IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

RELCO TANK LINE, INC.,	)	Docket 440, No. 69
Plaintiff,	)	
v.	)	ORDER AND JUDGMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW
STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA and JOHN M. BOEHM, Tax Commissioner of the State of Nebraska	)	
Defendants,	)	

This case is an appeal pursuant to Neb. Rev. Stat. sections 77-1775 (Reissue 1986) and 84-917 (Reissue 1987) from an order of the State Board of Equalization and Assessment (hereafter "State Board") denying Plaintiff's (Appellant's) claim for refund of 1986 car company taxes paid by Plaintiff pursuant to Neb. Rev. Stat. sections 77-624 to 77-633 (Reissue 1986). For the reasons hereafter stated, the Court finds that Plaintiff is entitled to a refund of the 1986 car company tax paid by Plaintiff.

Plaintiff is a car company; it was assessed and taxed for 1986 under Neb. Rev. Stat. sections 77-624 et seq. (Reissue 1986); and Plaintiff filed a request for refund of such tax within two years after such tax was due. Plaintiff claims a refund pursuant to the provisions of Neb. Rev. Stat. sections 77-1736.04, 77-1736.05, and 77-1775 (Reissue 1986). Section 77-1736.04, in relevant part,

provides:

> If, by judgment or final order of any court of competent jurisdiction in this state ... it has been determined that any personal property ... tax ... or any part thereof was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax ..., then such tax ... whether expended or not, which has been collected pursuant to such illegal tax ... for the year such tax ... is determined to be illegal shall, without the necessity of filing a claim therefor, be repaid and refunded. ... The procedure for refund provided for in this section shall be in addition to refund procedures otherwise authorized by law.

Section 77-1775, in relevant part, provides:

> (1) When any demand to refund property taxes paid is made upon the Tax Commissioner, the Tax Commissioner shall immediately transmit a copy of such demand along with the Tax Commissioner's recommendation to the State Board of Equalization and Assessment which shall approve the refund if the board finds the tax or a part of such tax to be invalid for any reason. ...
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> * * *
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> (3) If the refund claim is denied in whole or in part, the taxpayer may appeal the decision, and the appeal shall be in accordance with the Administrative Procedure Act. If at the trial it is determined that such tax or any part of such tax was invalid, judgment shall be rendered in the amount of the refund claim with interest and such judgment shall be collected as in other cases.

Defendants (Appellees) claim that the 1986 car company tax paid by Plaintiff is not illegal or invalid for any reason.

Defendants do not contend that any statute of limitations bars the claim by Plaintiff for refund of such tax if such tax is illegal or invalid for any reason. The Defendants do not contend that the claim was not properly filed with the Tax Commissioner or that this appeal is not properly before this Court.

Trial of this appeal was held by the Court and all parties were represented by counsel.

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereafter "4-R Act"), Public Law 94-21, 90 Stat. 31 (codified at 49 U.S.C. section 11503) makes it unlawful for a state or governmental entity to discriminate against rail transportation property in property taxes. The section was enacted in 1976 and became effective in 1979.

The original language of section 306 was changed by the codifier of the federal statute. Section 306 controls over the codification to the extent there is any difference in wording, Trailer Train Co. v. Leuenberger, CV 87-L-29 (D. Neb. Dec. 11, 1987), aff'd No. 88-1118 (8th Cir. Dec. 19, 1988), cert. denied sub nom. Boehm v. Trailer Train Co., ___U.S. ___, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989); Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir.).

In response to the 4-R Act, the Legislature of the State of Nebraska in 1983 passed LB 193 for the purpose of:

> An act to amend section 77-624, ...[car company tax sections]; to change provisions relating to certain railroad and air carrier taxes; [and] to provide certain property tax refund procedures... (LB 193, May 25, 1983).

Section 77-1775 was enacted as part of LB 193.

