HB

216

Adopted 5/14

23-LS0822\V
Cook
5/8/03

CS FOR HOUSE BILL NO. 216(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to and limiting municipal taxation of refined fuel and wholesale sales of fuel, and to the bulk fuel revolving loan fund."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 29.10.200(51) is amended to read:

(51) AS 29.45.650(c), (d), (e), [AND] (f), **(i), and (j)** (sales and use tax);

*** Sec. 2.** AS 29.10.200(52) is amended to read:

(52) AS 29.45.700(d) **and (e)** (sales and use tax);

*** Sec. 3.** AS 29.45 is amended by adding a new section to read:

Sec. 29.45.101. Limitation on taxation of fuel. A municipality may not levy or collect a property tax under AS 29.45.010 or 29.45.055 on refined fuel unless the fuel has been physically loaded, unloaded, or stored in the municipality.

*** Sec. 4.** AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), AS 29.45.750, and in (f), [AND]

(h), (i), and (j) of this section, a borough may levy and collect a sales tax on sales, rents, and on services provided in the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

* **Sec. 5.** AS 29.45.650 is amended by adding new subsections to read:

(i) A borough may not levy or collect a sales or use tax on (1) the physical transfer of refined fuel, unless the transfer is made in connection with a sale or use in the borough, or (2) wholesale sales of fuel refined in the borough. A sale is in the borough if the fuel is delivered to the buyer in the borough. A use is in the borough if the fuel is consumed in the borough. This subsection applies to home rule and general law municipalities.

(j) The prohibitions on the levy and collection of a sales or use tax on refined fuel in (i) of this section do not apply to a borough if, on the effective date of (i) of this section, the borough is

(1) levying and collecting a sales or use tax on the sale, use, or transfer of refined fuel under an ordinance adopted before January 1, 2003; or

(2) receiving payments in lieu of a sales or use tax on the sale, use, or transfer of refined fuel under an agreement entered into before January 1, 2003.

* **Sec. 6.** AS 29.45.700(a) is amended to read:

(a) A city in a borough that levies and collects areawide sales and use taxes may levy sales and use taxes on all sources taxed by the borough in the manner provided for boroughs. Except as provided in (d) **and (e)** of this section, the assembly may by ordinance authorize a city to levy and collect sales and use taxes on other sources.

* **Sec. 7.** AS 29.45.700 is amended by adding new subsections to read:

(e) A city that levies and collects sales and use taxes may not levy and collect a sales or use tax on (1) the physical transfer of refined fuel, unless the transfer is made in connection with a sale or use in the city, or (2) wholesale sales or transfers of fuel refined in the city. A sale is in the city if the fuel is delivered to the buyer in the city. A use is in the city if the fuel is consumed in the city. This subsection applies to home rule and general law municipalities.

(f) The prohibitions on the levy and collection of a sales or use tax on refined

fuel in (e) of this section do not apply to a city if, on the effective date of (e) of this section, the city is

(1) levying and collecting a sales or use tax on the sale, use, or transfer of refined fuel under an ordinance adopted before January 1, 2003; or

(2) receiving payments in lieu of a sales or use tax on the sale, use, or transfer of refined fuel under an agreement entered into before January 1, 2003.

* **Sec. 8.** AS 42.45.250(e) is amended to read:

(e) Loans made from the bulk fuel revolving loan fund to one borrower in any fiscal year are not subject to AS 42.45.060 and

(1) may not exceed **$300,000** [$200,000];

(2) shall be repaid in one year or less; and

(3) may not exceed 90 percent of the wholesale price of the fuel purchased.

* **Sec. 9.** Section 4, ch. 100, SLA 2002, is repealed and reenacted to read:

Sec. 4. AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), [AS 29.45.750,] and in (f), (h), (i), and (j) of this section, a borough may levy and collect a sales tax on sales, rents, and on services provided in the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: April 16, 2003 **FURTHER REFERRALS:**

Date of Committee Action: 5/14/03

The FINANCE Committee considered: **HB 216**

HOUSE BILL NO. 216 **MUNI TAXATION OF REFINED FUEL PRODUCTS**

"An Act relating to municipal taxation of refined fuel products."

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* _____ (FN)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CED				✓
CED				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
REV	2			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
K. Meyer	Meyer	✓			
M.D. Hawker	Hawker	✓			
Bill Stoltze	Stoltze			✓	
Bert Bertholo	Bertholo			✓	
Ralph Seekins	Seekins			✓	
Gene Therriault	Therriault	✓			
[illegible]	Whitaker	✓			
[illegible]	FOSTER	X			
Chair: [illegible]	Kapsis	✓			
Chair: Kevin Williams	Williams	✓			

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB 216 (CRA)
() Publish Date:

Revision Date/Time (Note if correction): 4/15/2003
Dept. Affected: DCED
Title: Muni Taxation of Refined Fuel Products
BRU: Comm Assist & Econ Dev (405)
Component: Community & Business Development
Sponsor: House Labor & Commerce
Requester: House Finance
Component No.: 2486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This Legislation would remove authority of local governments to levy a tax on gas and oil products This is a local tax issue and would have no fiscal impact on the department. The House CRA Committee Substitute adds a new section that increases the amount of bulk fuel revolving loan funds (AS 42.45.250) to one borrower from $200,000 to $300,000. This would have no fiscal impact on the division.

Prepared by: Gene Kane, Director — Phone 907-269-4580
Division: Community and Business Development — Date/Time 4/16/03 7:33 AM
Approved by: Edgar Blatchford, Commissioner — Date 4/16/2003
Agency: Department of Community and Economic Development

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CS HB 216 (CRA)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Muni Taxation of Refined Fuel Products
BRU: Rural Energy Programs (412)
Component: Energy Operations(1935)
Sponsor: House Labor & Commerce
Requester: House Finance
Component No.: 1935

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation increases the maximum amount that may be loaned annually from the Bulk Fuel Revolving Loan Fund to $300,000 from $200,000. The Alaska Energy Authority does not anticipate any increased administrative costs to this program.

Prepared by: Sara Fisher-Goad, Financial Analyst — Phone 907-269-4623
Division: Alaska Energy Authority — Date/Time 4/16/03 9:56 AM
Approved by: Edgar Blatchford, Commissioner — Date 4/16/2003
Agency: Department of Community & Economic Development

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 216(CRA)
(H) Publish Date: 4/16/03

Revision Date/Time (Note if correction):
Dept. Affected: Revenue

Title: Municipal Taxation of Refined Fuel Products
BRU: Revenue Operations
Component: Tax Division
Sponsor: House Labor and Commerce
Requester: Community & Regional Affairs
Component No.: 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would amend Title 29 of statute to prohibit municipalties from imposing a sales or transfer tax on motor fuel transported outside the municipality for sales or distribution.

This legislation would not have an effect on the operations of the Department of Revenue Tax Division, nor would it have a direct effect on state revenues.

Prepared by: Larry Persily, Deputy Commissioner
Phone 465-5469
Division: Department of Revenue
Date/Time 4/7/03 1:00 PM
Approved by: Larry Persily, Deputy Commissioner
Date 4/7/2003
Agency: Department of Revenue

(Revised 9/20/02 OMB)

COMMITTEE COPY

CS FOR HOUSE BILL NO. 216(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

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(51) AS 29.45.650(c), (d), (e), [AND] (f), (i), and (j) (sales and use tax);

*** Sec. 2.** AS 29.10.200(52) is amended to read:

(52) AS 29.45.700(d) **and (e)** (sales and use tax);

*** Sec. 3.** AS 29.45 is amended by adding a new section to read:

Sec. 29.45.101. Limitation on taxation of fuel. A municipality may not levy or collect a property tax under AS 29.45.010 or 29.45.055 on refined fuel unless the fuel has been physically loaded, unloaded, or stored in the municipality.

*** Sec. 4.** AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), AS 29.45.750, and in (f), [AND]

(h), **(i), and (j)** of this section, a borough may levy and collect a sales tax on sales, rents, and on services provided in the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

*** Sec. 5.** AS 29.45.650 is amended by adding new subsections to read:

(i) A borough may not levy or collect a sales or use tax on (1) the physical transfer of refined fuel, unless the transfer is made in connection with a sale or use in the borough, or (2) wholesale sales or transfers of fuel refined in the borough. A sale is in the borough if the fuel is delivered to the buyer in the borough. A use is in the borough if the fuel is consumed in the borough. This subsection applies to home rule and general law municipalities.

(j) The prohibitions on the levy and collection of a sales or use tax on refined fuel in (i) of this section do not apply to a borough if, on the effective date of (i) of this section, the borough is

(1) levying and collecting a sales or use tax on the sale, use, or transfer of refined fuel under an ordinance adopted before January 1, 2003; or

(2) receiving payments in lieu of a sales or use tax on the sale, use, or transfer of refined fuel under an agreement entered into before January 1, 2003.

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(a) A city in a borough that levies and collects areawide sales and use taxes may levy sales and use taxes on all sources taxed by the borough in the manner provided for boroughs. Except as provided in (d) **and (e)** of this section, the assembly may by ordinance authorize a city to levy and collect sales and use taxes on other sources.

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* **Sec. 8.** AS 42.45.250(e) is amended to read:

(e) Loans made from the bulk fuel revolving loan fund to one borrower in any fiscal year are not subject to AS 42.45.060 and

(1) may not exceed **$300.000** [$200,000];

(2) shall be repaid in one year or less; and

(3) may not exceed 90 percent of the wholesale price of the fuel purchased.

* **Sec. 9.** Section 4, ch. 100, SLA 2002, is repealed and reenacted to read:

Sec. 4. AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), [AS 29.45.750,] and in (f), (h), (i), and (j) of this section, a borough may levy and collect a sales tax on sales, rents, and on services provided in the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

Adopted 5/14 ✓

AMENDMENT NO. # 2
CS HB 216 (FIN) 23-LS0822/V

OFFERED BY: Chenault

Page 2, line 7, after, "sales"

INSERT: "or transfers"

AMENDMENT 1

OFFERED IN HOUSE FINANCE COMMITTEE

BY REPRESENTATIVE Seale

Not offered

TO: CS HB 216 (CRA)

Page 2, line 1 after "airport":

DELETE: "; or (2) whole sales or wholesale transfers of any refined petroleum product. This subsection applies to home rule and general law municipalities."

