STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

office, and since funds are unavailable for the payment of the salary in connection with this position, it is impossible to make an appointment to this position, subject to the Personnel Law. It would appear that if the 104th Legislature does not fund the Bureau of Mental Retardation, including salary for the position of Director of Mental Retardation, the Commissioner of Mental Health and Corrections may appoint the Director of Mental Health as *acting* Director of Mental Retardation, since the Bureau of Mental Retardation becomes effective as of July 1, 1969, and will require some leadership. The actual appointment of a Director of Mental Retardation, in our view, will have to await funding by the Legislature.

COURTLAND D. PERRY
Assistant Attorney General

May 26, 1969
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Application of sales and use tax to certain credit unions

SYLLABUS:

THE TELEPHONE WORKERS CREDIT UNION OF MAINE, THE RAILROAD WORKERS CREDIT UNION OF MAINE, AND THE GOVERNMENT EMPLOYEES CREDIT UNION OF MAINE ARE SUBJECT TO SALES AND USE TAX LAW OF MAINE.

FACTS:

Three credit unions: Telephone Workers Credit Union of Maine, Railroad Workers Credit Union of Maine, and Government Employees Credit Union of Maine have requested Sales and Use Tax exemptions.

Each credit union was created by private and special acts of the legislature. P. & S. L., 1921, c. 93; P. & S. S., 1927, c. 131; P. & S. L., 1931, c. 11.

The charters, as amended by P. L. 1961, c. 385, § § 16, 17, 18, similarly provide:

> "The Revised Statutes of 1954, Chapter 55, Section 3 pertaining to credit union fees and assessments shall apply to said corporation. The aforesaid fees and assessments shall be in lieu of all other state and municipal taxes to said corporation and all the deposits of shareholders and investments and other property of the corporation shall be exempt from state or municipal taxation to the corporation, excepting real estate owned by the corporation and not held as collateral security, which may be taxed in the town or city in which the same is located. The deposits of shareholders shall be exempt from municipal taxation to shareholders."

The public laws of credit unions provide:

> "No part of chapters 241 to 251 shall be construed as repealing, modifying or amending the provisions of any private and special acts authorizing the organization and defining the purposes of corporations of similar nature." 9 M.R.S.A. § 2605.
>
> "Credit union shares of corporations organized under chapters 241 to 251 shall be tax exempted and no taxes or charges, except as otherwise provided, shall

be assessed against them." 9 M.R.S.A. § 2762.

"Credit unions shall be under the supervision of the Commissioner, and sections 2, 6, 7, 171 and 172 shall be applicable to credit unions in the same manner that they apply to financial institutions. Semiannual assessments required by section 2 shall be computed in the manner prescribed therein for loan and building associations." 9 M.R.S.A. § 2542. (Formerly R.S. 1954, c. 55, § 3)

". . . assess semiannually each loan and building association . . . at the annual rate of 7 cents for each $1000 of average total resources . . . ." 9 M.R.S.A. § 2.

QUESTION:

Are the named credit unions subject to the Sales and Use Tax Law?

ANSWER:

Yes.

REASONS:

The Maine Constitution provides:

"The legislature shall, from time to time, provide as far as practicable, by general laws, for all matters usually appertaining to special or private legislation" Art. IV, Part Third, § 13, Maine Constitution.

"Corporations shall be formed under general laws and shall not be created by special acts of the Legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained, and however formed, they shall forever be subject to the general laws of the State." Art. IV, Part Third, § 14, Constitution of Maine.

The three credit unions under consideration were created, respectively, in 1921, 1927 and 1931. The general laws pertaining to credit unions were adopted by P.L. 1941, ch. 234. Since 1941, the public law prevails in the regulation of credit unions. *A. H. S. v. Mahoney,* 1961 Me. 391, 402-406 (1965).

Subjection to sales and use taxation is based upon two alternative approaches. One is statutory construction and the other is constitutional.

