

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 94-F-17

Date issued: June 24, 1994
Requested by: Bob Hanson, Tax Commissioner

- QUESTION PRESENTED -

Whether the North Dakota ad valorem tax on railroad operating personal property violates the 4-R Act, 49 U.S.C. ? 11503(b)(4), because North Dakota law exempts certain classes of commercial and industrial property.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the North Dakota ad valorem tax on railroad operating personal property does not violate the 4-R Act, 49 U.S.C. ? 11503(b)(4), even though North Dakota law exempts certain classes of commercial and industrial property.

- ANALYSIS -

Pursuant to authority contained in Article X, Section 4 of the North Dakota Constitution, N.D.C.C. ? 57-05-01 requires the State Board of Equalization to annually assess, at its actual value, the operating property, including franchises, of each railroad operated in this state.

The United States Court of Appeals in Ogilvie v. State Bd. of Equalization of the State of N.D., 657 F.2d 204 (CA8 1981), cert. den. 454 U.S. 1086, held that the State Board of Equalization could not include personal property and trade fixtures in the assessed value of railroad operating property under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), now 49 U.S.C. ? 11503, because locally assessed commercial and industrial personal property was exempt from ad valorem taxation. N.D.C.C. ? 57-02-08(25). The court determined that North Dakota's exemption of nonrailroad personal property constituted discrimination in taxation under Section 306(1)(d) of the 4-R Act. This section is now recodified as 49 U.S.C. ? 11503(b)(4). See 657 F.2d at 206, n.1. The court ruled in Ogilvie that the 4-R Act

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prevented tax discrimination against railroads in any form whatsoever, and that the most obvious form of tax discrimination is to tax a class of railroad property where nonrailroad property of the same class is not taxed. 657 F.2d at 210.

Recently, the United States Supreme Court decided Department of Revenue of Oregon v. ACF Industries, Inc., ____ U.S. ____, 114 S. Ct. 843 (1994). This case raised the question whether the State of Oregon violated the 4-R Act by imposing an ad valorem tax upon railroad personal property while exempting various other, but not all, classes of commercial and industrial personal property. The relevant part of the 4-R Act under consideration in this case provides:

The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.¹

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation

49 U.S.C. ? 11503(b) (emphasis supplied).

In deciding for Oregon, the United States Supreme Court held that a state may grant exemptions from a generally applicable

¹This provision was also an issue in the Ogilvie case, but has since been corrected by legislative action, beginning with the year 1981. S.L. 1981, ch. 564, ? 7.

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ad valorem property tax without subjecting the taxation of railroad property to challenge under the relevant provision of the 4-R Act, 49 U.S.C. ? 11503(b)(4). 114 S. Ct. 846. In this context, the United States Supreme Court's decision in Department of Revenue of Oregon v. ACF Industries, Inc., et al. has impliedly overruled the holding in Ogilvie that the State Board of Equalization could not include personal property and trade fixtures in the assessed value of railroad operating property, because the personal property of locally assessed businesses is exempt from ad valorem property taxation. 657 F.2d 209-210. Compare 1987 N.D. Op. Att'y Gen. 22. The United States Supreme Court decided that the structure of 49 U.S.C. ? 11503(b)(4) did not limit the state's discretion to levy a tax on railroad property while exempting various classes of nonrailroad property. The Court noted that Congress did not state whether exemptions are a form of forbidden discrimination against railroads, and that if it had so intended, it would have spoken with clarity and precision. 114 S. Ct. at 850.

Therefore, based upon the decision of the United States Supreme Court in Department of Revenue of Oregon v. ACF Industries, Inc., et al., it is my opinion that the North Dakota ad valorem tax on railroad operating personal property does not violate the 4-R Act, 49 U.S.C. ? 11503(b)(4), even though North Dakota law exempts certain classes of nonrailroad commercial and industrial personal property from ad valorem taxation. N.D.C.C. ? 57-02-08(25).

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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