



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable George H. Sheppard  
Comptroller of Public Accounts  
Austin, Texas

Dear Sir:

Opinion No. O-913

Re: Rural Electric Associations  
organized under Article 1528b  
are subject to ad valorem taxes;  
but they are not liable for the  
gross receipts taxes levied  
under the terms of Article 7060.

This is in answer to your inquiry as to (a) whether or not a Rural Electric Association (R. E. A.) organized under the "Electric Cooperative Corporation Act" is liable for ad valorem taxes on its property, and (2) whether or not such an association is liable for the gross receipts tax levied against such concerns in certain instances under Article 7060, E. C. S.

The "Electric Cooperative Corporation Act" became a law as House Bill No. 599, Chapter 86, 45th Legislature, in 1937, and it is codified as Article 1528b in Vernon's Annotated Revised Civil Statutes. The Act authorizes the creation of non-profit private corporations by three or more persons for the purpose of furnishing electricity and installing electrical and plumbing equipment in rural areas. That part of the act which we deem material in this discussion reads as follows:

"Sec. 3. Cooperative, non-profit, membership corporations may be organized under this Act for the purpose of engaging in rural electrification by any one or more of the following methods:

(1) The furnishing of electric energy to persons in rural areas who are not receiving central station service;

(2) Assisting in the wiring of the premises of persons in rural areas or the acquisition, supply, or installation of electrical or plumbing equipment therein;

(3) The furnishing of electric energy, wiring facilities, electrical or plumbing equipment, or services to any other corporations organized under this Act or to the members thereof.

"Sec. 4. Each corporation shall have power:

(1) To sue and be sued, complain and defend, in its corporate name;

(2) To have perpetual succession unless a limited period of duration is stated in its articles of incorporation;

(3) To adopt a corporate seal which may be altered at pleasure, and to use it, or a facsimile thereof, as required by law;

(4) To generate, manufacture, purchase, acquire, and accumulate electric energy and to transmit, distribute, sell, furnish, and dispose of such electric energy to its members only, and to construct, erect, purchase, lease as lessee and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange, and mortgage plants, buildings, works, machinery, supplies, equipment, apparatus, and transmission and distribution lines or systems necessary, convenient, or useful;

(5) To assist its members only to wire their premises and install therein electrical and plumbing fixtures, machinery, supplies, apparatus, and equipment of any and all kinds and character, and in connection therewith and for such purposes, to purchase, acquire, lease, sell, distribute, install, and repair electrical and plumbing fixtures, machinery, supplies, appa-

tus, and equipment of any and all kinds and character and to receive, acquire, endorse, pledge, hypothecate, and dispose of notes, bonds, and other evidences of indebtedness;

(6) To furnish to other corporations organized under this Act, or to the members thereof, electric energy, wiring facilities, electrical and plumbing equipment, and services convenient or useful;

(7) To acquire, own, hold, use, exercise, and, to the extent permitted by law, to sell, mortgage, pledge, hypothecate, and in any manner dispose of franchises, rights, privileges, licenses, rights of way, and easements necessary, useful, or appropriate;

(8) To purchase, receive, lease as lessee, or in any other manner acquire, own, hold, maintain, sell, exchange, and use any and all real and personal property or any interest therein;

(9) To borrow money and otherwise contract indebtedness, to issue its obligations therefor, and to secure the payment thereof by mortgage, pledge, or deed of trust of all or any of its property, assets, franchises, revenues, or income;

(10) To sell and convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets;

(11) To have and exercise the power of eminent domain for the purpose and in the manner provided by the condemnation laws of this State for acquiring private property for public use, such right to be paramount except as to property of the State, or of any political subdivision thereof;

(12) To accept gifts or grants of money, services, or property, real or personal;

(13) To make any and all contracts necessary or convenient for the exercise of the powers granted in this Act;

(14) To fix, regulate, and collect rates, fees, rents, or other charges for electric energy and any other facilities, supplies, equipment, or services furnished by the corporation;

(15) To conduct its business, and have offices within or without this State;

(16) To elect or appoint officers, agents, and employees of the corporation, and to define their duties and fix their compensation;

(17) To make and alter by-laws, not inconsistent with the articles of incorporation or with the laws of this State for the administration and regulation of the affairs of the corporation;

(18) To do and perform, either for itself or its members, or for any other corporation organized under this Act, or for the members thereof, any and all acts and things, and to have and exercise any and all powers as may be necessary, convenient, or appropriate to effectuate the purpose for which the corporation is organized.

