

Date Issued: March 18, 1987 (AGO 87 06)

Requested by: M. K. Heidi Heitkamp, Tax Commissioner

- QUESTION PRESENTED -

Whether the North Dakota ad valorem tax on air carrier transportation personal property is an "in lieu" tax within the meaning of the exception to the anti-discrimination provisions of 49 U.S.C. section 1513(d).

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the North Dakota ad valorem tax on air carrier transportation personal property is an "in lieu" tax within the meaning of the exception to the anti-discrimination provisions of 49 U.S.C. section 1513(d).

- ANALYSIS -

N.D. Constitution Article X, Section 4, N.D.C.C. Chs. 57-06 and 57-32 and section 57-02-27(3) provide that the State Board of Equalization shall annually assess the operative property, real and personal, of each air carrier transportation company operating in North Dakota. However, 49 U.S.C. section 1513(d) forbids discriminatory taxation of air carrier transportation property unless the tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes." 49 U.S.C. section 1513(d)(3).

In *Western Air Lines, Inc. v. Board of Equalization of the State of South Dakota* _____ U.S. _____, 107 S.Ct. 1038 (1987), the United States Supreme Court held that the meaning of the term "in lieu" in 49 U.S.C. section 1513(d)(3) was a federal question. In *Western Air Lines*, the Court found a South Dakota tax on air carrier transportation property was "in lieu" of the general property tax because the revenue was wholly used for airport purposes. Therefore, the court concluded that the South Dakota tax on air carrier transportation property did not violate 49 U.S.C. section 1513(d).

The North Dakota Supreme Court has held that the North Dakota tax on air carrier transportation property is not an "in lieu" tax within the meaning of 49 U.S.C. section 1513(d)(3). *Northwest Airlines v. State Bd. of Equalization* 358 N.W. 2d. 515, 518 (N.D. 1984). However, the United States Supreme Court's decision in *Western Air Lines* has impliedly overruled the holding in *Northwest Airlines*.

The North Dakota tax on air carrier transportation property is wholly distributed to the airport authorities that are being served by the air carrier transportation companies. N.D.C.C. section 57-32-04. Thus, under *Western Air Lines* the North Dakota tax on air carrier transportation property is "in lieu" of the general property tax.

Therefore, based upon the decision of the United States Supreme Court in *Western Air Lines* it is my opinion that the North Dakota ad valorem tax on air carrier transportation personal property is an "in lieu" tax within the meaning of the exception to the anti-discrimination provisions of 49 U.S.C. section 1513(d).

- EFFECT -

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

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Attorney General

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