U.S. Department of Transportation

General Counsel

1200 New Jersey Ave. S.E.
Washington, D.C. 20590

Office of the Secretary
of Transportation

MAR 28 2019

Roy Goldberg, Esq.
Stinson Leonard Street
1775 Pennsylvania Ave. N.W., Suite 800
Washington, D.C. 20006

Re: Request for Legal Opinion on Application of the Anti-Head Tax Act

Dear Mr. Goldberg:

Thank you for your letter on behalf of Ryan, LLC requesting a legal opinion from the Department regarding the application of the Anti-Head Tax Act (AHTA), codified at 49 U.S.C. § 40116. The language of the statute, as well as case law and prior Orders and opinions of the Department, address many of your questions, and we refer you to those authorities, as summarized below. Notably, existing authorities indicate that the relevant provision of the AHTA, section 40116(b), is focused on assessments levied on air passengers and commercial aircraft operators.

Section 40116(b) prohibits State and local (collectively, "State") taxes levied directly or indirectly[1] on:

(1) an individual traveling in air commerce;
(2) the transportation of an individual traveling in air commerce;
(3) the sale of air transportation; or
(4) the gross receipts from that air commerce or transportation.

49 U.S.C. § 40116(b) (emphases added).

As we understand it, it is your position that air passengers are "traveling in air commerce" when they make purchases from vendors of "ancillary commercial activities that occur within an airport," such as concessionaires, on-airport hotels, and on-airport car rental facilities. Therefore, you maintain that any State assessment on the gross receipts collected by such airport vendors is proscribed by section 40116(b) as an assessment on gross receipts from sales to "individual[s] traveling in air commerce." You suggest that such assessments may be considered indirect levies on air passengers, to the extent airport vendors pass the cost of the assessments along to air passengers through increased prices. It is also your view that all "'aeronautical activities' relating

[1] The word "indirectly" was omitted during the 1994 recodification of the Federal aviation laws, but that recodification was not intended to make any substantive change in the statute. *See* Pub. L. No. 103-272, § 6(a).

to the transportation of individuals by air," such as "the sale of aircraft parts to aircraft owners and operators," should be shielded by section 40116(b) from State assessment,[2] and that the term "air transportation," as used in section 40116(b)'s ban on State assessments affecting "the sale of air transportation," encompasses the transportation of freight and cargo.[3]

Statutory Text and Case Law

Even if the AHTA's prohibition of gross receipts taxes (section 40116(b)(4)) links to the prohibition of assessments on "an individual traveling in air commerce" (section 40116(b)(1)) – an issue not yet decided by the courts[4] – we note that the phrase "air commerce," which is defined in the general definitions section of the Federal Aviation Act, refers to transportation "by aircraft." 49 U.S.C. § 40102(a) (emphasis added). This statutory definition and others "limit the reach of the Anti-Head Tax Act." *City and County of Denver v. Continental Air Lines*, 712 F. Supp. 834, 837 (D. Colo. 1989). Therefore, notwithstanding that the definitions of "interstate air commerce" and "foreign air commerce" (both of which are encompassed within the definition of "air commerce") extend to transportation "partly by aircraft and partly by other forms of transportation," those sub-definitions should not "be applied to [section 40116(b)] to determine its parameters." *Salem Transp. Co. of New Jersey v. Port Auth. of New York & New Jersey*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985). Indeed, section 40116(b) of the AHTA "was intended to protect passengers transported by aircraft," *Continental Air Lines*, 712 F. Supp. at 837 (emphasis in original), and in the words of one State supreme court, it would be "unnatural" to ignore that important definitional qualifier. *Kamikawa v. UPS*, 966 P.2d 648, 652 (Haw. 1998).

Courts have found, for example, that a State-imposed tax on airport parking "is not a tax on air commerce" because the AHTA "does not apply to taxes on airport ground transportation services, such as parking facilities." *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 64 Cal. App. 4th 1217, 1223 (1998); *accord Alamo Rent-A-Car v. City of Palm Springs*, 955 F.2d 30, 31 n.1 (9th Cir. 1991); *Airline Car Rental v. Shreveport Airport Auth.*, 667 F. Supp. 293, 299 (W.D. La. 1986); *Salem Transp.*, 611 F. Supp. at 257.

In addition, courts have found that airport concessionaires are sufficiently removed from transportation by aircraft that their revenues do not fall within the scope of the AHTA.[5] *See*

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[2] The range of activities that may qualify as "aeronautical" is broad, and we are not in a position in this letter to address whether "all aeronautical activities" are protected from taxation under the AHTA, which refers to "air commerce" and "air transportation." We do note that the analysis of the first question is pertinent to evaluating whether a given activity or transaction falls within "air commerce," as that term is used in the AHTA.

[3] Because the situation described in your letter does not trigger section 40116(e)(1) of the AHTA, which "operates to define and limit the prohibition in" section 40116(b), *Interface Group v. Mass. Port Auth.*, 631 F. Supp. 483, 494 (D. Mass. 1986), *aff'd in part* 816 F.2d 9 (1987), we do not address that provision. And, because your letter is directed at taxes rather than fees, we include no discussion of the exemption in section 40116(e)(2), which applies to certain fees imposed by airport proprietors.

[4] The Federal and State decisions refer to gross receipts taxes, for purposes of the AHTA, as being imposed on airlines, *see Aloha Airlines v. Dir. of Taxation of Hawaii*, 464 U.S. 7, 12 n.6 (1983) (referring to "gross receipts taxes imposed on airlines"), linking section 40116(b)(4) to either paragraph (b)(2) ("the transportation of an individual traveling in air commerce") or paragraph (b)(3) ("the sale of air transportation").

[5] Notably, even if the AHTA is read to cover transportation that is partly non-aircraft based, it still would not apply to concessionaires such as airport food and beverage vendors – which provide no transportation at all.

Continental Air Lines, 712 F. Supp. at 836 ("the Anti-Head Tax Act has no application to the concession revenues at Stapleton" airport.); *Northwest Airlines v. County of Kent*, 955 F.2d 1054, 1060 (6th Cir. 1992) ("Non-airline concessions are not within the scope of the AHTA."), *aff'd* 510 U.S. 355 (1994). In so holding, the courts have noted that airport concessionaires are not patronized exclusively by air passengers. *See Continental Air Lines*, 712 F. Supp. at 838; *see also Burbank*, 64 Cal. App. 4th at 1223.

Finally, section 40116(d)(2)(A)(iv) of the AHTA – requiring that State assessments imposed after August 23, 1994 that fall "exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport" be "wholly utilized for airport and aeronautical purposes" – does not alter the analysis. As explained in DOT's *Tinicum Township Privilege Fee Proceeding* Order, this provision of the AHTA imposes a limitation on the use of revenue from assessments not otherwise proscribed by the AHTA. DOT Order 2008-3-18 at 33. It does not widen the scope of section 40116(b)'s prohibition. *Id.*

Legislative History

Distinguishing from the cases above, your letter places some emphasis on a 1985 report from the House Appropriations Committee, which states that the AHTA "may" outlaw State assessments on gross receipts collected by "freight forwarders, hotels, motels, limousine services, and rental car companies" from patrons who are accessing an airport. While this report warrants due consideration,[6] it is not controlling on the legal question you raise. This congressional report language cannot overcome the weight of the case law described above – especially because it comes from a committee that did not vote on the AHTA and from a different Congress from the one that enacted the law. Moreover, as noted in subsequent legislative history, an FAA study issued in response to the 1985 Appropriations Committee report stated, in reference to non-tenant off-airport rental car firms, that there is nothing to suggest "that such ground transportation has a sufficient aeronautical nexus to warrant including the activity within the definition of air commerce," which is focused on the operation of aircraft. *See* Prepared Testimony of Robert A. Blair before the House Committee on Appropriations, Subcommittee on Transportation and Related Agencies (May 3, 1985).