In 1986 Trailer Train Company, Rail Box Company and Railgon Company commenced CV 87-L-29 in the United States District Court for the District of Nebraska against the Nebraska Tax Commissioner to enjoin collection of the 1986 car company tax from such

companies. On December 11, 1987 the Federal District Court found in favor of such companies, finding that the Nebraska car company tax violated section 306 of the federal act, and the court granted the relief requested. The decision states, in part:

> I conclude that Nebraska's system discriminates against Trailer Train in violation of section 306(1)(d) of the 4-R Act based on the fact that 75.75 percent of the personal property in the state is exempt and none of Trailer Train's personal property is exempt.
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> ...The tax is discriminatory.
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> * * *
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> ...[T]he Nebraska tax violates the requirements of section 306(1)(d) and a collection of the tax from the plaintiffs must be unconditionally enjoined. (Trailer Train, supra, pp 11-12)

Subsequent to the filing of the 1986 action, class actions were filed in the federal district court for 1987 and 1988 to enjoin the State from imposing the tax on any car company, including the Plaintiff in this case. In conformity with its decision in Trailer Train, the federal district court again determined that the Nebraska car company tax violated the federal 4-R Act and enjoined the State from enforcing such tax for 1987 and 1988, Oklahoma Gas & Electric Co., et al. v. Leuenberger, CV 88-L-52 (D. Neb. Jan.26, 1988 and June 13, 1989); Oklahoma Gas & Electric Co. et al. v. Leuenberger, CV 89-L-32 (D. Neb. June 13, 1989).

The decision of the federal district court concerning the car company tax for 1986 was affirmed by the United States Court of Appeals for the Eighth Circuit, and review by writ of certiorari

of the Eight Circuit's decision was denied by the United States Supreme Court. Trailer Train Co. et al. v. Leuenberger, CV 87-L-29 (D. Neb. Dec. 11, 1987), aff'd No. 88-1118 (8th Cir. Dec. 19, 1988), cert. denied sub nom. Boehm v. Trailer Train Co., ___ U.S. ___, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989).

Subsequent to the federal court decisions the Nebraska Supreme Court and the Legislature of the State of Nebraska each have recognized that the 4-R Act as applied to the Nebraska property tax system for 1986 and thereafter had the effect of exempting car companies from the car company tax imposed under sections 77-624 et seq., Northern Natural Gas Co. v. State Board of Equalization, 232 Neb. 806 (1989); LB 7 (First Special Session 1989). And although not essential to the decision in this case, the Court notes that LB 7 (First Special Session 1989) specifically provides that railroad rolling stock, including rail cars that were subject to the car company tax, shall be exempt from the personal property tax. The Legislature expressed the specific intention that the changes made by LB 7 shall affect all state litigation pending as of the effective date of the act. This case was pending at the time such act became effective.

There is no distinction between car companies for purposes of the Nebraska car company tax and the application of the 4-R Act to such tax. Under the applicable Nebraska statutes there was a single class of car companies, all of which were treated and taxed the same under the Nebraska car company tax. Further, the federal district court held in both class actions that all car companies,

including both Trailer Train and the Plaintiff in this case, were members of a single class of car companies and that the Nebraska car company tax was invalid as to all members of such class.

The decision of the federal court that Nebraska's car company tax for 1986 violated the 4-R Act and was illegal is binding in this litigation, Northern Natural Gas Co., supra:

> The plaintiffs in Trailer Train were car companies that furnish railcars to railroads. Their only relationship to Nebraska stems from the fact that their railcars are located or operated in Nebraska by the railroads. The federal district court held that the assessment of the plaintiffs' personal property and the imposition, levy, or collection of any personal property taxes against the plaintiffs pursuant to Neb. Rev. Stat. §§ 77-624 et. seq. (Reissue 1986) violates § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), and permanently enjoined the imposition, levy and collection of any personal property taxes from the plaintiffs. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, ruling that the levy and collection of Nebraska's ad valorem tax on car company property violated the 4-R Act." (p. 809)

and

> ...Following argument of the case in this court, the Supreme Court of the United States issued an order on May 15, 1989, denying the petition for certiorari filed by the Tax Commissioner of Nebraska. Therefore, the Board's argument throughout its brief that the judgment of the U.S. District Court is not binding in this instance is no longer valid. (p. 813)