As a matter of statutory construction, the charter provision which purportedly exempts the credit unions from "all other state and municipal taxes" must be read in conjunction with the general law applying to credit unions. Thus read the limitation on taxation becomes restricted in application. The reference to fees and assessments as being in lieu of all taxes directs us to 9 M.R.S.A. § 2 which imposes the fees and assessments. The fees and assessments are imposed to defray the administrative costs of the Department of Banks and Banking. At most the assessment is in the nature of a business tax or a tax on shares, as such the construction of the limiting language in the charter would be similar to the language of § 2762 of Title 9. That is, no other state or municipal tax with respect to credit union shares shall be assessed.

All other credit unions are subject to sales and use tax, since the sales and use tax is not a tax upon shares. It is a tax on the sale of tangible personal property or the use of tangible personal property purchased at retail sale. If the legislature had intended to exempt the credit unions from sales and use tax it would have specifically exempted them in 36 M.R.S.A. § 1760. Exemptions from taxation must be strictly construed. *Town of Owls Head v. Dodge,* 151 Me 473 (1956); *Holbrook Island Sanctuary v. Inhabitants of Town of Brooksville.,* 161 Me 476 (1965).

Notwithstanding the statutory construction approach, if the charter provision is accepted literally, the credit unions in question are still subject to sales and use tax on constitutional grounds.

Thus, even though the general laws dealing with credit unions govern their activities, the charters of the three organizations specifically exempt them from all state and municipal taxation, whereas all other credit unions organized pursuant to Title 9 are exempt only with respect to their shares.

The crucial question for determination is whether the special tax exemption given to the three credit unions is a denial of equal protection. The following authorities are relied upon in arriving at the conclusion that special treatment of the three credit unions is unconstitutional.

". . . nor deny to any person within its jurisdiction the equal protection of the laws." Amend. 14, § 1, Constitution of the U.S.

"No person shall be . . . denied the equal protection of the laws . . . ." Art I, § 6-A, Constitution of Maine.

The general interpretative principles upon which factual situations may be analyzed with respect to the equal protection clause have been extracted from case law and are set forth:

"The inhibition of the Fourteenth Amendment that no person should be deprived of the equal protection of the law is designed to prevent any person or class of persons being singled out as a special subject for discriminating or favoring legislation." *Boothby v. Westbrook,* 138 Me. 117, 123, (1941).

"The specific regulations for one kind of business which may be necessary for the protection of the public can never be just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges upon the same conditions.

. . . .

"The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating and hostile legislation." *State v. Montgomery,* 94 Me. 192, 205-206 (1900).

"Though the words of the clause are prohibitory, they contain a necessary implication of a positive right, the right of every person to an equality before every law, the right to be free from any discriminations as to legal rights or duties a State may seek to make between him and other persons." *State v. Mitchell,* 97 Me. 66, 70 (1902).

"In a word, discrimination as to legal rights and duties is forbidden. All men under the same conditions have the same rights. Diversity in legislation to meet diversities in conditions is permissible. But if in legislative regulations for different localities, classes and conditions are made to differ, in order to be valid, these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification of such matters is forbidden by the Consitution. If there be no real difference between the localities, or business, or occupation, or property, the State cannot make one in order to favor some persons over others." *State v. Latham,* 115 Me. 176 (1916).

"If this Act is to be declared void, it must be because it is so manifestly in

violation of the Constitution as to leave no room for reasonable doubt. (citation omitted). 'The Constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt.' (citation omitted) 'But it may be the duty of the Court to pronounce invalid an act which violates an express mandate of the constitution even if the act is expedient and has been determined by the legislature to be necessary.' (citation omitted)

"The legislature can not dispense with a general law for particular cases. (citation omitted) It has no power to exempt any particular person or corporation from the operation of the general law, statutory or common. (citation omitted)

" 'It is manifestly contrary to the first principles of civil liberty and natural justice and to the spirit of our constitution and laws that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that anyone should be subjected to losses, damages, suits or actions, from which all others in like circumstances are exempted.' (citation omitted)

. . . .

