

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

*In the Matter of the Claim for Refund of BOMBARDIER, INC. under the Sales
and Use Tax Law:*

Appearances:

For Claimant: Mr. W. Scott Williams
Counsel for NCTD
Mr. Frederick A. Richman
Counsel for SCRRA

*For Business Taxes
Appeals Section,
Legal Division:* Ms. Susan M. Wengel
Assistant Chief Counsel

*For Sales and Use
Tax Department:* Mr. Gary Jugum
Assistant Chief Counsel
Ms. Janice Thurston
Tax Counsel
Mr. Kevin Hanks
Hearing Representative

MEMORANDUM OPINION

This opinion considers the merits of a claim for refund under the Sales and Use Tax Law for the period October 1, 1994, through June 30, 1995, in the amount of \$1,805,922 tax plus interest. Claimant sold sixteen rail passenger cars to the North San Diego County Transit Development Board (NCTD), a public agency which provides bus and rail mass transportation services in the San Diego area. It also sold tooling, equipment and spare parts for the cars. The total charge for the rail cars and other property was \$25,798,896. Claimant manufactured the cars and the other items in Canada and delivered them to NCTD in California by common carrier. NCTD paid \$1,674,960 in tax to claimant for the rail cars and \$130,962 for the spare parts, tooling and equipment, using funds derived from transit taxes or state bonds. Claimant paid the use tax to this Board and has agreed to return the tax to NCTD if it prevails in this claim.

NCTD purchased the cars for use on the "Coaster", a commuter train operating between Oceanside and San Diego. Most of the 43 miles of track and right-of-way on which the Coaster runs are owned by NCTD in conjunction with another local transportation agency. The track, which is part of the interstate rail system extending throughout the United States, is also used by Amtrak rail passenger trains, by Burlington Northern Santa Fe (formerly The Atchison, Topeka & Santa Fe Railway Company) rail freight trains, and by Southern California Regional Rail Authority (SCRRA) rail

passenger trains. The Coaster operates primarily on the weekdays during the commuter rush hours, with limited service on Saturdays and none on Sundays. It stops at the same stations as Amtrak, and also at additional stations. Local commuter passengers can ride an Amtrak train or a Coaster train to travel back and forth between the San Diego, Solana Beach, and Oceanside stations. Passengers who are not local commuter passengers can ride the Coaster from one station to another to catch Amtrak train services connecting to an out-of-state destination. It is not possible to make a trip on two carriers on one ticket, since each rail service on the line sells tickets only for its own trains, but NCTD has contracted to have Amtrak operate the Coaster on its behalf.

NCTD purchased the track and right-of-way for the Coaster from Santa Fe in late 1992 or early 1993. In contemplation of this purchase, NCTD filed a “Verified Notice of Exemption” with the Interstate Commerce Commission (ICC) in October 1992, together with a Motion to Dismiss that argued that the ICC lacked jurisdiction over the transaction. In its decision dated March 28, 1994 (the “Orange County” case), the ICC concluded that NCTD had acquired sufficient rights that Santa Fe’s ability to fulfill its common carrier obligation to freight shippers could be impaired. As a result, the ICC asserted jurisdiction over the NCTD’s acquisition of the rail assets. NCTD later petitioned the ICC to clarify its decision and to grant a blanket exemption from ICC regulation. On February 28, 1997, the Surface Transportation Board (STB), which had taken over certain of the ICC’s functions, granted the blanket exemption. It stated that regulation was not needed to carry out federal transportation policy because NCTD was “providing no ‘service’ that we regulate. . . .”

NCTD has provided this Board with letters (the “STB Letters”) from the Secretary of the STB, stating his informal opinion that NCTD and SCRRRA remain “rail carriers providing transportation subject to the jurisdiction of the Surface Transportation Board (STB),” notwithstanding their exemption from regulation by the STB. The STB Letters conclude that NCTD and SCRRRA are subject to STB jurisdiction, even if not actually regulated by the STB, unless and until the STB decides otherwise in a formal decision.

OPINION

We conclude that the sales and purchases of the rail cars qualify for exemption under Revenue and Taxation Code Section 6352, which allows exemption for tangible personal property that this State is prohibited from taxing under the laws of the United States. Federal law (the “4-R Act”, 49 U.S.C. § 11501 and former § 11503(b)) prohibits state taxation “that discriminates against a rail carrier providing transportation subject to the jurisdiction of [the ICC or STB].”

