STATEMENT OF SOUTHWEST AIRLINES AND AIRLINES FOR AMERICA REGARDING SB 483

July 7, 2015

Submitted by Keith L. Lee
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775-829-1400

Sections 22.1(e) and 31 of SB 483 purport to levy a tax on the gross revenues of an air carrier generated if the origin and destination points are both in Nevada. Presumably, these provisions are intended to tax commercial air carriers on the revenues from ticket sales, baggage fees and other charges directly or indirectly related to air commerce primarily between Reno and Las Vegas.

Southwest Airlines and Airlines for America (the trade association representing the major passenger and freight commercial air carriers) assert that these revenues are not taxable pursuant to Section 21.1(a) of SB 483, which provides that an entity may deduct from its gross revenues those gross revenues that cannot be taxed pursuant to the Constitution and laws of the United States.

Pursuant to 49 U.S.C. 40116(b) (also known as the "Anti-Head Tax Act"--AHTA) a state or local jurisdiction cannot levy a tax on the "gross receipts from . . . air commerce or transportation."

The Department of Transportation and Federal Courts have addressed attempts by state and local jurisdictions to tax the gross receipts of air commerce transportation. The AHTA has uniformly been interpreted to prevent taxes (even if called by a different name) such as the one purporting to be imposed on air commerce by SB 483.

Attached for your perusal are letters from Southwest Airlines and Americans for Aviation (A4A), both dated May 8, 2015 and addressed to Assemblyman Derek Armstrong, Chair of Assembly Taxation Committee. Both were submitted in opposition to Section 30 of SB 292 (which has become Section 31 of SB 483). Also submitted as an attachment to the A4A letter is a copy of a decision from the Department of Transportation disallowing an attempt by a county in Maryland to levy a head tax on each person riding on a hot air balloon. Also attached our follow-up letters from Southwest and A4A, dated May 21, 2015.

Thank you for thoughtfully considering our position on SB 483. We would be pleased to supply additional information or answer inquiries regarding the position of Southwest Airlines and Americans for Aviation.

May 21, 2015

The Honorable Ben Kieckhefer, Chairman
Senate Committee on Finance
401 S. Carson Street
Carson City, NV 89710

The Honorable Paul Anderson, Chairman
Assembly Committee on Ways and Means
401 S. Carson Street
Carson City, NV 89710

Re: Nevada Revenue Plan

Dear Chairman Kieckhefer and Chairman Anderson:

This letter is written on behalf of Southwest Airlines Company with respect to our concerns with the aviation-related section of the Nevada Revenue Plan. I previously sent a letter to Chairman Derek Armstrong on May 8, 2015 about federal preemption of the state's ability to tax revenues on passengers. This preemption applies to ancillary fees, as well. Federal law explicitly prohibits taxation of air commerce or air transportation, as confirmed by both the United States Department of Transportation (DOT) and the United States Court of Appeals. The State of Nevada is prohibited by federal law from taxing air transportation, or the gross receipts from air commerce or air transportation. This law also includes revenues associated with passengers in air transportation such as, ticket change sales, baggage fees, liquor sales or other sales associated with passenger travel.

Federal Law provides:

> *Except as provided in subsection (c) of this section and section 40117 of this title, a State, or political subdivision of a state . . . may not levy or collect a tax, fee, head charge, or other charge 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)(3), (4). (49 U.S.C. 40116 is commonly known as the Anti-Head Tax Act (AHTA)).

Further, it does not matter that the tax is not identified as a gross receipts tax. The U.S. Supreme Court has ruled that the description and classification of a tax by a state is not determinative. The Court stated "The manner in which the state legislature has described and categorized [a tax] cannot mask the fact that the purpose and effect of the provision is to impose a levy on the gross

receipts of an airline....A state statute that imposes such a tax is preempted." *Aloha Airlines v. Director of Taxation, 464 U.S. 7, 13-14 (1983).*

Therefore, we respectfully suggest that you do not include in the budget projected revenues from this provision. Thank you for your consideration.

