ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672 498
8233 SENATE COMMUNITY & REGIONAL AFFAIRS

SB

261

SENATE COMMITTEE REPORT

DATE: 2/2/94 FURTHER: Finance

DATE TURNED INTO OFFICE: 2-25-94

CRA Committee considered SENATE BILL NO. 261

"An Act relating to municipal sales and use taxes involving air carriers; and providing for an effective date."

and recommends:

[X] replace with _____ CS SB261 (CRA)
or [ ] adopt previous _____ CS _____ ( )
[ ] attaches amendment(s)

[ ] same title
[X] new title
[ ] technical title change (HB only)

[ ] adopts _____ Letter of Intent
[ ] further referral to the _____

[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal
previous ← DCRA	1/31/94	ϕ	
DOTPF	2/8/94	ϕ	
new for CSO DCRA-Muni	2/2/94	ϕ	

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal

[ ] Appropriation No Fiscal Note

DO PASS:

OTHER RECOMMENDATIONS:

Loren A. Leman No Rec

Kevin L. Taylor No Rec

Rick E. Halford No Rec

Chair: Signature and Recommendation

No. 1

Bill Version: SB 261

(S) Publish Date: 2-2-94

STATE OF ALASKA
1994 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

Dept. Affected: Community & Regional Affairs

Title: "An Act relating to municipal sales and use taxes involving air carriers: . . ."

BRU:

Component:

Sponsor: Senator Sharp

Requestor:

COMPONENT SERIAL NO.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current (FY94) Impact $ none

ANALYSIS: (Attach a separate page if necessary)

Changes in CS SB 261 (TRA) have no fiscal impact. This fiscal note is appropriate.

2/1/94 date — LAS Comte Aide (initial)

Prepared by: Rimond Henderson — Director — Phone: 465-4708

Division: Administrative Services — Date: 1/31/94

Approved by Commissioner: [signature] — Deputy Commissioner — Date: 1/31/94

Agency: Community & Regional Affairs

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[¶ 1572] STATE TAXATION OF AIR COMMERCE

Sec. 1113 [49 App. U. S. Code 1513] (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (c) except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sale or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, or other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans, the provisions of subsection (a) shall not apply to such authority until December 31, 1973.

[the rest is not relevant]

(d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a state used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL No.: SB 261

FISCAL NOTE

Revision Date:
Department Affected: DOT&PF
Title: No Municipal Sales Taxes on Air Carriers
BRU:

Sponsor: Sharp
Component:
Requestor:
Component Serial Number:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING:	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS	0	0	0	0	0	0
1003 GF MATCH	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/PROGRAM RECEIPTS	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL FUNDING:	0	0	0	0	0	0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY94) impact: $

ANALYSIS: (Attach a separate page if necessary)

This bill will not directly affect any state programs; however, it will result in transportation cost savings in that an additional potential tax would be clearly prohibited.

Prepared by: Jonathan A. Widdis, Director
Phone: 266-1460

Division: Statewide Aviation
Date: February 3, 1994

Approved by Commissioner: B.A. Campbell
Phone: 465-3901

Agency: Department of Transportation and Public Facilities
Date: February 8, 1994

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Municipal Fiscal Impact Note
(AS 24.08.035(e))

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 261
Version:

Revision Date: 1/26/94
Title: Taxes involving Air Carriers

Municipalities Affected: All

Requested By

Sponsor: Senator Sharp

Municipal Costs: (Thousands of Dollars)

Operating	FY95	FY96	FY97	FY98	FY99	FY2000
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
Total Operating						
Capital						

Funding (Thousands of Dollars)

Property Taxes						
Sales Taxes	(minimal loss)					
User Fees						
Federal Receipts						
State Receipts						
Other						
Total						

Positions

Full-Time						
Part-Time						

Analysis:

SB 261 would exempt all air carrier from sales tax for activities involving carrying of passengers or freight. There are currently 98 municipal governments which levy a sales tax. Of these, 6 are boroughs or unified municipalities, including Haines Borough, City & Borough of Juneau, Kenai Peninsula Borough, Ketchikan Gateway Borough, City & Borough of Sitka, and the City & Borough of Yakutat.

