

HB

63

Alaska State Legislature

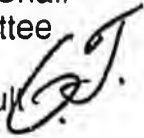
REPRESENTATIVE
GENE THERRIALT
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Fairbanks, Alaska 99701
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While in Session
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Juneau, Alaska
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House Of Representatives

House District 33

MEMORANDUM

DATE: January 27, 1997
TO: Representative Bill Williams, Chair
House Transportation Committee
FROM: Representative Gene Therriault 

SUBJECT: Scheduling of HB 63

I respectfully request House Bill 63 , "An Act extending the motor fuel tax exemption for fuel sold for use in jet propulsion aircraft to fuel used in those aircraft for flights that continue from a foreign country; and providing for an effective date" be scheduled for a hearing in the House Transportation Committee.

Attached you will find a copy of HB 63 that I am submitting for your consideration.

Since 1995, 37.6 million gallons of tax exempt foreign-produced fuel has been brought into Alaska for use in foreign flights. Without new legislation, it is anticipated that the practice of using the foreign trade zone (FTZ) to import fuel will increase as airlines move to purchase tax exempt fuel for use in foreign flights.

HB 63 will exempt all jet fuel used in international flights. This will provide a level playing field to Alaskan oil producers and should stimulate growth for this Alaskan resource.

Attachments include:
1. House Bill 63
2. Sponsor Statement
3. Sectional Analysis

I appreciate your consideration of my request.

attachments (3)

Alaska State Legislature

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House District 33

HB 63

Extending the motor fuel tax exemption of fuel sold for use in jet propulsion aircraft to fuel used in those aircraft for flights that continue from a foreign country

SPONSOR:

Representative Gene Therriault

A handwritten signature in dark ink, appearing to be "GT", written over the printed name of the sponsor.

SPONSOR STATEMENT:

House Bill 63 extends the motor fuel tax exemption to include fuel used in aircraft for flights that continue from a foreign country. Currently, the state of Alaska provides a tax exemption for fuel used only in flights to foreign countries. Federal laws preempt state taxation of imported aviation fuel transported through a foreign trade zone (FTZ) for use in aircraft during foreign flights. The federal definition of "foreign flight" includes flights originating from and flights continuing to a foreign country. As a result, jet fuel produced in Alaska is taxed 3.2 cents per gallon more than similar fuel produced at foreign refineries.

Two tankers filled with 20.7 million gallons of tax exempt foreign-produced fuel were brought into Alaska during 1995. Last year just under 38 million gallons were imported into the FTZ. Without new legislation, it is anticipated that the practice of using the FTZ to import fuel will increase as airlines move to purchase the tax exempt fuel for use in foreign flights.

HB 63 is needed to provide a level playing field to Alaskan producers by allowing the tax exemption for all fuel used in foreign flights.

Alaska State Legislature

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House Of Representatives

House District 33

HB 63 0-LS0262\A 1/27/97

Expands the existing exemption from state taxation (AS 43.40.100(2)) of jet fuel sold for use by aircraft flying to foreign destinations to also apply to jet fuel use by flights of foreign origination continuing on to a U.S. destination.

SPONSOR: Representative Gene Therriault

Sectional Analysis.

Section 1: Amends AS 43.40.100(2)(B) to include fuel sold for use by jet propulsion aircraft operating in flights that continue from foreign countries.

Replaces the word (WHICH) with the word that in AS 43.40.100(2)(F).

Expands the description (KW) to its complete spelling of kilowatts in AS.43.40.100(2)(L).

Section 2: Establishes an effective date of July 1, 1997.

**Alaska Department of Revenue
Income and Excise Audit Division**

Summary of Bunker Fuel Sales
Inception through September 30, 1996

(Fiscal year ending September 30)

<i>Fiscal Year</i>	<i>Gallons Sold</i>	<i>Refund Threshold</i>	<i>Refundable Gallons</i>	<i>Refund Rate</i>	<i>Refund Issued</i>
FY 1994	3,264,732	4,100,000	N/A	N/A	N/A
FY 1995	4,399,116	4,100,000	299,116	0.04	\$ 11,965
FY 1996	99,553	4,100,000	N/A	N/A	N/A

The 1994 legislature enacted legislation (Ch 42 SLA 94) establishing a different tax levy on residual (bunker) fuel oil. The legislation provides that for each year ending September 30, the tax levied on bunker fuel is 1¢/gallon after revenue derived from sales of bunker fuel at the normal marine fuel tax rate (5¢/gallon) exceeds \$205,000 (4,100,000 gallons). The legislation authorizes Department of Revenue to issue a refund to persons who remitted marine fuel tax on bunker fuel at the 5¢/gallon rate; the refund being for the difference between 5¢ and 1¢ per gallon rate once the \$205,000 threshold is reached.

The above legislation took effect May 13, 1994 and sunsets June 30, 1998.



H.C. PRICE CO.

301 W. Northern Lights Blvd., Suite 300
Anchorage, Alaska 99503
(907) 278-4400 • Fax (907) 278-3255

H.C. PRICE CO. POSITION PAPER ON HB 63

H.C. Price Co. supports HB 63 and urges legislative representatives to pass it, thereby repealing the motor fuel tax on jet fuel sales on all foreign flights. Passage of HB 63 will accomplish the following:

1. Encourage expansion of in-state refining capacity and promote Alaskan refined fuel instead of foreign refined fuel. This is a value added approach that will increase Alaskan jobs and favor Alaskan crude oil.
2. Protect maximum shipping on the Alaska Railroad of Alaskan refined jet fuel.
3. Send a signal to all air carriers that Alaska wants to be the premier stop in shipment of international air cargo and also a stop for international passenger traffic.
4. Allow natural market forces, not FTZ (free trade zone) tax favoritism, to determine the source of jet fuel purchases. This approach provides a level playing field for in-state refiners.

H.C. Price Co. supports the prompt passage of HB 63 which would eliminate the motor fuel tax on the sale of jet fuel for international flights. This tax exemption already exists in many localities where there are airports aggressively competing for Alaska's cargo and passenger traffic.

H.C. Price Co.

Wes Nason, VP and General Manager

CONAM CONSTRUCTION COMPANY

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Anchorage, Alaska 99503

(907) 278-6600 • FAX (907) 278-3255



CONAM CONSTRUCTION CO. POSITION PAPER ON HB 63

CONAM Construction Company supports HB 63 and urges legislative representatives to pass it, thereby repealing the motor fuel tax on jet fuel sales on all foreign flights. Passage of HB 63 will accomplish the following:

1. Encourage expansion of in-state refining capacity and promote Alaskan refined fuel instead of foreign refined fuel. This is a value added approach that will increase Alaskan jobs and favor Alaskan crude oil.
2. Protect maximum shipping on the Alaska Railroad of Alaskan refined jet fuel.
3. Send a signal to all air carriers that Alaska wants to be the premier stop in shipment of international air cargo and also a stop for international passenger traffic.
4. Allow natural market forces, not FTZ (free trade zone) tax favoritism, to determine the source of jet fuel purchases. This approach provides a level playing field for in-state refiners.

CONAM Construction Company supports the prompt passage of HB 63 which would eliminate the motor fuel tax on the sale of jet fuel for international flights. This tax exemption already exists in many localities where there are airports aggressively competing for Alaska's cargo and passenger traffic.

CONAM Construction Co.

A handwritten signature in black ink, appearing to read "Bob Stunson".

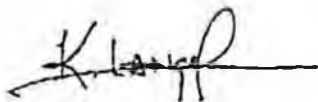
Bob Stunson, VP and General Manager

POSITION PAPER ON HB 63

As a member of the Alaskan business community, I support HB 63 and urge legislative representatives to pass it, thereby repealing the motor fuel tax on jet fuel sales on all foreign flights. Passage of HB 63 will accomplish the following:

1. Encourage expansion of in-state refining capacity and promote Alaskan refined fuel instead of foreign refined fuel. This is a value added approach that will increase Alaskan jobs and favor Alaskan crude oil.
2. Protect maximum shipping on the Alaska Railroad of Alaskan refined jet fuel.
3. Send a signal to all air carriers that Alaska wants to be the premier stop in shipment of international air cargo and also a stop for international passenger traffic.
4. Allow natural market forces, not FTZ (free trade zone) tax favoritism, to determine the source of jet fuel purchases. This approach provides a level playing field for in-state refiners.

