Opinion No. 90-18

September 20, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Frank M. Murray, Assistant Attorney General

TO: Leo Schmitz, Director, Cumbres & Toltec Scenic Railroad Commission, P.O. Box 561, Antonito, Colorado 81120 RE: Railroad Taxes

QUESTIONS

Is the Cumbres and Toltec Railroad, a bi-state agency of New Mexico and Colorado, immune from property taxes in the two states?

CONCLUSIONS

Yes.

ANALYSIS

Questions have arisen concerning tax payments by the Cumbres & Toltec Scenic Railroad Commission ("Commission"). The Commission, an entity of both the states of New Mexico and Colorado, is paying taxes from legislative appropriations to subordinate units of government.

Public property of both states is exempt from taxation under the Colorado Constitution Article X, § 4 and the New Mexico Constitution Article VIII, § 3.

Rio Arriba County, New Mexico, and Archuleta County and Conejos County, Colorado each claim the Commission owes current taxes on half the value of all Commission property. This claim is based on the theory that each state owns half the Cumbres and Toltec Scenic Railroad ("Railroad") and that each state owes taxes on its portion of the Railroad's property located in the other state. We believe such theory is in error and fails to recognize the ownership interest of the states. Each state has an undivided interest in this property.

Nature of Commission

The Commission was established by interstate compact between the states of New Mexico and Colorado. The compact is codified at NMSA 1978, §§ 16-5-1 to -13 (Repl. Pamp. 1987 and Supp. 1989) and Colo. Rev. Stat. §§ 24-60-1701, 24-60-1702 and 24-60-1901 to -1905 (1988). Congress consented to the formation of this interstate agency (a joint entity of Colorado and New Mexico). Pub. Law No. 93-467, 88 Stat. 1421 (1974). All railroad property has been held by the states as tenants in common since the

railroad was purchased in 1970. See Agreements to Purchase 1970 and 1977 amendments thereto. Unity of the right of possession is the essence of tenancy in common, Smith v. Borradaile, 30 N.M. 62, 227 P. 602 (1924). See also 86 C.J.S. Tenancy In Common § 5 (1954). In 86 C.J.S. Tenancy In Common § 4 it is stated:

Tenants in common hold by several and distinct titles, with unity of possession: and each tenant owns an undivided fraction, being entitled to an interest in every inch of the property. With respect to third persons, the entire tenancy constitutes a single entity.

Both state legislatures have provided extensive funding to carry out the interstate compact and both states fund the continuing operation of the Commission. See 1990 N.M. Laws, ch. 131 (General Appropriations Act), and Colorado Long Bill, HB 1356 for 1988 and each previous year.

The operations agreement whereby each state funds half the Commission's operations is similar to a partnership agreement. The payment of half the operational funding for the Commission by each state does not divide the Commission in half or create two separate entities. The Commission is one entity and its property is not separately owned by either state.

Bi-State Agencies

Various courts have addressed the nature of bi-state agencies such as the Commission. In Eastern Paralyzed Veterans Ass'n. Inc. v. City of Camden, 111 N.J. 389, 545 A.2d 127, 132 (1988), the court stated:

Bi-state agencies exist by virtue of compacts between the states involved, entered into by their respective legislatures with the approval of Congress. When formed, they become a single agency of government of both states. Their primary purpose is to cooperate in advancing the mutual interest of the citizens of both states by joint action to overcome common problems. We fail to see how either state could enact laws involving and regulating the bi-state agency unless both states agree thereto. To sanction such practice would lead to discord and destruction of the purposes for which such bi-state agencies are formed.

It has been recognized that a multi-state entity is an agency of each participant state in numerous court decisions. See, e.g., State ex rel. Tattersal v. Yelle, 52 Wash. 2d 856, 329 P.2d 841 (1958); People ex rel. Buffalo and Fort Erie Pub. Bridge Auth. v. Davis, 277 N.Y. 292, 14 N.E.2d 74, 76 (1938) (holding that an agency comprised of New York and Canadian participants was a public agency of New York); Miller v. Port of New York Auth., 18 N.J. Misc. 601, 15 A.2d 262 (1939) (holding that the bi-state agency was a direct state agency and the alter ego of both states); and Port of New York Auth. v. City of Newark, 20 N.J. 386, 393, 120 A.2d 18 (1956).