INSERT: "."

adopted 5-5-03

23-LS0822\U
Cook
5/4/03

CS FOR HOUSE BILL NO. 216( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

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*** Section 1.** AS 29.10.200(51) is amended to read:

(51) AS 29.45.650(c), (d), (e), [AND] (f), **and (i)** (sales and use tax);

*** Sec. 2.** AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), AS 29.45.750, and in (f), [AND] (h), **and (i)** of this section, a borough may levy and collect a sales tax on sales, rents, and on services provided in the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

*** Sec. 3.** AS 29.45.650 is amended by adding a new subsection to read:

(i) A borough may not levy or collect a sales or use tax on wholesale transfers of fuel refined in the borough. This subsection applies to home rule and general law municipalities.

*** Sec. 4.** AS 42.45.250(e) is amended to read:

(e) Loans made from the bulk fuel revolving loan fund to one borrower in any

fiscal year are not subject to AS 42.45.060 and

(1) may not exceed **$300,000** [$200,000];

(2) shall be repaid in one year or less; and

(3) may not exceed 90 percent of the wholesale price of the fuel purchased.

* **Sec. 5.** Section 4, ch. 100, SLA 2002, is repealed and reenacted to read:

Sec. 4. AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), [AS 29.45.750,] and in (f), (h), and (i) of this section, a borough may levy and collect a sales tax on sales, rents, and on services provided in the borough. The sales tax may apply to any or all of these sources. Exemptions may be granted by ordinance.

Alaska State Legislature
House of Representatives

Official Business

State Capitol
Juneau, AK 99801-1182

SPONSOR STATEMENT FOR CS HB 216(CRA)
BY: Representative Tom Anderson

TITLE: An Act relating municipal taxation of refined fuel products.

Committee Substitute for House Bill 216(CRA) clarifies local taxing authority for refined fuels sold both within and outside of a local jurisdiction. The conflict in existing State law was brought to the forefront in the Spring of 2002 when an initiative petition was approved in the Fairbanks North Star Borough to put the question of a two cent per gallon transfer tax before voters. A special election was held on June 25, 2002, and the voters overwhelmingly defeated the proposed tax by a margin of 62% no to 38% yes.

CS HB 216(CRA) clarifies that local governments have the right to tax any fuel consumed within their governmental boundaries, but do not have taxing authority on fuel used in turbine-powered aircraft (except fuel that his transferred into an aircraft at a municipal or private airport) or wholesale sales or transfers of any refined petroleum product.

State and Federal law restrict taxation on jet fuel specifically. Alaska is the only state that consumes four times more jet fuel than gasoline on a daily basis and jet fuel is the number one fuel consumed in Alaska. The aviation industry is a major economic force in Alaska and it is in the state's best interest to limit taxation on such fuels and to encourage the maintenance and expansion of air cargo and passenger business in Alaska.

Clarification is also needed to limit the number of entities that can tax fuel. In the case of interior Alaska refiners, as many as eight governments could have taxed fuel locally refined and shipped by rail to Anchorage for in the Southcentral and Southeastern markets. Such taxation would discourage value added economic activity not only in Interior Alaska, but also in other areas of the state where refineries operate. This type of taxation would also result in residents from other parts of the State paying local governments costs in municipalities where they do not reside.

The clarification contained in CS HB 216(CRA) will also benefit local governments. There is some uncertainty now in state law about the authority to tax fuel, and CS HB 216(CRA) will clarify the authority to tax locally consumed fuels.

Additionally, Section 4 contains language design to increase the maximum amount of loans from the bulk fuel revolving loan fund from the current $200,000 to $300,000. This change is necessary due to the rise in fuel prices nationwide, especially in rural Alaska.

I urge your support of CS HB 216(CRA).

Alaska State Legislature
House of Representatives

Official Business

State Capitol
Juneau, AK 99801-1182

Sectional Analysis for CS HB 216(CRA)
BY: Representative Tom Anderson

Section 1. Adds the restriction to the Limitation of home rule powers section of statutes.

Section 2. This section adds to the exceptions to 29.45.650(a) created in the bill.

Section 3. Creates the new law restricting a municipality's taxation of wholesale sales or transfers of refined petroleum products except fuel transferred into an aircraft at a municipal or private airport.

Section 4. Increases the maximum loan amount for loans made from the bulk fuel revolving loan fund.

Section 5. Clarifies that a borough may levy and collect sales taxes on the sales, rents, and on services provided in the borough.

TBC

LEGAL SERVICES

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

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FAX (907) 465-2029
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 2, 2003

SUBJECT: Technical amendment (HB 216)

TO: Representative Tom Anderson, Chair, House Labor and Commerce Committee
Attn: Josh Applebee

FROM: Tamara Brandt Cook
Director

You ask about Section 4 of HB 216. That bill section is purely technical in nature, necessary to accommodate changes made in a bill passed last year, CSHB 355(CRA); ch. 100, SLA 2002.

Section 3 of HB 216 adds a new tax restriction on refined fuel products as a new statute, AS 29.45.820. Section 2 of the bill adds a reference to the new AS 29.45.820 in AS 29.45.650(a), as an exception to the power of a borough to levy a sales tax. AS 29.45.650(a) was also amended last year in ch. 100, SLA 2002, dealing with taxation of mobile telecommunications services, to exempt AS 29.45.750 from the sales tax power. However, last year's bill also contained a section, coincidently numbered section 4, repealing AS 29.45.750 with a contingent effect date which may or may not ever come to pass. Only if a judgment based on federal law substantially limits or impairs the essential elements of 4 U.S.C. 116 - 126 will the section deleting the reference AS 29.45.750 from AS 29.45.650(a) take effect. However, if that section does take effect, I must ensure that AS 29.45.820, added in HB 216, is not dropped out. Consequently, I have amended section 4 of ch. 100, SLA 2002 in section 4 of HB 216 to reflect the change to AS 29.45.650(a) that will be made in HB 216, assuming, of course, that HB 216 is enacted into law.

Confused? I have attached a copy of sec. 4, ch. 100, SLA 2002 that is amended in HB 216 at section 4. I hope this helps.

TBC:mdr
03-059.mdr

Enclosure

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

(62) AS 29.45.750 (taxation of mobile telecommunications).

* Sec. 3. AS 29.45.650(a) is amended to read:

(a) Except as provided in AS 04.21.010(c), AS 29.45.750, and in (f) and (h this section, a borough may levy and collect a sales tax on sales, rents, and on servi provided in the borough. The sales tax may apply to any or all of these soun Exemptions may be granted by ordinance.

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(a) Except as provided in AS 04.21.010(c) [, AS 29.45.750,] and in (f) and of this section, a borough may levy and collect a sales tax on sales, rents, and services provided in the borough. The sales tax may apply to any or all of th sources. Exemptions may be granted by ordinance.

* Sec. 5. AS 29.45 is amended by addin, a new section to read:

Article 5A. Mobile Telecommunications Sourcing Act.

Sec. 29.45.750. Mobile Telecommunications Sourcing Act. (a) T provisions of 4 U.S.C. 116 - 126 (Mobile Telecommunications Sourcing Act) incorporated in this chapter by reference and have effect as though fully set out in t chapter.

(b) A municipality that levies and collects a sales tax on mob telecommunications services shall do so in accordance with the provisions of 4 U.S. 116 - 126 (Mobile Telecommunications Sourcing Act).

(c) The procedures and remedies for correcting a tax, charge, fee, assignment of place of primary use or taxing jurisdiction are as follows:

(1) if a customer believes that an amount of tax, charge, or fee or assignment of place of primary use or taxing jurisdiction included on a billin erroneous, the customer shall notify the home service provider; the customer notify the home service provider of the street address for the customer's place primary use, the account name and number for which the customer seeks a correc a description of the error asserted by the customer, and any other information that home service provider reasonably requires to process the request;

(2) within 60 days after receiving a notice under this section, the service provider shall review the records and the electronic database or enhanced

LAW OFFICES
GROSS & BURKE
A PROFESSIONAL CORPORATION
424 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801

AVRUM M. GROSS
SUSAN A. BURKE

(907) 586-2777

May 29, 2002

Mr. Hank Bartos
Presiding Officer
Fairbanks North Star Borough
809 Pioneer Road
Fairbanks, Alaska 99701

Dear Mr. Bartos:

We have been asked to render a legal opinion to the Fairbanks North Star Borough Assembly as to the scope and validity of the proposed initiative relating to a Fuel Transfer Tax. We understand that the Assembly wants to make a preliminary evaluation as to the impact this ordinance would have on future borough revenues if it were adopted and a number of legal issues must be resolved in order to do that.

We want to say at the outset that it is very hard to provide the Assembly with the information it seeks with any real degree of certainty. There are no state statutes that specifically grant or deny the borough the power to adopt such a tax. There has never been any litigation that we have identified in this state or for that matter any state that analyzes a fuel transfer tax like the one proposed in the initiative. Accordingly, much of what we say here is a prediction as to what courts are likely to do when they are faced with the novel issues raised by passage of this ordinance. Predictions about how judges will rule by their very nature have an element of risk. Moreover, there is little doubt here that if this ordinance is adopted, there will be litigation. While a few small communities

in Alaska have adopted fuel transfer tax ordinances similar to this one[1] and have enforced them without having to go to court to do so, none of those communities has a facility comparable to the Williams refinery in Fairbanks that would be heavily impacted by the tax. Williams has already provided a legal opinion to the borough attorney in which it argues that the proposed tax is nearly completely barred by federal and state law. We have little doubt that if the initiative is adopted, Williams will pursue its concerns through litigation. Until that prospective litigation is resolved, which will probably take years, there can be no real certainty as to revenues that will become available to the borough. In an effort to bring some light on the problem now, we will set out and analyze the major legal issues that will be raised if the initiative passes, and give you our best judgment as to how serious those issues are, and how they will probably be resolved.

I. THE NATURE OF THE PROPOSED FUEL TRANSFER TAX.

The place to start, of course, is with the words of the initiative, which the sponsors have titled a Fuel Transfer Tax. Section 2 of the initiative would add new sections to the FNSB Code of Ordinances. Proposed Section 3.59.010 would a tax of two cents per gallon on each gallon or part of a gallon of fuel "transferred" within the Borough. Section 3.5.020 imposes liability for the payment of the tax on "that person who owned the fuel immediately prior to the transfer." "Fuel" is defined in Section 3.59.100 as:

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[1] Apparently, the communities of St. George in the Pribilofs and Cold Bay in the Aleutians have ordinances that are similar to this one. Those were initially drafted by Lee Sharpe who was an attorney for those communities. Mr. Sharpe also drafted a fuel transfer tax ordinance for Fairbanks approximately ten years ago in response to a request from then mayor, Jim Sampson. The ordinance was never introduced.

