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IN THE NEW MEXICO COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
AUG 16 2016

RENZENBERGER, INC.,

Plaintiff-Appellant,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Defendant-Appellee.

No. A-0001-CA-2015-34999

On Appeal from a Judgment of the Honorable David K. Thomson, District Judge, First Judicial District Court for Santa Fe County.

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT-APPELLEE

Helen Hecht
General Counsel
Bruce Fort, N.M. Bar # 960
Counsel
Counsel of Record
Multistate Tax Commission
444 N. Capitol St., NW
Washington, D.C. 20001
(202) 650-0300

Counsel for Amicus Curiae
Multistate Tax Commission

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INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission (the Commission) respectfully submits this brief as *amicus curiae* in support of Defendant-Appellee New Mexico Taxation and Revenue Department ("the Department"). The Commission urges this court to affirm the district court's decision that New Mexico's authority to tax activities occurring within its borders was not preempted by federal statute. While we do not believe the scope of the federal statute at issue is ambiguous, if it is, the proper application of the long-established presumption against preemption requires that the ambiguity be resolved in favor of the state. Moreover, this presumption against preemption embodies important principles of federalism.[1]

The Commission was created in 1967 by the Multistate Tax Compact (the Compact). *See RIA All States Tax Guide,* ¶ 701 *et seq*. (RIA 2005).[2] The purposes of the Compact are: (1) facilitation of proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes; (2) promotion of uniformity or compatibility in significant components of tax systems; (3) facilitation of taxpayer convenience

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[1] The Commission files this brief on its own behalf, and not on behalf of any member state except New Mexico. No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states through the payment of dues made any monetary contribution to the preparation and submission of this brief.

[2] The validity of the Compact was upheld in *U. S. Steel Corp. v. Multistate Tax Comm'n,* 434 U.S. 452 (1978).

and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. *See Multistate Tax Compact*, Art. I.[3]

New Mexico has been a member of the Commission since 1967. *See* Laws 1967, Ch. 56, § 1, codified at NMSA 1978, §7-1-5, *et seq*. Today, fifteen states and the District of Columbia are compact members, and thirty-two other states regularly participate in Commission activities as sovereignty or associate members.[4]

The Compact and the creation of the Commission were part of the states' response to a 1965 congressional committee report which criticized aspects of state tax systems as applied to multijurisdictional taxpayers and threatened federal legislation restricting state taxation. *See, e.g.*, H.R. Rep. No. 952, 89th. Cong. 1st sess., Pt. IV, at 1143 (1965). Preserving the states' authority to establish their own tax policies free from unwarranted federal interference is a cornerstone of the Commission. As the U.S. Supreme Court has noted, "It is upon taxation that the

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[3] *Available at* http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.

[4] Compact Members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington. Sovereignty Members: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, and West Virginia. Associate Members: Arizona, California, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871).

SUMMARY OF ARGUMENT

Section 14505 of Title 49 of the United States Code preempts state and local taxation of transportation of passengers by motor carrier in interstate commerce—that is, across state lines. The appellant, however, also argues that this statute preempts New Mexico's gross receipts tax imposed on receipts from transportation services performed entirely within the state, so long as that transportation is related in some way to interstate transportation. This expansion of the statutory language should be rejected.

ARGUMENT

A. A presumption against preemption governs the proper interpretation of 49 U.S.C. § 14505.

It is a well-established rule that federal statutory preemption of the states' traditional powers is not to be inferred but must, instead, be stated in clear and unequivocal terms. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997). The presumption against preemption is sometimes referred to as a

requirement for Congress to "speak plainly" or for federal statutes to express a "clear and manifest purpose." For example, in *Altria Group v. Good*, the U.S. Supreme Court declined to hold that numerous federal cigarette labelling statutes preempted a state common law claim for deceptive advertising:

> [W]e wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress... Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."[5]

The need for "clear statement" is heightened in the area of state taxation because taxation is essential to sovereignty. And because it is a well-established rule, Congress is also presumed to know that it must speak clearly.[6]