The determination of the federal district court for 1986 is conclusive as to: (a) those issues actually litigated, (b) those issues that could have been raised, and (c) all facts that were necessarily involved in the dispute. In Pflasterer v. Koliopoulous, 213 Neb. 330, 328 N.W.2d 789 (1983), the Nebraska Supreme Court summarized the doctrine of res judicata:

> Our most recent review of the elements of res

> judicata is found in Brommer v. City of Hastings, 212 Neb. 367, 322 N.W.2d 787 (1982). We said therein that the scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised. We also said that any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same. In the earlier case of DeCosta Sporting Goods, Inc. v. Kirkland, 210 Neb. 815, 316 N.W.2d 772 (1982), we had said that a right or fact in issue and directly adjudicated in an action in which a judgment has been rendered upon the merits is, by that judgment, conclusively settled and may not again be relitigated between the parties and their privies.... The above-cited cases teach that a former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action. (p. 333)

The State has already had a full, fair and complete determination of the illegality of the 1986 car company tax, and the determination of that illegality is binding on the State in all cases involving the State. As held in Peterson v. Nebraska National Gas Co., 204 Neb. 136, 281 N.W.2d 525 (1979) the doctrine of collateral estoppel and issue preclusion apply and the State may not relitigate issues when it has already received a full consideration of such issues in another case:

> With respect to collateral estoppel we held in Johnson v. Marsh, 146 Neb. 257, 19 N.W.2d 366, that where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
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> In Cover v. Platte Valley Public Power and Irr. Dist., 162 Neb. 146, 75 N.W.2d 661, this rule was applied

> where the defendant had negligently constructed an inadequate drain under its canal. In a prior case brought by a different party but involving the same drain, Faught v. Platte Valley Public Power & Irri. District, 147 Neb. 1032, 25 N.W.2d 889, the defendant had been held to be negligent in the construction of the drain which was inadequate. This court held that the issue of the defendant's negligence had been finally decided in the prior case and could not properly be again submitted to a jury for it to determine whether the prior decision was correct. We said: "To hold otherwise would be a travesty upon justice and permit a trifling with judgments duly rendered according to law."
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> Generally, mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel. It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. See, Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892; Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal.2d 601, 25 Cal.Rptr. 559, 375 P.2d 439; Blonder-Tongue v. University Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788; Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552. (Peterson, supra, pp. 138-139)

Moreover, the identical issues involved in the 1986 federal lawsuit have also been litigated in the 1987 and 1988 class actions in which both the State and the taxpayers in these proceedings were parties. Therefore, the State is bound by the determinations made by the federal court in the 1986, the 1987, and the 1988 tax litigations that the Nebraska car company tax was illegal under the 4-R Act. Further this Court finds, based on the evidence introduced before the State Board, that there was no significant difference in the Nebraska car company tax for purposes of this

litigation for 1986, 1987 and 1988.

All car companies were taxed in the same manner in 1986 under §§ 77-624 et seq. Accordingly, the final determination of the federal court that the car company tax was invalid under the federal 4-R Act is equally applicable for all car company taxes imposed by the state for 1986.

These are proper cases for refund. These are not valuation cases. The federal court held that Nebraska could not impose the car company tax and that rail cars of such companies were exempt from such tax. The scope of the federal decision was so recognized by the Nebraska Supreme Court in Northern Natural Gas Co., supra:

> ...a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax. (p. 815, emphasis added)

and

> It therefore becomes necessary to determine whether the pipelines of Enron are personal property and thus exempt from taxation under the doctrine of Trailer Train Co.,... (pp. 816-17, emphasis added)

Although it is not necessary to do so in this case, the Court finds that the evidence introduced before the State Board also establishes the invalidity of the car company tax for 1986 and the Court would grant a refund in this case under section 77-1775 and under section 77-1736.04 even if the federal court had not already determined that the tax was invalid.