VI. CONCLUSION.

What we have said thus far concerns what we see as the major issues that will be raised about the application of this ordinance. We do not in any way mean to imply that they are the only issues that will be raised if and when the ordinance is attacked in court. For instance, some fuel is "transferred" in Fairbanks to containers for the purpose of transportation to Canada in foreign commerce. Taxing those transfers will raise issues under the commerce clause of the federal constitution, though the amount of fuel impacted will be very small. There are issues concerning how the revenues raised by this tax may be spent. Federal statutes (49 USC. Sec. 47133) do restrict the use of "local taxes on aviation" – a restriction, incidentally, that is reflected in state law which dedicates at least a part of the money raised from taxation of aviation fuel to aviation facilities.[32] There is no present restriction in the Transfer Tax that would limit the use of the proceeds.

We have not attempted to analyze every conceivable issue because what we can conclude about this tax is evident from the issues we have already discussed. That discussion, as confusing as it may be, forms the basis of our recommendation to the Assembly as to how it should evaluate the impact that this proposed ordinance will have on future borough revenues.

The first and most critical point we want to make is that while there is an element of uncertainty in any prospective contested legal issue, the uncertainty about this particular tax is enormous. This is a new and different kind of tax. There is no prior

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[32] AS 43.40.010(e)

litigation that can provide answers with any real certainty as to just how much of this ordinance if any will survive the nearly certain litigation that will occur if it is enacted. Review of the cases cited in this op. n discloses immediately that none of them is directly on point. All of the arguments made here are by analogy; there are no cases that analyze a tax anything like this. The task is one of predicting just how doctrines developed under different circumstances will be applied to this situation.

The only thing that can be said with certainty is that there is hardly a single transaction or "transfer" under this tax that is not subject to some kind of legal challenge, ranging from the authority of the borough to tax fuel transfers at all to pre-emption of its right to tax jet fuel and other products exempted under the state fuel tax. To the extent this transfer tax covers simple sales of fuel in Fairbanks, where title to the fuel is in fact transferred or the fuel is moved into containers for sale in Fairbanks, the tax will probably be upheld against pre-emption claims based on the mere existence of a state sales or transfer tax. Even many of those sales and transfers, however, will be challenged on the basis that they tax "transfers" that are exempt under the State Fuel Tax.[33] The amount of revenue brought in by simply applying the tax to traditional sales will be minimal compared to the amount that would be derived from a transfer tax on all fuel produced in Fairbanks, and then shipped out for sales or use in other areas of the state. But the validity of tax on that larger category of "transfers" is subject to all kinds of serious

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[33] For instance, in an attachment to its legal memo to the borough attorney, Williams claims that out of the nearly 15,000 barrels of fuel "transferred" in the borough daily, only 4,500 would be subject to tax – primarily sales of gasoline. The remainder, Williams claims, would be covered by exemptions to the state fuel tax, such as those relating jet fuel, fuel sold to electrical generation plants or house heating fuel.

challenges. At best, the borough can expect that the transfer tax will be tied up in complicated litigation for years and that until at least the Alaska Supreme Court rules on the validity of the tax, there is absolutely no way the Assembly can or should rely on any revenues from the tax.

We hope this opinion is of some help to you in evaluating the impacts of this tax. We are, of course available to discuss it with you further should you so desire.

Yours very truly,

GROSS & BURKE

Avrum M. Gross

Testimony on House Bill 216
House Finance Committee
April 29, 2003

Chairman and members of the committee, my name is Jeff Cook and I am vice president of external affairs for Williams Alaska Petroleum. Williams operates Alaska's largest refinery at North Pole, near Fairbanks. In addition, Williams owns product terminals in Fairbanks and Anchorage, twenty-nine convenience stores located in seven Alaskan communities, and a three per cent interest in the Trans Alaska Pipeline System. Since our North Pole Refinery commenced operations just over 25 years ago, we have purchased 300 millions barrels of royalty crude oil from the State of Alaska. The State received $5 billion for this crude oil. Our refinery and the other Alaska refineries have been a real economic success story for Alaska.

I am here to support HB 216. The sponsor statement accompanying the bill provides an excellent summary of the reasons this bill should be supported. On June 25, 2002, a special election was held for the Fairbanks North Star Borough (FNSB) to determine if a two cents per gallon transfer tax should be enacted. The tax proposal failed by a vote of 62% no to 38% yes. This process and election brought to the forefront a potential taxing problem that could be devastating to Alaskan refiners, one that could discourage future value added investment in Alaska's refining business.

Had the tax passed in Fairbanks, the cost to Williams and our neighbor refinery, PetroStar, would have been in excess of $20 million per year. This added cost could not be passed on to the majority of our consumers, as they have alternative sources of supply. Williams refines about 70,000 barrels per day (bpd) of product. About 60% of our product is jet fuel and over 90% of this production is shipped south by rail for use at the Anchorage International Airport and for shipment by barge to rural Alaska airports. The air passenger and air cargo businesses are very competitive. The air carries will not pay a penny more than necessary for their product. The recent decision by Air France to use longer range planes and fly over Russian air space points to the vulnerability of the airline business in Alaska. Air France has pulled out of Fairbanks at a significant economic loss to the community. It would be unwise to burden any of the air carriers in Alaska with costs they are not able to absorb. In addition to jet fuel shipments by rail, we ship large quantities of naphtha to Anchorage for export to Japan. Our trading partner,

Itochu, recently completed construction of a special ice class vessel that will allow them to pick up naphtha cargos year around at the Port of Anchorage.

An additional point of concern is that there are eight taxing jurisdictions between our North Pole Refinery and the Port of Anchorage where we ship our fuel. If all of these jurisdictions could tax fuel exported from Fairbanks, we could be driven out of business. It is in the best interest of the State of Alaska and the consumers in Alaska to have an equal tax on refined products exported out of any refining community. This is important for the preservation of the jobs and economic impact of Alaska refineries and for the encouragement of future refinery expansions. Alaskan refiners face millions of dollars of new investment by the end of 2006 to meet new Federally mandated clean fuel requirements. Such investment is discouraged if we face a variety of potential new taxes.

There is also something unfair in having taxpayers from other parts of Alaska pay the costs for local government in say, Fairbanks. The Fairbanks property owners would receive property tax relief and consumers of gasoline and home heating fuel in other parts of the State would potentially pay higher product prices. Those in Fairbanks should see the inequity if such funding of local government were carried on by the Port of Anchorage. The Port of Anchorage could respond to such a fuel transfer tax in Fairbanks but taxing all freight going north through the Port of Anchorage. I do not believe this is a trend we want to see in Alaska.

Prior to the vote in Fairbanks last June, former Attorney General Avrum Gross completed a legal opinion on the potential fuel transfer tax for the FNSB. He concluded there was no certainty on the authority of local governments to enact such a tax. He indicated there was ample room for legal challenge. This uncertainty applied to locally consumed fuels as well as fuel exported for sale. Passage of HB 216 will be good for Alaskan refiners, local governments and consumers. It will clarify taxing authority, create a level playing field for refiners throughout the State, and avoid costly litigation and court challenges in the future.

I urge you to recommend passage of HB 216. I would be pleased to answer any questions.

Jeff Cook, Vice President
Williams Alaska Petroleum
1150 H&H Lane
North Pole, AK 99705

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jeff.cook@williams.com
Rev. 4-28-03

GREATER ★ FAIRBANKS
CHAMBER
OF COMMERCE

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e-mail: staff@fairbankschamber.org
website: www.fairbankschamber.org

Introduced By: Board of Directors
Date Introduced: April 15, 2003
Date Passed: April 15, 2003
Date Transmitted: April 16, 2003

RESOLUTION 03-0415

A RESOLUTION BY THE GREATER FAIRBANKS CHAMBER OF COMMERCE SUPPORTING HOUSE BILL 216, AN ACT RELATING TO MUNICIPAL TAXATION OF REFINED FUEL PRODUCTS

WHEREAS the Greater Fairbanks Chamber of Commerce strongly opposed an initiative on the Fairbanks North Star Borough ballot in June 2002 that would have imposed a fuel transfer tax in the Fairbanks North Star Borough; and

WHEREAS the special election in June 2002 cost the Fairbanks North Star Borough approximately $35,000 and the initiative was defeated by 62% of the voters; and

WHEREAS any new revenue sources or tax for local municipalities, including the Fairbanks North Star Borough should be equitable and should be paid by those who are users of the services that are being taxed; and

WHEREAS the proposed legislation would prohibit local municipalities from singling out one industry in an attempt to make those who live outside the area pay a tax that would be used to provide services within their municipality; and

WHEREAS Alaska Statute 43.40.100 and 15AAC 40.020 which exempts certain types of fuel from taxation including, but not limited to, fuel sold for use in jets operating in flights to foreign countries or that continue from foreign countries, fuel sold to federal, state and local government agencies for official use, fuel used to heat private or commercial buildings or facilities; and

WHEREAS House Bill 216 would further require that local governments can only tax fuel within their governmental boundaries and prohibits taxes on potential development of value added products exported for sale beyond the local taxing jurisdiction; and

GREATER ★ FAIRBANKS
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website: www.fairbankschamber.org

THEREFORE BE IT RESOLVED the Greater Fairbanks Chamber of Commerce supports House Bill 216 and believes the legislation would prevent future ballot initiatives.