While scores of U.S. Supreme Court cases have applied this presumption or requirement for a clear and manifest purpose in construing federal preemption statutes, the case that may be most pertinent here is *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332 (1994). That case involved provisions of the federal "4R Act," 49 U.S.C. § 11501, which set out prohibitions against taxing railroad property at higher rates or at higher assessed values than other commercial property. The question was whether a state could grant exemption from tax to

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[5] *Altria Group v. Good*, 550 U.S. 70, 78 (2008), *quoting Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-542 (2001) and *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

[6] *See, e.g., Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 344 (1994).

categories of commercial property, while still taxing railroad property. The Court found that such categorical exemptions were a common practice under most state property tax systems. It therefore concluded that, even though railroad property would obviously be taxed at a greater rate and greater value than these other exempt categories, the 4R Act's provisions did not preempt that tax. The Court explained the reasons for this strict construction of the federal statute saying:

> Principles of federalism support, in fact compel, our view. Subsection (b)(4), like the whole of § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress."

ACF Industries, 510 U.S. at 344-5 (internal citations omitted).

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997), is also instructive because the question presented was whether a state tax on certain health care providers was preempted by ERISA, a broad federal statutory scheme. The provision at issue there preempted any state statute "relating to" pension benefits. (*See* 29 U.S.C. § 1144(a).) The Court first noted that the literal text of provision was "clearly expansive." It then noted that in a prior ERISA case, it had confronted whether the "relates to" language was intended to modify "the starting presumption that Congress does not intend to supplant state law" (ultimately concluding that it did not). The Court next noted that in prior ERISA cases, it had

determined that to "to evaluate whether the normal presumption against pre-emption has been overcome in a particular case," it would have to look "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." And the Court conceded that the tax at issue might increase the cost of providing benefits to ERISA covered employees, and thus have an effect on ERISA plans. Yet, even with all of this stacked against applying the normal presumption against preemption, the Court also noted that the state revenue-raising measure at issue clearly operated in a field that "has been traditionally occupied by the States." Therefore, the Court determined that the party opposing the tax had to "bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" And so the Court concluded that the challenged state tax should be allowed to stand. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813-16 (1997).

It should also be noted that the presumption against preemption, while firmly established as a rule of construing federal preemption statutes, does not imply or suggest that Congress's inherent powers are somehow limited. Rather, the Court has described the rule this way: "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Therefore, even where Congress

clearly has a valid reason to act and the undeniable power to do so, the Court will not assume it has done so or read into a federal statute implied intent. *Id.* at 470.

B. The language of 40 U.S.C. Sec. 14595 cannot be interpreted as clearly preempting the tax at issue, and therefore the presumption against preemption applies.

In *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175 (1995), the U.S. Supreme Court held dormant Commerce Clause principles did not prevent Oklahoma from taxing the entire value of a bus ticket purchased in Oklahoma for interstate travel. In so holding, the Court overruled *Cent. Greyhound Lines of N. Y. v. Mealey*, 334 U.S. 653 (1948). In response to *Jefferson Lines*, Congress enacted 49 U.S.C. § 14505, which preempted four categories of state and local excise taxes on interstate bus travel. *See generally* 1 Hellerstein & Swain, State Taxation, ¶ 4.25 (3rd Ed., W., G. & L., 2016). As summed up in H.R. Conf. Rep. No. 104-422, 220 (1995):

> This section prohibits a State or political subdivision of a State from levying a tax on bus tickets for interstate travel. This reverses a recent Supreme Court decision permitting States to do so and conforms taxation of bus tickets to that of airline tickets.

There is no contrary legislative history, and the Appellant all but concedes that the "scant legislative history" of Section 14505 indicates it was passed as a direct response to the decision in *Jefferson Lines*. Brief in Chief, p. 19.