The Plaintiff has complied with all procedural requirements for obtaining a refund under section 77-1775.

It is clear from the legislative history that section 77-1775

was intended to provide for a refund of car company taxes if the imposition of such tax violated the 4-R Act, and the Plaintiff is entitled to a refund under such section regardless of how the term invalid or illegal may be used in any other Nebraska tax refund statute.

LB 193 was directed specifically at the 4-R Act, the car company tax, and the entitlement of a taxpayer to a refund if the tax was illegal for any reason, including being illegal under the 4-R Act. The legislative history to LB 193 states, in part:

> LB 193 modifies various provisions regarding property taxation of centrally assessed *** carlines. Many of the changes in the bill are required by recent changes in federal law. (Part of introducer's statement of intent Calvin F. Carsten, Chairman, Committee of Revenue, on January 24, 1983).
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> * * *
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> Summary of purpose and/or changes: LB193 changes property tax provisions for centrally-assessed *** carline companies. In order to conform to federal law changes that prohibit taxing these properties different from other commercial property,... (Revenue Committee statement on January 24, 1983, on committee action advancing LB 193 to general file).
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> * * *
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> Federal legislation was recently enacted to correct the discriminatory taxation of such property in many states. In the case of railroads, this legislation is known as the federal 4-R Act... It should be noted that the railroads are now suing other states under this federal legislation....
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> So if this situation existed in Nebraska, the current state law could be challenged and found in violation of these new federal acts and the United States Constitution. This is exactly what has occurred in other states with similar provisions and this is why these changes proposed by the department are necessary. (Testimony of Tax Commissioner, Ms. Donna Karnes, before Revenue Committee on January 24, 1983, pages 13-14).

Defendants acknowledge in their brief that section 77-1775 was intended to be applicable to refund claims for car company property.

Under Nebraska law, a tax is illegal and void when the person or the property were not legally subject to the tax imposed. Several of the Nebraska cases so holding are summarized in Power v. Jones, 126 Neb. 529 (1934).

Car company property was not properly subject to the Nebraska car company tax in 1986 because such taxation was prohibited by the 4-R Act, and the Court finds that the 1986 Nebraska car company tax paid by the Plaintiff both was invalid as such term is used in section 77-1775 and was illegal as such term is used in section 77-1736.04.

The injunctive relief that the federal district court may grant under section 306 of the 4-R Act is not the exclusive remedy for violations of the 4-R act. The right to seek an injunction, if desired, is merely an additional, and not an exclusive remedy. Subsection (2) of section 306 specifically provides that the injunctive jurisdiction of the federal court is non-exclusive and is only concurrent with the jurisdiction, and remedies, otherwise available in federal or state courts:

> (a) such jurisdiction shall not be exclusive of the jurisdiction which any federal or state court may have in the absence of this subsection;...

Section 306 of the federal 4-R Act made it "unlawful for a state...or a governmental entity...to impose a discriminatory tax."

The Nebraska car company tax under §77-624 et seq. for 1986 was discriminatory, and the imposition of the car company tax was unlawful, illegal and prohibited by subsection (1) of the 4-R Act:

> (1) ... It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:....

In addition to the plain wording of the Act, Senate Report No. 94-499 to the Act also states, in relevant part:

> This section amends Part I of the Interstate Commerce Act by adding a new section 27 which declares certain taxation activities to be an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. These activities are prohibited and it is made unlawful for any State, political subdivision, or entity acting on behalf of the State or subdivision to commit any of these acts. (emphasis added, Volume 2, United States Code Congressional Administrative News, 94th Congress-2nd Session 1976, page 79).