Sincerely,

John S. Dritt
Senior Manager Property Tax
SOUTHWEST AIRLINES CO.
HDQ-6TX
2702 Love Field Dr.
Dallas, TX 75235-1611
Phone 214-792-5505

May 8, 2015

The Honorable Derek Armstrong
Chair Assembly Taxation Committee
401 S. Carson Street
Carson City, NV 89710

Re: SB 252, Section 30

Dear Mr. Chairman,

This letter is written on behalf of Southwest Airlines Co. Based on review of SB 252, Section 30, it appears that the Nevada Department of Taxation will determine the quarterly business license fee by the amount of gross revenue generated by the business in Nevada. Federal law explicitly prohibits such a tax, as confirmed by both the United States Department of Transportation (DOT) and the United States Court of Appeals.

Federal law provides:

> *Except as provided in subsection (c) of this section and section 40117 of this title, a State, or political subdivision of a state . . . may not levy or collect a tax, fee, head charge, or other charge 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)(3), (4). (49 U.S.C. 40116 is commonly known as the Anti-Head Tax Act (AHTA)).

Nevada SB 252, Section 30 is clearly a tax on gross receipts, and prohibited under the above statute.[1] It appears that Nevada believes that subsection (c) of the AHTA permits Nevada to impose a fee based on the gross revenue of an Airline doing business in Nevada. Subsection (c) reads:

> *A state or political subdivision of a state may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the state or political subdivision as part of the flight.*

The question of whether subsection (c) is a blanket authorizing provision allowing any tax or fee to be imposed as long as it relates to flights landing or taking off in a state, as opposed to a provision restricting taxes otherwise allowable under subsection (e) of the AHTA, has been addressed by the DOT and the U.S. Court of appeals. Both bodies held that subsection (c) does not override subsection (b), but serves to limit taxes otherwise allowed under subsection (e)[2].

In 2007 Tinicum Township in Pennsylvania (Tinicum) passed an ordinance that would have imposed a "privilege fee" on aircraft landing at Philadelphia International Airport (Tinicum does not own or operate the airport, but some of its runways are within its borders). ATA, (Air Transport Association) and others filed a petition with DOT for a declaratory order that the privilege fee was prohibited by subsection (b) of the AHTA, among other reasons.[3]

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[1] The federal prohibition applies to the receipts from the carriage of passengers, property, and mail. See the definitions in 49 U.S.C. 40102.

[2] Subsection (e)(1) of the AHTA permits a state to levy or collect *"taxes (except those enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods and services"*.

[3] DOT has jurisdiction over the AHTA under 49 U.S.C. 40113(a).

Tinicum responded that the plain meaning of subsection (c) of the AHTA granted it the authority to impose the privilege fee on aircraft landing within its boundaries.

On March 19, 2008, DOT issued Declaratory Order 2008-3-18 invalidating Tinicum's ordinance. The Order stated:

> We find that 49 U.S.C. § 40116(c) is a preclusive, not authorizing, provision. It does not permit a political subdivision to impose additional taxes besides those expressly indicated in 49 U.S.C. § 40116(e)(1). Because the Township attempts to impose a landing fee – which is not within the permitted category of taxes nor permitted to be imposed by a non-airport proprietor – it may not do so under the cover of subsection (c) of § 40116. (DOT Order page 5, see also pages 23-31)

In addressing the "*Except as provided in subsection (c) of this section*" phrase of subsection (b) that Tinicum relied upon (as apparently does Nevada) the DOT stated "We find that the 1994 recodification of subsection (b) did not create any exceptions to the broad prohibitions on states and local jurisdictions from assessing, directly or indirectly, charges on . . . the gross receipts from air commerce or air transportation." (DOT Order page 32)

Tinicum appealed the DOT Order to the United States Court of Appeals for the Third Circuit. The Court issued its decision on September 14, 2009, upholding DOT's Order. *Township of Tinicum v. U.S. Dep't of Transportation*, 582 F. 3d 482 (3d Cir. 2009). (copy enclosed) The decision states:

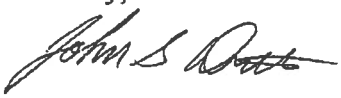
> Suppose a municipality enacts a tax that falls within one of the four enumerated categories in subsection (b). Suppose the tax relates to a commercial flight. And suppose that flight arrives in or departs from the taxing municipality. Does subsection (c) save the tax from the categorical ban? That is the question presented by Tinicum's petition for review, and we answer it in the negative. (*Tinicum*, page 8)