Your letter also emphasizes other legislative history, including the original congressional reports accompanying the AHTA. As we noted in *Tinicum*, Congress passed the AHTA "because [F]ederal taxes on air transportation were intended to be the primary source of revenue for the uniform development and maintenance of [the] system of airports across the country," and "State and local taxes were considered double taxation on air travelers." DOT Order 2008-3-18 at 17. Congress passed the AHTA to protect air passengers from that "double taxation" – whether imposed directly on the air passenger or passed through to the air passenger, indirectly, via another entity – and, to be sure, it can be argued that any ancillary cost to an air passenger is an indirect economic burden on his or her travel in "air commerce." *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 718 (1972). Yet in enacting the AHTA, Congress was focused on State indirect assessments on air passengers that were imposed directly on airlines or other commercial

[6] Courts have treated such legislative history in different ways. *Compare States v. United Mine Workers*, 330 U.S. 258, 281-282 (1947) ("We fail to see how the remarks of . . . Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932 . . . ."); *with Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of a subsequent Congress are "entitled to significant weight").

aircraft operators (collectively, "airlines"). *Niagara Frontier Transp. Auth. v. Eastern Airlines*, 658 F. Supp. 247, 251 (W.D.N.Y. 1987); *Rocky Mountain Airways v. Pitkin County*, 674 F. Supp. 312, 315 (D. Colo. 1987).

As a result, Congress drafted the AHTA to proscribe many State assessments on airlines – as an attempt to prohibit collateral assessments on air passengers. *See Niagara Frontier*, 658 F. Supp. at 250 (legislative history is clear "that the intended beneficiary is primarily air travelers," with the ancillary effect of also protecting "those companies who carry persons in air commerce or sell air transportation."); *Interface Group v. Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987). But there is no indication that Congress sought to stop assessments on airport concessionaires and other non-airline tenants of an airport. *See Continental Air Lines*, 712 F. Supp. at 838 ("Nowhere in the legislative history of the Anti-Head Tax Act is there any indication that Congress intended to regulate rates charged to concessionaires."); *Alamo Rent-A-Car*, 955 F.2d at 31 n.1; *In re Menier*, 59 B.R. 588, 591 (N.D. Ohio 1986) (per-gallon State assessment on fuel providers for sale of gasoline "is not directly on the operation of an aircraft or on persons traveling in air commerce").

Air Cargo

As for your position that one part of the AHTA applies to the air transportation of freight and cargo, we agree and refer you to DOT's Order in *Hawaii Inspection Fee Proceeding*, DOT Order 2012-1-18, 17-18 & notes 15-16. As you point out, because the term "air transportation," as used in the "sale of air transportation" prong of the AHTA, is defined in part as "the transportation of passengers or property by aircraft as a common carrier for compensation," 49 U.S.C. § 40102(a)(25) (emphasis added), that prong encompasses direct assessments on the sale of air cargo service or commercial freight transportation by air. *Id.*[7]

Conclusion

As our past letters have said in similar situations, we recognize that each case under the AHTA is fact specific. This letter does not address any particular fact scenario, and it does not constitute an administrative ruling or final agency decision. Rather, in response to your request, we have simply summarized the pertinent legal authorities as we view them, and we hope that you find this letter useful. If you have any further questions, please do not hesitate to contact me at (202) 366-9151.

Sincerely,

Ronald Jackson

Ronald Jackson
Assistant General Counsel for Operations

[7] We should add that we have previously opined that the "sale of air transportation" prong of the AHTA, which covers State assessments "imposed in connection with the sale of a ticket or waybill," *Tinicum*, DOT Order 2008-3-18 at 5, does not apply to intrastate air cargo service or commercial freight transportation by air. *See* DOT Letter to Riggs Air Service, 2 (Dec. 18, 1985).