Approved: March 20, 2003
Date

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE

The meeting was called to order by Chairperson David Corbin at 10:45 a.m. on March 19, 2003, in Room 519-S of the Capitol.

All members were present except: Senators Allen, Donovan, and Pugh

Committee staff present: Chris Courtwright, Legislative Research Department
April Holman, Legislative Research Department
Shirley Higgins, Committee Secretary

Conferees appearing before the committee: Pat Hubbell, Kansas Railroads
Melissa Wangemann, Office of Secretary of State

Others attending: See attached list.

Senator Corbin called the Committee's attention to the minutes of the March 18 meeting. Senator Oleen moved to approve the minutes of the March 18, 2003, meeting, seconded by Senator Taddiken. The motion carried.

HB 2005–Income tax credit for property taxes paid on railroad machinery and equipment

Senator Cobin reminded the Committee that a bill which was passed during the 2002 Legislative Session, **SB 39**, allowed railroads to utilize machinery and equipment income tax credits, and an interim study of the issue was conducted during the summer of 2002.

Pat Hubbell, representing Kansas Railroads, testified in support of **HB 2005**. (Attachment 1) He explained that railroads have been protected from discriminatory taxation by the federal 4-R Act passed by Congress in 1975. He called attention to a copy of the relevant section from the 4-R Act attached to his written testimony. In addition, he called attention to a copy of an appeal heard by the Supreme Court of the State of Washington which illustrates that the protection from discriminatory taxation extends to other taxes imposed upon railroads. He explained that **HB 2005** would allow railroads to be treated the same as other industrial, commercial taxpayer in the state. He noted that a House Taxation Committee amendment would make the credit available for tax year 2003. He indicated that, if the bill is passed, the railroads are willing to drop a case with the Board of Tax Appeals and a case in the federal court attempting to gain credit under the 4-R provisions back to 1998 when legislation was enacted to provide refundable income tax credits to offset property taxes on commercial and industrial machinery and equipment.

Senator Oleen requested further information concerning the lawsuit filed by the railroads. In response, Richard Cram, Kansas Department of Revenue, noted that this was not within his area of expertise, but Mark Beck, Property Valuation Division, will be available for questions at a future meeting.

Senator Corbin opened a discussion on a previously heard bill, **SB 29**, introduced by the Kansas Bar Association for the purpose of bringing the Kansas corporate code in compliance with Delaware law. He recalled that the Committee considered a provision dealing with franchise fees filed with the Secretary of State after the Senate Judiciary Committee addressed the corporate codes. Following committee questions, Melissa Wangemann, legal counsel with the Office of the Secretary of State, confirmed that the Secretary of State has no enforcement ability or the ability to determine whether or not the correct franchise tax is being paid. Following a discussion regarding the negative fiscal impact of the current bill, Ms. Wangemann suggested that the fiscal note could be eliminated by deleting Section 81. In response to questions from Senator Goodwin regarding double taxation, she noted that language could be added to the bill to require reporting of parent and subsidiary information to the Secretary at the time of filing the corporate annual report. She agreed to prepare both proposed amendments for the Committee's consideration at the next meeting. She also explained that, if **SB 29** does not pass, there is no point to passing a companion bill, **SB 38**, which has not yet been heard by the House Taxation Committee.

The meeting was adjourned at 11:10 a.m. The next meeting is scheduled for March 20, 2003.

SENATE ASSESSMENT AND TAXATION COMMITTEE
GUEST LIST

DATE: March 19, 2003

NAME	REPRESENTING
Richard Cram	KDOR
[illegible] Hubbell	Kansas Railroads
Ann Durkes	DOB
Matt Bergmann	
Ron Seeber	Hein Law Firm
Todd Johnson	KLA
Trista Curzydlo	KS Bar Assn.
Stuart Little	Westar Energy
JEREMY S[illegible]	
Deann Williams	KMCA
Christy Caldwell	Topeka Chamber of Comm.
Marlee Carpenter	Kansas Chamber
Ashley Sherard	Lenexa Chamber
Bill Brady	Ks Gov't Consulting

KANSAS RAILROADS

PATRICK R. HUBBELL

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Kansas Railroads Statement on HB 2005

My name is Patrick Hubbell. I represent the Kansas Railroads. During the 2002 legislative session a provision in Senate Bill 39 was passed allowing railroads to utilize machinery and equipment income tax credits. The tax legislation created by SB 39, would be made available for railroad property beginning in tax year 2005, when the credit amount would be 20 percent. Railroad property would then qualify for a subsequent credit increase in tax year 2007, when the credit would be raised to 25 percent.