The Court also addressed Tinicum's argument concerning the "*Except as provided in subsection (c)*" language in subsection (b) and stated "we thus reject Tinicum's argument that subsection (b)'s plain language requires reading subsection (c) as a savings clause." (*Tinicum*, pages 13-14)

Finally, it does not matter that the business license is not called a gross receipts tax. The U.S. Supreme Court has ruled that the description and classification of a tax by a state is not determinative. The Court stated "The manner in which the state legislature has described and categorized [a tax] cannot mask the fact that the purpose and effect of the provision is to impose a levy on the gross receipts of an airline....A state statute that imposes such a tax is preempted." *Aloha Airlines v. Director of Taxation, 464 U.S. 7, 13-14 (1983).*

For all of the reasons above it is clear that Nevada cannot impose a gross receipts based tax, or fee, on revenues from air transportation, even if a flight lands or takes off in the state. Therefore we respectfully request that the Committee delete this section of the bill because of the reasons stated herein. If you have any questions I can be reached at 214-792-5505.

Sincerely,



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Airlines for America®
We Connect the World

David A. Berg
Senior Vice President, General
Counsel & Secretary

May 21, 2015

The Honorable Paul Anderson
Chair, Assembly Ways and Means Committee
401 S. Carson Street
Carson City, NV 89710

Senator Ben Kieckhefer
Chair, Senate Committee on Finance
401 S. Carson Street
Carson City, NV 89710

Re: Nevada Revenue Plan

Dear Chairman Anderson and Chairman Kieckhefer:

This letter follows up on my May 8, 2015 letter to Chairman Armstrong (Taxation Committee) in which I explained why a business license fee based on Nevada gross revenue violates federal law prohibiting state or local taxes and fees on the gross revenues of airlines from air commerce or transportation. Specifically, the Anti-Head Tax Act (AHTA), codified at 49 U.S.C. 40116(b), states as follows:

> (b) Prohibitions.—Except as provided in subsection (c) of this section and section 40117 of this title,[1] a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title may not levy or collect a tax, fee, head charge, or other charge 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.

The U.S. Department of Transportation and federal courts have construed this provision broadly to ensure that states and localities do not create a patchwork of burdensome taxes and fees. As the Senate report accompanying the Airport Acceleration Development Act (which ultimately included the AHTA) explained:

> S.38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year...It is significant that revenues which would be derived from some of these local or state head taxes would not be earmarked for airport development, but would be used to gain financial windfalls. The most blatant example of this is Philadelphia...with the funds going, unearmaked for airport development, into the cities' general fund...*Recent experience with the Philadelphia tax is indicative of the chaos which such local taxation works on the national air transportation*

[1] Subsection (c) and Section 40117 are not relevant here.

> *system*. Sen. Rept. No. 93-12, reprinted at 1973 U.S.C.C.A.N. 1446 (93rd Cong., Sess 1) (emphasis added).

The AHTA's prohibition on state or local taxation extends to ancillary services such as baggage services and on-board liquor and food. Taxing these revenues also would violate the AHTA. First, it is clear that liquor/food revenues result only from the "transportation of an individual traveling in air commerce" and therefore fall within subparagraph (b)(2) of the AHTA.[2] These revenues derive solely from air transportation. Second, bag fee revenue derives solely from the transportation of property and, therefore, a tax on bag fee revenue is a "charge on the sale of air transportation" within subparagraph (b)(3) of the AHTA.[3] Air transportation includes the transportation of property, including baggage.

Given the purpose of the AHTA to prevent states and localities from creating a chaotic system of taxes that go to general funds instead of airport development, and given the clear language of the AHTA itself, a revenue plan that contemplates taxing baggage, liquor or other air transportation-related charges violates federal law and is impermissible. For this reason I urge you to not include these items in Nevada's budget and revenue planning.

Very truly yours,

David A. Berg

[2] "Air commerce" includes "the operation of aircraft within the limits of a Federal airway." 49 U.S.C. 40102(a)(2).

[3] "Air transportation" is defined to include foreign air transportation and interstate air transportation, both of which are further defined to include "transportation of property." 49 U.S.C. 40102(a)(23), (24).