I support the prompt passage of HB 63 which would eliminate the motor fuel tax on the sale of jet fuel for international flights. This tax exemption already exists in many localities where there are airports aggressively competing for Alaska's cargo and passenger traffic.



Ken Langel
Administrative Manager
H.C. Price Co., Anchorage, Alaska

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 15, 1997

SUBJECT: House Bill 63, expanding an exemption from the state motor fuel tax for sales of jet fuel: dispute between state agency and air carriers' representative as to case law applicable (Work Order No. 0-LS0262\A)

TO: Representative Bill Williams, Chair
House Transportation Committee
ATTN: Peter Ecklund

FROM: Jack Chenoweth
Legislative Counsel 

Your communication to Tara Cook concerning the Alaska Air Carriers Association's February 28, 1996, letter and supporting analysis to Representatives Mark Hanley and Gene Therriault was directed to me for preparation of a response.

In its letter and supporting analysis, the Association challenges an assertion by the Department of Revenue to the effect that the state may not, under the federal Tariff Act of 1930 and the federal Foreign Trade Zones Act, levy a tax on fuel imported into a foreign trade zone and eventually used in foreign commerce. Because it may not levy the tax, the department suggests that the state should amend its tax law to extend the existing jet fuel exemption from the tax to both foreign and domestic jet fuel used in continuing flights.

The positions advanced by the Alaska Air Carriers Association and the Department of Revenue are in direct conflict.

The Association relies on its reading of Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1, 91 L.Ed.2d 1, 106 S.Ct. 2369 (1986), under which the United States Supreme Court upheld levy and collection of a nondiscriminatory state sales tax on aviation fuel sales to carriers in international commerce against a claim that the tax violated the commerce clause of the United States Constitution. Given evidence in various international documents showing federal government agreement in the taxation of the sale of fuel by political subdivisions of countries, the Court found that the Congress had not determined to occupy the field of international aviation thereby precluding any state regulation, and that

Representative Bill Williams

February 15, 1997

Page 2

Congress had expressly permitted states to exercise authority to impose taxes on aspects of air travel.

The Department of Revenue bases its argument on an earlier decision, McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 84 L.Ed. 840, 60 S.Ct. 664 (1940), wherein the United States Supreme Court determined that the Tariff Act of 1930 barred levy and collection of a municipal sales tax on fuel oil manufactured from crude oil imported into a bonded warehouse and used in vessels in foreign commerce as ships' stores:

. . . [T]he exemption [from taxes] and drawback provisions were designed, among other purposes, to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stores. In furtherance of that end Congress provided for the segregation of the imported merchandise from the mass of goods within the state, prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation. It is evident that the purpose of the congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the permitted import duty. The congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships's stores and shall not become subject to the taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the congressional regulation of the commerce.

McGoldrick, 309 U.S. at 428 - 429, 84 L.Ed. at 848 - 849 (citations omitted; emphasis added).

Both sides acknowledge that neither decision on which each relies addressed the status of goods held in a foreign trade zone.

*

The issue raised in both Wardair and McGoldrick involves "preemption." When Congress chooses to exercise a power, conflicting state legislation may be challenged by application of the "preemption doctrine."

Representative Bill Williams

February 15, 1997

Page 3

Any state law is potentially subject to preemption by federal law under any or all of three possible theories. First, state regulations in areas left unregulated by Congress may nevertheless be found to violate the Commerce Clause, article I, sec. 8, Constitution of the United States. This authority, sometimes referred to as the "dormant commerce clause," derives from the Constitution's negative implications. Second, when Congress legislates within a legitimate sphere of its authority, then, under article VI, clause 2, Constitution of the United States, the Supremacy Clause directs that the federal law overrides or preempts when Congress has explicitly preempted state regulation in the same area.

But Congress may also exercise a power without specifying that its action serves the purpose of preempting state regulation. When that happens, courts may find that state lawmaking in the same subject matter area is outlawed by implication. In cases of actual or apparent conflict, the courts are asked to ascertain Congressional intent and to determine whether the state law is to be invalidated because the state law impermissibly interferes with the attainment of Congressional objectives. Conflict preemption requires that a court determine whether the application of the state law would conflict with one or more purposes of the federal law. The courts may also be asked to determine whether the federal enactment is part of a pervasive regulatory scheme under which Congress does not want state law to apply even if state law does not actually conflict with the federal regulatory effort.

The general principles of contemporary preemption analysis derive in the first instance from Pennsylvania v. Nelson, 350 U.S. 497, 100 L.Ed. 640, 76 S.Ct. 477 (1956). Procedurally, the first inquiry to be made concerns whether Congress intended to preempt state law. In some few instances, Congressional intent may be explicit in the statutory language. Absent explicit preemptory language, a court is generally required to make an inquiry to ascertain the intended pervasiveness of the federal regulatory effort. Most commonly, however, a federal statute impliedly preempts state regulation. In its Pacific Gas & Electric decision, the United States Supreme Court summarized the law concerning implied preemption as follows:

Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose.'" Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Representative Bill Williams

February 15, 1997

Page 4

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n., 461 U.S. 190, at 203 - 204, 75 L.Ed.2d 752, at 765, 103 S. Ct. 1713 (1983). Thus, implied preemption requires the court to ascertain whether federal occupation of the field is pervasive, whether the state and federal regulations conflict, or whether the state regulatory effort frustrates Congressional objectives. In the development of the case law decisions during the intervening four decades since Pennsylvania v. Nelson, the courts have generally concentrated on the task of trying to determine whether the state law that is said to be in conflict with the federal initiative facilitates or impedes the objectives of the federal effort.

State-imposed taxes are subject to preemption analysis in the same manner as are other types of state laws.

*

To promote foreign commerce in the United States, Congress has provided by law for several classes of facilities that are exempt from payment of federal customs. The most common of these facilities are customs-bonded warehouses and foreign trade zones. Customs-bonded warehouses and foreign trade zones significantly benefit from the alleviation or deferral of federal customs duties. Another substantial benefit to the activities associated with them is the exemption of the imported goods from the taxing authority of the state and local governments in which they are located. That issue, whether this state may impose an excise tax on the aviation fuel imported into a foreign trade zone and held there for use in flights involving foreign commerce, is raised in the disagreement between the parties.

Two cases illustrate differences in preemption analysis conclusions as applied to state and local taxation. In Xerox Corp. v. County of Harris, Texas, 459 U.S. 145, 74 L.Ed.2d 323, 103 S.Ct. 523 (1982), the United States Supreme Court, finding a Congressional purpose in promoting goods for export and encouraging the use of American ports, determined that because local ad valorem taxes would financially penalize the federal purpose, they would be a hindrance to that initiative. Consequently, the court disallowed imposition of the county's tax on copy machines manufactured abroad, imported and stored in custom-bonded warehouses, and destined for foreign markets. Some four years later, a different result was reached in R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 93 L.Ed.2d 449, 107 S.Ct. 499 (1985). In that decision, local ad valorem taxes on tobacco in customs-bonded warehouses were allowed, the United States Supreme Court finding that federal customs laws did not preempt the local levy on tobacco destined for manufacture for domestic markets.

Congress' purpose in creating foreign trade zones is not altogether different than the purpose of bonded warehouses that were identified by the Court in McGoldrick. The purpose of the Foreign Trade Zones Act is to expedite and encourage foreign commerce involving the transshipment of foreign goods through the United States for re-export and ultimate

Representative Bill Williams

February 15, 1997

Page 5

consumption abroad. 1950 U.S. Code Congressional Service, pp. 2533 - 2534; New York Foreign Trade Zone Operators, Inc. v. State Liquor Authority, 34 N.E.2d 316 (N.Y. 1941). A foreign trade zone is defined as an isolated area within or adjacent to a port of entry where foreign merchandise may be landed, stored, repacked, sorted, mixed, or otherwise manipulated with a minimum of customs control. Goods warehoused or held in a foreign trade zone for use in foreign commerce are free of customs bond.