The staff argues that NCTD provides commuter rail transportation entirely within California’s borders, asserting that although it operates on track which is part of the interstate rail system, it does not sell tickets for interstate journeys. The staff also asserts that ICC asserted jurisdiction over NCTD’s acquisition of the track from Santa Fe solely to prevent NCTD from interfering with Santa Fe’s ability to provide interstate rail freight

service, that neither the ICC nor the STB has asserted jurisdiction over NCTD's transportation functions, and that the STB recognized this point when it concluded, in the Orange County case, that NCTD is "providing no 'service' that we regulate."

The 4-R Act requires only that NCTD be a "rail carrier" providing transportation "subject to the jurisdiction" of the STB. The ICC and STB have found a broad variety of entanglements with the interstate transportation network to constitute transportation that is subject to their jurisdiction, and the STB has confirmed that NCTD is providing such transportation. Even though the STB has granted NCTD an exemption from regulation, the STB can obviously grant such an "exemption" only if the STB has "jurisdiction" to regulate in the first place. In the present case, the STB granted an exemption after determining that regulation was not needed with respect to this portion of the interstate rail system; the STB did not determine that it had no jurisdiction to regulate. (*See* 18 Cal. Code of Regs. § 25122 (distinguishing "exemption" from tax from "jurisdiction" to tax)). But as a commuter railroad operating on a portion of the interstate rail system, NCTD is entitled to protection from discrimination under the 4-R Act.

The staff argues that California's use tax as applied to NCTD is not discriminatory since some taxpayers who are engaged only in local commerce and who are allegedly similarly situated to NCTD (buses, vans and taxis) are not entitled to any exemptions unavailable to NCTD. Exemptions are allowed for certain watercraft and rail freight cars, but only when they are used in interstate commerce. (Rev. & Tax. Code §§ 6368, 6368.1 and 6368.8.) Thus, according to the staff, there is no discrimination against NCTD. But NCTD points out that all commuter aircraft are exempt, whether or not used in interstate commerce, and California thus discriminates in favor of commuter aircraft and against commuter railroads.

The staff argues that the exemption for aircraft used in common carriage is not sufficient to show discrimination of the type prohibited by the 4-R Act, since states have discretion to levy a tax on railroad property while exempting nonrailroad property. (*See Department of Revenue v. AFC Indus., Inc.* (1994) 127 L.Ed.2d 165 (510 U.S. 332); and *Atchison, Topeka and Santa Fe Ry. v. State of Ariz.* (9th Cir. 1996) 78 F.3d 438.)

The cases cited by the staff are distinguishable. *Department of Revenue v. AFC Indus., Inc.*, *supra*, involved property taxes, not sales and use taxes. The Court concluded that, because the first three provisions of the 4-R Act provided that the relevant comparison for property taxes was all commercial and industrial taxpayers, consideration of property tax exemptions under the fourth provision of the 4-R Act should use the same comparison class. But the Court did not address what the proper comparison class is for sales and use taxes, and various other courts have held that the proper comparison in connection with non-property taxes is differing modes of transportation. (*See Burlington Northern Railroad Company v. Commissioner of Revenue* (Minn. 1993) 509 N.W.2d 551; *Burlington Northern Railroad Company v. Triplett* (D. Minn 1988) 682 F.Supp. 443; *Burlington Northern Railroad Company v. Huddleston* (10th Cir. 1996) 94 F.3d 1413; *Burlington Northern Railroad Company v. Bair* (8th Cir. 1995) 60 F.3d 410; *Ogilvie v. North Dakota State Board of Equalization* (D.N.D. 1995) 893 F.Supp. 882).

We believe that is the right approach, particularly because that is the approach that was determined to be correct in the case that is closest to the present one: *Nat. R.R. Pass. Corp. v. Cal. Bd. of Equalization* (N.D.Cal. 1986) 652 F.Supp. 923 (the “Amtrak” case). In *Amtrak*, the court held the Board could not impose use tax on Amtrak’s purchase of 15 rail passenger cars, because the tax was “clearly” discriminatory where it was not imposed on passenger aircraft and passenger watercraft used by other common carriers. The court held that the 4-R Act did not limit its prohibitions to taxes that discriminate among competitors, but rather among various modes of transportation.

Atchison, Topeka and Santa Fe Ry. v. State of Ariz. is also distinguishable. It involved (1) Arizona transaction privilege and use tax, not California sales and use tax, (2) a taxpayer that claimed a complete exemption from the tax for all goods and services (not just the means of transportation, as in the present case), and (3) involved a tax structure that, despite an exemption for motor carriers, did not in fact discriminate, since all common carriers (including motor carriers) were subject to one tax or another.

We thus conclude that the subject claims for refund relating to the rail cars should be granted. The claims for refund for the tax paid on the spare parts, tooling, and equipment should be denied.

Done at Sacramento, California, this first day of September, 1999.

Dean F. Andal, Member
Claude Parrish, Member
John Chiang, Member