"Sec. 6. (a) The articles of incorporation shall state:

(1) The name of the corporation, which name shall include the words, 'Electric Cooperative' and the word 'Corporation,' 'Incorporated,' 'Inc.,' 'Association,' or 'Company' and the name shall be such as to distinguish it from any other corporation organized and existing under the laws of this State;

(2) The purpose for which the corporation is formed;

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"Sec. 25. (a) Each corporation shall be operated without profit to its members but the rates, fees, rents, or other charges for electric energy and any other facilities, supplies, equipment, or services furnished by the corporation shall be sufficient at all times.

(1) To pay all operating and maintenance expenses necessary or desirable for the prudent conduct of its business and the principal of and interest on the obligations issued or assumed by the corporation in the performance of the purpose for which it was organized, and

(2) For the creation of reserves.

(b) The revenues of the corporation shall be devoted first to the payment of operating and maintenance expenses and the principal and interest on outstanding obligations, and thereafter to such reserves for improvement, new construction, depreciation, and contingencies as the Board may from time to time prescribe.

(c) Revenues not required for the purposes set forth in Sub-section (b) of this Section shall be returned from time to time to the members on a pro rata basis according to the amount of business done with each during the period, either in cash, in abatement of current charges for electric energy, or otherwise as the Board determines; but such return may be made by way of general rate reduction to members, if the Board so elects.

"Sec. 30. Corporations formed hereunder shall pay annually, on or before May first, to the Secretary of State, a license fee of Ten Dollars (\$10) and such corporations shall be exempt from all other excise taxes of whatsoever kind or nature.

"Sec. 31. Whenever any corporation organized under this Act shall have borrowed money from any Federal agency, the obligations issued to secure the payment of such money shall be exempt from the provisions of the Texas Securities Act, (Chapter 100, Acts of the Forty-fourth Legislature, Regular

Session), or any Acts amendatory thereof, nor shall the provisions of said Act apply to the issuance of membership certificates.

"Sec. 35. If any provision of this Act, or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

We will first discuss your inquiry as to whether or not a corporation organized under this law is liable for ad valorem taxes on its property. We call your attention to the fact that we have already answered this question in our Opinion Number O-587, dated April 19, 1939, addressed to Honorable John C. Marburger, County Attorney of Fayette County, in which we held that corporations of this kind, organized under this law, are subject to ad valorem taxes.

In our previous opinion, on April 19, 1939, we discussed this question very exhaustively; and we firmly believe that the reasons and conclusions given in that opinion are correct. We will not go into as much detail on this question in this opinion as we did in our former opinion.

"The power of the State to impose taxes is an inherent governmental power, not dependent on nor derived from either the Federal or State Constitution. These Constitutions impose restrictions, but are not the source of the State's taxing power, which is an attribute of sovereignty." 40 Tex. Jur. 20. See also Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, and Stratton v. Commissioners' Court of Kinney County, (Tex. Civ. App.) 137 S. W. 1170 (writ of error refused). There are no provisions in the Texas Constitution that could be construed as exempting, or authorizing the exemption of, property of the kind in question from ad valorem taxation; but, on the other hand the Constitution, in our opinion prohibits such an exemption. The provisions of the Texas Constitution bearing on this particular question are as follows:

Article VIII, Section 1. "Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be

provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; Provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the State for the same period on such profession or business."

Article VIII, Section 2. "All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools, also the endowment funds of such institutions of learning and religion not used with a view to profit and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages; that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void."

Article XI, Section 9. "The property of counties, cities and towns, owned and held only for public purposes. such as public buildings and

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ture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, provided, nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing."

The property in question is clearly not within any of the classes that the legislature is permitted to exempt from taxation. We have found no statute that attempts to exempt this property from ad valorem taxation; and we believe the passage of such a statute is prohibited by the last phrase in Article VIII, Section 2, of the Constitution, which says that "all laws exempting property from taxation other than the property above mentioned shall be null and void."

We will now discuss your second question, which is, whether or not a corporation organized under this law is liable for the gross receipts tax levied against such concerns in certain instances under Article 7060, R.C.S.

The part of Article 7060 that is material to this discussion reads as follows:

"Each individual, company, corporation or association, owning, operating or managing or controlling any gas, electric light, electric power or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric lights, electric power or water, shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power or water for the quarter next preceding. Said individual, company, corporation or association, at the time of making said report for any such incorporated town or

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city of twenty-five hundred (2500) inhabitants and less than ten thousand (10,000) inhabitants, according to the last United States Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to seven-tenths of one per cent (0.7 of 1%) of said gross receipts, as shown by said report; and for any incorporated town or city of ten thousand (10,000) inhabitants or more, according to the last United States Census next preceding the filing of said report, the said individual company, corporation or association, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to one and three-eighths per cent (1 3/8%) of said gross receipts, as shown by said report. Nothing herein shall apply to any such gas, electric light, power or water works or water and light plant within this State owned and operated by any city or town, nor to any County or Water Improvement or Conservation District."

