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May a Railroad Use 49 U.S.C. § 11501(b)(4) to Challenge an Alabama Sales and Use Tax Exemption as Discriminatory Against Rail Carriers?

CASE AT A GLANCE

Alabama imposes a sales and use tax on diesel fuel purchased or consumed by rail carriers; this is a tax that motor and water carriers are essentially exempted from. This case asks the Court to determine whether a rail carrier can challenge Alabama's state and local sales and use tax exemption scheme under 49 U.S.C. § 11501(b)(4), a provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) that precludes the states from imposing "another tax" that discriminates against a rail carrier.

CSX Transportation, Inc. v. Alabama Department of Revenue
Docket No. 09-520

Argument Date: November 10, 2010
From: The Eleventh Circuit

by Michele LaForest Halloran
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ISSUE

Is Alabama's imposition of a 4 percent sales and use tax on diesel fuel purchased or consumed by a rail carrier, while not imposing the same tax on diesel fuel acquired or used by two rail carrier competitors (motor carriers and interstate water carriers), subject to challenge under 49 U.S.C. § 11501(b)(4), a provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act)?

FACTS

CSX Transportation, Inc. (CSX) is a common carrier railroad operating in interstate commerce in Alabama and is subject to that state's general sales and use tax provisions that levy a 4 percent tax on diesel fuel purchased or used in the state. In addition, various local entities impose comparable sales and use taxes on diesel fuel for which CSX is liable. In conducting business in Alabama, CSX competes with motor carriers and interstate water carriers, both of which are exempt from payment of sales and use taxes on their acquisition or use of diesel fuel. In lieu of Alabama sales and use taxes, motor carriers remit a motor fuel excise tax. Water carriers are in an even better position: They not only pay no sales or use tax on diesel fuel acquisitions, but they also have no liability for the motor fuel excise tax.

Contending that the state's sales and use tax enactments violate § 11501(b)(4), a provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), because motor carriers and interstate water carriers do not pay Alabama sales or use tax on their diesel fuel acquisitions or consumption, CSX brought suit against the Alabama Department of Revenue in federal district court. CSX sought to enjoin Alabama from assessing, levying, or collecting sales or use taxes on CSX's purchase or consumption of diesel fuel. The district court granted CSX's motion for a preliminary injunction, concluding

that there was reasonable cause to believe that the 4-R Act had been violated. It also granted Alabama's request that further proceedings be stayed pending decision by the Eleventh Circuit in *Norfolk Southern Railway v. Alabama Department of Revenue*, a case in which the district court had denied the taxpayer's request for a preliminary injunction based on the same claims offered by CSX.

The Eleventh Circuit subsequently decided *Norfolk Southern* on grounds not briefed by either party—that the claim advanced by the railroad, which involved a nonproperty tax—was not within the scope of § 11501(b)(4). According to the *Norfolk Southern* court, while the 4-R Act does preclude a state from imposing discriminatory property tax rates, it does not prevent the state from imposing nonproperty taxes—such as sales and use taxes—upon rail carriers while relieving others from payment of the taxes so long as the railroad is not targeted. The court observed that subsection (b)(4) refers to a discriminatory "tax," not to a discriminatory "tax exemption."

After the decision in *Norfolk Southern* was issued, the district court vacated its preliminary injunction order and dismissed CSX's complaint; thus, there was no determination as to whether, in fact, the exemption scheme discriminates against CSX. CSX appealed to the Eleventh Circuit, which affirmed the lower court's determination, recognizing that it was bound by the decision in *Norfolk Southern*. CSX filed a petition for a writ of certiorari on October 28, 2009. After inviting the Solicitor General to submit a brief, the Supreme Court granted the petition on June 14, 2010, limiting the question to that posed by the Solicitor General: Whether a state's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as "another tax that discriminates against a rail carrier?"

CASE ANALYSIS

The 4-R Act is designed to facilitate and maintain the financial stability of United States railroads. To further this purpose, 49 U.S.C. § 11501 (§ 306 of the 4-R Act) forbids four state tax schemes that “unreasonably burden and discriminate against interstate commerce.” Three of these schemes—those set forth in subsections (b)(1), (b)(2), and (b)(3)—specifically relate to discriminatory modes of property taxation. The fourth, that specified in subsection (b)(4), precludes the states from “[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” In an earlier case, *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the Supreme Court held that a taxpayer cannot use subsection (b)(4) to challenge a state’s property tax exemption scheme alleged to be discriminatory vis-à-vis railroads. The question presented by this case is whether subsection (b)(4) can be used by a taxpayer to challenge a state’s nonproperty tax exemption scheme on grounds that it discriminates against railroads.

CSX contends that Alabama’s sales and use tax enactments, which require rail carriers to remit tax on diesel fuel while not subjecting commercial competitors to the identical taxes, are other taxes that discriminate against rail carriers, and therefore fall squarely within the language of subsection (b)(4). In support of its contention, CSX looks to what it perceives as the plain, ordinary, and broad language of the governing statute. It notes that this language is not at all restrictive as to the type of tax that discriminates against a rail carrier, and does not evince a congressional intent to withhold relief under subsection (b)(4) for nonproperty taxes said to discriminate because of a variable exemption scheme. As demonstrated by reference to case law interpreting “another” or the equivalent phrase “any other,” the word “another” as used in this provision means precisely what it says and is without limitation.

