

## Opinion No. 34-741

March 21, 1934

**BY:** E. K. NEUMANN, Attorney General

**TO:** Honorable Arsenio Velarde, State Auditor, Santa Fe, New Mexico.

{\*124} Under date of March 20, 1934 you have requested this office to render an opinion upon the question as to whether our State Income Tax Law should be applied in cases which involve the salaries of public officials of this state, and we make haste to answer your inquiry as the time for rendering the returns will expire under the Act on April 15th.

The State Income Tax Law is cited as Chapter 85 of the Session Laws of 1933, and under Section 4 of the Act salaries and wages are to be taken into consideration in determining the amount of the gross income. No exemption is provided in cases of the salaries of public officials and if such exemption is to be allowed we must find authority for same either in other laws or in the Constitution of the State.

The income tax under said Chapter 85 is imposed upon the net income of the taxpayer in graduated amounts, the net income being the gross income of the taxpayer less certain exemptions and deductions allowed by the Act.

Section 27 of Article 4 of the State Constitution of the state reads as follows:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution."

The question presented then may well be couched in this language, "Does the imposition of the income tax upon the salary of a public official who has a 'term of office' constitute a diminution of the salary of such public officials?"

There is no distinction so far as this question is concerned, between a constitutional and a statutory officer, and if such official has a term of office then the holding herein applies with equal force to both classes of public officials. Those officials which immediately come to mind as having a "term of office" are those Constitutional Officers mentioned in Section 1, Article 5 of the Constitution, which are governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney {\*125} general, superintendent of public instruction and commissioner of public lands. Also members of the state corporation commission and all other elective officers, both state and county.

Similar questions have been before the Supreme Court of the United States on at least two occasions which involve the imposition of the Federal Income Tax as against the salary of certain Federal Judges. These cases will be cited below.

The Constitution of the United States, in Section 1, Article 3, provides as follows:

"The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Section 213 of the Federal Revenue Act of 1926 provides, that the gross income shall include \* \* \* salaries of the Judges of the supreme court and inferior courts of the United States. Prior enactments of 1919 contained the same provision.

A Federal Judge from the Western District of Kentucky protested payment of the said income tax, upon the ground that the effect of such imposition was to diminish his salary during his term of office.

In the case which was finally decided by the Supreme Court of the United States, and entitled *Evans vs. Gore*, 253 U.S. 245; 64 L. Ed. 887, the court held in a lengthy opinion that the diminution could be indirect as well as direct and that the effect was the same, and that the tax imposed was contrary to the Constitutional prohibition and therefore invalid.

The Court cited with approval an opinion of Attorney General Hoar, in 1869, wherein that official had expressed himself in accordance with a protest made by Chief Justice Taney in a letter to the Secretary of the Treasury. (157 U.S. 701; 39 L. Ed. 1155). In this protest the Chief Justice said: "I regard an Act of Congress retaining in the treasury a portion of the compensation of the judges, as unconstitutional and void." In *Miles vs. Graham*, 268 U.S. 501; 69 L. Ed. 1067, the court reached the same conclusions as stated in the foregoing citations.

Our State Constitution provides for three distinct governmental agencies or departments; the legislative, the executive and the judicial, and as said in *New Orleans vs. Lea*, 14 La. Ann. 194, the existence of one department ought not to depend upon the will of a co-ordinate department, as it necessarily would if the legislature could diminish or destroy the salaries of the judicial officers by imposing a tax thereon.

The principle in the case at hand, and in the cases heretofore cited is the same and where the Constitution of a state provides that the salaries of certain officers cannot be diminished during their continuance in their term, the legislature cannot impose a tax upon their compensation, and to do so is unconstitutional as it amounts to a reduction. *Long vs. Watts*, 110 S.E. 785; 22 A.L.R. 277.

By the Legislative Appropriation Act of June 20th, 1932, see 314, 47 Stat. 382, Congress provided for certain reductions in pay of Federal employees and judges and

the Act was questioned upon the ground that it was unconstitutional by certain judges of the courts of the District of Columbia.

Mr. Justice Sutherland, in the opinion in *O'Donoghue vs. United States*, May 29th, 1933, (no citation at hand) held that the compensation of such judges could not be diminished during their term and that to do so would be in violation of the Constitutional prohibition.

From all of the foregoing, therefore, we can only draw one conclusion and that is that the imposition of the income tax upon the salaries of all public officers in this state, who have a term of office, amounts to a reduction or diminution of the compensation of such officers and, is, therefore, invalid as being repugnant to our own Constitutional prohibition herein quoted.

By: FRANK H. PATTON,

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