The Eleventh Circuit Court of Appeals has considered a Florida effort to enforce the state's Drug and Cosmetic Act on warehousing activities occurring within the Port Everglades foreign trade zone. In 3M Health Care, Ltd. v. Grant, 908 F.2d 918 (11th Cir. 1990), the appellate court wrestled with the pre-emption issue as it might apply to the state's exercise of its police power under its Drug and Cosmetic Act. It determined that the Foreign Trade Zones Act neither explicitly preempted state police power nor did the Act's legislative history indicate that the Congress intended to implicitly preempt state law to the extent that it conflicted with federal regulation. Still, the appellate court panel considering the appeal found that an implied preemption operated:

... Though the Foreign Trade Zones Act says nothing about pharmaceuticals, that does not mean that Florida's Drug & Cosmetic Act as applied will not create a conflict with the Foreign Trade Zones Act which might require preemption of Florida law.

"Such a conflict will be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hillsborough County v. Automated Medical Laboratories, Inc., [471 U.S. 707] at 713 [105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985)] (quoting Hines v. Davidowitz, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941))." In Taylor [v. General Motors Corp.], 875 F.2d 816 (11th Cir. 1989), cert. den., 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990)], this court described it thusly: federal law preempts state law when state law creates a "potential frustration of the administrative scheme provided by [federal law]," Howard v. Uniroyal, Inc., 719 F.2d 1552, 1562 (11th Cir. 1983), or when the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." International Paper Co. v. Ouelette, 479 U.S. 481, 494, 107 S.Ct. 805, 813, 93 L.Ed.2d 883 (1987).

Here the goal of the Foreign Trade Zones Act is straightforward--to facilitate the use of U.S. ports for the transshipment of goods in foreign commerce. The use of our ports for the warehousing of goods in international trade was considered an endeavor worthwhile enough to exempt such goods from customs duties and thus to make use of our ports as easy as possible for transshipment. The zones are to operate with few formalities to encourage the use of our ports. While the exemption from customs duties is

Representative Bill Williams

February 15, 1997

Page 6

likely the singlemost attractive feature that so encourages use of the [foreign trade] zones, it alone cannot ensure the use of the zones as Congress intended if the states are free to encumber zone operations with multifarious regulations over goods in which they have no interest. To the extent that Florida law would encumber the ease of transshipment through the zones by requiring unnecessary regulation of goods in which it has no interest, it frustrates the goal of the Foreign Trade Zones Act.

3M Health Care, Ltd. v. Grant, 908 F.2d at 922.

The Circuit Court ruled against the state's regulatory effort:

Unless and until [the company seeking relief from the Florida law] also brings goods into the commerce of Florida, [the state] cannot regulate [the company's] warehousing of pharmaceuticals without unnecessarily complicating the ease with which Congress intended foreign trade zones to be used for transshipment and without unnecessarily contravening congressional intent.

3M Health Care, Ltd. v. Grant, 908 F.2d 918, 922. The Eleventh Circuit's decision was cognizant of the distinction that had been drawn by the United States Supreme Court in the Xerox (local taxes on copy machines stored in custom-bonded warehouses and destined for foreign markets were preempted by federal customs laws) and R.J. Reynolds (local taxes on tobacco in customs-bonded warehouses were allowed when the Court found that federal customs laws did not preempt the local levy on tobacco destined for manufacture for domestic markets) decisions and added, in an accompanying footnote, that "we believe Congress' purposes in creating foreign trade zones would be disserved by the imposition of Florida's Drug & Cosmetic Act, regulations, and operation on [the company's] transshipment of pharmaceuticals through the [foreign trade] zone."

I acknowledge that concerns about the state's exercise of its regulatory authority, as in the 3M Health Care litigation, and questions about a state's ability to levy and collect a tax raise substantively different issues. Historically, when Congress legislates in fields traditionally occupied by the states, usually including the police power regulation associated with matters of public health and public safety, a presumption exists that state regulation is **not** preempted. The willingness of the courts to entertain this presumption with respect to the exercise of a state's police power apparently does not operate when the question involves a matter of state taxation.

Preemption questions are difficult to resolve because each case is based on singular circumstances. Until a court has rendered a conclusive decision, people will differ as to whether this state's imposition of a tax on the aviation fuel would be found to stand as an obstacle to the purposes and objectives of the Congress under the Foreign Trade Zones Act.

Representative Bill Williams
February 15, 1997
Page 7

I do not mean to overlook the Air Carriers Association's response on the question of an implied preemption, and particularly the Association's assertion that preemption should not be found unless Congress "has unmistakably so ordained."

Nonetheless, in the absence of an unambiguous expression or indication in the language of the Act of Congress that federal preemption is or is not intended, the courts are prepared to evaluate cases and may find preemption on the basis of the court's interpretation of the intent or purpose of the law. I believe it more probable than not that the principles described would be applied to resolve the issue.

Congress has exempted goods in foreign trade zones from state and local ad valorem, or property, taxation. The Supreme Court's decision in Xerox exempts all goods in a customs-bonded warehouse destined for foreign commerce from state and local taxation. Applying a preemption analysis in its 3M Health Care analysis, the Eleventh Circuit indicated that it would disallow exercise of state public health regulation within a foreign trade zone. From a reading of these decisions, I conclude that it is more probable than not that a federal court, using preemption analysis, would not hesitate to invalidate state taxes such as the excise tax on jet fuel imported into a foreign trade zone finding that the levy and collection of the tax would thwart or discourage the benefits that the federal effort to stimulate business in the foreign trade zones is seeking to encourage.

For that reason, I would conclude that the Department of Revenue presents the position that, more likely than not, would be sustained by a court if the question were eventually litigated. While there is merit in some of the argument offered by the Air Carriers Association, I don't find myself in agreement with the Association on its analysis of the preemption issue. Instead, the weight of the case decisions suggests to me that the state may not levy and collect its motor fuel tax on the jet fuel imported into a foreign trade zone for use in foreign commerce.

If this memo or the issue it addresses presents questions, please contact me.

JBC:lmb:plm
97-029.lmb

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

P.O. BOX 110400
JUNEAU, ALASKA 99811-0400
TELEPHONE: (907) 465-2300
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February 19, 1997

The Honorable Bill Williams
Alaska State Legislature
State Capital, Room 424
Juneau, Alaska 99801

Dear Chairman Williams:

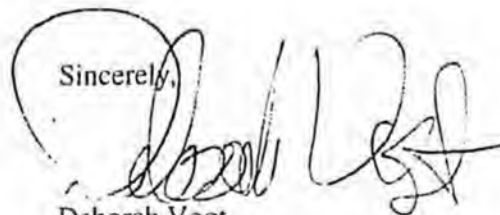
You have asked us to respond to issues raised by Ms. Kim Ross, Executive Director of the Alaska Air Carriers Association, during the House Transportation hearing Wednesday, February 12. We have reviewed the written transcript of her testimony, and found that there is one item we should respond to.

The issue is whether the State of Alaska has the legal authority to collect an aviation fuel tax on fuel brought legally into a Foreign Trade Zone. Ms. Ross believes that we can tax fuel run through an FTZ; her testimony states: "if the Department of Revenue were doing its job, the claimed problem disappears entirely. It has been one year now; and no one - not DOR and not the Alaska refineries - has refuted our analysis on this point."

Last year, in legislative testimony and in discussions with all groups involved in this issue, DOR explained its disagreement with AACA's analysis. Our research indicates that the state's authority to tax fuel appropriately imported into an FTZ and used in foreign commerce is preempted by federal law. On October 10, 1996 DOR sent a letter to Representative Hanley explaining our position and refuting AACA's analysis. A copy of that letter is enclosed. On February 15, 1996 Legislative Counsel provided a written opinion supporting the position taken by DOR. We believe we are doing our job, and would be happy to discuss this issue with you.