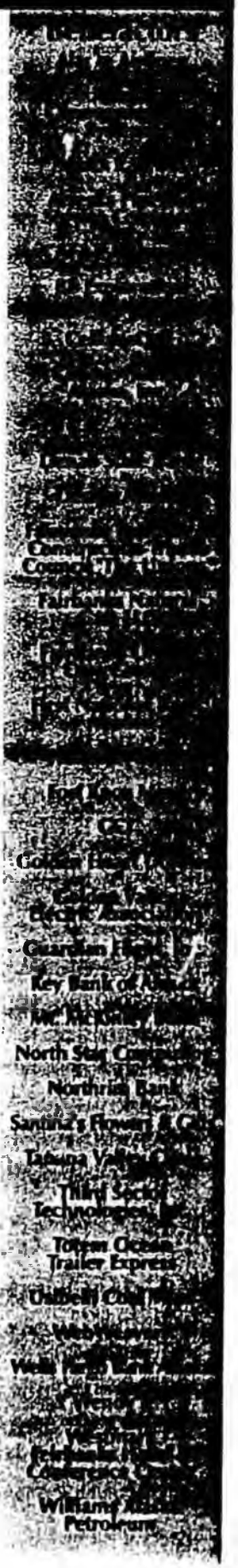
BE IT FURTHER RESOLVED that this resolution be distributed to the following:

Governor Frank Murkowski
Interior Delegation
Representative Tom Anderson
Mayor Rhonda Boyles, Fairbanks North Star Borough
Fairbanks North Star Borough Assembly
Mayor Steve Thompson, City of Fairbanks
Fairbanks City Council
Mayor Jeff Jacobson, City of North Pole
North Pole City Council

PASSED in Fairbanks, Alaska this 15th day of April, 2003 by the Greater Fairbanks Chamber of Commerce Board of Directors.

Terry Aldridge
Board Chair

Kara Moriarty
President/CEO



April 28, 2003

The Honorable Bill Williams
House of Representatives
Co-Chairman House Finance Committee
Alaska State Capitol
Juneau, Alaska 99801-1182

Re: HB 216

Dear Representative Williams,

This letter is in support of HB 216, specifically the amendment increasing the AEA administered Bulk Fuel Revolving Loan fund from $200,000 to $300,000. The following bullet points highlight our concern for remote communities who depend upon this program:

- Price volatility during the last few months has shown swings of up to 63 cents per gallon on wholesale fuel markets. Fuel bought during such an upward swing could erode purchasing power by 30%.
- With new infrastructure projects coming online in many villages, fuel consumption increases rapidly. Often, this extra demand isn't covered by village resources.
- Denali Commission tank farms have enough capacity to accommodate a single annual delivery. An increased loan limit will allow qualifying villages to use the new capacity.
- Single large deliveries typically give buyers a price advantage.
- This program has demonstrated that some of the most distressed villages can perform responsibly on loans. Increasing the limit may also assist some of the larger villages that find conventional financing difficult or impossible to obtain.

This program gives vital assistance to village entities which face uncertain fuel volume and price requirements. Running out of fuel and the subsequent emergency re-supply by air is not uncommon. This burden is often borne by distressed villages which can least afford the extra burden.

Yukon Fuel Company supports the amended bill and the State's efforts to ensure village winter fuel requirements are secured.

Mark Smith

Yukon Fuel Company

LAW OFFICES
GROSS & BURKE
A PROFESSIONAL CORPORATION
424 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801

AVRUM M. GROSS
SUSAN A. BURKE

(907) 586-2777

May 29, 2002

Mr. Hank Bartos
Presiding Officer
Fairbanks North Star Borough
809 Pioneer Road
Fairbanks, Alaska 99701

Dear Mr. Bartos:

We have been asked to render a legal opinion to the Fairbanks North Star Borough Assembly as to the scope and validity of the proposed initiative relating to a Fuel Transfer Tax. We understand that the Assembly wants to make a preliminary evaluation as to the impact this ordinance would have on future borough revenues if it were adopted and a number of legal issues must be resolved in order to do that.

We want to say at the outset that it is very hard to provide the Assembly with the information it seeks with any real degree of certainty. There are no state statutes that specifically grant or deny the borough the power to adopt such a tax. There has never been any litigation that we have identified in this state or for that matter any state that analyzes a fuel transfer tax like the one proposed in the initiative. Accordingly, much of what we say here is a prediction as to what courts are likely to do when they are faced with the novel issues raised by passage of this ordinance. Predictions about how judges will rule by their very nature have an element of risk. Moreover, there is little doubt here that if this ordinance is adopted, there will be litigation. While a few small communities

in Alaska have adopted fuel transfer tax ordinances similar to this one[1] and have enforced them without having to go to court to do so, none of those communities has a facility comparable to the Williams refinery in Fairbanks that would be heavily impacted by the tax. Williams has already provided a legal opinion to the borough attorney in which it argues that the proposed tax is nearly completely barred by federal and state law. We have little doubt that if the initiative is adopted, Williams will pursue its concerns through litigation. Until that prospective litigation is resolved, which will probably take years, there can be no real certainty as to revenues that will become available to the borough. In an effort to bring some light on the problem now, we will set out and analyze the major legal issues that will be raised if the initiative passes, and give you our best judgment as to how serious those issues are, and how they will probably be resolved.

I. THE NATURE OF THE PROPOSED FUEL TRANSFER TAX.

The place to start, of course, is with the words of the initiative, which the sponsors have titled a Fuel Transfer Tax. Section 2 of the initiative would add new sections to the FNSB Code of Ordinances. Proposed Section 3.59.010 would levy a tax of two cents per gallon on each gallon or part of a gallon of fuel "transferred" within the Borough. Section 3.5.020 imposes liability for the payment of the tax on "that person who owned the fuel immediately prior to the transfer." "Fuel" is defined in Section 3.59.100 as:

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[1] Apparently, the communities of St. George in the Pribilofs and Cold Bay in the Aleutians have ordinances that are similar to this one. Those were initially drafted by Lee Sharpe who was an attorney for those communities. Mr. Sharpe also drafted a fuel transfer tax ordinance for Fairbanks approximately ten years ago in response to a request from then mayor, Jim Sampson. The ordinance was never introduced.

Liquid refined petroleum products intended or manufactured primarily for consumption for the production of energy that are transferred within the Borough in a liquid state. It does not include such products of the refining process as asphalt, lubricants and other products that are not intended, when produced, to be used as a source of energy. Crude oil is not a fuel. Bunker grade oils are fuels notwithstanding the fact that they many need to be heated to be physically transferred.

Proposed Section 3.59.100 defines "transfer" and "transfer of fuel" to mean:

A. The physical transfer of fuel from one container to another container, without regard to whether possession of or title to the fuel passes from one person to another or whether there was a sale of the fuel and without regard to the ownership of the containers;
B. Any transfer of title to, or ownership or possession of fuel without regard to whether there is a physical transfer from one container to another. "Transfer" does not include the transmission of fuel through a pipeline unless the pipeline delivers the fuel to a container within the borough. "Transfer" does not include the initial transfer by a refinery of newly refined fuel to a storage tank at the refinery nor a transfer from one fixed storage tank owned by a refinery to another fixed storage tank owned by the refinery, unless the transfer is for the purpose of giving a consumer or person other than the refinery direct access to the fuel or is for the purpose of making the fuel available to the refiner for consumption by the refiner.

Section 3.59.09 of the proposed ordinance exempts from the transfer tax:

1. Transfers of fuel where a prior transfer of the same fuel has been subject to the tax under this chapter
2. Transfers of fuel upon which a tax levied under this chapters is prohibited by state or federal laws
3. Transfers of 10 gallons or less including transfers of a total of more than ten gallons where the fuel is packaged in barrels or cans that contain ten gallons or less
4. Transfers of liquid or gaseous propane
5. Transfers of liquid or gaseous natural gas

The definition of "transfer" in this ordinance describes two distinct kinds of taxable events. The first is a physical transfer from one container to another without necessarily any change of ownership. The second is a legal transfer of ownership or possession regardless of whether the fuel is physically transferred from one container to

another. In point of fact, the transfer of ownership will nearly always involve a physical transfer since most sales will involve passage of title upon delivery rather than while the fuel is still in the physical possession of the transferor.[2] One way or another though, the tax reaches nearly all transactions by which fuel is moved from one location to another or from one owner to another in the FNSB.

We might note in passing that while the State of Alaska has a tax on all fuel "sold or otherwise transferred" within the state,[3] the state fuel tax bears little resemblance to the proposed initiative. The state tax is not imposed on the simple physical transfer of fuel from one container to another. There is not even a separate definition of "otherwise transferred" in the state act; "transfer" has traditionally been interpreted simply as applying to barter situations rather than cash sale transactions.[4]

There are a number of transactions to which this proposed transfer tax clearly applies. All fuel manufactured at any refinery in the FNSB would be subject to the tax when the fuel is transferred either to dealers within the borough, or to modes of transportation such as railroad cars or trucks that take the fuel to destinations outside the borough for sale. An exemption is provided in Section 3.59.100(6) of the ordinance for

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[2] Generally, under sales taxes at least, the transfer of title occurs when the goods are delivered either directly to a buyer or when the seller places the goods on a common carrier for deliver to the buyer. See *Antorg Trading Corp. v. Higgens*, (2d Cir. 1945) 150 Fed. 536; *Crown Iron Works Co. v. Commissioner of Taxation*, 214 N.W. 2d 462, 466 (Minn. 1974); *Trucklease Corp. v. Cozy Harbor Seafoods*, 746 A.2d 916,919 (Me. 2000)

[3] AS 43.40.10 et seq.

[4] This interpretation was confirmed through interviews with staff of the Department of Revenue.

fuel transferred through pipelines. While this exception was apparently aimed at exempting fuel byproducts returned by pipeline to TAPS after the high end products have been removed at the refinery in Fairbanks,[5] in theory at least the exemption covers all pipelines that might be used for any transportation of "fuel." The tax reaches all "transfers"; that is, even non-commercial transfers of fuel brought into the borough by individuals and then placed in boats, cars or the like are subject to the tax, though these "transfers" would obviously be minimal at best. The real focus on the tax is obviously on the commercial activities of fuel dealers who either manufacture refined products within the borough or ship them into Fairbanks.

The first step in analyzing this ordinance is to identify the nature of the tax. While some sales may be included, the tax is not structured like a sales tax. AS 29.45.650 allows municipalities to impose a sales tax on "sales, rents, and services"; this tax on "transfers" is none of those. It does not require passage of title to trigger the tax, which is the common focus of a sales tax.[6] Unlike traditional sales taxes, this tax has no relationship to the price of the fuel. The tax is not what is normally understood to be a use tax either. Certainly, transferring fuel is a "use" of that fuel, but nonetheless, it is not the kind of "use" that appears to be contemplated by the Municipal Code provisions

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[5] The crude oil that flows to the refinery from TAPS is exempt through the language of Section 3.59.100 which provides: "Crude oil is not a fuel."