Section 27 was subsequently renumbered as 306.

Subsection (1) of section 306 made it illegal for Nebraska to impose the tax.

Subsection (2) of the Act, which is a separate subsection from that which makes the tax illegal, provides a remedy that otherwise would not be available for a violation of the 4-R Act. When Congress passed the Act, it recognized and affirmed that taxpayers could sue for refunds in state courts. Congress also wanted to provide taxpayers with an additional form of relief, a federal injunction, which a taxpayer could seek if it so desired. However, this additional, optional remedy under §306(2) does not supersede or replace any remedies otherwise available in federal or state court, including the right to obtain refunds. As previously

stated, subsection (2)(a) specifically provides that the injunction jurisdiction granted to the federal district court is an additional and not an exclusive remedy:

> (a) such jurisdiction shall not be exclusive of the jurisdiction which any federal or state court may have in the absence of this subsection; (emphasis added)

Congress wanted to permit a federal injunction as an additional form of relief. To accomplish this objective, it was necessary to add subsection (2) for the reason that without the specific authorization of subsection (2) a federal court would be prohibited by section 1341 of title 28, United States Code, from granting injunctions since taxpayers also had remedies available to them under state laws, such as the right to sue for refunds. Of course, there would be no reason to add subsection (2) unless taxpayers had and would continue to have a right to seek refunds and other relief in state court since section 1341 only applies when taxpayers have such rights.

The intent that a federal injunction be an additional optional remedy and not an exclusive remedy is clear both from the plain language of subsection (2), and from the legislative history. The Senate Report reflects that taxpayers under the act have the right to seek refunds and, if desired, to also seek injunctions in federal court. As stated in the report:

> Subsection (b)
> Provides a new remedy for carriers who wish to challenge taxing authorities under this section. ...under current procedure, a carrier must pay the disputed tax and then contest the collection of the tax in the State courts.... Under this section a carrier could seek an injunction before paying the disputed tax.
> The jurisdiction provided for by this section shall

not be exclusive of the jurisdiction which any Federal or State court may have.... (Senate Report No. 94-499, supra, p. 80, emphasis added).

Neb. Rev. Stat. sections 77-1777 through 77-1780 (Supp. 1988) apply to the extent not inconsistent with any other prior enacted refund statute. Under section 77-1780(6) and (7) interest shall be paid on the 1986 overpayment of tax at the rate of 14 percent from the date of overpayment or the date the tax was required to be paid, whichever is later, until the date the overpayment is refunded. The 1986 tax was timely paid by Plaintiff in the amount of $2,248.20, and the delinquent date by which the tax had to be paid without penalty was February 1, 1987 for the first half and July 1, 1987 for the second half.

The Court finds that the decision of the State Board should be reversed and judgment entered for the Plaintiff. The substantial rights of the Plaintiff have been prejudiced by the decision of the State Board because such decision was affected by errors of law, was arbitrary and capricious, and was not supported by competent, material and substantial evidence.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The 1986 Nebraska car company tax imposed on the Plaintiff was invalid and illegal within the meanings of Neb. Rev. Stat. sections 77-1775 and 77-1736.04 (Reissue 1986).

2. Plaintiff is entitled to a refund of the 1986 car company tax paid by Plaintiff in the amount of $2,248.20.

3. Plaintiff is entitled to 14 percent interest on the 1986 car company tax to be refunded, with such interest to be at the

rate of 14 percent on $1,124.10 for the period of February 1, 1987 to July 1, 1987 and at the rate of 14 percent on $2,248.20 from July 1, 1987 until the date the overpayment is refunded.

4. Costs shall be paid by the Defendants.

5. Judgment for Plaintiff is hereby ordered and decreed against Defendants for $2,248.20, together with interest as provided in this Order, and costs to be paid by Defendants.

DATED this 27 day of July, 1990.

BY THE COURT

Earl J. Wattier
District Court Judge

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