Airlines for America

David A. Berg
Senior Vice President, General
Counsel & Secretary

May 8, 2015

The Honorable Derek Armstrong
Chair, Assembly Taxation Committee
401 S. Carson Street
Carson City, NV 89710

Re: SB 252

Dear Chairman Armstrong:

Airlines for America (A4A) is the principal trade association of the U.S. airline industry, representing the leading U.S. passenger and cargo airlines. On behalf of our members[1], I write to express our opposition to Section 30 of SB 252 because it violates controlling federal law.

SB 252 imposes a new business license fee based on a business' Nevada gross revenue. The quarterly fees for the air transportation business category, based on Nevada gross revenue, are set forth in Section 30. Section 30 specifies 67 different increments of gross revenue and related fees.

SB 252 as applied to airlines is unlawful because it violates federal law prohibiting state or local taxes and fees on "the gross receipts from...air commerce or transportation." 49 U.S.C. 40116(b), also known as the Anti Head Tax Act (AHTA). SB 252's gross revenue business license fee does not fall within any of the exceptions enumerated in Section 40116.[2]

The U.S. Department of Transportation (DOT) has addressed the issue of taxes and fees imposed on airlines and other air transportation companies based on gross receipts and determined that they violate the AHTA, relying in part on U.S. Supreme Court precedent. *Aloha Airlines v. Director of Taxation,* 464 U.S. 7 (1983). The attached 2010 DOT letter, addressing a Maryland gross receipts tax applied to hot air balloon operations, lays out the legal principles at issue here and provides the reasoning why SB 252 as applied to airlines operating in Nevada by means of Section 30 would be deemed to violate the AHTA.

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[1] Alaska Airlines, Inc.; American Airlines Group (American Airlines and US Airways); Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

[2] Section 40116(e)(1) allows imposition of common taxes, and Section 40116(e)(2) allows reasonable rental charges, landing fees and related airport charges.

For this reason, we oppose SB 252 as applied to airlines and respectfully request that Section 30 be deleted.

Very truly yours,

David A. Berg

U.S. Department
of Transportation

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

JAN 29 2010

Mr. Matthew Frank Lidinsky
Up Up Away Hot Air Balloon Co.
10 Manor Knoll Court
Baldwin, MD 21013-9582

Re: Question on Taxation of Hot Air Balloon Flights

Dear Mr. Lidinsky:

The General Counsel has asked me to respond 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 a State of Maryland admission and amusement (A&A) tax assessed on the gross receipts from sales of your company's hot air balloon rides. You believe that under the AHTA, the A&A tax, which is levied by the counties of Baltimore and Howard, cannot apply to Up Up Away because your hot air balloons are licensed by the Federal Aviation Administration (FAA), piloted by a certificated airman, operated in air commerce, and engaged in the carriage of passengers.

We take this opportunity to provide you with general guidance that the AHTA would preempt a state tax on the gross receipts received for hot air balloon operations. However, we do not feel it appropriate to issue an opinion on the merits of your particular administrative proceeding before the State of Maryland. We are not privy to all the facts in the proceeding, and so offer this guidance, with a copy to the state's Comptroller.

The Department is charged with administering the AHTA. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 366-67 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws, including the AHTA."). The AHTA prohibits a state or political subdivision (such as a county) from levying or collecting a:

> tax, fee, head charge, or other charge [directly or indirectly] on -- an individual traveling in air commerce; . . . or the gross receipts derived from that air commerce or transportation. 49 U.S.C. § 40116(b)(1), (4).

Without addressing the specifics of the Maryland A&A tax, we can say generally that an amusement tax imposed by a locality pursuant to state law on the gross receipts of a hot air balloon operator carrying passengers in air commerce would be preempted by the AHTA.

The Supreme Court has stated that the classification of the tax is not determinative under the AHTA; rather, if the tax -- even if classified as other than a "gross receipts" tax -- is measured by gross receipts, the purpose and effect of the tax would be to impose a levy on the gross receipts. Accordingly, it would be preempted as a direct or indirect gross receipts tax. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 13-14 (1983).

