions of the passage just quoted, in my estimation, the conclusion that mineral interests are subject to taxation applies not only to property otherwise exempt under Article 16, § 5, but *a fortiori* to any other variety of property not exempted pursuant to the Arkansas Constitution or preemptive federal law – including, with the exception of the property discussed immediately below, property owned by the entities listed in your request.

This conclusion is consistent with the fact that the exemptions set forth in Article 16, § 5 are based upon the exempt *uses* to which property is put. Stated differently, the exemptions extend only to a property estate that is *used* in one of the ways recited. As reflected in my previous opinion, mineral estates, by their very nature, are *never* used for any such purpose, even though the proceeds of commercial mineral exploitation may be.

Having reiterated my previous conclusion, I must in the present context stress the significance of the qualification I stated above – namely, that the taxability of producing mineral under Arkansas law extends only to entities that are, indeed, “subject to taxation” under state law. Among the entities you have listed in your question is “the United States of America,” which, absent congressional action, is immune from state and local property taxation as a matter of federal constitutional law.⁵

⁵ *Smith v. Davis*, 323 U.S. 111, 113, 65 S.Ct. 157 (1944) (affirming as generally applicable “the rule, first enunciated in *McCulloch v. State of Maryland*, [17 U.S. 316,] 4 Wheat. 316, 4 L.Ed. 579 [(1819)], that without Congressional action there is immunity from state and local taxation, implied from the Constitution itself, of all properties, functions and instrumentalities of the federal government”).

In my opinion, then, all of the entities recited in your question other than the United States are subject to taxation upon their producing mineral interests. However, as noted in the AACD internet posting quoted above, any contested claim for taxes allegedly owed by the state or its agencies on producing mineral interests must be resolved by the Arkansas Claims Commission.⁶ All other such claims and may be pursued through standard judicial channels.

Question 2: May the entities listed above claim exemption from ad valorem property taxes upon their producing mineral rights in excess of the exemption granted by virtue of Ark. Const. art. 16, sec. 5?

Because Article 16, § 5 does not exempt from property taxation producing mineral interests, this question appears to be moot. In any event, Article 16, § 6 expressly forbids “[a]ll laws exempting property from taxation, other than as provided in this Constitution” No provision of the Arkansas Constitution supports granting exemptions “in excess” of those recited in Article 16, § 5.

Question 3: May the General Assembly extend an exemption in excess of that afforded an entity or taxpayer by virtue of Ark. Const. art. 16, sec. 5?

No. As noted above, any such legislative grant of an exemption not constitutionally mandated is prohibited by Ark. Const. art. 16, § 6.

Question 4: Are persons afforded the homestead tax protections under Amendment 79 exempt or protected from ad valorem property taxes upon their producing mineral rights?

In my opinion, the answer to this question is “no.”

Amendment 79 provides that increases in the assessed value of non-homestead property in any given year, excluding newly discovered real property, new construction or substantial improvements to real property, will be limited to 10% of the assessed value of the property in the year preceding the first post-Amendment 79 reappraisal, and to 5% on a homestead.⁷ The amendment further

⁶ See Op. Att’y Gen. No. 2008-107 (discussing in terms of sovereign immunity the jurisdiction of the Claims Commission to entertain claims for money damages against the state). For a detailed discussion of these provisions, see Op. Att’y Gen. No. 2004-300.

⁷ Ark. Const. amend. 79(a)-(d).

precludes increasing the assessed value of the homesteads of the disabled or persons over the age of 65.⁸

Specifically in response to your question, I must note initially that Amendment 79 does not extend to anyone an exemption from property taxation. Rather, it addresses what will be the operative date of the assessment to be used in calculating an eligible individual's tax obligation.

Moreover, the favorable tax treatment accorded under Amendment 79 expressly applies only to a qualifying homestead "*used as the taxpayer's principal place of residence.*"⁹ Any such use, as with the uses articulated in Article 16, § 5, differs fundamentally from the commercial use undertaken in the exploitation of a mineral interest. Stated differently, the favorable tax treatment accorded under Amendment 79 can only extend to a surface estate, not to a mineral estate of the sort here at issue.¹⁰

Question 5: Are disabled veterans exempt from ad valorem property taxes upon their producing mineral rights by virtue of A.C.A. 26-3-306, or otherwise?

Section 26-3-306 of the Arkansas Code (Supp. 2011) prohibits altogether taxing the homesteads of certain disabled veterans, their surviving unmarried spouses and their minor children. In my opinion, for the reasons set forth above, this prohibition does not extend to the taxation of a producing mineral estate, which is generally distinguishable from any surface estate and even more clearly distinguishable from a "homestead" as that term is traditionally used.¹¹

One of my predecessors has indirectly addressed this issue as follows:

⁸ *Id.* at (d).

⁹ *Id.* at (c)(1) and (d) (emphasis added).

¹⁰ See my extensive discussion of this point in Opinion 2012-010.

¹¹ In analyzing this statute, I will presume, as I must absent a judicial determination to the contrary, that the legislation is constitutional. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001). I will note, however, that this office has on numerous occasions questioned whether this statute would withstand a constitutional challenge given that, in apparent derogation of Article 16, § 6, it purports to exempt from property taxation a category of property not mentioned in Article 16, § 5 or elsewhere in the constitution. See, e.g., Ops. Att'y Gen. Nos. 2010-093; 2009-054; 2005-209; 2001-213; 2000-011; 95-408; 93-438; 93-807; 92-084 and 91-265.

The veterans' tax exemption statute does not contain a definition of the term "homestead." An early definition of the term in Arkansas is found in *Tumilson v. Swinney*, 22 Ark. 400 (1860). It was stated therein that "[t]he homestead is the place of a home or house. That part of a man's landed property which is about and contiguous to his dwelling house. . . . The dwelling may be a splendid mansion, or a mere cabin or tent, open to the winds and rains of heaven. If there be either, it is under the protection of the law, but there must be a home residence. . . ." 22 Ark. at 403-404, citing in part, *Franklin v. Coffee*, 18 Texas 415 The most recent pronouncement of the Arkansas Supreme Court upon the meaning of the term is found in *Maloney v. McCullough*, 215 Ark. 570, 221 S.W.2d 770 (1949), wherein the court stated:

The term "homestead" has three meanings: (1) The homestead premises, or the land and dwelling occupied as a home; (2) the homestead exemption, or right to reserve the home from the claims of creditors; (3) the homestead estate, or the interest of the widow and minor children in their deceased husband's and father's homestead, or the interest of the minor children in their deceased mother's homestead.

215 Ark. at 574, citing *Jones' Ark. Titles*, 867.

In my opinion the veterans' tax exemption statute uses the term "homestead" in the first sense of the word as set out above. The statute exempts the veteran from payment of taxes on "the homestead and personal property owned by the disabled veteran." A.C.A. 26-3-306(a)(1)(A). The term "homestead" as used in this statute has reference, in my opinion, to the veteran's dwelling and the land contiguous thereto which the veteran occupies as a home.¹²

This discussion makes clear that the "homestead" to which the exemption extends is a surface estate put to a particular use – namely, occupation as homestead premises. This definition logically cannot extend to a subsurface estate put to a

¹² Op. Att'y Gen. No. 93-438. *Accord* Op. Att'y Gen. No. 2001-213 (approvingly quoting this passage in its entirety).

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different use – namely, commercial exploitation. Accordingly, I do not believe the statute could serve as a basis for exempting the taxation of a disabled veteran's mineral estate.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh