U.S. Department
of Transportation

Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Ave., S.E.
Washington, DC 20590

DEC 30 2013

Mr. Randy Ottinger
United States Parachute Association
5401 Southpoint Centre Boulevard
Fredericksburg, VA 22407

Re: Question on Taxation of Skydiving

Dear Mr. Ottinger:

This is in response to your request for an opinion from the U.S. Department of Transportation (Department or DOT) on whether a Federal aviation statute on State taxation (49 U.S.C. Section 40116, also known as the Anti-Head Tax Act (AHTA)) preempts State amusement taxes assessed on the gross receipts from the retail sales of skydiving operations. The essence of your argument is that the AHTA preempts such a tax because skydiving receipts are exempt as derived from "air commerce," defined in 49 U.S.C. Section 40102(a)(3) as ". . . the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce."

You have informed us that States have taken different positions on this issue, and that two of your members are engaged in administrative proceedings challenging such a tax assessed by the State of Washington. Because we are not party to any specific proceeding before a State entity, and we do not have all of the facts relevant to any specific situation, we do not feel it appropriate to offer an opinion on the merits of any particular proceeding.

Instead, we offer only general guidance on this issue. As a general matter, the AHTA would preempt a State tax on the gross receipts from skydiving operations provided by a commercial operator.[1] In contrast, the AHTA expressly permits a State to collect taxes on revenues from the related sale or use of other goods or services, such as the sale of DVDs, photographs, or tee-shirts memorializing a skydiver's experience.

[1] A "commercial operator" is, in pertinent part:

> A person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier . . . . Where it is doubtful that an operation is for "compensation or hire," the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit. 14 CFR § 1.1.

ATTACHMENT 12

The AHTA prohibits a State or political subdivision from levying or collecting a:

> Tax, fee, head charge, or other charge on – an individual traveling in air commerce; … or the gross receipts from that air commerce or transportation. 49 U.S.C. § 40116(b)(1), (4).

Without addressing the specifics of any particular State tax, we can say generally that a State sales tax imposed on the gross receipts from skydiving operations would be preempted by the AHTA as unlawfully levied or collected on "the gross receipts from that air commerce or transportation," which includes "an individual traveling in air commerce." 49 U.S.C. § 40116(b)(1), (4).

The scope of "air commerce" includes not just "interstate, overseas, or foreign air commerce," but also "any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."[2] Aircraft operations carrying skydivers fall under the definition of "air commerce" because those operations use aircraft that directly "affect or may endanger safety in interstate air commerce." 49 U.S.C. § 40102(a)(3). Revenues received by an aircraft operator for carrying skydivers are exempt from State tax under the prohibitions of the AHTA, as such revenues would constitute "gross receipts from…air commerce," including receipts from "an individual traveling in air commerce" within the scope of the AHTA. 49 U.S.C. § 40116(b)(1), (4).[3]

We understand that the Association's members are concerned with "amusement" taxes purporting to tax a skydiver's "fall," rather than the flight. The purpose of an individual's air travel, however, is irrelevant for the purposes of AHTA preemption. The Supreme Court has stated that the classification of a tax is not determinative under the AHTA; rather, if the tax – even if classified as something other than a "gross receipts" tax – is measured by gross receipts from an individual traveling in air commerce, the purpose and effect of the tax would be to impose a levy on such gross receipts. Accordingly, it would be preempted as a direct or indirect gross receipts tax.[4] Every individual traveling in air commerce has some purpose for procuring the transportation – visiting family, attending a business meeting, enjoying a sightseeing tour, or as in this case, skydiving. The purpose of the transportation procured is irrelevant: the gross receipts charged by the aircraft operators providing the transportation to the passengers may not be taxed, consistent with the AHTA.[5] Moreover, the Supreme Court has interpreted the AHTA's

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[2] 49 U.S.C. § 40102(a)(3); 14 C.F.R. § 1.1.

[3] That a flight supporting a skydive may occur exclusively within one State does not alter this conclusion. See Hill v. National Transportation Safety Board, 886 F.2d 1275, 1279 (10th Cir. 1989).

[4] Aloha Airlines v. Director of Taxation, 464 U.S. 7, 13-14 (1983).

[5] A tax purportedly on the gross receipts for the "amusement," as opposed to the air carrier's flight to the point of descent, would run afoul of the prohibition against even "indirect" taxes on the gross receipts received for carrying passengers. The AHTA applies to both direct and indirect taxes even though the current version of the statute does not so expressly state. However, immediately prior to recodification at Section 40116, the AHTA provided: "(a) Prohibition; exemption. No state (or political subdivision thereof ...) shall levy or collect a tax, fee, head charge, or other charge, directly *or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom...." Township of Tinicum v. U.S. Dep't of Transportation, 582 F.3d 482, 485 (3rd Cir. 2009) (citing 49 U.S.C. § 1513 (1994)) (emphasis added). In the recodification statute, Congress provided: "Sections 1–4 of this Act restate, without substantive change, laws enacted before July 1, 1993, that were replaced by those sections. Those sections may not

preemption language broadly, stating that the AHTA "expressly preempts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce," and that "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted."[6]

We also note that at least four States have found that the AHTA prohibits the State or local taxation of aircraft flights for amusement purposes, including skydiving, untethered hot air balloon rides, and other flights that begin and end at the same point. In 1993, the Arizona Department of Revenue determined that the AHTA preempted the application of the Arizona transaction privilege tax to gross proceeds from amusement flights, such as flights associated with skydiving.[7] In its ruling, the Arizona Department of Revenue emphasized that, "[t]he customer's reasons for flight do not change the fact that they are being transported in the air."[8] Similarly, the Wisconsin Department of Revenue recently revised its sales and use tax so as not to apply to admissions charged for flights purportedly for "entertainment" purposes, including those that carry a skydiver to a jump point.[9] Additionally, Kansas and Maryland recently changed their policies to exempt, from admissions or amusement taxes, gross receipts from untethered hot air balloon rides, due to preemption by the AHTA.[10] Similar to skydiving operations, FAA regulates sightseeing flights conducted in hot air balloons as commercial operations in air commerce, particularly those under 14 CFR Part 31.

We thank you for your patience as we have reviewed and considered the issues raised in your request, and we hope that you find this discussion of the AHTA informative. Please be advised, however, that this letter provides only guidance and does not constitute a final action of the Department on the matters you raised, nor an opinion on the merits of any particular

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be construed as making a substantive change in the laws replaced." Id. at 486 (citing Pub. L. No. 103-272, 108 Stat. 1378, § 6(a)). Thus, the current statute must be interpreted to include both direct and indirect taxes.

[6] Aloha Airlines at 11-12.

[7] Ariz. Transaction Privilege Tax Ruling No. 93-13 (Mar. 15, 1993).

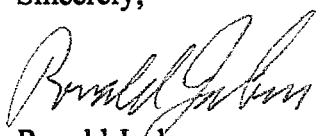
[8] *Id.* (citing United States v. Twentieth Century-Fox Film Corp., 235 F.2d 719 (9th Cir. 1956)).

[9] Wisconsin Department of Revenue, Tax Release "Hot Air Balloon Rides and Other Aircraft-Related Admissions" (Dec. 14, 2010), stating: "The statutory definition of 'air commerce' is broad enough to include intrastate flights that may endanger the safety in interstate commerce. Because un-tethered hot air balloon rides, sightseeing flights, using an aircraft to tow a hang glider, and carrying a sky diver to an in-air jump point all meet the definition of 'air commerce,' the state of Wisconsin and political subdivisions within the state are prohibited under the federal Anti-Head Tax Act from imposing state, county, and stadium sales and use taxes on the admissions charged for these activities. Subsection (c) of 49 USC § 40116 does not provide an exception to the sales tax prohibition for aircraft that take off or land in the state. That section merely establishes the state geographical nexus as a minimum requirement that must be met for a state to impose a permitted tax relating to an aircraft activity, but does not itself grant permission to a State to impose any tax relating to an aircraft activity that is otherwise prohibited by subsection (b)."

[10] Kan. Office of Policy & Research, Priv. Ltr. Rul. P-2010-003 (June 30, 2010); MD. Code, Tax - General Section 4-103(b)(3)(iv) (West 2011) (as revised, April 2011 to conform to January 29, 2010 advisory letter from U.S. Department of Transportation to Up Up Away Hot Air Balloon Co.).

proceeding. Please contact me at (202) 366-9151 if you have any questions concerning this matter.

Sincerely,



Ronald Jackson
Assistant General Counsel for Operations

cc: Carol Nelson, Washington State Department of Revenue
Sam Rickets, Washington, D.C. Office of Governor Jay Inslee