

**OPINION
79-278**

September 11, 1979 (OPINION)

Honorable Byron L. Dorgan
State Tax Commissioner and
Secretary to the State Board
of Equalization
State Capitol
Bismarck, North Dakota 58505

Dear Commissioner Dorgan:

This is in response to your letter of August 23, 1979, on behalf of the State Board of Equalization requesting the opinion of this office on a question relating to the assessment by the State Board of property of railroad and car line companies for property taxation purposes.

You state that several of the railroad and car line companies object to the assessment by the State Board of that part of their property that they consider to be personal property, particularly railroad cars and locomotives, because the personal property of other commercial and industrial enterprises, none of whose property is assessed by the State Board, is exempt by subsection 25 of N.D.C.C. section 57-02-08 from all state and local taxation.

Subsection 25 of section 57-02-08 was added to that exemption section by Section 1 of Chapter 528, Session Laws 1969, and it exempts from all state and local taxation all personal property (with some exceptions not applicable here) belonging to owners whose property is not, and never was, assessable by the State Board of Equalization but was subject to assessment by local assessors.

The railroad and car line companies base their claims of exemption on the anti-tax discrimination provision of the federal "4-R" Act, which they argue prohibits the state from taxing their personal property.

As you have noted, the "4-R" Act is the "Railroad Revitalization and Regulatory Reform Act of 1976" enacted by the United States Congress as P.L. 94-210. Section 306 of that Act added a new section, Section 28, to Title 49 of the United States Code. That section prohibited discriminatory tax treatment by the states of transportation property owned or used by a common carrier by railroad - see subsection (3)(d) of Section 28 - and it gave the Federal District Courts jurisdiction to grant mandatory or prohibitive injunctive relief and made the whole section effective three years after its enactment - see subsection (2) and subdivision (b) thereof. Since the Act was approved by the President on February 5, 1976, Section 28 became effective three years later, that is, on February 5, 1979. The Railroad Revitalization and Regulatory Reform Act of 1976 and other federal laws relating to transportation and interstate commerce were revised and codified without substantive change in 1978 by P.L. 95-473. The antitax discrimination section added in 1976 to Title 49 as Section 28, referred to above, now appears in this 1978 revision

as Section 11503 of Title 49.

As you also noted, Section 179 of the North Dakota Constitution provides for the assessment by the State Board of Equalization, in the manner provided by law, of property of railroads and of freight line companies, car equipment and private car line companies operated in this state. N.D.C.C. chapters 57-05 and 57-32 have provided for many years for the assessment of all of the operating property in this state of those companies. None of these statutory provisions were amended by the Legislature to exempt any of their property after the enactment of the Federal 4-R Act in 1976 and therefore those provisions continue to require that all of the operating property of those companies in this state, whether real property or personal property, shall be assessed by the State Board of Equalization and taxed.

Because of this claim by railroad and car line companies that the taxation of their personal property is prohibited by the antitax discrimination provision of the Federal 4-R Act, 49 USC Section 11503, and therefore that their personal property should not be assessed by the State Board of Equalization, you advise that the State Board now asks for the opinion of this office on the following two questions:

1. Is there a conflict between the antitax discrimination provision of the 4-R Act, 49 USCA Section 11503, and the constitutional and statutory provisions of the State relating to assessment of property of railroad and car line companies insofar as railroad cars, locomotives, and other movable type properties are concerned?
2. If there is a conflict, which law, the Federal or the State, should the State Board of Equalization apply in assessing the operating property of these companies?

The full text of the revised Federal antitax discrimination provision as it now appears in 49 USC Section 11503 is as follows:

11503. TAX DISCRIMINATION AGAINST RAIL TRANSPORTATION PROPERTY

(a) In this section

- (1) "assessment" means valuation for a property tax levied by a taxing district.
- (2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.
- (3) "rail transportation property" means property as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
- (4) "commercial and industrial property" means property, other than transportation property and land used

primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

- (b) 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.
 - (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 subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
- (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the states, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by state law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section -
- (1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true

market value of all other commercial and industrial property; and

- (2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Considering, first, North Dakota law only there is no doubt that Section 179 of the North Dakota Constitution and N.D.C.C. chapters 57-05 and 57-32, continue to require the State Board of Equalization to annually assess for taxation purposes the operative property of railroad and car line companies in this state, whether that property be real property or personal property. If the personal property in this state of those companies is exempt from assessment and taxation, it would be exempted by concluding that the North Dakota law is in conflict with, and superseded by, a valid and paramount federal law, namely, 49 USC Section 11503.

