STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

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.

FACTS:

Foreign corporations, which are not railroads, own or lease railroad tank cars used by them to carry liquids from outside the state to manufacturing and storage plants located within a municipality of the State of Maine. The cars remain at the plant only so long as it is necessary to remove the contents. Thereupon they leave the State. An average of two cars a week arrive at the respective plants on a regular schedule.

QUESTIONS:

1. May a municipality assess a personal property tax upon railroad tank cars used and employed in the municipality although engaged in interstate commerce?
2. If the railroad tank cars are subject to personal property taxation, what is a proper method of determining the amount of tax?

ANSWERS:

1. Yes.
2. Any administrative method which is fair and reasonable and which affords equal treatment is proper.

REASONS:

1. The State of Maine imposes personal property taxes pursuant to the following statutory provisions:

> "Personal property for the purposes of taxation includes all tangible goods and chattels. . . ." *36 M.R.S.A. § 601.*
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> "All personal property within or without the State, except in cases enumerated in section 603, shall be taxed to the owner in the place where he resides." *36 M.R.S.A. § 602.*
>
> "Personal property which is within the State and owned by persons residing out of the State shall be taxed either to the owner, or to the person having the same in possession, or to the person owning or occupying any store, storehouse, shop, mill, wharf, landing, shipyard or other place therein where such property is." *36 M.R.S.A. § 603(3).*

Since the property in question is owned or leased by nonresidents it is taxable to the owners or lessees where the property is located.

The Supreme Court of the United States has often addressed itself to the question whether such rolling stock engaged in interstate commerce and used and employed in a State is a proper subject of property taxation. For example, in *Pullman's Car Co. v. Pennsylvania,* 141 U.S. 18, the court stated the following:

> "No general principals of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders. . . .
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> "For the purposes of taxation, as have been repeatedly affirmed by this Court, personal property may be separated from its owner; and he may be taxed on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. . . .
>
> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its

jurisdiction."

In *American Refrigerator Transit Co. v. Hall,* 174 U.S. 70 (1899), the Supreme Court upheld a property tax assessed by the State of Colorado against railroad cars of an Illinois Corporation which were used on trains throughout the United States and which passed through Colorado. At page 81 of its opinion the court stated:

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were consistantly changing, according to the exigencies of the business.
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> . . .

To the argument that a property tax was a burden on interstate commerce in *Braniff Airways v. Nebraska Board,* 347 U.S. 590 (1953) the court stated at page 597: "We have frequently reiterated that the Commerce Clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a nondiscriminatory share of the tax burden."

To an argument that the tax violated the due process clause the court in the same case quoted *Ott v. Mississippi Valley Barge Line Co.,* 366 U.S. 169, 174: " 'So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state.' "

The most recent approval of such taxation was expressed in *Norfolk & W. Ry. Co. v. Mo. State Tax Commission,* 390 U.S. 317 (1968).

There is no constitutional or statutory objection to the imposition of a personal property tax upon railroad tank cars owned or leased by foreign corporations and used during the taxing year in a taxing district.

2. An important question is the determination of the nature, amount and value of the property subject to be taxed. By virtue of 36 M.R.S.A. § 706 taxpayers are required to furnish assessors with lists of property subject to taxation. This applies to nonresident taxpayers as well as resident taxpayers.

Pursuant to 36 M.R.S.A. § 708 assessors are required to ascertain *"as nearly as may be* the nature, amount and value as of the first day of each April of the . . . property subject to be taxed". (Emphasis supplied.) Since not all railroad tank cars passing through this State would have a situs here it would become necessary to determine which portion of these cars could properly be subject to tax.

Maine law requires a determination of the nature, amount and value of property subject to tax, "as nearly as may be". However, the legislature did not set forth the procedure for the determination.

In order that property moving in interstate commerce and subject to taxation by the State of Maine, receive its fair share of the burdens of taxation there must be an assessment. The assessment must be of such a nature that it complies with the Constitution of the United States, the decisions of the Supreme Court, the Constitution of the State of Maine, and the Statutes of the State of Maine.

Since it is difficult to determine the nature, amount and value of property such as railroad tank cars, the Supreme Court has stated that "the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used

and employed." *American Refrigerator Transit Co. v. Hall,* 174 U.S. 70, 81 (1899). Later the Supreme Court said: "When individual items of rolling stock are not continuously the same but are constantly changing as the nature of their use requires, the Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within the limits." *Johnson Oil Co. v. Oklahoma,* 290 U.S. 158 (1933).