A phone survey of municipalities on 1/28/94 by the Office of the State Assessor found that very few municipalities levy a sales tax against air carriers for this activity. This is partially due to the fact that the federal government levies a tax against passenger service precluding any local taxation. At the present time, the Kenai Peninsula Borough is in court on this specific issue.

Continues on attached page.

Prepared by: Michael Cushing, Research Analyst
Phone: 465-4751
Division: Municipal and Regional Assistance Division
Date: 1/31/94
Approved by Commissioner: [signature] DEPUTY COMMISSIONER
Date 2/2/94
Agency: Department of Community and Regional Affairs

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MUNICIPAL FISCAL NOTE
& ANALYSIS

In addition to Kenai, Sitka and Cordova currently levy a tax on passenger service, however, with little revenue generated. The cities of Haines, Ketchikan and Nenana levy a sales tax on freight. The taxes received are also minimal. Dillingham, Juneau, Kodiak, Palmer, Petersburg and Yakutat do not levy any type of sales tax against air carriers, although they do levy a general sales tax.

Based on the survey by the State Assessor's Office, it appears that passage of this legislation will have minimal fiscal impact on municipalities, partially because federal law appears to exempt passenger service already.

In summary, this bill would probably have little fiscal impact on local governments. At the state level, passage of this bill would certainly address the legal question of whether or not local governments can impose a sales tax on air carrier passenger service. At any rate, parts of this question may be answered by the courts shortly.

STATE OF ALASKA
1994 LEGISLATIVE SESSION

FISCAL NOTE

BILL NO: SB 261

Revision Date:

Dept. Affected: Community & Regional Affairs

Title: "An Act relating to municipal sales and use taxes involving air carriers: . . ."

BRU:

Component:

Sponsor: Senator Sharp

Requestor:

COMPONENT SERIAL NO.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current (FY94) Impact $ none

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Rimond Henderson — Director — Phone: 465-4708

Division: Administrative Services — Date: 1/31/94

Approved by Commissioner: [redacted] — Deputy Commissioner — Date: 1/31/94

Agency: Community & Regional Affairs

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For further [redacted]tive Office

Official Business

COMMITTEE:
SENATE COMMUNITY & REGIONAL AFFAIRS

DATE: 2/15/94

SIGN-IN

Subject of meeting:
SB 261 NO MUNICIPAL SALES TAXES ON AIR CARRIERS

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Dave Palmer	155 So Seward Juneau	586-5230	CBJ	Y
Reed Staoys	240 Main St Suite 600	4633223	AACM	Y
Chrystal Smith	217 2nd St, Suite 200	586-1325	AML	Y

Official Business

COMMITTEE:

SENATE COMMUNITY AND REGIONAL AFFAIRS

DATE: 2/17/94

Subject of meeting:

SB 261 NO MUNICIPAL SALES TAXES ON AIR CARRIERS

SIGN-IN

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
John Hartle	c/o CBJ 155 S. Seward JNU	586-5242	CBJ	Yes
PAUL BOWERS	Juneau Int'l Airport 1873 Shell Simmons Dr	789-7821	CBJ	yes
BOB JACOBSEN	WINGS OF ALASKA 1873 SHELL SIMMONS DR JUNEAU, AK	789-0790	WINGS OF ALASKA	YES

8-LS1560\K.1
Cook
2/23/94

AMENDMENT

OFFERED IN THE SENATE BY SENATOR SHARP

TO: CSSB 261( )

Page 1, line 11, after "carrier":

Insert "other than a fee authorized under 49 U.S.C. App. 1513(e)"

(PASSENGER FACILITY CHARGE)

ALASKA AIR CARRIERS ASSOCIATION
1117 E. 35th Avenue, Suite 102
Anchorage, Alaska 99508
(907) 277-0071 Fax (907) 277-0072

February 14, 1994

Senator Bert Sharp
Chairman, Transportation Committee
Juneau, Alaska

Dear Senator Sharp:

The Alaska Air Carriers Association supports your sponsorship of SB 262 regarding sales taxes on air transportation. The preemption provision of the Federal Aviation Act of 1958 (as amended), prohibits States or political subdivisions to impose taxes or fees on air transportation.