Previously, legislation was enacted to provide refundable income tax credits beginning in tax year 1998, to offset 15 percent of property taxes on commercial and industrial machinery and equipment. At the time of the 1998 legislation railroads were not given these tax credits.

The state of Kansas centrally assesses railroad property, both real and personal. Under section 306 the Federal 4-R Act, four taxing practices are detailed that "unreasonably burden and discriminate against railroads in interstate commerce."

The 4-R Act provides:

- Rail transportation property may not be assessed at a higher ratio to its value than other commercial and industrial property in the same jurisdiction.
- A tax may not be levied or collected based on this unlawful assessment.
- Railroads are protected from paying property taxes at a higher rate than the rate applicable to other commercial and industrial property.
- States are forbidden from imposing any other tax that results in discriminatory treatment of railroads.

Failure to give tax credits to railroads is not only discriminatory, but also a detriment to the industry's overall productivity within the state. Without these tax credits railroads will be forced to pay additional taxes towards machinery and equipment.

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Senate Assessment & Taxation
3-19-03
Attachment 1

Section 11501. Tax discrimination against rail transportation property

(a) In this section -
(1) the term "assessment" means valuation for a property tax levied by a taxing district;
(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;
(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and
(4) the term "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 paragraph (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 Board under this part.

(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.

In State Tax Today on August 15, 2002
Code Section: Miscellaneous
Author: Owens
Institutional Author: Supreme Court
Citations: Regional Disposal Co., et al. v. City of Centralia; No. 71557-2 (8 Aug 2002)
Tax Analysts Reference: 2002 STT 158-52

Washington High Court Relieves Disposal Company of Utility Tax Liability

The Washington Supreme Court has ruled that a utility tax unlawfully imposes a burden on railroading not imposed on other commercial or industrial activities (Regional Disposal Co., et al. v. City of Centralia, No. 71557-2, Aug 8, 2002).

========== CASE NAME ==========

REGIONAL DISPOSAL COMPANY, A WASHINGTON JOINT VENTURE;
THURSTON COUNTY; AND HAROLD LEMAY ENTERPRISES, INC.,
A WASHINGTON CORPORATION,
Respondents,
v.
CITY OF CENTRALIA, A WASHINGTON MUNICIPAL CORPORATION,
Appellant.

========== SUMMARY ==========

The Washington Supreme Court has ruled that a utility tax unlawfully imposes a burden on railroading not imposed on other commercial or industrial activities (Regional Disposal Co., et al. v. City of Centralia, Aug 8, 2002).

Regional Disposal Co. contracts with Thurston County to dispose of the county's garbage. The trash is collected at the county's transfer station and placed into cargo containers. Harold LeMay Enterprises Inc., a subcontractor, then moves the containers to a rail yard in the city of Centralia. The railroad then transports the containers to a landfill. Thurston County pays Regional for transporting the garbage and depositing it in the landfill, which totals approximately 200,000 tons of garbage per year. Centralia imposes a utility tax on the transfer of solid waste from trucks to trains, and in 2001, Regional filed a complaint in Lewis County Superior Court seeking a declaratory judgment that the tax was unlawful and an injunction. The court permanently enjoined Centralia from collecting the tax, finding Centralia's tax unlawful. Centralia appealed to the supreme court.

The court explained that Centralia Ordinance No. 2068 imposes upon every person engaged in or carrying on the business of solid waste intermodal transfer service, a fee or tax equal to 8 percent of the total gross income from such business in the city. The court added that the term "solid waste intermodal transfer service" includes "service consisting of the transfer of solid waste generated in or outside of the city from one mode of transportation to another." The superior court declared the tax in violation of the 4-R Act, which was meant to restore the financial stability of the railway system. The court explained that this act is violated if a tax imposes a heavier burden on a railroad than on all other commercial and industrial taxpayers. Regional and LeMay argued that Centralia's tax is discriminatory because it singles out for taxation an activity performed only in railroading. Centralia maintained that the railroad does not use the transfer service and does not pay for it. However, the court pointed out that this is irrelevant, noting that the tax will still increase the cost of the activity to the railroad's detriment.