The determination of the nature, amount and value of property subject to taxation is properly an administrative function. This is evidenced from the legislative use of the language "as nearly as may be" in defining the duty of the assessors.

The State of Utah requires taxpayers to furnish lists of property owned by them in the State. There is no statutory procedure for determining the average number of rolling stock units used in the State, although the Supreme Court of the United States has upheld this procedure for the taxation of railroad cars in *Union Refrigerator Transit Co. v. Lynch,* 177 U.S. 149 (1900), in which case Utah imposed a tax upon railroad cars owned by a Kentucky Corporation which maintained no office in Utah and which railroad cars passed through Utah in interstate commerce.

The Utah Court in *Crystal Car Line v. State Tax Commission,* 174 P. 2d 984 addressed itself to the administrative determination of the amount of property subject to taxation:

> "The situs of personal property for taxation purposes is established by the presence, actual or constructive, within the taxing jurisdiction where it receives the protection of said jurisdiction.
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> . . . .
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> "Rolling stock is personal property but because of the very nature of its use the individual items are constantly changing and ordinarily do not remain in any particular jurisdiction long enough to create a taxable situs for the individual item for general property tax purposes, yet where there are always present and being used within the taxing jurisdiction a certain number of these items a situs is established for such taxation purposes, and the value of the property is arrived at by determining the average number of such items which are present in the State.
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> . . . .
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> "Our constitutional provision that the legislature shall provide by law a uniform and equal rate of taxation on all tangible property and 'shall prescribe by law such regulation as shall secure a just valuation for taxation of such property' does not mean that the legislature must prescribe a formula which must be used by the tax commission in arriving at its assessments. The ascertainment of the amount of property to be taxed and its value is properly an administrative function. It is sufficient if the legislature provides the property shall be taxed and fixes the rate at which it may be taxed."

Similarly, the Texas Supreme Court has upheld an administrative determination of a formula for assessing the rolling stock of a motor bus corporation operating in interstate commerce. *Greyhound Lines, Inc. v. Board of Equalization,* 419 S.W. 2d 345 (Texas, 1967).

The most recent expression of approval by the U.S. Supreme Court of the use of formulas in determining valuation is found in *Norfolk & W. Ry Co v. Mo. State Tax Com'n.*

> "Established principles are not lacking in this much discussed area of the law. It is of course settled that a state may impose a property tax upon its fair share of an interstate transportation enterprise. That fair share may be regarded as the

value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State, including a portion of the intangible, or going-concern, value of the enterprise. The value may be ascertained by reference to the total system of which the interstate assets are a part. As the Court has stated the rule, the tax may be made to cover the enhanced value which comes to the (tangible) property in the State through its organic relation to the (interstate) system. *Pullman Co. v. Richardson,* 261 U.S. 330, 338, 43 S. Ct. 366, 368, 67 L. Ed. 682 (1923). Going-concern value, of course, is an elusive concept not susceptible of exact measurement. As a consequence, the states have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders. Such formulas usually involve a determination of the percentage of the taxpayer's tangible assets situated in the taxing State and the application of this percentage to a figure representing the total going-concern value of the enterprise. A number of such formulas have been sustained by the Court, even though it could not be demonstrated that the results they yielded were precise evaluations of assets located within the taxing State." *Supra,* at 323.

Since the determination of the nature, amount and value of property subject to taxation is properly an administrative function, it might well be within the jurisdiction of the State Tax Assessor to provide assessing officials with a procedure for determining the amount of such property to be considered located in the State for taxing purposes. This is said with reference to 36 M.R.S.A. § 201 which gives the State Tax Assessor "general supervision over the administration of the assessment and taxation laws of the State and over local assessors and all other assessing officers in the performance of their duties, to the end that all property shall be assessed at the just value thereof in complaince with the laws of the State."

The method used to determine the amount of property located within the taxing district, and the just value of such property must be fair and reasonable; with equal treatment being given.

JAMES M. COHEN
Assistant Attorney General

June 4, 1969
Executive

Kenneth M. Curtis, Governor

Appointment of a faculty member of the University of Maine to membership on the board of trustees of the University.

SYLLABUS:

A person may not serve in the dual capacity of faculty member and trustee of the University of Maine.

QUESTION:

May a faculty member of the University of Maine serve as a member of the Board of Trustees of the University?