[6] Actually, while the transfer tax defines a change of title or possession as a "transfer" even if there is no transfer into different containers, the vast bulk of the fuel manufactured in Fairbanks will not change title or possession until it is transferred physically and actually delivered to a prospective customer. It is the physical transfer portion of the Act, then, that really defines what this tax is about.

authorizing use taxes. AS 29.45.650(b) allows a borough "levying a sales tax" to also levy a use tax on the "storage, use or consumption" of property in the borough. If the "transfer" of fuel in the borough is in fact defined as a "use" of that fuel, serious legal problems would immediately arise due to the simple fact that the FNSB has no sales tax, the pre-requisite under state law to adoption of a use tax. It is doubtful, however, that a court will consider this a use tax. Use taxes are generally viewed as complementary taxes; that is, they complement a sales tax so as to insure that property purchased outside the borough for use or storage in the borough or manufactured in the borough for consumption there will pay the same tax as is levied upon goods sold in the borough.[7] That is why the state legislation that authorizes local use taxes ties then to the prior imposition of a sales tax. The Municipal Code also requires that use taxes provide for credit for any sales taxes paid anywhere for the same goods, which again suggests that the "use" contemplated relates to property purchased elsewhere that had no previous sales tax imposed or to the consumption of property that has otherwise gone untaxed because it

[7] The purpose of complementary sales and use taxes is "to assure uniform treatment of goods and materials to be consumed in the state." *Maryland v. Louisiana* 451 U.S. 725, 759 68 L. Ed 2d 576 (1981).

was manufactured in the borough.[8] The proposed transfer tax, on the other hand, does not "complement" any other tax; it is imposed on all transfers of fuel oil in the borough, whether the fuel came from outside or not. A use tax, like a sales tax, is related to the value of the goods; this tax is imposed at a flat rate on every gallon transferred, regardless of value.

Finally, the transfer tax is not a property tax. Unlike a property tax, there is no tax imposed on mere storage or presence. The tax is triggered only when the fuel is transferred in some way. Also, property taxes are traditionally based on the value of the property. This tax, as noted above is not based on the value of the fuel.

The transfer tax can best be categorized as one of a broad category of excise taxes imposed on the privilege of being allowed to conduct a certain activity within the taxing jurisdiction.[9] A tax imposed on the right to transfer fuel within the jurisdiction of the

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[8] The state Motor Fuel Tax, which imposes a use tax, defines "user" in AS 43.40.100(4)as:

(4)"user" means a person consuming or using motor fuel, who either
(A) purchases the fuel out of the state and ships it into the state for personal use in the state;
(B) manufactures the fuel in the state; or
(C) purchases or receives fuel in the state that is not taxed at the time of purchase or receipt or is taxed at a rate that is less than the rate prescribed by AS 43.40.010.

[9] An excise tax is defined in Black's Law Dictionary as "a tax imposed on the manufacture sale or use of goods (such as a cigarette tax) or on an occupation or activity (such as a license tax) or (an attorney occupation fee)." Black's Law Dictionary, (7th ed. 1999) at 585. It is distinguished from such taxes as a property tax or a tax on income. Examples of such taxes are found in cases such as *American Oil Co. v. P.G. Neill*, 380 U.S. 451, 14 L. Ed 2d 1 (1965) (license to "import, receive, use, sell or distribute any motor fuels is an excise tax); *New York ex rel Hatch v. Reardon*, 204 U.S. 152, 51 L. Ed 415 (1917) (tax on right to transfer stock)

FNSB is a tax on the privilege to do so. While excise taxes include sales and use taxes, not all excise taxes are related to value of a commodity. Their purpose is to raise general revenues to support the kind of basic government services that make it possible or desirable to exercise the privilege taxed.[10]

There are many serious legal issues surrounding the proposed Fuel Transfer Tax and nearly all are raised by the second exemption in proposed Section 3.59.090. That section provides that there is no tax where the tax imposed "is prohibited by state or federal laws." This of course means all laws – the constitutions of the state and federal governments and the statutes and laws of both. There are a whole series of issues about this tax that can be raised under state and federal laws, and that is what makes this opinion so complex. We cannot, of course, anticipate every potential legal challenge that could be raised in future litigation. What we can do is anticipate the obvious and most serious issues that will be raised and evaluate those as well as possible.

II. MAY MUNICIPALITIES ADOPT TAXES OTHER THAN SALES OR PROPERTY TAXES?

The first and most immediate question is whether local governments in Alaska have the right to adopt any kind of tax except taxes on sales, uses, or property. Municipal governments gain their power to tax from the state, and may only exercise that power consistent with state law. There are provisions of the Municipal Code that authorize both home rule and general law municipalities to impose taxes on sales, uses, and property. There is no specific authorization for anything else.

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[10] *Dravo Corp. v. Tacoma*, 496 P.2d 504 (Wash. 1972) (excise taxes are imposed on benefits derived from exercising a privilege in an "orderly civilized society").

Decisions by the Alaska Supreme Court, however, clearly indicate that municipalities may adopt taxes different than those specifically mentioned in state statutes. In *Liberati v. Bristal Bay Borough*, 584 P.2d 1115, (Alaska 1978) the Alaska Supreme Court upheld a sales tax on raw fish imposed by the Bristal Bay Borough. While the major issue in the case involved whether the state had pre-empted this particular field of taxation (a subject that will be discussed later) the court introduced its analysis with a general review of constitutional doctrines relating to municipal powers of taxation. The court noted that Section 3 of the Local Government Article of the Alaska Constitution authorizes the legislature to enumerate borough powers, and that the legislature had done so in AS 29.48.010 (7)[11] which provides:

> General Powers. Municipalities have the following general powers, subject to other provisions of Law:
>
> ...
>
> (7) To levy taxes

The court then went on to note in *Liberati* that:

> This broad grant of taxing authority limited only by other provisions of law is consistent with the second sentence of Art. X Section 1 which requires that [a] liberal constitution shall be given to the powers of local government. This theme of liberal constitution and broad local power was reiterated by the legislature in AS 29.48.310-330.

The court then concluded its general analysis, stating:

> The foregoing summary should have at least a cautionary effect on the judiciary. We should not be quick to imply limitations on the taxing authority of a municipality where none are expressed."

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[11] What was 29.48.010(7) is now AS 29.35.010(7) under the last Municipal Code Revision. It now authorizes municipalities "to levy a tax or special assessment..."

Subsequent to its decision in *Liberati*, the Supreme Court upheld a local business license fee imposed by the city of Dillingham, even though there is no specific authorization for it in the municipal code and even though the state has a similar tax. The Court noted that municipalities have the power "to levy a tax" (AS 29.35.260(a)) and that there was "no language in state law prohibiting a municipality from charging a fee for a business license." The Court then concluded that "In the absence of such a prohibition or interference with the function of a state statute, Dillingham may properly charge the fee." *McCormick v. City of Dillingham*, 16 P.3d 735 (Alaska 2001). *Liberati* has also been relied upon by the Attorney General's office, which has issued an opinion that a severance tax imposed by local governments on natural resources is valid, even though there is no specific authorization for it in state law. (Opinion of Attorney General, "Power of borough to levy severance tax on minerals," April 29, 1986.) On the basis of the Supreme Court's decisions in *Liberati* and *Dillingham*, we believe that the borough has the authority to enact a fuel transfer tax.

III. DUE PROCESS ISSUES.

There is no question that this is an unusual tax – one on the simple physical act of moving things from one container to another, without any compensation necessarily being received. It is not, however, we believe so unusual as to raise fundamental issues of fairness and due process which are incorporated in both federal and state constitutions in the due process clauses. In order to satisfy due process under both the federal and state constitutions, there must be some reasonable relation between the taxpayer and the taxed

activity on one hand and the taxing jurisdiction on the other.[12] If the activity to be taxed occurs within the confines of the taxing jurisdiction and the taxpayer itself is present in the jurisdiction, there is little doubt that the required relationship exists.[13] A more difficult question is whether the simple act of transferring fuel from one container to another is the kind of event that justifies a tax at all. After all, in most cases, possession or title will not change; no money will pass hands, and the oil will simply be put in transit to other places – places it would seem that would have exactly the same power to tax "transfers" as the FNSB. That, in and by itself, means nothing – there is no rule that prohibits different taxing jurisdictions from taxing successive transactions (such as several transfers) so long as the act of transfer itself is taxable.[14] Courts are extremely lenient in allowing local and state governments leeway to raise revenues from privilege taxes imposed on activities that occur within the jurisdiction. While we have found no

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[12] *Miller Bros. Co. v. Maryland*, 347 U.S. 340,344-45, 98 L. Ed 744 (1954); *Quill Corp. v. North Dakota*, 504 U.S. 298, 119 L. Ed 2d 91 (1992).

[13] *State of Alaska v. Sears Roebuck and Company*, 660 P.2d 1188 (Alaska 1983)(taxpayer had outlets in the state providing catalog and repair services; tax on gross receipts in state justified). In instances where the taxed activity occurs outside the jurisdiction, courts will hold the tax invalid under the due process clause. *American Oil Company v. P.G. Neill*, 380 U.S. 451, 14 L. Ed 2d 1 (1965) (tax on "receipt" of fuel out state by fuel dealers beyond state power to tax, even though dealer operated in state and knew fuel received outside the state would subsequently be transported there).

[14] Successive taxation by differing tax jurisdictions is not inherently invalid. "To constitute [objectionable or prohibited double] taxation, the two taxes must be imposed on the same property by the same state or government, during the same taxing period, for the same purpose. Successive taxation by different taxing jurisdictions is not objectionable. *Estate of Good*, 8 Cal. Rptr. 378 (Cal. 1963); 1 Cooley *Taxation* (4th Ed) Section 223 et seq; and see *Estate of Fasken*, 138 Cal Rptr. 276, 563 P.2d 832 (1977); *A. B. Hirshfield Press Inc. v. City and County of Denver*, 806 P.2d 917 (Colo. 1991).

specific cases approving or denying the validity of a transfer tax like this, the United States Supreme Court has held that the simple act of separating fuel into containers from bulk cars is a sufficiently local event to justify a tax as against claims that no real "taxable event" had occurred. The Court noted that:

> The company was doing business in the state and its property was receiving the protection of the state...It required storage there [in the state] – the maintenance and the means of storage; of putting it in and taking it from storage.