The court affirmed the decision of the superior court and concluded that Centralia's tax on solid waste transfer service taxes an activity in which only railroads engage. The court held that the tax imposes a burden on railroading not imposed on other commercial and industrial activities and therefore discriminates against a rail carrier.

========== FULL TEXT ==========

[Editor's note: Emphasis has not been supplied in the original document.]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

August 8, 2002

SOURCE OF APPEAL Appeal from Superior Court of Lewis County Docket No: 012004776 Judgment or order under review Date filed: 08/06/2001 Judge signing: Hon. Richard L. Brosey

Counsel OF Record

Counsel for Appellant(s) Michael P. Ruark Inslee Best Doezie & Ryder PO Box 90016 Bellevue, WA 98009-9016. Shannon M. Murphy Assistant City Attorney City of Centralia PO Box 609 Centralia, WA 98531.

Counsel for Respondent(s) David W. Wiley Attorney At Law PO Box 21926 Seattle, WA 98111-3926. Dana A. Ferestien 601 Union St #4100 PO Box 21926 Seattle, WA 98111-3926. Mark H. Calkins 3535 7th Ave SW 2424 South Evergreen Park Olympia, WA 98502-5010. Joseph B. Genster 1221 2nd Ave 5th Flr Seattle, WA 98101-2925. David E. Myre Jr. 1221 2nd Ave Ste 500 Seattle, WA 98101-2925.

The opinion of the court was delivered by: Owens, J.

Oral Argument Date: 05/09/2002

[1] JUSTICES Concurring: Gerry L. Alexander, Charles Z. Smith, Charles W. Johnson, Barbara A. Madsen, Richard B. Sanders, Faith E Ireland, Bobbe J. Bridge, Tom Chambers

En Banc

[2] The City of Centralia (Centralia) imposes a utility tax on the transfer of solid waste from trucks to trains. Regional Disposal Company (Regional Disposal), which ships garbage through Centralia under a contract with Thurston County, sued to enjoin the tax. The superior court did, and Centralia appeals. The issues we address are whether this tax 'discriminates against a rail carrier' in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), 49 U.S.C. sec. 11501(b)(4) (Supp. V 1999), and, if so, whether the injunction was proper. We affirm.

FACTS

[3] Regional Disposal contracts with Thurston County to dispose of the county's garbage. The trash is collected at the county's transfer station in Lacey and placed into covered cargo containers. Regional Disposal employs a subcontractor, Harold LeMay Enterprises, Inc. (LeMay), to truck the containers from Lacey to a rail yard in Centralia. At the Centralia rail yard, LeMay employees use a 'container pick' to load the containers from the trucks onto railroad cars. Clerk's Papers (CP) at 15. The railroad then transports them to a landfill in Roosevelt, Washington. Thurston County pays Regional Disposal about forty dollars per ton for transporting the garbage and depositing it in the landfill. The figure is not broken down for different legs of the journey, but the parties estimate less than one dollar per ton is attributable to the cost of transferring the containers from trucks to trains in Centralia. Regional Disposal has similar arrangements with Lewis, Mason and Grays Harbor Counties. About 200,000 tons of garbage pass through Centralia every year.

[4] Centralia Ordinance No. 2068 was enacted in March 2001. See Centralia Municipal Code 5.72.020, .050, .055. The ordinance imposes {u}pon every person engaged in or carrying on the business of solid waste intermodal transfer service a fee or tax equal to eight percent of the total gross income from such business in the city. CP at 242.

[5] The ordinance defines '{s}olid waste intermodal transfer service' as 'the providing by any person of service consisting of the transfer of solid waste generated in or outside of the city from one mode of transportation to another.' CP at 241. According to the preamble of the ordinance, the purpose of the tax is to pay for 'planning, roadwork, and other costs' Centralia expects to incur to address the impacts of the garbage trucking. CP at 240. The preamble describes complaints about 'noise, smell, and weight impacts . . . on City streets, particularly through residential neighborhoods.' Id. A memorandum authored by the city manager summarizes the complaints and concludes that a new access to the rail yard has to be built. CP at 383-84.

[6] Other industrial trucks in Centralia use the same streets as LeMay trucks. There is evidence that two lumber processing facilities and a fly ash/cement plant generate commercial traffic. There are also trucks hauling garbage to the Lewis County transfer station located in Centralia. But because the ordinance excludes from the definition of 'solid waste intermodal transfer service' any 'transfers in connection with solid waste treatment, utilization or processing at any interim solid waste handling site,' these trucks are not subject to the tax. CP at 241. The only activity subject to the tax is the transfer made by LeMay employees at the rail yard.

