

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 95-F-09

Date issued: October 3, 1995

Requested by: Representative John Mahoney

- QUESTION PRESENTED -

Whether the United States is exempt from the filing fee imposed under North Dakota Century Code (N.D.C.C.) § 11-17-04(1)(b) for answering a case in state court.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the United States is exempt under Article X, Section 5, of the North Dakota Constitution from the state court filing fee imposed under N.D.C.C. § 11-17-04(1)(b) for answering a case in state court.

- ANALYSIS -

"With a famous declaration that 'the power to tax involves the power to destroy,' McCulloch v. Maryland, 4 Wheat. 316, 431 (1819), Chief Justice Marshall announced for the Court the doctrine of federal immunity from state taxation." United States v. New Mexico, 455 U.S. 720, 730 (1982). Additionally, "no state can tax the property interest of the United States in the absence of Congressional consent." United States v. Allegheny County, 322 U.S. 174, 187 (1944). It is, however, "within Congressional power to authorize regulations, including taxation, by the state of federal instrumentalities." Mayo v. United States, 319 U.S. 441, 446 (1943).

For example, 28 U.S.C. § 2410 waives the sovereign immunity of the United States and allows it to be named as a party in state courts in actions involving mortgage foreclosures, quiet title, condemnations, partition and interpleaders involving real and personal property. See Murray v. United States, 520 F.Supp. 1207 (D.N.D. 1981), aff'd, 686 F.2d 1320 (8th Cir. 1982), cert. denied, 459 U.S. 1147 (1983). In these cases, the United States as a defendant is required to file an answer to protect its property interest. However, N.D.C.C. § 11-17-04(1)(b) provides that the clerk of the district court shall charge and collect \$50 "[f]or filing an answer to a case that is not a small claims action." Although N.D.C.C. § 11-17-04 designates filing charges as fees, these fees

constitute a tax. See Menz v. Coyle, 117 N.W.2d 290, 296-97 (N.D. 1962).

Article X, Section 5, of the North Dakota Constitution provides, in part, that "[t]he property of the United States, to the extent immunity from taxation has not been waived by an act of Congress, . . . shall be exempt from taxation." The South Dakota Supreme Court in Egan Independent Consol. Sch. Dist. v. Minnehaha County, 270 N.W. 527 (S.D. 1936), found a similar constitutional provision to be self-executing and I believe that the North Dakota Supreme Court would hold the same for Article X, Section 5, of the North Dakota Constitution.

By design, therefore, Article X, Section 5, must be interpreted in light of Article VI, Clause 2 of the United States Constitution, known as the Supremacy Clause and judicial precedence thereunder. Clearly, the Legislature understood the practical realities of the Supremacy Clause by directly incorporating the principle of Congressional waiver of immunity of state taxation in Article X, Section 5, of the North Dakota Constitution. Supporting this interpretation is the expansive definition of property under North Dakota law. N.D.C.C. § 1-01-49(12) defines property as "includ[ing] property, real and personal." N.D.C.C. § 1-01-49(13) defines real property as "coextensive with lands, tenements, and hereditaments." N.D.C.C. § 1-01-49(9) defines personal property as "includ[ing] money, goods, chattels, things in action, and evidences of debt."

Thus, when the United States seeks to vindicate its property or property interest, as in those actions under 28 U.S.C. § 2410 in state court involving mortgage foreclosures, quiet title, condemnations, partition and interpleaders involving real and personal property, it must be concluded that Article X, Section 5, of the North Dakota Constitution precludes the imposition of a filing fee under N.D.C.C. § 11-17-04(1)(b).

- 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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