Taxation: Ninth Circuit Holds Fannie and Freddie Statutorily Exempt from Real Property Transfer Taxes

City of Spokane v. Federal National Mortgage Assoc., No. 13-35655 (9th Cir. Dec. 30, 2014).

The Ninth Circuit has joined the large preponderance of Circuit Courts finding that the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Feddie Mac") are exempt from real property transfer taxes. Spokane alleged, under various theories, that these two organizations are not statutorily exempt from paying real property transfer taxes. As has been the case in six circuits that considered this issue, the District Court held that the organizations are exempt from the taxes. Spokane appealed.

HELD: The Ninth Circuit affirmed the lower court, thus enforcing the legislative exemption of Fannie Mae and Freddie Mac from real property transfer taxes.

DISCUSSION: Spokane argued that Fannie Mae and Freddie Mac are not statutorily exempt from paying real property transfer taxes because these taxes fall under the statute's requirement that these organizations pay real property taxes. Specifically, the city pointed to 12 U.S.C. §§ 1452(a) and 1723a(c)(2) which state, respectively, that Fannie Mae and Freddie Mac "shall be exempt from all [state and local] taxation, . . . except that any real property of [Freddie or Fannie] shall be subject to State [and] local taxation to the same extent . . . as other real property is taxed." The Circuit rejected this argument by noting that there has long been a distinction between *excise* taxes, those levied against the *use or transfer* of a property, and a tax levied against the property itself. The court found it "clear" that the statute at issue permits state and local taxation of Fannie Mae and Freddie Mac for property taxes, not excise taxes. It did not help Washington that its own statutory tax scheme uses this precise dichotomy, a fact highlighted by the court.

Second, Spokane argued that the exemptions created by Congress exceeded that body's authority under the Commerce Clause. The court disagreed, noting that Congress may enact laws to regulate activities that substantially affect interstate commerce. The court also looked at the Necessary and Proper Clause to evaluate "whether the statute [at issue] constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." Spokane tried to frame this issue by arguing that the regulated activity is state and local taxation and then differentiating taxation from commerce. The Court however took a larger view, pointing out that Spokane did not object to the premise that Congress has the power to regulate the secondary mortgage market. The Court, citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 426 (1819), held that if Congress had the power to create Fannie Mae and Freddie Mac, it had the power to protect the statutory mission it gave them by exempting them from state and local taxes.

Spokane also argued that the exemptions violated the Tenth Amendment, on two grounds. It first posited that the tax exemptions amounted to Congress commandeering state employees, since county clerks "would be required to record deeds from the Enterprises free of charge." The court disposed of this argument by highlighting that no municipalities are tasked with additional affirmative obligations under the law; they simply cannot enforce the tax law against these entities. Spokane next argued that the tax exemptions violated the general principles of federalism enshrined in the Tenth Amendment. This was unavailing: "nothing in the text or

structure of the Constitution categorically immunizes state taxation from federal preemption . . . [and m]ore to the point, the Supreme Court has long made clear that when Congress properly exercises its enumerated powers, it may lawfully abridge the states' ability to tax."

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/30/13-35655.pdf
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