A passenger-carrying, piloted and untethered hot air balloon operator carries individuals who are "traveling" under the AHTA. The FAA has determined that hot air balloons "travel" while flying. *See Balloon Flying Handbook* (Handbook) FAA-H-8083-11A (DOT/FAA, 2008) (www.faa.gov/library/manuals/aircraft/media/faa-h-8083-11.pdf). The FAA explains that hot air balloons launch, then "travel," then land. "The best launch site is of little use if there are no appropriate landing sites downwind." *Handbook*, p. 6-8. "A balloon is distinct from other aircraft in that it travels by moving with the wind and cannot be propelled through the air in a controlled manner." *Id.* at 2-2. "The pilot should always face the direction of travel." *Id.* at 7-11.

It may be contended that hot air balloon passengers in untethered, piloted balloons do not "travel" within the meaning of the AHTA, based on an argument that the dominant purpose of a hot air balloon ride is not to go from one specific place to another specific place, but rather to provide entertainment, such as that provided by sightseeing companies. However, the AHTA nowhere mentions the purpose of a flight. Nor does it limit the definition of "travel" by specifying that one can only "travel" from one specific place to another. We decline to interpret the word "travel" as including any such limitations not found in the statute.

Untethered hot air balloons also operate in "air commerce." 49 U.S.C. § 40102(a)(3). "Air commerce" includes not only "foreign or interstate air commerce," but also "the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce." 49 U.S.C. § 40102(a)(3); 14 CFR § 1.1. A hot air balloon is an "aircraft" under the definition in the federal aviation statutes: "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. § 40102(a)(6). Additionally, the FAA expressly defines a "balloon" as an aircraft, namely as a "lighter than air aircraft that sustains flight through the use of either gas buoyancy or an airborne heater." 14 CFR § 1.1. Further, a hot air balloon can have an FAA-issued standard airworthiness certificate, and a hot air balloon pilot can be certified under the lighter-than-air category rating with a balloon class rating, under 14 CFR part 61. Moreover, there is no dispute that hot air balloons *may* "directly affect [or] endanger safety in" interstate commerce, and the courts have made it clear that the FAA may regulate flight activities that have the "potential" to endanger safety in interstate or overseas air commerce. *See Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1279-1280 (10th Cir. 1989). An aircraft operator need not be a commercial operator, or operate in interstate air transportation, in order to be regulated under the FAA's "air commerce" jurisdiction. *See Gorman v. NTSB and FAA*, 558 F.3d 580, 591 (D.C. Cir. 2009).

Finally, we note that an apparent savings clause to the AHTA prohibition on state or local gross receipts tax, namely 49 U.S.C. Section 40116(c), would not authorize a levy of a tax on a hot air balloon operator's gross receipts, even where the balloon takes off or lands within the state.[1] The subsection does not provide an exception for a tax on the flight of a commercial aircraft; it is not a "savings clause" from the categorical ban on flight-related taxes in the AHTA. *Township of Tinicum v. U.S. Dep't of Transportation*, 582 F. 3d 482 (3d Cir. 2009). The *Tinicum* decision denied the petition of Tinicum Township to review a DOT order invalidating, under the AHTA, a township tax on arriving or departing flights at Philadelphia International Airport, part of which is located within Tinicum's boundaries. DOT Order 2008-3-8 (March 24, 2008). The Court of Appeals held that Section 40116(c) merely establishes the state geographical nexus as a minimum requirement that must be met for a state or locality to impose a *permitted* tax relating to an aircraft flight or activity, but does not itself grant the permission to impose any tax or change the prohibition against taxes based on the *gross receipts* from passengers traveling in air commerce. *See also Virginia Dep't of Revenue, PD 2005-50* (2005 WL 1695963, April 8, 2005) (AHTA preempts a city business, professional or occupational license tax, based on gross receipts, to be imposed on a medical air transport company; subsection (c) "specifies the conditions that must be met prior to a state or locality imposing a tax related to a flight of a commercial aircraft or an activity or service on the aircraft. It does not, however, grant a state or a locality the permission to impose any type of tax on such business activity.") Consequently, a state may not impose a tax otherwise prohibited by 49 U.S.C. Section 40116(b) on passenger flights in air commerce simply because the flight lands or takes off within that state. Nor may a state or county tax the gross receipts of a hot air balloon operator merely because the aircraft operator lands or takes off within the state.