Thanks for your interest in this issue.

Sincerely,



Deborah Vogt
Deputy Commissioner

Enclosure

cc: Kim Ross, Executive Director
Alaska Air Carriers Association

97-014

HB03COR1.WPD

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER

P.O. BOX 110400
JUNEAU, ALASKA 99811-0400
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October 10, 1996

The Honorable Mark Hanley
Alaska State Legislature
716 West 4th Avenue, Suite 300
Anchorage, AK 99501

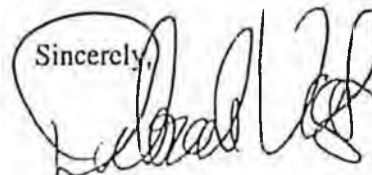
Dear Representative Hanley,

We have concluded our review of the Alaska Air Carriers Association's (AACA) analysis of the state's ability to tax aviation jet fuel sold for use in foreign commerce. The issue they raise concerns whether the state's motor fuel tax is preempted when jet fuel is entered into a Foreign Trade Zone (FTZ) and used in foreign trade. The AACA argues that Wardair Canada Inc. v. Florida Department of Revenue, 106 S.Ct. 2369 (1986), rather than McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 664 (1940) controls. Wardair holds that a state tax on carriers engaged in foreign commerce does not violate the Commerce Clause and is not preempted by the Federal Aviation Act. McGoldrick holds that a state tax is preempted (by the Tariff Act of 1930) on FTZ fuel (or customs-bonded fuel or fuel entered into a customs-bonded warehouse) used in foreign commerce.

We continue to conclude that the Tariff Act of 1930 precludes state taxation of fuel entered into an FTZ and used in foreign commerce. The Wardair case did not involve FTZ (or bonded) fuel. We believe that McGoldrick is still good law, as evidenced by Xerox Corp. v. County of Harris Texas, 103 S.Ct. 523 (1982). While there are some differences between the McGoldrick situation and the situation here, we believe that they are, as was also the case in the Xerox case, "distinctions without a legal difference." 103 S.Ct. At 528.

The Wardair case does, however, raise a point that the legislature may want to consider. Alaska statutes currently exempt aviation fuel sold for use in flights to foreign countries from the Motor Fuel Tax. See AS 43.40.100(2)(B). The Wardair case clearly holds that Alaska is not required to do this.

I'm confident that the conclusions reached by our staff are correct, and that we must continue to exempt fuel used in foreign commerce that is run through the FTZ. Thanks for the opportunity to review these arguments. Let me know if there is anything further we can do, or if you would like further detail on these cases.

Sincerely,


Deborah Vogt
Deputy Commissioner

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR
3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

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PHONE: (907) 465-3900

February 24, 1997

The Honorable Bill Williams
Chair, House Transportation Committee
State Capitol, Room 424
Juneau AK 99801

Dear Representative Williams:

We are providing this letter in response to testimony offered by Kim Ross, Executive Director of the Alaska Air Carriers Association, on February 12 and February 17, 1997. This correspondence addresses the points in the testimony relating to the Department of Transportation and Public Facilities (DOT&PF).

The issue of tax revenue loss through the Anchorage Foreign Trade Zone (FTZ) arose when foreign aviation jet fuel began coming into Anchorage International Airport through a designated FTZ. A FTZ provides designated locations within the state, free from federal excise taxes, where goods can be imported and value added. These goods can then be shipped overseas tax free, or enter US soil and then be subject to federal excise tax. The establishment of the Anchorage FTZ has resulted in foreign tax-free jet fuel being brought into Anchorage to fuel aircraft flying from foreign origination points. This places Alaska jet fuel suppliers at a distinct disadvantage.

We believe that HB 63 is a positive step toward leveling the playing field for Alaska suppliers of jet fuel. The loss in tax revenue is compensated in benefits to Alaska's economy through retention of local jobs and potential for increased business at the international airports. The proposed legislation will provide equal treatment to all carriers servicing foreign destinations.

It is hypothetically possible to construct a scenario that would have a freight forwarder in Asia leave space available on the Tokyo-Anchorage route to then pick up bulk cargo in Anchorage for another domestic location. However, the revenue lost on the Tokyo-Anchorage route would far exceed any potential gain in fuel tax savings. Moreover, the department is unaware of any Alaska air carrier that considers this potential a threat to their market share.

The Alaska International Airport system has experienced substantial growth in cargo activity. The cargo market is very competitive and low yields create slim margins for cargo carrier operations. While location is a principal factor in determining viability for a cargo refueling or transfer operation, a favorable tax climate will send a message to all international destination carriers that Alaska is a commerce friendly state.

Cargo carriers (both domestic and foreign) flying to international destinations currently fund over 50% of the operating expenses of the Alaska International Airport System. The operating agreement at the international airports requires landing fee rates to be adjusted downward if total revenues exceed the operating costs. As cargo activity increases, the landing fee rates are reduced for all carriers flying to Fairbanks and Anchorage, including the passenger carriers who also fly to rural Alaska. Taxes go into the state general fund and landing fees generated at

Anchorage and Fairbanks are required by federal regulations to be used within the international airport system.

We do not anticipate a loss of funding for rural airports if HB 63 passes because the legislature does not use aviation taxes as a specific funding source for the department's budget.

AS 43.40.010 (e) states in part:

"...proceeds of the taxes on aviation fuel shall be paid into a special aviation fuel tax account in the state general fund. The legislature may appropriate funds from this account for aviation facilities."

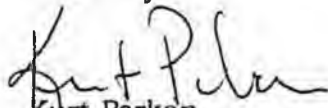
We have found no instance where the legislature has appropriated any funds directly from this general fund account for aviation facilities.

Under ch. 127, SLA 1994, the legislature increased the aviation fuel tax .7 cents per gallon. If DOT&PF increases the landing fees it charges under AS 02.15.090(a) for rural airports before Jan 1, 2000, the tax rate will be lowered to its previous level. DOT&PF currently charges no landing fees at rural airports and does not intend to institute them to recover any lost tax revenue resulting from the passage of HB 63. Any new landing fees would result in an automatic reduction in the aviation fuel tax rate.

The DOT&PF collects \$2.8 million in designated program receipts for rents and fees from rural airports. The cost of maintaining our rural airports exceeds \$22 million. The budget for rural airports is entirely dependent on the importance given to it by the legislature and the administration. Aviation is a primary mode of transportation for many Alaskans and deserves priority funding. We appreciate the Alaska Air Carriers Association's concern and support for adequate funding at our rural airports. DOT&PF's proposed FY 98 operating budget addresses increased needs at the certificated airports by transferring funding to them from highway and facility maintenance and increased designated program receipts. Again, there is no functional link between the fuel tax and the department's budget.

Please do not hesitate to contact me if you have further questions.

Sincerely,


Kurt Parkan
Deputy Commissioner

cc: Representative Therriault
House Transportation Committee members
Kim Ross, Alaska Air Carriers Association

STATE OF ALASKA

**HEARING BEFORE THE
HOUSE TRANSPORTATION COMMITTEE
ON H.B. 63**

**TESTIMONY OF
WILLIAM D. BUTTREY
SENIOR REPRESENTATIVE
GOVERNMENT AFFAIRS
FEDERAL EXPRESS CORPORATION**

February 24, 1997

Juneau, Alaska

On behalf of the 826 Alaska employees of FedEx in Alaska, we appreciate the opportunity to express our support for H.B. 63, a measure that we believe will be good for Alaska jobs and the economy in general. In this connection, we would like to share some facts about our Company.

Mr. Chairman, as you know, FedEx has a major economic presence in Alaska. In addition to being among the top 20 employers, we believe other factors are equally important:

- FedEx's annual payroll exceeds \$32 million.
- FedEx's current capital investment exceeds \$110 million.
- FedEx's projected capital investment exceeds \$38 million.
- FedEx's annual vendor payments exceed \$35 million.
- FedEx's annual fuel purchases exceed \$49 million.

- FedEx's annual fuel taxes exceed \$980,000.
- FedEx's annual landing fees exceed \$1.5 million.
- FedEx's annual miscellaneous fees and charges exceed \$1 million.

In addition to these rather compelling statistics which we believe speak for themselves, we would remind the Committee that we have a major air cargo sorting facility, a widebody aircraft maintenance hangar and a new flight training facility (with simulator) in Anchorage.

We have been observing with great interest Governor Knowles' international trade initiatives which are designed to make Alaska a more attractive venue for business activity relying on international air transportation services. Alaska is strategically situated geographically and it is critical, in our view, that the State make the most of that situation. We applaud the Governor's desire to create a pro-international trade

environment through economic incentive legislation like H.B. 63. We look forward to working with the Governor and State Legislature to further this goal by developing innovative legislation to encourage and create economic activity in Alaska.

Turning now to H.B. 63, we reiterate here our support for that bill. As you may recall, we opposed the increased tax on aviation fuel that was enacted during the previous administration because we believed such a tax would harm Alaska refineries and their employees and because we believe that the anticipated revenue gain was illusory given the alternatives available on the global fuel market.

FedEx is a major purchaser of fuel in Alaska and we prefer to purchase that fuel from Alaska refineries so long as it is competitively priced. We believe the enactment of H.B. 63 will enable Alaska refineries to be competitive for the long term.

Therefore, we urge the immediate passage of H.B. 63.

Thank you for this opportunity to present our views.

Alaska State Legislature

REPRESENTATIVE
GENE THERRIAULT

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House District 33

House Of Representatives

HB 63

Extending the motor fuel tax exemption of fuel sold for use in jet propulsion aircraft to fuel used in those aircraft for flights that continue from a foreign country

SPONSOR: Representative Gene Therriault

SPONSOR STATEMENT:

House Bill 63 extends the motor fuel tax exemption to include fuel used in aircraft for flights that continue from a foreign country. Currently, the state of Alaska provides a tax exemption for fuel used only in flights to foreign countries. Federal laws preempt state taxation of imported aviation fuel transported through a foreign trade zone (FTZ) for use in aircraft during foreign flights. The federal definition of "foreign flight" includes flights originating from and flights continuing to a foreign country. As a result, jet fuel produced in Alaska is taxed 3.2 cents per gallon more than similar fuel produced at foreign refineries.

Two tankers filled with 20.7 million gallons of tax exempt foreign-produced fuel were brought into Alaska during 1995. Last year just under 38 million gallons were imported into the FTZ. Without new legislation, it is anticipated that the practice of using the FTZ to import fuel will increase as airlines move to purchase the tax exempt fuel for use in foreign flights.

HB 63 is needed to provide a level playing field to Alaskan producers by allowing the tax exemption for all fuel used in foreign flights.

Alaska State Legislature

REPRESENTATIVE
GENE THERRIAULT

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House District 33

House Of Representatives

HB 63 0-LS0262\A 1/27/97

Expands the existing exemption from state taxation (AS 43.40.100(2)) of jet fuel sold for use by aircraft flying to foreign destinations to also apply to jet fuel use by flights of foreign origination continuing on to a U.S. destination.

SPONSOR: Representative Gene Therriault

Sectional Analysis:

Section 1: Amends AS 43.40.100(2)(B) to include fuel sold for use by jet propulsion aircraft operating in flights that continue from foreign countries.

Replaces the word (WHICH) with the word that in AS 43.40.100(2)(F).

Expands the description (KW) to its complete spelling of kilowatts in AS.43.40.100(2)(L).

Section 2: Establishes an effective date of July 1, 1997.

MEMORANDUM

DATE: December 4, 1996
TO: File
FROM: Tamara Mayer
SUBJECT: FTZ #160 Foreign Jet Fuel

The purpose of this memorandum is to document the quantity of foreign produced aviation jet fuel processed through FTZ #160 since U.S. Customs activation of the fuel storage facilities in the Zone.

<u>Date</u>	<u>Vessel</u>	<u>Barrels</u>	<u>Gallons</u>	<u>Originated</u>
10/6-7/95	Neptune	247,829	10,408,818	Aruba
12/15-17/95	Uranus	246,079	10,333,318	Aruba
TOTAL 1995		493,908	20,744,136	
5/19-20/96	Osprey Cape	242,007	10,164,294	Korea
8/3-5/96	Sunshine	84,606	3,553,452	Japan
8/22-23/96	Igrim	108,134	4,541,628	Korea
9/6-8/96	Gorgona	239,102	10,042,284	Venezuela
10/10-12	Kenneth T. Derr	101,500	4,263,000	Singapore
TOTAL 1996		775,349	32,564,658	(1)
ALL TOTALS		1,269,257	53,308,794	

1996 FTZ Imports

(1) 1996 Jan-Oct 32,564,658 gallons
 Nov 0
 Dec 5,067,720
 Total 1996 37,632,378

d:\total\awm\ftz.wk4

Copy of Memo Dtd 12/4/96
 Information Requested
 by : Dept. of Revenue
 Income & Excise Audit Divison

Audit Report



DEPARTMENT OF REVENUE
INCOME AND EXCISE AUDIT DIVISION
JET FUEL TAXATION

February 5, 1996



Audit Control Number:

04-4524-96

Division of Legislative Audit
P.O. Box 113300, Juneau, Alaska 99811-3300

Excerpts Only

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P. O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347

February 5, 1996

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF REVENUE
INCOME AND EXCISE AUDIT DIVISION
JET FUEL TAXATION

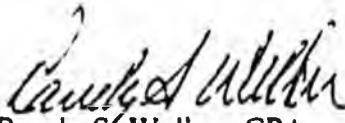
February 5, 1996

Audit Control Number

04-4524-96

The objectives of this audit were to determine if the Department of Revenue's approach to auditing jet fuel tax returns is reasonable and if changes to the statutes or regulations are needed to assist the department in its tax collection role.

The audit was conducted in accordance with generally accepted government auditing standards. Field work procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section. Audit results can be found in the Report Conclusions section.


Randy S. Welker, CPA
Legislative Auditor

OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we conducted an audit of the Department of Revenue (DOR), Income and Excise Audit Division, jet fuel taxation program.

Objectives

The objectives of the audit were as follows.

- To determine if DOR's approach to auditing jet fuel tax returns is reasonable.
- To determine if changes to the statutes or regulations are needed to assist the department in its tax collection role.

Scope and Methodology

Our audit examined jet fuel tax procedures existing during the time period from July 1, 1994 through the present. Field work for this audit included the following.

- Interviews with the management and technical staff of DOR and the Department of Transportation and Public Facilities.
- Review of agency materials which document the system for collecting jet fuel tax.
- Review of the Legislative Research Agency's report, *Overview of the Aviation Fuel Tax*.
- Review of DOR's report, *Aviation Jet Fuel Tax Compliance Review*.
- Research of statutes, regulations, court cases, attorney general opinions, and professional literature.
- Interviews with public officials at the federal, state, and local levels regarding use of the Foreign Trade Zone located in Anchorage.
- Review of the concerns of air carriers and refiners as expressed in legislative committee testimony, written materials, newspapers, and the business press.
- Interviews with personnel of the Anchorage Economic Development Corporation and the Fairbanks Industrial Development Corporation.

ORGANIZATION AND FUNCTION

The Department of Revenue (DOR), Income and Excise Audit Division, is responsible for the collection of a wide variety of taxes and fees. The primary items are taxes on corporate income, motor fuel, fisheries, alcohol, and tobacco. Of the 23,076 tax returns and \$334 million processed in FY 95, only a handful of returns and \$7 million related to jet fuel.¹ The majority of this fuel is explained at Anchorage International Airport.