The provisions of 49 U.S.C. § 14505 at issue read as follows:

A State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on:

(1) a passenger traveling in interstate commerce by motor carrier;
(2) the transportation of a passenger traveling in interstate commerce by motor carrier;
(3) the sale of passenger transportation in interstate commerce by motor carrier; or
(4) the gross receipts derived from such transportation.

The gross receipts tax at issue in this case was assessed against the Appellant and imposed on the receipts received for providing intrastate transportation services, taking railroad crews to and from local hotels at the beginning and end of their work shifts.

1. The district court properly held that the scope of preemption under 40 U.S.C. Sec. 14595 is limited to interstate transportation.

The district court held that the *sin qua non* of the federal statute's preemptive scope is the transportation of passengers by motor carrier across state lines. The district court's conclusion is consistent with the most natural reading of the statute. Manifestly, the state has not levied its gross receipts tax on the *passengers* here, but rather on the Appellant, thus ruling out reliance on subsection (1). Those passengers are not traveling in interstate commerce *by motor carrier* when the trains they operate cross state borders, thus ruling out reliance on subsection (2). The Appellant did not sell passengers transportation in interstate commerce, thus ruling out reliance on subsection (3). As for subsection (4), the

gross receipts at issue here are not from "such transportation," since they are not from transportation described in the other subsections.

Nor can it be argued that, in the context of the statute, the term "interstate commerce" is used in some special expansive manner so as to include intrastate commerce. Rather, the opposite appears to be true—that the terms "interstate" and "intrastate" are only used to refer to separate and distinct ideas or activities. Chapter 145 of U.S.C. Title 49, of which the statutory provision at issue here is a part, begins with a prohibition against certain state and local regulations of "interstate or intrastate transportation." *See* 49 U.S.C. § 14501(a)(1)(A). If interstate transportation necessarily included intrastate, it would not be necessary to use both terms. That section 14501 also uses the term "intrastate" by itself in other contexts. *See* 49 U.S.C. § 14501(b)(1) having to do with freight forwarders and brokers. In another Section of Chapter 145, states are prohibited from imposing an unreasonable burden on "interstate commerce." An unreasonable burden, in turn, is defined, in part, as requiring any interstate motor carrier that also performs intrastate operations to pay any fee or tax which a carrier engaged exclusively in intrastate operations is exempt. 49 U.S.C. § 14504(c)(2).

From this context it is clear that Congress not only recognized the need to make distinctions between interstate and intrastate commerce or activities, it also knew how to make those distinctions, sometimes using both terms, sometimes

using one or the other. Congress cannot, therefore, be expected to be using the term "interstate commerce" in a more the expansive way the Appellant contends.

2. The fact that Congress may have had the power to preempt a tax imposed solely on intrastate transportation is not relevant.

As support for reading subsection (2) in an expansive way, Appellant notes that Congress has, in another context, broadly defined activities that "affect commerce." In *Heart of Atlanta Motel*, the Court upheld Congress's authority to define that term to include, and therefore to regulate, "any inn, hotel, motel, or other establishment which provides lodging to transient guests." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247-48 (1964). But, as noted elsewhere in this brief, the presumption against preemption does not have to do with any inherent or assumed limit on Congress's power. Here, unlike the Civil Rights legislation at issue in *Heart of Atlanta Motel*, the statute does not use the broadly defined term "affect commerce" nor does it anywhere define "interstate commerce" in a similarly expansive way.

Moreover, the Appellant's argument proves too much. Under its broad reading of the phrase "in interstate commerce," taxes on any number of activities undertaken by passengers traveling via motor carrier would be preempted including excise taxes on a meal purchased by such passengers, or lodger's taxes imposed on the use of hotel rooms.

3. Other appellate courts have reached the same conclusion as the district court in this case.

To date, only two appellate courts have considered the application of § 14505 to state and local taxes on transportation services, and in both cases, the courts held that the statute did not go beyond what was necessary to overturn *Jefferson Lines*. *See Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth.*, 732 N.E.2d 1137 (Ill.App. 1 Dist. 2000), *appeal denied*, 191 Ill. 2d 561, 738 N.E.2d 936 (2000), *cert. denied,* 532 U.S. 994 (2001); *Jalbert Leasing, Inc. v. Massachusetts Port Auth.*, 449 F.3d 1 (1st Cir. 2006). Both cases rejected arguments nearly identical to those advanced by the Appellant in this case—that is, that the statute was intended to prohibit taxation of intra-state motor vehicle transportation which was associated with or incidental to interstate transportation accomplished by other means.