That article was passed in its present form by the 44th Legislature at its 3rd called session in 1936.

We must now consider Section 30 of the "Electric Cooperative Corporation Act" (Art. 1528b V.A.R.C.S), quoted above, which provides that "such corporations shall be exempt from all other excise taxes of whatsoever kind or nature." The "Electric Cooperative Corporation Act" permits the organizing of corporations to furnish electricity to persons in "rural areas", and Article 7060 requires the payment of gross receipts taxes by corporations and persons operating electric plants in incorporated cities and towns. It may be that concerns organized under the Electric Cooperative Corporation Act by virtue of being limited to "rural areas" could not operate in incorporated towns, and that there could not be a concern so situated that both the Electric Cooperative Corporation Act and Article 7060 would apply to it; but we do not intend to go into that question in this opinion, because we assume by vir-

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tue of you asking this particular question that you have in mind a Rural Electric Association that comes within the terms of Article 7060. If Section 30 of the "Electric Cooperative Corporation Act" is valid it creates an exception to Article 7060, and would control in the situation you ask about.

As we view it, said Section 30 is a valid law, and it creates an exception to Article 7060. Under its terms all Rural Electric Associations organized under the "Electric Cooperative Corporation Act" are exempt from excise taxes.

The gross receipts tax provided in Article 7060 is a form of excise tax. In the case of Foster & Creighton Company v. Graham, 154 Tenn. 412, 285 S. W. 570, 47 A. I. R. 971, the court said:

"All taxes, other than polls, are either direct or indirect. A direct tax is one that is imposed directly on property according to its value. It is generally spoken of as a property tax, or an ad valorem tax. An indirect tax is a tax upon some right or privilege, and it is also called an excise or occupation tax."

It has been suggested that said Section 30 creates an exemption that is arbitrary and unreasonable and that it violates the constitutional provisions on uniform taxation and equal protection of the laws; but we do not agree with that contention. The "Electric Cooperative Corporation Act" is designed to create concerns of a distinct type, and that are engaged in a business different from other concerns. Not only are they different from concerns selling other commodities, but they are different from the usual concern selling electricity. In the first place they are non-profit organizations, and the others are in business for a profit; and in the second place they limit their activities to "rural areas", and the others do business in cities and towns. As we understand it 'occupations may be classified for the purpose of taxation, \* \* \* provided the classification is reasonable.\* \* \* So persons of the same class may be sub-divided according to certain differences, provided the sub-classification is reasonable, and the tax graduated accordingly, or one or more sub-classes may be exempted." 1 Cooley on Taxation, 4th Ed., 746.

In view of what the appellate courts have said we are convinced that said Section 30 in question is valid. In the case of Citizens Telephone Co. v. Fuller, 229 U. S. 322, 57 L. Ed. 1206, 33 Sup. Ct. 833, the constitutionality of the Michigan law taxing telephone companies was upheld, and in that case the Supreme Court of the United States said:

"The act contained this proviso: 'Provided, That the property of telegraph and telephone companies whose gross receipts within this State for the year ending June thirty do not exceed five hundred dollars shall be exempt from taxation.'

"The contention of appellant that the act offends the equal protection clause of the Constitution is based on that proviso. It is urged that the proviso makes an unjust discrimination between companies doing the same business by the same means and imposes a tax \* \* \* because the business of one is large and the other small.\* \* \*

"The District Court, however, took a broader view and considered the inducement of the legislation and its administrative possibilities as giving character to its classification. The court also considered the character of the taxed and non-taxed lines, their number and comparative value and the amount of taxes which would be assessed against them. \* \* \*

"The Lines may be divided into two classes, (1) lines owned by appellant and conducted for profit, and (2) lines connected with those of the first class and called sub-licensed companies, rural and roadway. \* \* \*

"The 'rural' usually belongs to an association of farmers who live along the line. It comprises a switch-board leased by the main or profit-making company to a rural manager, the main company owning the telephones on the line and receiving the entire charge for toll messages, less the manager's commissions for collection. The roadways connected

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with a 'rural' are constructed and owned by the farmers in the same way as other roadways. The larger portion of 'rurals' are contracts with individuals." \* \* \*

"The profit that is derived from the rural and roadway lines is in the reduced rate for the telephones. The manager gets the difference between what he pays the main company and what he gets from those to whom he rents.