The court went on to comment that for these to activities to occur, "the protection of the state is necessary."[15]

There are cases, however, that hold that when property is transferred through a state and the only activity that occurs there is the transfer of goods from one common carrier to another (rail to barge) that a tax based on the transfer is not "fairly related to services provides by the state..." *Union Electric v. Dept. of Revenue*, 534 N.E. 2d 1028 (Ill. App. 1989). The decision was two to one; the dissent noted that the state provided law enforcement and other government services and that the tax was related to benefits provided by the society. And there have been cases before the United States Supreme Court that struck down "first gathering" taxes imposed on gas being shipped through interstate pipelines on the basis that the simple act of moving gas into a pipeline was not a sufficiently local event to justify a state tax. *Michigan Wisconsin Pipe Line v. Calvert*, 347 U.S. 157, 98 L. Ed 583 (1954). The Court noted that if Texas could tax the first "gathering," every other state through which the gas passed could carve out some "local" event which was really not uniquely local at all and through taxing it, burden interstate

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[15] *General Oil Co. v. Crain*, 209 U.S. 211, 52 L. Ed. 754 (1907)

commerce with unreasonable costs.[16]

The fuel transferred in Fairbanks travels mainly in intra-state commerce,[17] and there is no general prohibition against successive taxation on subsequent transfers by communities other than Fairbanks should those communities choose to do so. There still must be, however, some basic relationship between the tax imposed here and the governmental services that justify the tax. In recent years, the United States Supreme Court has basically turned the fair relationship test into something of a meaningless exercise, failing to do any real investigation once a basic nexus between the taxpayer's

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[16] In *Calvert*, the Supreme Court placed great emphasis on the fact that the gas being "gathered" had already started to move from refineries into pipelines for transportation in interstate commerce. The concept of movement may still be important in determining whether a local taxable event has occurred, but it is no longer the defining test of whether goods in interstate commerce may be taxed or not. *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 100 L. Ed 2d 21 (1988) (no difference whether catalogs taxed under state use tax had "come to rest" in mailboxes in state or "were still considered in the stream of interstate commerce").

[17] The federal Commerce Clause, of course, has no application to purely intrastate activities. Our research has disclosed only one jurisdiction that has engrafted certain federal Commerce Clause doctrines into its state constitution. The Supreme Court of California has held that under its equal protection clause, a municipality may not impose gross receipts taxes on activities that take place both within that municipality and within other California municipalities unless the tax is apportioned in some way so as to reach only the activities that take place within the taxing municipality. *City of Los Angeles v. Shell Oil Company*, 480 P.2d 953 (Cal. 1971). In the case of the proposed Fuel Transfer Tax, it could be argued that if Anchorage, for example, were to adopt a similar fuel transfer tax and imposed a second tax on the fuel after it left the FNSB, that businesses that transferred the same fuel in more than one municipality would be subjected to greater tax burdens than businesses that transferred fuel in only one municipality. We do not see this as a serious problem, however. For one thing, no other jurisdiction has followed California's lead. For another, the California Supreme Court seems to have been more concerned with the concept of extra-territorial taxation than with the potential for unduly burdensome economic impacts on businesses engaged in inter-city activities. In fact, a significant basis for the court's ruling in *Shell* was a provision of the California Constitution expressly prohibiting extra-territorial taxation by municipalities.

activity and the taxing jurisdiction is shown.[18] It may well be, as the U.S. Supreme Court has observed, that a local jurisdiction may impose a tax that somehow unfairly burdens consumers down the line. There is, however, a remedy for that. As the Court noted in *Commonwealth Edison v. Montana*, 453 U.S. 609, 101 S. Ct. 2946 (1981), when it upheld a severance tax on coal bound for interstate commerce:

> Montana's levy on consumers in other States may in the long run prove to be an intolerable and unacceptable burden on commerce...Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs, of the Montana tax and of the trend in the energy ride states to aggrandize their position and perhaps lessen the tax burden on their own citizens by imposing unusually high taxes on minimal extraction. Yet, Congress is so far content to let the matter rest...

Like the Congress, the Alaska legislature is free at any time to limit the kinds of activities that municipalities may tax or the types of taxes that can be imposed on specified activities. Without those kinds of restrictions, a municipality is free, at least under existing law, to make its own judgment about what is fair.

The constitutional due process notions of fairness impose only minimal restrictions. The commercial enterprises that transfer the fuel are benefited by the governmental services provided by the borough – its police and fire protection at the least. The local government also provides a civil order that allows the business enterprises to function successfully. That is about the limit of the relationship courts require between a taxable transaction and the governmental benefits provided to a

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[18] See Hellerstein, *State Taxation* (2d ed. 1993) Section 4.13(1)(d).

taxpayer. While the issue is far from certain, our view is that this tax would probably be held to meet the minimal requirements of due process.

IV. PRE-EMPTION BY THE STATE'S MOTOR FUEL TAX.

Even assuming, that a general state authorization to tax means that without more, municipalities would have the authority to impose a transfer tax like this one, the question yet remains as to whether that authority has been somehow limited or removed by the state through other legislation. A prohibition on municipal action would in fact occur if the state preempted a local government's authority to enact a fuel tax by legislative action of some sort. The state has absolute authority to do that; municipal power to tax comes from the legislature and it may be limited by the legislature. Pre-emption however, is not lightly assumed. It does not occur, for instance, simply from the fact that the state taxes the same thing that a local government seeks to tax. As the Supreme Court noted in *Liberati* at 1122:

> Merely because the state has enacted legislation concerning a particular subject does not mean that all municipal power to act on the same subject is lost. We have consistently rejected application of any such concept in our cases dealing with home rule in municipalities. We do so now with respect to general law municipalities because our constitution requires that their powers be liberally construed as well. We believe that an appropriate accommodation can be made between the state and general law municipalities by a rule which determines pre-emption to exist, in the absence of an express legislative direction or a direct conflict with a statute, only where an ordinance substantially interferes with the effective functions of a state statute or regulation of its underlying purpose.

The doctrine that pre-emption only exists where there is a direct conflict with state law or a "substantial interference" with the functions of state statutes or regulations has been recently re-affirmed in *Kotzebue Lions Club v. City of Kotzebue*, 955 P.2d 921 (Alaska 1998). In that case, the city of Kotzebue applied its sales tax to charitable gaming

operations. The Lions Club argued that the extensive state regulation of gaming activities essentially pre-empted the field and that local regulation or taxation would interfere with the state policies. The court referred back to *Liberati*, noting that "like commercial fishing, gaming is a highly regulated industry." Again referring to the ordinance in *Liberati*, the court commented that, "the sales tax issue here [on gaming] is intended only to raise money and has no regulatory component." The court therefore concluded that the city's sales tax "does not 'substantially interfere' with state regulations."

AS 43.40 presently imposes a state tax on the sale or other transfer of fuel. There is nothing in AS 43.40 that expressly prohibits a municipality from enacting a similar or, for that matter, a different kind of tax on fuel transfers. Nor is there any obvious inherent conflict between the two statutes. On its face, like the sales tax in *Liberati* or the gaming tax in *Kotzebue*, a tax on fuel transfers could exist side by side with state revenue statutes as non-conflicting dual efforts by different governments to raise money.

The real issue then, since there is no express prohibition or obvious conflict, is whether this proposed local transfer ordinance would somehow, "substantially interfere with the effective functions of a state statute [in this case the state Motor Fuel tax] or its underlying purpose."[19] AS 43.40.010(a) imposes the state motor fuel tax at different rates on a variety of refined fuel products that are "sold or otherwise transferred" in the state. AS 43.40.010(b) imposes a corresponding use tax at the same rates for fuel brought into the state and consumed or "used" here. The definition of "motor fuel" set out in 43.40.100 exempts from the state tax a substantial number of fuel sales that would

[19] *Liberati* at 1122.

otherwise be taxed, such as fuel sold to power plants, fuel sold for heating purposes, fuel used by charitable institutions and several others. A major exemption in the state act is set out in AS 43.40.100(2)(B) which exempts from taxation all fuel for jet aircraft engaged in flights to foreign countries or that continue from foreign countries. Much of the fuel refined in Fairbanks is made into jet fuel and sold to airlines and is covered by this state exemption.[20]

None of these exemptions – heating fuel used in power plants, jet fuel for foreign flights, fuel for power generating plants to name a few of the major ones -- are incorporated into the proposed fuel transfer tax. On the face of the ordinance, "transfers" of fuel for whatever purpose are taxed, subject of course, to the exemption for transfers "prohibited" by state or federal laws. A major issue is thereby created as to whether there is a conflict between the initiative and state law sufficient to prohibit municipal taxation of the subjects exempted by the state from its own sales tax. If so, that portion of the initiative that exempts from the transfer tax all transfers "prohibited by state or Federal laws" would read the state exemptions directly into the local ordinance, and by so doing, exempt from the tax the vast majority of fuel transfers in the borough.

The issue here appears to be the same for all of the exemptions contained in the state's motor fuel tax statutes. Every single exemption under state law has some purpose. The exemption for sales of fuel to charitable organizations is a subsidy to those organizations; exemption of fuel sold to utilities is a legislative way of lowering power

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[20] Of the 60,000 barrels per day produced by the Williams Refinery in Fairbanks, for instance, only slightly over 9,000 barrels are consumed for any purpose in Fairbanks; the vast majority of the remainder goes to Anchorage by rail and is sold there.

costs. These purposes are obvious. The purpose for the exemption of sale of jet fuel to airlines flying to and from foreign countries is more complex but even more specific. Apparently, airlines that come through Anchorage have the option of purchasing jet fuel from a federal Free Trade Zone where the fuel is immune from state taxation. Local refineries in Alaska specifically sought assistance from the legislature in "leveling the playing field" by exempting them from the state tax, just as the fuel in the Free Trade Zone was exempt.[21] The legislature did just that. The issue is whether that kind of action by the legislature and its actions exempting other kinds of sales pre-empt municipalities from imposing their own taxes on the exempted activities.