[7] On April 10, 2001, Regional Disposal filed a complaint in Lewis County Superior Court seeking a declaratory judgment that the tax was unlawful and an injunction. Actions filed by Thurston County and LeMay were later consolidated. On May 18, 2001, the superior court entered a preliminary injunction against Centralia. Then, on August 6, 2001, based on stipulated facts, the superior court permanently enjoined Centralia from collecting the tax. The superior court found Centralia's tax unlawful for several reasons, including because it violated the 4-R Act. Centralia takes direct appeal.

[8] ISSUES

(1) Does Centralia's tax discriminate against a railroad in violation of the 4-R Act?

(2) Is injunctive relief appropriate?

ANALYSIS

[9] (1) The 4-R Act was meant to "restore the financial stability of the railway system of the United States." *Dep't of Revenue of Or. v. ACF Indus.,* 510 U.S. 332, 336, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994) (quoting Pub. L. No. 94-210, sec. 101(a), 90 Stat. 33). Congress found railroads to be "easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." Id. (quoting *W. Air Lines, Inc. v. Bd. of Equalization of S.D.,* 480 U.S. 123, 131, 107 S. Ct. 1038, 94 L. Ed. 2d 112 (1987)). The 4-R Act forbids the states from taxing railroad property at higher rates than other commercial and industrial property. At issue is the 4-R Act's catchall prohibition against any other discriminatory tax: (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:

> (4) Impose another tax that discriminates against a rail carrier providing transportation. . . . 49 U.S.C. sec. 11501(b)(4) (Supp. V 1999).

[10] Subsection (b)(4) does not reach discriminatory property taxes. ACF Indus., 510 U.S. at 343. However, the federal circuits have construed it, consistently with its broad language, to reach any other discriminatory state taxes. *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona,* 78 F.3d 438, 441 (9th Cir. 1996) (citing authorities). We do too.

[11] A tax is discriminatory under subsection (b)(4) if it imposes a heavier burden on a railroad than on 'all other commercial and industrial taxpayers.' Id. This is the proper comparison class because '{t}he only simple way to prevent tax discrimination against the railroads is to tie their tax fate to the fate of a large

and local group of taxpayers.' *Kansas City S. Ry. Co. v. McNamara,* 817 F.2d 368, 375 (5th Cir. 1987). Regional Disposal and LeMay contend that Centralia's tax is discriminatory because it singles out for taxation an activity performed only in railroading.

[12] In *Burlington Northern Railroad Co. v. City of Superior, Wisconsin,* 932 F.2d 1185, 1187-88 (7th Cir. 1991), the court held that a tax on an activity performed only in railroading is per se discriminatory. The City of Superior, Wisconsin (Superior), imposed a tax on operators of iron ore concentrates docks. Burlington Northern Railroad operated the only three such docks in Superior, which were the only three in the state. The docks jutted out into Lake Superior and the railroad used them to load iron ore concentrates from trains into barges. The Seventh Circuit held that the tax was discriminatory because it was imposed 'on an activity in which, in Wisconsin anyway, only railroads engage.' Id. at 1188. Superior was not allowed to present evidence that Wisconsin's tax scheme as a whole was not discriminatory. Id. Because Congress wished to avoid 'the thicket of incidence analysis,' the court said, the 4-R Act confined the state 'to taxing railroads as members of larger taxpayer groups.' Id.

[13] Centralia's tax is discriminatory under City of Superior. It taxes an activity performed only in railroading. Judge Posner gave a list of examples of such activities:

> It could be a tax on operating rail crossing signals, on selling railroad passenger tickets, on loading tank cars, on hoisting containers from flat cars onto flatbed trucks--or on placing iron ore concentrates shipped by rail on wharves for further shipment, a form of unloading. Id. at 1187 (emphasis added).

[14] A tax on any of these activities would discriminate against rail carriers because it would impose a burden on railroading not imposed on any other commercial and industrial activities. Centralia's tax raises the cost of getting on the railroad. It burdens only railroading and is therefore discriminatory.