Your bill will have little if any effect on the ability of cities and municipalities to enact revenue generating methods not already proscribed by federal law. The bill will, however, clarify the matter. There will no longer be the costly and persistent need to defend in court the language and intention of the regulation.

If you have any additional questions or would like further information, please call. We look forward to working with you on this and other matters throughout the year's legislative session.

Sincerely,

Richard Harding
President, AACA

ALASKA AIR CARRIERS ASSOCIATION
1117 E. 35th Avenue, Suite 102
Anchorage, Alaska 99508
(907) 277-0071 Fax (907) 277-0072

January 24, 1994

Commissioner Bruce Campbell
State of Alaska DOT/PF
3132 Channel Drive
Juneau, Alaska 99801-7898

Via Fax: 586-8365

Re: Amendment to AS 29.45.650
City Sales Tax Proposals on Air Commerce

Dear Commissioner,

Thank you for taking the time last week following the RDC breakfast to listen to our concerns over the various local government proposals imposing sales taxes on air commerce. I enjoyed the information you provided in your talk -- You were pretty easy to listen to even at 7:30 a.m.!

As you know, the Federal Pre-emption Provision disallows state or local taxes to air transportation. With imminent decreasing revenue sharing, communities are continually on the lookout for new revenue opportunities. We expect much effort on our part will be necessary to educate public supporters of such tax proposals. Your commitment to support an amendment to AS 29.45.650 that will clear up the language and put the issue to rest conclusively, is greatly appreciated and will certainly lend weight to the cause.

I've attached a draft amendment for your perusal and a copy of an informational letter to the AACA membership explaining the issue.

If you have questions or would like further information, please call. We look forward to working with you on this matter and others (including your Intermodal Transportation Committee) as the Legislative session progresses.

Sincerely,

Kimberly S. Daniels
Executive Director

February 10, 1994

155 SOUTH SEWARD STREET
JUNEAU, ALASKA 99801

Senator Bert M. Sharp
Chair, Senate Transportation Committee
Room 514 State Capitol
Juneau, AK 99801-1182

Dear Senator Sharp:

Re: CSSB 261

The City and Borough of Juneau (CBJ) has been exploring the possibility of imposing a sales tax on flightseeing business conducted within the Borough. The issue in Juneau is a bit different than many jurisdictions in that nearly all of the flightseeing activity occurs completely within the City and Borough jurisdiction.

Within the CBJ, it is estimated that 19 air transport companies provide some level of flightseeing. There are four major companies and we estimate that they produced a gross flightseeing revenue of approximately $ 7,600,000 in 1992. This represents a tax revenue to the CBJ of over $300,000. CBJ disagrees with the DCRA fiscal note on SB 261 which states that "this bill would probably have little impact on local governments."

Whether the CBJ may impose such a tax on a service conducted within the CBJ boundaries is being researched now, and of course, the Kenai case (Homer Air vs. Kenai Peninusla Borough) is being monitored with interest. SB 261 would preempt the local effort to impose and administer a sales tax within the Borough by providing an exemption to a particular class of service. The City and Borough of Juneau believes that the determination of what services should or should not be exempted at the local government level are best made at the local level. Providing exemptions to locally imposed sales tax at the state legislative level opens the door to many special interests who desire similar exemptions.

There are some particular questions that we would appreciate having clarified regarding the bill under consideration:

1. Define "use tax".
Page 1 line 12...the bill prohibits a sales and "use tax." Concern is that a variety of fees and taxes imposed by the CBJ could be construed to be included. For example, although the CBJ does not presently impose a Passenger Facility Charge, one is authorized by the federal law. This charge is imposed on passengers utilizing the airport terminal. The CBJ imposes landing fees, airport use fees, and fuel flowage fees. If the intent is to prohibit a sales tax, perhaps the term "use tax" should be deleted, or a clear, and precise definition developed.

c:\drpfiles\legis\cssb261

2. Specify air carriers intended to be exempted.
Page 1 line 13...although the title of the bill refers to "air carriers", line 13 refers to "federally certificated air carrier". A more specific definition is required. If the intent is to cover air carriers operating under a federally issued certificate of public convenience and necessity under Section 401 of the Federal Aviation Act, it should be clearly specified. Otherwise, confusion can be created because there are "air carriers" that operate under more general certificates issued under Part 135, or Part 121 of the act, for example. A prohibition to a sales tax for Section 401 carriers would not create a problem for the CBJ, but a prohibition that included Part 135 operations would.