Through a fuel consortium, many of the airlines operating in Anchorage purchase fuel "tax off" and place it in bulk storage facilities. These carriers then file monthly tax returns in which they remit the tax due for nonexempt flights.² Returns directly from fuel suppliers and from these self-reporting taxpayers are then subject to DOR audit.

The Municipality of Anchorage operates a federal Foreign Trade Zone (FTZ) that includes the port facilities, fuel tanks at Anchorage International Airport, and the pipeline that connects these locations. Imported jet fuel, that is processed through this zone, is not subject to U.S. Customs' duties nor is the state fuel tax currently being imposed on this fuel. The fuel consortium used the FTZ for the first time in 1995 and imported 20 million gallons of fuel.

¹Under AS 43.40.010(a)(3), jet fuel is currently taxed at 3.2 cents per gallon.

²Foreign flights, as defined by regulation, are exempt from the jet fuel tax. See discussion at Report Conclusions.

SELECTED STATUTES AND REGULATIONS
PERTAINING TO THE TAXATION OF JET FUEL

Alaska Statute 43.40.010 *Tax on transfers or consumption of motor fuel and expenditure of proceeds*

(a) There is levied a tax of eight cents a gallon on all motor fuel sold or otherwise transferred within the state, except that

.....

(3) the tax on all aviation fuel other than gasoline is three and two-tenths cents a gallon.

(b) There is levied a tax of eight cents a gallon on all motor fuel consumed by a user, except that

.....

(3) the tax on all aviation fuel other than gasoline is three and two-tenths cents a gallon.

.....

Alaska Statute 43.40.100 *Definitions. In this chapter*

....

(2) "motor fuel" means fuel used in an engine for the propulsion of a motor vehicle or aircraft, and fuel used in and on watercraft for any purpose, or in a stationary engine, machine or mechanical contrivance which is run by an internal combustion motor; "motor fuel" does not include

.....

(B) fuel sold for use in jet propulsion aircraft operating in flights to foreign countries:

.....

15 AAC 40.020 *FUEL SUBJECT TO TAX, BULK SALES, AND EXEMPTIONS.*

(a) All motor fuel sold or transferred in the state or consumed by a user in the state is subject to the motor fuel tax under AS 43.40.010 - 43.40.100, unless exempted under (c) of this section. For purposes of AS 43.40.010 - 43.40.100 and this chapter, "motor fuel" is fuel used in an engine for the propulsion of a motor vehicle or aircraft, and fuel used in and on watercraft for any purpose, or in a stationary engine, machine, or mechanical contrivance which is run by an internal combustion motor, including bulk or other transfers of fuel between producing, refining, importing, or exporting companies, and gasoline separated from a mixture of gasoline and alcohol that was not taxed in its combined state.

(b) Bulk sales of fuel to a person who uses a common storage tank servicing both taxable and nontaxable uses, except bulk sales of jet fuel to a person who flies directly from the state to a foreign country, are subject to the motor fuel tax under AS 43.40.010 - 43.40.100, but the portion actually used for nontaxable purposes is eligible for a tax refund upon application to the department. A dealer who makes bulk sales of motor fuel shall collect and remit the tax in accordance with this chapter, except that if the sale is a sale of jet fuel to a person who flies directly from the state to a foreign country the tax may not be collected. However, if a portion of that jet fuel is used on a foreign flight that makes more than one stop in this state or makes a stop in another state, the user shall file a return as required by 15 AAC 40.010 and remit the amount of tax due for the jet fuel actually consumed over Alaska.

(c) Fuel meeting the following requirements is exempt from the motor fuel tax under AS 43.40.010 - 43.40.100:

.....

(13) fuel sold to, transferred to, or used on jet propulsion aircraft operating flights from the state to a foreign country, except flights to a foreign country with intermediate stops within the United States;

.....

REPORT CONCLUSIONS

Background

Aviation jet fuel is currently taxed at 3.2 cents per gallon under AS 43.40. However, not all privately used fuel is taxed; the primary exemption is "fuel sold for use in jet propulsion aircraft operating in flights to foreign countries." In FY 95, while jet fuel taxes generated approximately \$7 million, another \$10 million was exempted as relating to foreign flights.

This is a relatively small program for the Income and Excise Audit Division of the Department of Revenue (DOR). DOR's *FY 95 Income and Excise Audit Annual Report* lists 23,076 tax returns and \$334 million in revenue received in total by the division. In contrast, the jet fuel tax totaled only \$7 million and was collected from only a handful of taxpayers.

The last comprehensive DOR audits of jet fuel tax returns were completed in November 1992 and were for FY 91. The department found that the airlines and the jet fuel jobbers were in substantial compliance.

DOR's audit approach is reasonable

Given the relatively small revenue potential of this program and the findings of substantial compliance, the department has not continually focused audit efforts on this program. It did, however, recently begin another series of jet fuel audits. If noncompliance is encountered, DOR has the option of auditing back three years in accordance with the statute of limitations. We consider this approach to be reasonable.

Inefficient self-reported tax mechanism

We noted that DOR was having difficulty in obtaining essential documents to conduct these audits. We suggest the statutes and regulations be modified to tax all fuel on delivery, rather than on a self-reporting basis; any refunds due could be applied for and be accompanied by supporting documentation. This issue is discussed in more detail in the Auditor's Comments section of this report.

Jet fuel taxes currently being contested

A major airline is presently challenging DOR's interpretation of the foreign flight exemption. This exemption is outlined on the opposing page. DOR uses a "next landing" rule to determine if fuel enplaned in Anchorage is to be taxed. That is, if the next landing is in the U.S., the fuel is taxed; if the next landing is in a foreign country, it is not taxed.

A formal DOR administrative hearing is pending. If the airline prevails, it would set precedent and could significantly reduce the aviation fuel tax revenues of the State.

We suggest that, if the legislature decides to continue a foreign flight exemption, the term "foreign" be clearly defined in statute. Regardless of whether the jet fuel tax statutes are amended or not, the department should revise its regulations.

No formal program implementation recommendations are presented in this report, as this program is being considered for modification through HB 362. Our comments on this bill, and on other principal options available to the legislature, are provided in Auditor's Comments. Our suggestions for program implementation are tailored to the individual options and are outlined therein.

AUDITOR'S COMMENTS

1996
LEGISLATION

The legislature is currently considering the aviation fuel tax structure. Specifically, HB 362 would expand the foreign flight tax exemption to include "*flights that continue from foreign countries.*" The public interest questions of whether and how much to tax, the equity of taxation between domestic and foreign carriers, and the impact of the tax on the ability of Alaskan businesses to compete for jet fuel sales are matters of public policy that should be addressed by the legislature. However, as we became familiar with aviation fuel tax related issues in the course of this audit, we offer the following outline of legislative options along with our observations and suggestions for implementation.

Background

Aviation jet fuel is currently taxed at 3.2 cents per gallon under AS 43.40. However, not all privately used fuel is taxed; the primary exemption is "*fuel sold for use in jet propulsion aircraft operating in flights to foreign countries.*" The Department of Revenue (DOR) has defined this exemption in regulation. Per 15 AAC 40.020, the exemption includes

... fuel sold to, transferred to, or used on jet propulsion aircraft operating flights from the state to a foreign country, except flights to a foreign country with intermediate stops within the United States.