"A proper classification must embrace all who naturally belong to the class, or who possess a common disability, attribute or qualification, and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched." *In Re Milo Water Company,* 128 Me. 531, 535-536 (1930).

The most recent Maine case involving special treatment in both tax and regulatory matters is *A. H. S. vs. Mahoney,* 161 Me. 391 (1965). It was there argued that the legislative permission, through private and special act, granting the plaintiff insurance company tax exempt status with relative freedom from statutory supervision was a denial of equal protection to other insurance companies selling the same protection. The court held:

"The tax free and relatively unsupervised competition which plaintiff purports to supply in the health and accident insurance field is inconsistent without system of free enterprise, violates the principles established in Maine judicature and results in unequal protection of the laws." op. cit., 413.

Pertinent parts of the court's reasoning is set forth below:

"The phrase 'equal protection of the laws' has not been precisely defined. In fact, the phrase is not susceptible of exact delimination, nor can the boundaries of the protection afforded thereby be automatically or rigidly fixed. In other words, no rule as to what may be regarded as a denial of the equal protection of the laws which will cover every case can be formulated. . . . (E)ach case must be decided as it arises." 16 Am. Jur., (2nd) Constitutional Law § 486.

"Unquestionably the legislature is empowered to establish regulations of a business in which the interest of the public is involved."

"The general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions is subject to limitation to the extent that it does not permit discriminations by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions." 16 Am. Jur., *Constitutional Law* § 518.

"The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the

enforcement of the laws." *Soon Hing v. Crowley,* 113 U.S., 703, 709 (1884), as quoted and followed in *Dirken v. Great Northern Paper Company,* 110 Me. 374, 386, 86 A. 320.

". . . (D)iscrimination, to be constitutional, must be based upon some reasonable ground, – some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. . . . It must be reasonable and based upon real differences in the situation, condition or tendencies of things." *State v. Leavitt,* 105 Me. 76, 84, 72 A. 875.

The problem is one of classification.

Consistently with the realization that each case must be decided upon its merits, a multivariety of decisions pro and con exist in the federal court system, citation of which will serve no purpose. Op. cit., 409, 410.

With these authorities as background, an analysis of the specific problem should be commenced by a look at classification. There is no attempt at classification. The subject of the special legislation is three private corporations and the attempt is to give each a special tax privilege. No public purpose is suggested in granting the tax exemption. See *Opinion of the Justices,* 161 Me. 185, 206 (1965). There is discrimination in favor of private corporations by arbitrary selection in violation of both the Maine and Federal constitutions.

To strike down the special tax treatment is to subject the credit unions to the general laws. By so doing, they are liable for sales and use tax as are other credit unions. No exemption exists in the sales tax law for credit unions.

Subjection to taxation is based upon the language of 9 M.R.S.A. § 2762, supra and the exemption therein granted must be construed strictly. *Town of Owls Head v. Dodge,* 151 Me 473 (1956), *Green Acre Baha'I Institute v. Town of Eliot,* 150 Me. 350 (1955); *Town of Orono v. S.A.E. Society,* 105 Me. 214 (1909). That exemption is limited to taxation of shares. The sales and use tax is a tax on the sale of property, or the use of property purchased, based upon the purchase price.

The Telephone Workers Credit Union, Railroad Workers Credit Union and Government Employees Credit Union are therefore subject to the Sales and Use Tax Law.

JAMES M. COHEN
Assistant Attorney General

May 26, 1969
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Property Taxation of Privately Owned Railroad Tank Cars

SYLLABUS:

A MUNICIPALITY MAY ASSESS PERSONAL PROPERTY TAXES UPON RAILROAD TANK CARS USED AND EMPLOYED IN THE MUNICIPALITY ALTHOUGH ENGAGED IN INTERSTATE COMMERCE. AN ADMINISTRATIVE METHOD OF DETERMINING THE JUST VALUE OF SUCH PROPERTY IS PROPER SO LONG AS IT IS FAIR AND REASONABLE AND AFFORDS EQUAL TREATMENT.