[15] Centralia argues that 'the railroad does not use the transfer service and does not pay for it.' Appellant's Br. at 12. But it does not matter that the railroad is not the taxpayer. City of Superior dealt with this issue too. There was a fourth dock in Superior used for loading coal from trains into barges instead of iron ore concentrates. Although this dock served the same purpose as the three iron ore concentrates docks, except with different cargo, it was not operated by the railroad. The coal dock was obviously not subject to Superior's tax on iron ore concentrates docks, but it was subject to a similar tax. Based on this evidence Superior argued that its tax did not discriminate against the railroad, since anybody might operate the docks and have to pay the tax. The court disagreed:

> Who conducts the activity that is taxed is irrelevant. The tax will increase the cost of the activity, to the railroad's detriment. The statute applies to taxes on rail transportation property and to other taxes if they discriminate against rail carriers; it thus is not limited to cases in which the railroad is the taxpayer. City of Superior, 932 F.2d at 1186.

[16] Other cases also suggest that discriminatory effect takes precedence over who the taxpayer is. See *Trailer Train Co. v. State Bd. of Equalization of N.D.,* 710 F.2d 468, 471 (8th Cir. 1983); *Union Carbide Corp. v. Bd. of Tax Comm'rs of Ind.,* 69 F.3d 1356, 1357 (7th Cir. 1995). Centralia's tax presents exactly the hypothetical advanced in City of Superior and rejected by the court: LeMay performs the transfer instead of the railroad. The difference is as between a tax on selling tickets and a tax on buying them. The economic impact on the activity is the same. We hold that Centralia's tax on 'solid waste intermodal transfer service' violates 49 U.S.C. sec. 11501(b)(4).

[17] Centralia's reliance on *Franks & Son, Inc. v. State,* 136 Wn.2d 737, 966 P.2d 1232 (1998), is no help. That case related to the state's power to regulate common carriers in interstate commerce. The court held that a regulatory fee imposed on truck common carriers was neither an unreasonable burden on interstate commerce nor preempted by federal law. Id. at 758. Franks is unrelated to the present case. First, it involved a regulatory fee, not a tax. Id. at 749-50. Second, Congress has already determined that taxes that discriminate against railroads unreasonably burden interstate commerce. The only issue here is whether Centralia's tax in fact discriminates against a railroad within the meaning of the 4-R Act.

[18] (2) Centralia asserts that even if the tax is unlawful, RCW 84.68.010 bars injunctive relief in this case. Chapter 84.68 RCW creates an exclusive procedure for taxpayers to challenge property taxes. RCW 84.68.010 says,

> '{i}njunctions and restraining orders shall not be issued or granted to restrain the collection of any tax or any part thereof, . . . except in the following cases{.}' Instead, the taxpayer may pay under protest and sue for recovery under RCW 84.68.020.
>
> '{I}njunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law.' *Tyler Pipe Indus. v. Dep't of Revenue,* 96 Wn.2d 785, 791, 638 P.2d 1213 (1982). Therefore, where there is a statutory remedy for a taxpayer, courts will respect anti-injunction provisions despite harsh consequences. Id. at 789; *Longview Fibre Co. v. Cowlitz County,* 114 Wn.2d 691, 699, 790 P.2d 149 (1990).

[19] Neither the protest procedure nor the anti-injunction provision of chapter 84.68 RCW applies here. Centralia relies on the words 'any tax' in RCW 84.68.010 to argue that it applies. However, RCW 84.04.100 defines 'tax' for purposes of Title 84 RCW as 'the imposing of burdens upon property in proportion to the value thereof, for the purpose of raising revenue for public purposes.' Legislative definitions are controlling. *City of Seattle v. Shepherd,* 93 Wn.2d 861, 866, 613 P.2d 1158 (1980). Because Centralia's tax is not a burden on property in proportion to its value, it is not a 'tax' for purposes of RCW 84.68.010. Injunctive relief is not barred.

CONCLUSION

[20] Centralia's tax on 'solid waste intermodal transfer service' taxes an activity in which only railroads engage. It imposes a burden on railroading not imposed on other commercial and industrial activities. It therefore 'discriminates against a rail carrier' under 49 U.S.C. sec. 11501(b)(4) in violation of federal law. Because injunctive relief is not barred as Centralia contends, we affirm the superior court.

Document Number: Doc 2002-18797 (7 original pages) [PDF]
Cross Reference:
Geographic Identifier: Washington; United States
Subject Area: Compliance
Excise taxation