The Anchorage port, the fuel tanks at the airport, and the pipeline connecting them are part of a federal Foreign Trade Zone (FTZ). FTZs are established under 19 USC 81 and 15 CFR Part 400 to "*expedite and encourage foreign commerce.*" FTZs are commonly used to combine various foreign and domestic materials with the final assembled product being re-exported. No U.S. Customs' duties or other taxes are paid unless items are transferred for domestic consumption. This creates local employment that might not have otherwise been possible. Any organization can apply for a zone to the federal FTZ board; this board takes comments from interested parties and makes a decision on whether a zone will be established, its physical boundaries, and zone procedures (i.e., what products and processes will be allowed to use the zone). We understand that most applicants do not request zone procedure restrictions, thus the board does not usually establish such limitations. FTZ-160 was applied for by the Municipality of Anchorage with boundaries around the port, the fuel line, and the airport tanks. It currently has no zone procedure restrictions; any product, including jet fuel, can be processed through the zone. We understand that, while boundary change requests generally come from the original applicant, zone procedure changes are commonly requested by other interested parties. Per 19 USC 81, "*[t]he Board may at any time order the exclusion from the zone of any goods or process of treatment that in its judgement is detrimental to the public interest, health, or safety.*"

Fuel that is refined from foreign oil is allowed to enter and leave the zone free of federal taxes³ and also, under traditional interpretation, some forms of state and local taxes, provided it leaves on a foreign flight. This sounds similar to the State's foreign exemption. However, the difference is substantial, as the State's definition of "foreign" is narrow, while the federal government's definition is very broad. That is, any aircraft with a foreign original or ultimate destination is considered eligible for exempt FTZ fuel, regardless of the number of intermediate domestic stops.

Historically, in-state refineries have not supplied all of the jet fuel used at Anchorage International Airport. Prior to October 1995, the FTZ had been inactive; however, before year end two tankers totaling 20 million gallons were processed through the zone.

Various newspaper and magazine articles have voiced concerns that in-state refineries may not be able to compete with FTZ fuel. Irrespective of the relative advantage or disadvantage of in-state refineries in the global fuel market, these refineries would be disadvantaged by the 3.2 cents per gallon excise tax. The intent of the FTZ is not to injure local existing business, but to create additional opportunities that would not otherwise exist.

The expansion of the foreign flight exemption under HB 362 to include "*flights that continue from foreign countries*" is intended to place in-state refineries on a more equal footing with the FTZ. It is probably intended to allow those aircraft that could use the tax-free FTZ fuel to buy fuel from in-state refineries on a tax-free basis.

As an alternative to in-state fuel or FTZ fuel, the airlines may elect to use bonded fuel under 19 USC 1309. Under this program, foreign oil that is processed in foreign refineries can be bonded in conjunction with the U.S. Customs Service and be loaded onto foreign flights tax free. Although this alternative has been available, we understand that it has not been used by the airlines in Anchorage since the late 1970's. This approach is common in the Lower 48. We suspect that the reason for the difference is that fuel transportation costs are higher for Anchorage than for most Lower 48 airports. Whether to use bonded fuel or not is an economic decision based predominately on global fuel prices, fuel availability, and transportation costs. The airlines made a decision to discontinue using bonded fuel in Anchorage. Obviously, the relative cost factors will fluctuate over time. However, as the fuel pricing cycles of the past have not triggered a return to bonded fuel, we suspect that the economic disadvantage of this approach is substantial. We view the 3.2 cents per gallon tax as relatively minor and do not believe that its continuation would cause the airlines to use bonded fuel when they have not done so in recent years.

³The federal government adopted an excise tax on jet fuel of 4.3 cents per gallon, effective October 1, 1995. However, the Internal Revenue Service informed us that all foreign flights were exempt from this tax. As this tax would not encourage nor discourage FTZ use, it is excluded from the remainder of this discussion.

Legislative Options

Simply put, the primary legislative options are to tax no flights, tax all flights, tax all except foreign flights, or select one of these tax plans and request that the FTZ be modified to eliminate the tax disadvantage to in-state refineries. Our comments on these options are as follows.

Option 1: Tax no flights

Legislative Action: →Repeal the jet fuel tax

Probable Outcome: →Forgo jet fuel tax of \$17 million

→In-state refineries not disadvantaged by tax

Under this scenario, the excise tax would not be collected on domestic nor foreign flights. The State would not collect the \$7 million it currently does, nor would it collect the \$10 million that is currently exempt. Relative to a tax-all-flights program, this would be forgoing \$17 million per year in revenues. There would be no immediate drop in State expenditures; less than one full-time equivalent position audited these returns in FY 95. Eventually, however, this option would mean \$17 million less in State services.

In addition to the tax reduction, the airlines would also be able to eliminate some of the bookkeeping costs of tracking and reporting fuel usage for the State. In theory, lower costs to the airlines would eventually be passed through to the travelers and the purchasers of cargo. However, we observe that little of this benefit would be realized in Alaska.

While some might argue the necessity of tax concessions to the airlines in order to maintain and continue to attract their business, we believe that few would advance such an argument in support of domestic carriers. We do not see a significant net benefit to Alaska through such tax cuts.

Option 2: Tax all flights

Legislative Action: →Repeal the statutory foreign flight exemption

→Pass resolution requesting that FTZ procedures exclude jet fuel

→Amend statutes to require taxation at point of delivery

Probable Outcome: →Receive jet fuel tax of \$17 million

→Very minor, if any, increase in DOR expenditures

→In-state refineries not disadvantaged by tax

→Federal tax exclusion benefits of the FTZ eliminated for jet fuel

Based upon 1995 flight activity, the General Fund would receive \$17 million per year. As mentioned above, some might argue that tax concessions are needed and that a tax increase would drive international flights away from Alaska. If this were true, much of the \$17 million would never be realized. We do not believe this would be the case, given the immateriality of the tax.

This is not to say that millions of dollars are immaterial, merely that within the context of an airline routing decision the incremental cost of this tax would be a relatively minor issue. We assume routing decisions are part of the daily life of an airline. In a serious consideration of whether or not to route through Alaska, an airline would likely consider such factors as fuel price levels, fuel price fluctuation, availability of fuel, social/political stability, availability of aircraft parts and services, space availability at the airport, capability and cost of local labor, risk of weather diversions and delays, air traffic control delays at busy airports, and flight distances. Anchorage has already established itself as a refueling stop for cargo aircraft, thus it appears to have an advantage in these categories.

We estimate the tax equates to approximately 20 minutes of fuel. That is, the fuel tax dollars paid by a cargo plane would pay its fuel bill for approximately 20 minutes⁴ of flight time. We observe that this additional flight time may be quite immaterial in comparison to the costs and other considerations of proposed alternate routes. We believe the airlines have selected Anchorage partly because of its geographic advantages: a minor change in costs weighed against longer flight times or delays at other airports would still come out in Anchorage's favor.⁵

This option would not result in significantly higher state expenditures. As discussed under Report Conclusions, we consider DOR's periodic compliance audits to be a reasonable approach to the administration of the jet fuel tax program. Doubling the revenue would not necessarily double the audit staff. In fact, by taxing all flights, foreign and domestic, the audits would be much simpler and quicker to conduct. Thus, we would not predict a significant budget increase.

We also suggest that, if any jet fuel is to be taxed, it be taxed at the point of delivery, rather than being paid by the eventual user on a self-reporting basis. We understand that past DOR audits have been frustrated when some taxpayers were slow to share the supporting data. Under this tax option, it might be most efficient to tax the fuel when it is delivered. To accomplish this, AS 43.40.010(c) would need to be modified to eliminate the reference to user reporting. The regulations would then require updating.

⁴This estimate was based upon the ratio of the 3.2 cent tax to the current tax-off cost of jet fuel. This ratio was applied to the number of hours a flight may be airborne, to arrive at the 20 minute estimate. The calculation was based upon a cargo flight using a Boeing 747 on a flight of 8 hours, which we understand is the normal maximum.

⁵With the opening of Soviet airspace, many new routes are available. We observe that as airports are built in the region the geographic advantage held by Alaska may diminish or disappear. We also observe that Alaska's 3.2 cent tax would be clearly irrelevant in such a routing decision given the immense difference in flight miles.

As discussed earlier, the airlines currently purchase fuel through Anchorage's FTZ and avoid paying the excise tax. This leads to concerns that in-state refineries are being handicapped by the tax. That is, the airline can buy tax free through the FTZ but they must pay the tax if they choose to buy from in-state refineries. We suggest the legislature consider conducting hearings to determine if it is in the public interest to remove this disadvantage to in-state refineries and to tax all foreign flights. We understand that the FTZ board would give substantial weight to a resolution from the State legislature, particularly if hearings had been held to assist it in the public interest determination. The legislature could request that the board amend FTZ procedures to exclude jet fuel from the zone on the basis of public interest in terms of economy, employment, and revenues needed to provide services.