While not determinative, tax commissioners in two other states have held that the AHTA prohibits the state or local taxation of gross receipts from hot air balloon operations that carry passengers in air commerce. *See* New Mexico Rev. Ruling 422-98-1 (1998),

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[1] The pertinent text of the AHTA reads:

(b) PROHIBITIONS.--Except as provided in subsection (c) of this section . . . , a State [and] a political subdivision of a State . . . may not levy or collect a tax, fee, head charge, or other charge 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.

(c) AIRCRAFT TAKING OFF OR LANDING IN STATE.--A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

* * * *

(e) OTHER ALLOWABLE TAXES AND CHARGES.--Except as provided in subsection (d) of this section [identifying taxes found to impose unreasonable burdens and discrimination against interstate commerce], a State or political subdivision of a State may levy or collect--

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and

(2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

www.tax.state.nm.us/ruling/toc.htm; Arizona Dept. of Revenue, Transaction Privilege Tax Ruling TPR 92-1 (1992), www.azdor.gov/LegalResearch/Rulings.aspx. Our analysis of the application of the AHTA to gross receipts tax on air commerce is also consistent with prior judicial decisions, as we describe more fully below.

In 1983, the U.S. Supreme Court had occasion to rule on whether the State of Hawaii's four percent gross income tax on the airline businesses of Aloha and Hawaiian Airlines was preempted by the AHTA. In *Aloha Airlines*, the Court invalidated the Hawaii tax, finding that the AHTA's "plain language" preempts gross receipts taxes on the sale of air transportation or the "carriage of persons in air commerce," and that the Hawaii law imposed a state tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce. The Court further found that Hawaii's categorization of the tax as a "property" tax did not mask the fact that the law imposed a levy on the gross receipts of airlines and, because it was measured by gross receipts, it constituted at least an "indirect" tax on their gross receipts. (The Court quoted from the original version of the AHTA, enacted in 1973 and recodified, without substantive change, in 1994 in its current version. Pub. L. No. 103-272, 108 Stat. 745 (1994).

The *Aloha* Court cited with approval to an earlier Arizona state court decision, which found a state privilege tax on the gross receipts of Cochise Airline's intrastate operations invalid under the AHTA. In *State of Arizona v. Cochise Airlines*, 626 P.2d 596 (Ariz. 1980), the court found the AHTA to cover gross receipts derived from the carriage of persons traveling in air commerce, thereby protecting the gross receipts of an intrastate airline from the state tax. The court rejected, as a "self-contradictory" reading of the AHTA, Arizona's defense of the tax as a permitted "sales" tax under the AHTA. (The AHTA permits a state or subdivision to levy or collect "taxes, . . . including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.")

State courts have also held that the AHTA preempts state or local license, business and franchise taxes on airlines measured by their gross receipts. *See, e.g., City of College Park v. Atlantic Southeastern Airlines, Inc.*, 391 S.E.2d 460 (Ga. App. 1990) (city license tax based on an airline's gross receipts); *Republic Airlines v. Dept. of Treasury*, 427 N.W.2d 182 (Mich. App. 1988) (state Single Business Tax measured by passenger revenue miles operated within the state); *Air Transport Association of America v. New York State Dept. of Taxation and Finance*, 458 N.Y.S.2d 709 (N.Y.A.D. 3), *aff'd*, 453 N.E.2d 319 (N.Y.), *cert. denied*, 464 U.S. 960 (1983) (state franchise tax measured as a percentage of gross receipts).

To be sure, the AHTA permits a state or locality to impose other taxes such as "property taxes, net income taxes, and franchise taxes." 49 U.S.C. § 40116(e). *See Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (upholding a state sales tax on an airline's purchase of aviation fuel); *see also Aloha Airlines*, 464 U.S. 7 at 11, n. 6. For example, a local entity may impose a property tax on airlines when the tax rate is not based on gross receipts. *United Air Lines, Inc. v. County of San Diego*, 2 Cal. Rptr. 2d 212 (Cal. App. 1991).

We hope that you find this discussion of the AHTA informative. Please be advised, however, that this is only guidance and does not constitute a final action of the Department on the matters you raised.

Should you have any questions, please feel free to contact me at 202-366-9151 or Nancy Kessler, Senior Attorney, at 202-366-9301. Thank you.

Sincerely,

Ronald Jackson

Ronald Jackson

cc: The Honorable Peter Franchot
Comptroller of Maryland
P.O. Box 466
Annapolis, MD 21404-0466