In *Tri-State Coach Lines*, the taxpayer argued that the locality could not impose a tax on either intra-state or interstate airport shuttle services because the passengers were in the process of completing interstate movement. The Illinois court of appeals relied extensively on the legislative history of the ICCTA concluding that Congress only intended to reverse the holding of *Jefferson Lines*. *Tri-State Coach Lines*, 732 N.E. 2d at 1137. Therefore, the Illinois court held that the statute did not apply to preempt taxes even on *interstate* shuttle services (to nearby destinations in Wisconsin and Indiana), since those services were not the

type of long-distance interstate transportation which was at issue in the *Jefferson Lines* case. *Id.* at 1137-8.

The holding of the Illinois court with respect to interstate shuttle service is important because of what happened next. As detailed in *State Taxation*, ¶ 4.25, Congress responded to the *Tri-State Coach Lines* decision by enacting the Real Interstate Driver Equity Act of 2002. This act prohibited state and local taxation of airport shuttle and other short-distance transportation services but only when those services cross state lines as part of a pre-arranged trip. Had Congress meant to overrule *Tri-State Coach Lines* with respect to intrastate transportation as well, it clearly had the opportunity to do so.

Jalbert Leasing, Inc. v. Mass. Port Authority, supra, is instructive because it also concerns a local tax on short-distance airport shuttle services which, the court assumed, primarily involved passengers travelling in interstate commerce via air transportation. The tax was measured by the number of shuttle departures from Logan Airport, and thus did not fall squarely within any of the four categories of taxes identified in identified in § 14505. The Court of Appeals declined to extend the scope of § 14505 to encompass a tax that was "nearly" preempted based only on Congress' traditional concern with interstate commerce. *Jalbert Leasing*, 449 F.3d at 4.

CONCLUSION

Because 49 U.S.C. § 14505 does not clearly preempt intrastate transportation services, the statute cannot be construed to preclude New Mexico's gross receipts tax imposed on the Appellant for receipts from providing intrastate transportation services. Preserving the presumption against preemption fosters certainty for states and ensures that their sovereign authority to tax will not be preempted by implication, but only by the express statement of Congress.

Respectfully Submitted,

Helen Hecht
General Counsel
Bruce Fort
Counsel
Multistate Tax Commission
444 N. Capitol St., NW
Washington, D.C. 20001
(202) 650-0300

Counsel for Amicus Curiae
Multistate Tax Commission

CERTIFICATION OF COMPLIANCE WITH N.M.R.A. 12-215

I hereby certify that counsel of record for all parties were notified on June 24, 2016 via mail and e-mail of the Commission's intent to submit an *amicus curiae* brief in support of Defendant/Appellee, the New Mexico Taxation and Revenue Department.

Bruce Fort on behalf of

Bruce J. Fort

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Brief of Multistate Tax Commission as Amicus Curiae in Support of Defendant-Appellee New Mexico Taxation and Revenue Department has been served upon the following persons via U.S. Mail, first-class postage prepaid, this 19th day of July, 2016 as follows:

Benjamin C. Roybal
Betzer, Roybal & Eisenberg, P.C.
4900 Lang Avenue, NE, Suite 202
Albuquerque, New Mexico 87109

Robert J. Desiderio
Sanchez, Mowrer & Desiderio, P.C.
P.O. Box 1966
Albuquerque, New Mexico 87103

Elena P. Morgan
Special Assistant Attorney General
New Mexico Taxation and Revenue Department
P.O. Box 630
Santa Fe, New Mexico 87504

Bruce Fort on behalf of

Bruce J. Fort