Our analysis of Section 11503 convinces us that it does not conflict with North Dakota law insofar as the assessment and taxation of the personal property in this state of railroad and car line companies is concerned and that therefore it is not necessary to consider either the validity or the paramountcy of that federal law. Our reasons for this conclusion follow.

As you indicated in your letter and as is shown by the written materials from railroad and car line companies which you enclosed with your letter, those companies claim exemption for their personal property on the basis that assessment and taxation of it is prohibited by the Federal 4-R Act under subsection (b) of Section 11503, quoted above, because subsection 25 of N.D.C.C. section 57-02-08 exempts the personal property of other commercial and industrial owners from assessment and taxation.

Subsection (b) of Section 11503 provides that a state and its subdivisions may not -

- (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.

The railroad and car line companies base their claim of exemption from assessment of their personal property on this subsection (b)(1) of Section 11503. However, because several of the terms used in that provision are defined in subsection (a) of Section 11503, it is necessary to consider the following definition that appears there:

(a) In this section

* * *

- (4) "commercial and industrial property" means property,

other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

Subsection (a)(4) just quoted excludes transportation property and land used primarily for agricultural purposes or for growing timber from the definition of "commercial and industrial property" and then it further limits the definition of that term to property that is "devoted to a commercial or industrial use and subject to a property tax levy". Since the personal property that is exempted from assessment and taxation by subsection 25 of N.D.C.C. section 57-02-08 never becomes "subject to a property tax levy", that exempt personal property, regardless of its use, cannot be regarded as "commercial and industrial property" for purposes of determining if there is a state taxation activity that 49 USC Section 11503 purports to prohibit.

This interpretation of subsection (a)(4) of Section 11503 is fully consistent with and supported by the provision of subsection (c) of Section 11503, which provides an alternative basis for the federal court to find a violation of Section 11503 if the sales assessment ratio for "other commercial and industrial property" under subsection (b)(1) cannot be determined to the satisfaction of that court. That alternative basis as provided for in the last sentence of subsection (c) and in clause (1) thereof refers to "the assessed value of all other property subject to a property tax levy in the assessment jurisdiction" and in clause (2) it refers to "a tax rate that exceeds the tax rate applicable to taxable property in the taxing district" (emphasis added); this underlined language is fully consistent with our interpretation of subsection 4(a) that any property exempt from taxation cannot be considered in determining if a state taxation activity contravenes the provisions of 49 USC Section 11503.

For these reasons it is our opinion that there is no merit in the claim of the railroad and car line companies that the personal property exemption in subsection 25 of N.D.C.C. section 57-02-08 becomes the basis under 49 USC Section 11503 for preventing and prohibiting the State Board of Equalization from assessing for taxation purposes that part of the operative property in this state of railroad and car line companies that is personal property.

This question that you have presented was not an issue in either or the two recent Federal District Court decisions that you enclosed and which involved this tax discrimination provision of the Federal 4-R Act. For that reason they are not regarded as in any way affecting our conclusion.

Our answer to your first question therefore, insofar as this claim of exemption by the railroad and car line companies is concerned, is that there is no conflict between 49 USC Section 11503 and the North Dakota constitutional and statutory provisions which require the State Board of Equalization to assess all operative property in this state of railroad and car line companies, including railroad cars, locomotives, and other movable type properties. The State Board of Equalization therefore should assess such operative property

regardless of whether it might be considered real property or personal property.

Because of our answer to your first question, it is unnecessary to answer your second question.

Sincerely,

ALLEN I. OLSON

Attorney General