The issue of pre-emption is an extremely close question. There are no Alaska Supreme Court decisions that specifically deal with that question of whether the fact that a matter is exempted from a state tax means, in and by itself, that municipalities may not tax the very thing or transaction that the state does not. There are however some analogous situations that provide some guidelines in resolving the issue. At the outset, it is helpful to examine the kind of situation where tax decisions by one government unit clearly do pre-empt taxation by a subordinate unit. Federal bonded warehouses and free trade zones, referred to earlier, represent such an example. For many years, the federal government acting under its constitutional powers to regulate foreign and interstate

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[21] Extensive hearings were held on the adoption of what eventually became Ch.88, SLA 1997 pertaining to the extension of the existing fuel tax exemption for jet fuel to cover additional circumstances. There is no question but that refineries from Fairbanks specifically explained the problem of tree trades zones to the legislature and that the legislature was fully aware of the concerns when it expanded the exemption. e.g. minutes of House Transportation Standing Committee, Feb. 12, 1997 concerning HB 63, Aviation Fuel Tax Exemption.

commerce as well as to control imports has established zones in the various states for the purpose of encouraging local enterprise within those zones. Goods can be imported into the zones, value added in some way, such as manufacture, and then, the goods removed from the warehouses or zone and put back in foreign commerce free of customs duties and any state taxation whatsoever. In *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84 L.Ed. 840 (1940), the Supreme Court refused to allow local taxes on the sale of fuel oil imported into a bonded warehouse and sold from there as ships stores. The Court's comments about the nature of federal pre-emption are informative:

> Congress provided for the segregation of the imported merchandise from the mass of goods within the state, [and] prescribed the procedure to insure...and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation."

Id. at 428-429 L Ed 840, 60 S Ct 664.The Court concluded 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 remitted import duty.

Id. at 429.

Similarly, in *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145, 74 L.Ed 2d 323 (1982), the Supreme Court reaffirmed its earlier holding, this time concerning copying machines imported into bonded warehouses for subsequent export. Referring to *McGoldrick*, the Court noted that Congress had sought "in the statutory scheme...to benefit American industry by remitting duties otherwise due." The Court went on to note that "the state tax [sought to be imposed] was large enough in each case to offset

substantially the very benefits Congress intended to bestow by remitting the duty. In short, freedom from state taxation is...necessary to the congressional scheme here..."[22]

The language just quoted has obvious relevance to a situation where the state tries to benefit Alaska industries (such as those who compete in the sale of jet fuel) and local governments seek to "offset...the very benefits" granted by the state. But the holdings of the cited cases are far from conclusive on the issue of pre-emption. There are, if not competing authorities, at least qualifying ones. In *Ward Air Canada, Inc. v. Florida Department of Revenue*, 477 U.S, 1, 91 L.Ed 2d 1 (1986), the United States Supreme Court upheld a Florida state tax on the sale of airline fuel in the face of an argument that as applied to air carriers engaged exclusively in foreign commerce, the tax conflicted with federal regulation of that commerce. While agreements between the United States and foreign governments exempted the fuel sold from excise taxes of the various nations, the agreements said nothing about state taxes. The court held that while Congress had the power to do so, it had not sufficiently occupied the field of international aviation so as to pre-empt all state taxation, and indeed, over time, had permitted some state taxation. The Court noted that it would turn the commerce clause "entirely upside down...to apply it in

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[22] Id. at 848. In a similar vein, the United States Supreme Court invalidated a local tax on fuel used in logging operations on the Fort Apache reservation, noting that the federal plan for logging was "so pervasive as to preclude the additional burdens in this case." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 36, 65 L. Ed 2d 665 (1980). The Court pointed to federal statutes that guaranteed that Indians would derive the maximum benefits from the forests logged and noted that the local taxes would infringe upon the federal government's right to set fees and charges for trees, thereby financially impacting the ability to comply with laws to ensure the continued viability of the forest. The federal plan for logging was extensive, contained in a series of statutes and a multitude of regulations that related to comprehensive day to day management of the logging activity.

such a way as to reverse the policy that the Federal Government has elected to follow." Id. at 12.

The decisions of the Alaska Supreme Court in the general area of state pre-emption of municipal authority provide only limited assistance in resolving the specific question concerning the proposed transfer tax presented here. The one common thread that is woven through all of the cases is that the court is hesitant to assume pre-emption without some kind of clear statutory language either completely prohibiting a municipality from acting or specifically detailing what the municipality may or may not do. For instance, in *Kenai Peninsula Borough v. DCRA*, 751 P.2d 14 (Alaska 1988), the court struck down an effort by a local government to define all oil and gas property as personal property and then tax it at a higher rate than real property. The court noted that state law required municipalities to tax all property at its full and true value. It went on to hold that "taxing real and personal property at different rates is the functional equivalent of assessing real property at less than its true value." Since the various tax rates produced different taxes on the same property value, the court concluded by noting that the borough could not do "indirectly" something that it was specifically prohibited from doing.

In *Allstate Ins. Co. v. Municipality of Anchorage*, 599 P.2d 140 (Alaska 1979), the court indicated reluctance to extend state prohibitions on municipal action beyond the clear wording of the statute, ruling that a statute that specifically pre-empted the field of regulating insurance and prohibited municipalities from issuing permits or registration for agents did not prohibit the Anchorage Equal Rights Commission from pursuing an

investigation into alleged discrimination in issuing a policy. The Court ruled that while the commission was prohibited from actually issuing any orders controlling the alleged conduct, there was no specific prohibition against an investigation. And in *City of Kenai v. Kenai Peninsula Newspaper*, 642 P.2d 1316 (Alaska 1982) the court ruled that certain provisions of state law clearly applied to municipalities and required them to disclose the resumes of applicants for municipal positions, because contrary action would be "directly inconsistent with state law." At the same time, however, the Court ruled that municipalities could enact other provisions relating to the disclosure of public records that were "consistent with state law" since

> [E]xisting state law is neither so detailed or comprehensive as to permit an inference that the legislature intended to occupy this field to the exclusion of municipalities.

Id. at 1325.

The *Liberati, Kotzebue Lions Club* and *Dillingham* cases earlier noted are more specific to the tax area, and while they are consistent with the general principles of pre-emption outlined in other cases, they do not resolve the issue here. All three cases dealt with the ability of a municipality to impose a tax in an area already regulated or taxed by the state. All of them held that while the legislature clearly had the power to exempt matters from local taxation, and had in fact done so when it chose, the court would not infer pre-emption in the absence of specific prohibitions or clear interference with some legislative policy.

There is one element of the decision in *Liberati* that bears special mention here. In that case, the Bristol Bay Borough had imposed a sales tax of 3 percent on the sales of all raw fish in the borough. The challenge to the tax was based on the existence of extensive

state regulation and also on the existence of a state license tax on the processing of fish, based like the local sales tax on the value of fish. Unlike the sales tax, however, the state fish processing tax was not simply imposed on a uniform percentage of value. Fishery products canned at shore based facilities were taxed at one rate; products sold to floating businesses, at another, salmon that was canned was taxed at a different rate than salmon that was processed in other ways.[23] All of these differing tax rates represented policy choices by the state, encouraging or discouraging different forms of processing fish. Indeed, the distinction between the tax rates led to litigation in which floating processors unsuccessfully claimed they were discriminated against unfairly.[24] But though the state made distinctions in its tax structure dependent upon the way the fish were processed, the borough tax simply taxed sales of all raw fish at the same rate. It did not incorporate the policy decisions the state had made in the fish processing tax into the local sales tax ordinance. The Alaska Supreme Court did not even discuss this issue and as a result, it is inappropriate to read too much into the decision. Nonetheless, it is at least worth taking note that in an instance when the court was confronted with a local tax that did not simply mimic the policy decisions of a state tax but reflected other policy decisions, it allowed the local tax to stand without qualification once the municipality's basic authority to impose the tax had been established.

Trying to derive some consistent theme out of the Alaska and federal pre-emption cases, so as to help resolve the issues surrounding the transfer tax, is not easy. A few

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[23] See AS 43.75.015(a)(1), (2) and (3).

[24] *Alaska v. Arctic Maid*, 366 U.S. 199 6 L. Ed *2d 227 (1961).*

points do stand out. First, the policy choices and programs established by the federal government through custom houses and bonded warehouses discussed in the *Xerox* and *McGoldrick* cases are far more extensive than those involved in simple tax exemptions for certain fuels under state law. Free Trade Zones affect all kinds of industries; they are not established to benefit one particular retailer or manufacturer as opposed to others but as part of a long term and comprehensive federal effort to create jobs for American workers where they would otherwise not exist. It is hard to conceive of any form of state taxation that would be consistent with such a comprehensive plan to encourage the importation of foreign products in order to stimulate American industry.

When the policy has not been so explicit or comprehensive (such as in *Ward Air*) or, for that matter, when the importation of goods into customs bonded warehouses no longer clearly justify the tax exemptions, the United States Supreme Court has been quick to allow state taxation.[25] In the absence of specific prohibitions against state taxation, pre-emption is only implied when the regulatory scheme is pervasive and state taxation would clearly interfere with that plan.

The pre-emption issue, as noted, is extremely close. On the one hand, there is no question that in the Motor Fuel Tax the legislature specifically exempted certain fuel sales to encourage various public purposes, the most recent and explicit of which was the

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[25] In *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 93 L. Ed 2d 449 (1986) the court allowed a local taxing authority to impose property taxes on tobacco imported into customs bonded warehouses, where the imported tobacco was destined for local rather than foreign markets. The court held that the tax did not interfere with the purpose of the bonded warehouse since it would no way inhibit importers from bringing goods destined for foreign markets into U.S. ports. Pre-emption was held to be unintended and unnecessary for products headed for domestic markets.

exemption for jet fuel sales. In at least the case of jet fuel sales, there is clear evidence that in the course of its deliberations, the legislature carefully considered the policy implications of its actions. Along with the creation of the jet fuel exemption in Ch. 88 SLA 1997, the legislature adopted provisions in the same Act that would remove the exemption if a refiner that expanded its capacity also entered into a "voluntary agreement" with the state incorporating certain policies to further Alaskan employment and industry, and then broke the "voluntary agreement."[26] However, it does not necessarily follow that exempting Alaskan refiners from a state sales tax in order to accomplish certain legislative goals means that all local taxes of any kind on the exempted fuel are thereby impliedly forbidden. For one thing, if that were the legislature's intention, it had every opportunity to say so. In other circumstances, where the legislature has sought to limit or prohibit local taxation, it has said so in specific language.[27] The Alaska Supreme Court has placed great emphasis on the fact that when the legislature fails to say anything, pre-emption is not easily assumed. It has also as previously noted, allowed municipal taxes imposed at different rates and reflecting different policy choices from state taxes to stand.[28] Finally, if a court were to find pre-

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[26] Just what incentive a refiner would have to enter into a voluntary agreement, the breach of which would cost the loss of an exemption which already existed in the absence of such an agreement, is not clear.