Public Property Exempt from Taxation

State property is exempted from local taxation because the state, through its entities collects the taxes it uses to perform state functions. For the state to tax its own property would be "taking money out of one pocket and putting it in another." Church of the Holy Faith v. State Tax Commission, 39 N.M. 403, 410, 48 P.2d 777, 781 (1935). Also see, N.M. Atty. Gen. AG Op No. 6183 (1955). Any tax on state property would diminish the state's ability and capacity to carry out its duties. The courts consistently refuse to permit such property to be taxed in any form. See, e.g., Game and Fish Comm'n v. Feast, 157 Colo. 303, 402 P.2d 169 (1965). State ownership of land is the only criteria for exemption. City of Colorado Springs v. Board of Comm'rs, 36 Colo. 231, 84 P.1113 (1906); Stewart v. City & County of Denver, 70 Colo. 514, 202 P. 1085 (1921); Colo. Atty. Gen. AG Op. No. 61-83 (1961). Public policy repudiates the state taxing its own property. When the state acquires property, it is absolved of further liability for taxes. State v. Locke, 29 N.M. 148, 219 P. 790 (1923); Schmitz v. New Mexico State Tax Comm'n, 55 N.M. 320, 232 P.2d 986 (1951); N.M. Atty. Gen. AG Op. No. 61-103 (1961). Joint Powers agreements entered into by governmental organizations are tax exempt. N.M. Atty. Gen. AG Op. No. 64-17 (1964).

Public property is property belonging to the state or a political subdivision thereof, including subordinate public corporations of the state. Board of Park Comm'rs v. Board of Tax Appeals, 160 Ohio St. 451, 116 N.E.2d 725, 727, 728 (1954). Public property includes property vested in the state, a political subdivision, or in a person holding exclusively for the benefit of the state or subordinate public corporation. Board of Trustees of Gate City Guard v. City of Atlanta, 113 Ga. 883, 39 S.E. 394 (1901). Public property includes all property which legally or equitably belongs to the state. State v. Underwood, 54 Wyo. 1, 86 P.2d 707 (1939). The public nature or use to which property is put justifies exemption of such property from taxation. Rutherford v. City of Great Falls, 107 Mont. 512, 86 P.2d 656, 659 (1939).

Property dedicated to a public use, the revenues of which serve a public purpose though the title is not in the public but in a quasi public corporation or public institution, is exempt from taxation. Martin v. Louisiana Cent. Lumber Co., 150 La. 157, 90 So. 553, 562 (1922). See also Foreman v. Vermihon Parish Police Jury, 336 So.2d 986, 988 (La. App. 1976) (public property is not subject to seizure or sale to satisfy a judgment).

The following properties have been held to be public property for purposes of tax exemptions: airports, Denver Beechcraft, Inc. v. Colorado Bd. of Assessment Appeals, 681 P.2d 945 (Colo. 1984); Application of City of Marion, 46 Ohio L. Abs 616, 68 N.E.2d 391 (Ohio 1946); transportation systems, City of Cleveland v. Bd. of Tax Appeals, 167 Ohio St. 263, 147 N.E.2d 663 (1958); port authority docks and warehouses; Sigman v. Brunswick Port Auth., 214 Ga 332, 104 S.E.2d 467 (1958); utilities, City of Wyandotte v. State Bd. of Tax Admin., 278 Mich. 47, 270 N.W. 211, 213 (1936); and river authorities, Lower Colorado River Auth. v. Chemical Bank & Trust Co., 144 Tex. 326, 190 S.W.2d 48 (1945).

The Commission is a state agency of both Colorado and New Mexico. The property of the Railroad administered by the Commission is public property immune from taxation

under the constitution of each state. There is no legal means to enforce any claimed lien by the county for property taxes allegedly owed. Neither state has consented to be sued by the other for such taxes and the Commission is probably immune from such suit. See Miller v. Port of New York Auth., 15 A.2d at 266. We also find no authority in Colorado or New Mexico law which would permit the sale of state or bi-state agency property for taxes. Inter-state compacts are the "law of the Union," Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 420 (1940), whose interpretation is ultimately a question of federal law. Cuyler v. Adams, 449 U.S. 433, 438 n.7 (1981).

We further note that Conejos and Archuleta Counties in Colorado are attempting to collect approximately twice the dollar amount of taxes that Rio Arriba County, New Mexico is attempting to collect. It would create problems and conflicts which need not be addressed here, for one state to, in effect, obtain a greater contribution through the guise of differential taxation through subordinate units of government. The property of the Cumbres and Toltec Railroad Commission, a bi-state agency, is immune from taxation by local governmental subdivisions of either state.

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