Option 3: Tax all except foreign flights

- Legislative Action: → Define a foreign flight exemption in statute
→ Consider whether taxation at the point of delivery is necessary
- Probable Outcome: → Revenues dependent upon which flights are defined as foreign
→ Expenditures dependent upon which flights are defined as foreign
→ Tax reduction required to eliminate in-state refinery disadvantage

This option is based upon the theory that, by not taxing foreign travelers and freight, Anchorage will continue as a global refueling station and will grow into a global warehousing and distribution center. We observe that any decision by a company on whether to refuel and/or set up distribution facilities in Anchorage would be based upon forecasted incremental costs of alternate routes and facilities. As discussed earlier, we do not believe that a 3.2 cents per gallon tax is material to such a decision.

If foreign flights are to be exempt, the term "foreign" should be carefully defined. Under current practice, only outbound flights in which the next stop is in a foreign country escape the taxes. However, there are many possible definitions of "foreign" that the legislature could consider, perhaps even a combination of the following:

- Location of immediately preceding or subsequent landing
- Aircraft owner's country or perhaps lessor's country
- Origin or destination of the majority of the payload
- Airport where aircraft's flight number originated or is to terminate
- Where this aircraft's maintenance is routinely performed
- Miles over Alaska
- Miles over the United States
- Number of U.S. stops before or after Anchorage stop

- Category of aircraft
- Category of payload
- Airport where the last major stopover occurred, specifying the number of hours
- Whether the flight is eastbound or westbound

Nevertheless, we observe that a complex definition of "foreign" would probably only serve to increase the costs of tracking it by the airlines and administering by DOR. The legislature could also select different tax rates for different categories of "foreign" flights. As immaterial as we believe this tax is to the airlines on an incremental route basis, we do not believe such complexity is justified.

As discussed earlier, if fuel taxes are to be levied, we suggest that, due to the difficulty of obtaining essential records, that the statutes and regulations be amended to collect the tax on delivery, rather than on a self-reporting basis. Any tax refund requests could be accompanied by supporting documents. With the foreign exemption under this tax option, this could be inefficient for the airlines and for DOR. Whether the current difficulty in obtaining records outweighs this inefficiency is a matter for DOR to address.

Option 4: FTZ modification to eliminate the tax disadvantage to in-state refineries

Legislative Action: →Pass resolution requesting that FTZ procedures cap jet fuel volume
→Request a similar resolution from the Municipality of Anchorage

Probable Outcome: →In-state refineries not disadvantaged by tax
→Full FTZ benefits on jet fuel below volume cap

The airlines currently have two alternatives to avoid any tax that the legislature does enact, if the flight is "foreign" as broadly defined by the federal government. First, the bonded fuel alternative is available; however, as discussed above, this does not appear to have been economically feasible. Second, the airlines could utilize FTZ imports to escape the tax. This, of course, would put in-state refineries at a relative disadvantage.

The legislature should consider requesting the FTZ board, based upon public interest findings, to amend zone procedures to limit jet fuel to a specified number of gallons each year. Alternatively, a floating cap could be established; a set percentage of the total annual purchases would qualify for FTZ benefits. We believe such a modification would accomplish the following.

- Eliminate the tax disadvantage of in-state refineries
- Protect some of the State revenues necessary to provide services
- Continue the FTZ alternative and benefits on authorized fuel purchases
- Maintain employment within the State
- Maintain economic health within the State

As this option protects the viability of the FTZ for jet fuel imports, we believe the Municipality of Anchorage would prefer this option over the total preclusion of jet fuel. Concurrence by the original FTZ applicant, while not required, might make the board's deliberations simpler.

**Alaska Department of Revenue
Income and Excise Audit Division**

Summary of Bunker Fuel Sales
Inception through September 30, 1996

(Fiscal year ending September 30)

<i>Fiscal Year</i>	<i>Gallons Sold</i>	<i>Refund Threshold</i>	<i>Refundable Gallons</i>	<i>Refund Rate</i>	<i>Refund Issued</i>
FY 1994	3,264,732	4,100,000	N/A	N/A	N/A
FY 1995	4,399,116	4,100,000	299,116	0.04	\$ 11,965
FY 1996	99,553	4,100,000	N/A	N/A	N/A

The 1994 legislature enacted legislation (Ch 42 SLA 94) establishing a different tax levy on residual (bunker) fuel oil. The legislation provides that for each year ending September 30, the tax levied on bunker fuel is 1¢/gallon after revenue derived from sales of bunker fuel at the normal marine fuel tax rate (5¢/gallon) exceeds \$205,000 (4,100,000 gallons). The legislation authorizes Department of Revenue to issue a refund to persons who remitted marine fuel tax on bunker fuel at the 5¢/gallon rate; the refund being for the difference between 5¢ and 1¢ per gallon rate once the \$205,000 threshold is reached.

The above legislation took effect May 13, 1994 and sunsets June 30, 1998.

MAPCO POSITION PAPER ON JET FUEL TAX

In the fourth quarter of 1995, the Foreign Trade Zone (FTZ) was activated at the Anchorage International Airport. In just three months during 1995, about 20 million gallons of foreign refined jet fuel were brought in through the Port of Anchorage to avoid the 3.2 cents per gallon (cpg) motor fuel tax charged by the state of Alaska on foreign flights returning through Anchorage to a domestic location. Jet fuel sales on flights going through Anchorage to a foreign location are now tax exempt per state law. During that fourth quarter of 1995, the state lost about \$750,000 in revenue out of \$4.2 million total potential revenue from tax on jet fuel for flights going through Anchorage with a technical stop on their way to a domestic location.

During 1996, approximately 100 million gallons of fuel were sold through the FTZ with revenue lost to the state of \$3.2 million out of the total \$4.2 million. Clearly, there is a shift to FTZ fuel. Such a shift discourages expansion of jet fuel production for in state refiners. The solution is to repeal the jet fuel tax on all foreign flights as embodied in House Bill (HB) 63.

In the way of background, the state of Alaska uses about 51,000 barrels per day (bpd) of jet fuel. Nearly 42,000 bpd of that consumption is at the Anchorage International Airport. Coincidentally, the in state refiners currently refine about 42,000 bpd of jet fuel, thus requiring importing about 9,000 bpd of jet fuel. Prior to the FTZ advantage for foreign refined jet fuel, most of this import tended to be from west coast refiners who had, in many cases, refined Alaskan crude oil.

There are a number of reasons the state legislature should pass HB 63, thereby repealing the motor fuel tax on jet fuel sales on all foreign flights. 1) To encourage expansion of in state refining capacity and promote Alaskan refined fuel in place of foreign refined fuel. This is a value added approach that will increase Alaskan jobs and favor Alaskan crude oil. 2) To protect maximum shipping on the Alaska Railroad of Alaskan refined jet fuel. 3) To send a signal to all air carriers that Alaska wants to be the premiere stop in shipment of international air cargo and also a stop for international passenger traffic. 4) To allow natural market forces, not FTZ tax favoritism, to determine the source of jet fuel purchases. This approach provides a level playing field for in state refiners.

MAPCO ALASKA PETROLEUM Inc. will greatly appreciate the support of the 20th Alaska legislature in prompt passage of HB 63, which will enhance and promote in state refining by eliminating the motor fuel tax on the sale of jet fuel for all international flights. This tax exemption exists in many localities where there are airports aggressively competing for Alaska's cargo and passenger traffic. MAPCO will also appreciate the support of affected industries and interested trade and professional groups in supporting this legislation in 1997.

For more information, please contact Jeff Cook, Vice President External Affairs, MAPCO ALASKA PETROLEUM Inc., at (907) 488-2741 or by internet at jeffc@mapcoinc.com