[27] The Oil and Gas Production Tax (AS 43.55.017) and the Oil and Gas Exploration, Production, Pipeline Transportation Property Tax (AS 43.56.030) are clear examples of specific limitations on municipal taxations.

[28] *Liberati v. Bristol Bay Borough*,.

emption solely on the bases of a state tax exemption, it would have very broad implications. In order to reach the same kind of tax free environment present in federal free trade zones, it would be necessary to pre-empt not only the presently proposed transfer tax but also all other traditionally accepted forms of local taxation. A simple sales tax in Anchorage or Fairbanks on the sale of jet fuel at the airports would create the same kind of problem as the Fairbanks transfer tax; a business license fee of the type approved in the Dillingham case would also impact the price of the jet fuel. Indeed, if the North Star Borough were to raise its real property tax and thereby raise the cost of doing business for any refineries within its jurisdiction, that increase would impact the cost of all fuels produced by the refinery. It is hard to believe that the legislature would go to

such lengths to prohibit municipal taxation without saying so in explicit language.[29]

There is no doubt that if the legislature chose to use such language, it could exempt any kind of sales or transfers of fuel from local taxation. It could even make some kind of exemption for property used in the production of certain fuel, as it has done for crude oil facilities. But to date at least, the legislature has not done that. It is, in our view, more probable than not (though we emphasize it is far from certain) that the courts will require something more than a simple exemption from state taxes to accomplish pre-emption of local authority to tax the exempted item. As it stands, the exemptions from the state sales tax for sales of jet fuel or other fuel products are just that – state exemptions --

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[29] That kind of language was used in the Oil and Gas Property Tax (AS 43.56.030) where after authorizing a limited property tax, the legislature stated:

> Section 43.56.030. In place of other taxes. Except for those taxes imposed under AS 43.55, the taxes levied or authorized under AS 43.56.010(b) are in place of
> (1) all other ad valorem taxes or other taxes imposed by a municipality on property subject to tax under this chapter or exempted from taxation by As 43.56.020; and
> (2) all other taxes imposed by a municipality on or with respect to the property subject to tax under this chapter or exempted from taxation by AS 43.56.020, including, but not limited to,
> (A) taxes on the retail sale or use of the property except for the retail sales tax on the first $1,000 of each sale;
> (B) taxes on the sale or use of gas or unrefined oil;
> (C) taxes on the sale or use of services used in or associated with the property or in its maintenance or operation except for the sales tax on the first $1,000 of each sale;
> (D) taxes on or measured by gross or net income from the property, including income from the exploration for, production of, or pipeline transportation of gas or unrefined oil or property; and
> (E) any license, excise, fee, charge or other tax on or pertaining to the property or services.

and they do not appear to in and by themselves to exempt those same fuel "transfers" from otherwise valid local taxes.

V. .CONFLICT WITH FEDERAL STATUTES.

The pre-emption issue, while perhaps the most serious problem here, is not the only issue raised by this tax. As it is presently written, the transfer tax applies to all transfers, to "containers," which in turn are defined in part as "aircraft, motor vehicles, watercraft, rail tank cars, and other mobile devices used for transporting fuel in bulk..." Section 3.59.100(2). Subsection (6) (B) of the same section goes on to provide that "Transfer does not include the transmission of fuel through a pipeline unless the pipeline delivers the fuel to a container within the borough." There are two ways to read this provision. The first is to assume that it only seeks to exempt fuel coming through the borough by pipeline; that it is another way of saying that the mere movement of fuel in a closed pipe from one point in the pipe to another is not a "transfer." The second alternative is the simple and more obvious interpretation that a "transfer" from a storage tank at a refinery or any other place to a pipeline for subsequent transportation is not a "transfer" taxable under the act. The problem with the second interpretation is that it would run squarely into the terms of a federal law (49 U.S. C. Sec.11501) which prohibits any "tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] Board..." The Alaska Railroad is clearly covered by the act, and while the tax is not directly imposed on the railroad, it may nonetheless be held to discriminate against the railroad by making it more expensive

to ship by railroad and therefore more attractive to ship oil by pipeline. As one court has noted:

> Who conducts the activity that is taxed is irrelevant. The tax will increase the cost of the activity to the railroad's detriment. The statute is not limited to cases in which the railroad is the taxpayer.

Burlington Northern v. City of Superior, Wisconsin, 932 F.2d 1185 (7th Cir. 1991).

If, in fact, the tax is held to have a discriminatory impact on railroads, it will not matter that other means of transportation, such as tank trucks, are also subject to the same discrimination.[30] Once the discrimination is shown, courts will require that railroads receive whatever benefits are accorded to pipelines and denied to railroads. In this case, that is complete exemption from the tax. Since a huge percentage of the fuel that moves from the refinery in Fairbanks to Anchorage goes by rail, that is a serious matter.

Like everything else about this tax, however, this outcome is far from certain. The first alternative interpretation – that the exemption for pipelines applies only to fuel moving inside a pipeline, while far from obvious has some merit. For one thing, Section 3.59.100 of the proposed initiative defines "container" (to which "transfers" are made) in a broad way as including all "objects used for holding, storing, or transporting fuel." On its face, this would include transfers to a pipeline that transports refined fuel from the refinery in Fairbanks to other points of destination for sale or use. Of course, if that is the case, there is at least a possibility that all oil (which in its crude form is not fuel as defined in Section 3.59.100) transmitted to the refinery in Fairbanks by pipeline, there refined and then returned to TAPS by pipeline may be subject to tax on the return trip. It

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[30] *Trailer Train Co. v. Leuenberger*, 766 F.2d 1222 (8th Cir. 1988).

all depends how broadly the term "fuel" is defined. If a court concludes that the oil returned to the pipeline after refining is not "fuel" either because it is not "produced to be used as a source of energy" or because it reverts to its status as crude oil when it is returned to the mainstream, then there will be no tax on that transfer from the refinery to a pipeline. Otherwise, there will be, unless of course, all transfers to pipelines are considered to be exempt from the transfer tax in which case, as noted, all fuel shipped by rail cars might also be exempt.

The Railroad Discrimination Act is not the only federal law that may impact this ordinance. There are also provisions of federal law that relate to motor carriers and prohibit states or local governments from enacting laws that are "related" to a price, route or service of any motor carrier. 49 U.S.C. Sec. 14.501(c). This provision, however, is probably inapplicable to transfers taxed under the proposed ordinance. It is true that an excise tax on the transfer of fuel may "relate" in some way to the tariff charged by the trucks but even if such a showing could be made, it would be, as one court characterized it "no more than indirect, remote and tenuous." It would have no real impact on competition between motor carriers or motor carriers and other carriers. Any effort to link the tax to some kind of interference with the federal regulatory plan for trucking regulations would be probably be unsuccessful.[31]

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[31] *California Division of Labor Standards Enforcement v. Dillingham*, 519 U.S. 316, 136 L.Ed 2d 791 (1997). In this case, the Supreme Court held that while California wage laws were "related" to a trucker's prices, routes and services, the wage laws were not "actually interfering" with the purposes of the federal act regulating commerce by truck. This kind of relationship the court noted is nothing more than an example of the fact that "everything is related to everything else." 136 L. Ed. 2d at 843.

VI. CONCLUSION.

What we have said thus far concerns what we see as the major issues that will be raised about the application of this ordinance. We do not in any way mean to imply that they are the only issues that will be raised if and when the ordinance is attacked in court. For instance, some fuel is "transferred" in Fairbanks to containers for the purpose of transportation to Canada in foreign commerce. Taxing those transfers will raise issues under the commerce clause of the federal constitution, though the amount of fuel impacted will be very small. There are issues concerning how the revenues raised by this tax may be spent. Federal statutes (49 USC. Sec. 47133) do restrict the use of "local taxes on aviation" – a restriction, incidentally, that is reflected in state law which dedicates at least a part of the money raised from taxation of aviation fuel to aviation facilities.[32] There is no present restriction in the Transfer Tax that would limit the use of the proceeds.

We have not attempted to analyze every conceivable issue because what we can conclude about this tax is evident from the issues we have already discussed. That discussion, as confusing as it may be, forms the basis of our recommendation to the Assembly as to how it should evaluate the impact that this proposed ordinance will have on future borough revenues.

The first and most critical point we want to make is that while there is an element of uncertainty in any prospective contested legal issue, the uncertainty about this particular tax is enormous. This is a new and different kind of tax. There is no prior

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[32] AS 43.40.010(e)

litigation that can provide answers with any real certainty as to just how much of this ordinance if any will survive the nearly certain litigation that will occur if it is enacted. Review of the cases cited in this opinion discloses immediately that none of them is directly on point. All of the arguments made here are by analogy; there are no cases that analyze a tax anything like this. The task is one of predicting just how doctrines developed under different circumstances will be applied to this situation.

The only thing that can be said with certainty is that there is hardly a single transaction or "transfer" under this tax that is not subject to some kind of legal challenge, ranging from the authority of the borough to tax fuel transfers at all to pre-emption of its right to tax jet fuel and other products exempted under the state fuel tax. To the extent this transfer tax covers simple sales of fuel in Fairbanks, where title to the fuel is in fact transferred or the fuel is moved into containers for sale in Fairbanks, the tax will probably be upheld against pre-emption claims based on the mere existence of a state sales or transfer tax. Even many of those sales and transfers, however, will be challenged on the basis that they tax "transfers" that are exempt under the State Fuel Tax.[33] The amount of revenue brought in by simply applying the tax to traditional sales will be minimal compared to the amount that would be derived from a transfer tax on all fuel produced in Fairbanks, and then shipped out for sales or use in other areas of the state. But the validity of tax on that larger category of "transfers" is subject to all kinds of serious

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[33] For instance, in an attachment to its legal memo to the borough attorney, Williams claims that out of the nearly 15,000 barrels of fuel "transferred" in the borough daily, only 4,500 would be subject to tax – primarily sales of gasoline. The remainder, Williams claims, would be covered by exemptions to the state fuel tax, such as those relating jet fuel, fuel sold to electrical generation plants or house heating fuel.

challenges. At best, the borough can expect that the transfer tax will be tied up in complicated litigation for years and that until at least the Alaska Supreme Court rules on the validity of the tax, there is absolutely no way the Assembly can or should rely on any revenues from the tax.

We hope this opinion is of some help to you in evaluating the impacts of this tax. We are, of course available to discuss it with you further should you so desire.

Yours very truly,

GROSS & BURKE

Avrum M. Gross