In fact, says CSX, although the plain language of the enactment controls resolution of this matter, the history and purpose of the 4-R Act further solidifies its position in this case. A review of such discloses that Congress intended to bolster railroads’ commercial viability by initially outlawing deleterious property taxation, and later, when it determined that more pervasive action was necessary, by adding a “catch-all” provision, subsection (b)(4), that encompasses discrimination engendered by all other taxes, including Alabama’s state and local sales and use taxes. Pertinent to this discussion is the fact that the House favored language in subsection (b)(4) that related to taxes in lieu of property taxes, while the Senate version—that ultimately adopted—expansively referred to “any other tax.”

CSX cites the Eleventh Circuit’s decision in *Norfolk Southern* as erroneous, indicating that nothing in the case that court relied upon, the Supreme Court’s decision in *ACF Industries*, provides a sound basis for concluding that subsection (b)(4) cannot be used by a rail carrier as a vehicle to obtain relief from discriminatory nonproperty tax exemptions. *ACF Industries* solely addressed property taxes. In determining that § 11501(b)(4) does not permit a railroad to challenge differential property tax exemptions, the *ACF Industries* Court focused on the illogical nature of permitting discriminatory property tax exemptions under subsections (b)(1)–(3), while prohibiting them under (b)(4). According to CSX, the Eleventh Circuit erred in

noting that subsection (b)(4) refers to a discriminatory tax, not a discriminatory *tax exemption*; the provision covers discriminatory exemption schemes not only by virtue of its broad language, but also because allowance of such schemes contravenes clear congressional intent. CSX further challenges the validity of the Eleventh Circuit’s decision that the *ACF Industries* holding applies to nonproperty as well as property taxes because the Supreme Court did not specify that its determination only applied to property taxes. Contrary to the Eleventh Circuit’s determination, there are no federalism concerns at play here.

Alabama’s position is that the driving factors behind the Supreme Court’s decision in *ACF Industries* apply with equal force to the sales and use tax exemption scheme considered here. It doesn’t matter whether § 11501(b)(4) applies to another tax such as Alabama’s sales and use tax exemptions if those exemptions do not discriminate against railroads. Section 11501(b)(4) cannot be considered in isolation, but instead must be interpreted in the context of the entire statute, which defines discrimination as imposing a greater tax burden on railroads. According to the state, generally applicable taxes such as sales and use taxes do not discriminate against rail carriers—they actually align railroads with other entities to which the taxes apply; nor are exemptions from generally applicable taxes discriminatory, given that rail carriers are taxed in proportion to others who shoulder the tax, and that, in § 11501(b)(4), Congress removed exempt property from the comparison class, thereby demonstrating an intent to remove exemption provisions from the discriminatory mix. The language of subsection (b)(4) does not permit differentiation between discrimination effected by property taxes and that created by nonproperty taxes. Allowance of challenges to allegedly discriminatory exemption schemes would create certain statutory anomalies, among them that differential comparison classes would be created for property tax and nonproperty tax exemptions. Ambiguities created by the pertinent statutory language must be resolved in Alabama’s favor, given that § 11501(b)(4) exists as a narrow exception to the Tax Injunction Act.

Alabama submits that, as in *ACF Industries*, the fact that Congress did not supply standards in § 11501 to differentiate valid exemption schemes from invalid ones supports the proposition that Congress found tax exemptions to be nondiscriminatory; nor does this provision prescribe a remedy for tax exemptions that discriminate against railroads. The facts that sales and use tax exemptions were as prevalent as property tax exemptions throughout the length of time in which § 11501 was developed and passed and Congress was silent with respect to exemptions discloses Congress’s intent to also exclude nonproperty tax exemption schemes from § 11501(b)(4). The same federalism concerns expressed by the *ACF Industries* Court inhere in this context. Finally, § 11501(b)(4) is not nullified by a determination that it cannot be used to challenge exemptions to a generally applicable tax, as there are a number of taxes that fit within that provision that would be challenged on grounds that they target railroads by imposing a proportionately higher tax burden (e.g., Wisconsin’s occupational tax on owners and operators of iron ore concentration docks). For CSX to proceed as it requests, it must seek to have Congress amend the operative provision.

The state suggests that, should the Supreme Court conclude that CSX *can* maintain its challenge under subsection (b)(4), it should direct the district court to consider taxes CSX's competitors have to pay with respect to the same taxable event, i.e., the purchase or use of diesel fuel.

SIGNIFICANCE

State taxpayers in general have frequently asserted the invalidity of differential tax exemption schemes, ones in which selected taxpayers, allegedly on the same footing with others, are granted exemption from payment of a tax. Although some taxpayers have successfully waged this battle on a number of fronts (among them the Commerce and Equal Protection Clauses), in many instances states have successfully defeated these challenges. Avoiding the hurdles presented by these cases (hurdles consisting not only of the bases for decision, but also of the fact that courts typically are constrained from enjoining payment and collection of taxes), the railroads have understandably focused on subsection (b)(4) of the 4-R Act as a potentially viable mechanism for injunctive relief for allegedly discriminatory treatment of railroads with respect to state tax exemption provisions.

Although the Supreme Court, in *ACF Industries*, previously addressed the applicability of subsection (b)(4) to property tax exemption claims, it has not, to date, spoken to the applicability of this section to exemption claims arising in the context of generally applicable nonproperty taxes. It will in this case, and in so doing necessarily will apply statutory interpretation principles while discerning congressional intent. However, if the Court determines that relief may be had under this provision, it will not decide whether CSX actually was the subject of discrimination—that determination will be left to the district court on remand. Interestingly, the United States, in an

amicus brief that is more cogent than the briefs offered by either of the parties, has adopted a position in alignment with that advanced by CSX, and contrary to that of Alabama, citing its interest in the proper application of § 11501(b)(4).

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PREVIEW of United States Supreme Court Cases, pages 92–94.
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