"The difference, therefore, between the tax-paying and non-tax-paying companies, or individuals is that the former, as said by the District Court, belong to commercial corporations or enterprises, organized and conducted for the purpose of earning and paying profits as or in the nature of dividends; the latter, the untaxed, are cooperative or farmers' mutual associations, usually unincorporated, conducted at estimated costs and organized primarily to get for the association cheap telephone service.

"It is manifest, therefore, that there are marked differences between the taxed and non-taxed companies, and the differences might be pronounced arbitrary if the rule urged by appellant should be applied, that is, that in the taxation of property no circumstance should be considered but its value, or, to use appellant's words, 'each dollar's worth should be treated alike.' But such rigid equality has not been enforced. In Michigan the legislature has the power of prescribing the subjects of taxation and exemption, notwithstanding the constitution of the State requires the legislature to provide a uniform rule of taxation, \* \* \*

"We think the statute under review is within the rule. It is not arbitrary. It has a reasonable basis, resting on a real distinction. It is not a distinction based on mere size only, as contended by appellant, nor upon the mere amount of

business done. There is a difference in the doing of the business and its results; a difference in the relation to the public."

The constitutionality of Article 7060 as originally passed, prior to its amendment in 1936, was attacked on the ground of discrimination in the case of Dallas Gas Co. v. State, (Ct. Civ. App.) 261 S. W. 1063 (writ of error refused), and we think the language of Justice Baugh in upholding the statute in that case is applicable to the question in this opinion, that language being as follows:

"Appellant insists that because the act in question levies an occupation tax at one rate on those pursuing an occupation in cities of over 25,000 inhabitants, an occupation tax at a lesser rate upon those pursuing the same occupation in cities of 10,000 inhabitants and less than 25,000 inhabitants, and no occupation tax at all on those pursuing that same occupation in places other than these two classes of cities, it is void, and in violation of section 3 of article 1 and sections 1 and 2 of article 8 of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States.\* \* \*

"In small towns such cost is so out of proportion to the returns from such occupation as to make it impracticable, if not economically impossible, to pursue it there. The very existence of such occupation must needs depend upon volume of business, which, generally, is in proportion to the number of inhabitants served. Usually the larger the volume of business done the more economically such occupation can be pursued and the more profitable it thus becomes. All these considerations necessarily enter into the matter of classification and could have been, and doubtless were, considered by the Legislature in arriving at the classification of which appellant complains. The Legislature may have concluded, and perhaps did, that due to its very nature the operation of a gas plant in any place

of less than 10,000 inhabitants was so unprofitable as to be economically impracticable, or so nearly so that an occupation tax upon it would render it so. And as stated in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160:

"When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

"In view of the peculiar nature of the occupation involved and our duty to uphold the acts of the Legislature unless same are clearly in violation of the state or national Constitution, we are not prepared to say that the classification of appellant's occupation is so arbitrary, discriminatory, unreasonable, or unreal as to warrant us in holding it unconstitutional for that reason."

The last case we wish to quote from is the case of *Texas Company v. Stephens*, 100 Tex. 628, 103 S. W. 481, which upheld the constitutionality of a gross receipts tax law that placed a different rate of taxes on different types of business, and in that case the Supreme Court of Texas said:

"The very language of the Constitution of the State implies power in the Legislature to classify the subjects of occupation taxes and only requires that the tax shall be equal and uniform upon the same class. Persons who, in the most general sense, may be regarded as pursuing the same occupation, as for instance merchants, may thus be divided into classes and the classes may be taxed in different amounts and according to different standards. Merchants may be divided into wholesalers and retailers, and, if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage. The considerations upon which such classifications shall be

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based are primarily within the discretion of the Legislature. The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the businesses classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature. This is the rule in applying both the State and Federal Constitutions, and it has been so often stated as to render unnecessary further discussion of it."

Our answer to your first question is that Rural Electric Associations organized under the "Electric Cooperative Corporation Act" (Art. 1528b) are liable for ad valorem taxes on their property.

Our answer to your second question is that by virtue of Section 30 of the "Electric Cooperative Corporation Act" (Art. 1528b) concerns organized under said act are not liable for the gross receipts tax levied against such concerns under Article 7060.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Cecil C. Rotsch*

Cecil C. Rotsch  
Assistant

APPROVED JUL 17, 1939

CCR:jm

*[Signature]*  
FIRST ASSISTANT  
ATTORNEY GENERAL