To be clear: our first choice is no bill at all. If, however, a bill is to be enacted, clarification is needed as noted above. An amendment making the legislation inapplicable to flights entirely within a borough would resolve CBJ's concerns.

Sincerely,

David R. Palmer
Deputy City Manager

CC: Mayor Parsons and Assembly
Representative Fran Ulmer
Representative Bill Hudson
Senator Jim Duncan
Mark Palesh, City Manager
Clark Gruening

c:\drpfiles\legis\cssb261

February 10, 1994

155 SOUTH SEWARD STREET
JUNEAU, ALASKA 99801

Senator Bert M. Sharp
Chair, Senate Transportation Committee
Room 514 State Capitol
Juneau, AK 99801-1182

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c:\drpfiles\legis\cssb261

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Sincerely,

David R. Palmer
Deputy City Manager

CC: Mayor Parsons and Assembly
Representative Fran Ulmer
Representative Bill Hudson
Senator Jim Duncan
Mark Palesh, City Manager
Clark Gruening

c:\drpfiles\legis\cssb261

DOUGLAS TO INTENSIFY MARKETING OF TWIN PROPFAN

Douglas Aircraft early next year will "intensify" its marketing efforts with airlines for a propfan derivative of its MD-80 series, despite a Boeing decision this week to delay indefinitely its 7J7 propfan project (DAILY, Dec. 16). Boeing said it is consolidating its product development activities, including studies of the 7J7, into a new Advanced Programs Organization.

A Douglas spokesman said that the company is "moving ahead" with its propfan flight tests on testbed aircraft and has completed 110 flight tests. "We will be out heavily after the start of the new year talking to airlines. We are trying to get enough interest to launch. We have encountered a lot of interest." Douglas will be trying to determine the size of aircraft to offer, which is one reason why Boeing backed off a 1993 introduction of the 7J7. Boeing said airlines wanted the 7J7 in sizes of 130 to 180 seats. "The 7J7 was visualized initially as 150 seats," a Boeing spokesman said. Douglas could offer the 130-seat MD-91, the MD-87 equivalent, or the larger MD-92, which is based on an aircraft the size of the MD-80.

The Boeing decision could put the proposed 7J7 into a mid-1990s timeframe, which is when Airbus Industrie had predicted propfan technology would become feasible for use on transport aircraft. Airbus said it believes its A320 "in any event" will be a competitive aircraft to either U.S. offering. "We do not think technologically it will be superseded for the foreseeable future."

Alan Mulally, former director of engineering for the 7J7, was named general manager of the new Advanced Programs Organization, which Boeing said will have responsibility for development of its advanced technology and design and new airplane programs. Reporting to Mulally will be Ardell Anderson, director of new product development; Robert Mathis, director of finance; Murray Booth, director of 7J7 engineering, and Roy Phillips, manager of the 7J7 joint venture management.

Concerning Japanese participation on the 7J7 program, Michio Daibo of Japan Aircraft Development Corp. will coordinate with Mulally, and similar relationships will exist between Akira Ikeda and Murray Booth and Norio Yamanouchi and Roy Phillips. Boeing said that because of the major air traffic growth expected by the year 2000, the new organization structure "will ensure a synergistic approach to development and implementation of technical advances in all new and derivative products, including the high-speed commercial transport under study."

It said the reorganization resulted from a decision earlier this year to delay program timing of the 7J7 until a "more defined requirement of airplane and engine size can be obtained from key customers."

NEW MEXICAN CARRIER ORDERS AIRBUS A300-600

Latur, a new Mexican charter carrier venture started by the Mexican pilots association through its pension fund and Promotora Mexicana de Hoteles, has ordered an A300-600, making it the first Mexican customer for an Airbus product. Engine selection is yet to be made for the aircraft, which is to be delivered in July 1989 and used on routes between the U.S. East Coast and Mexican resorts.

FAA EXTENDS DEADLINE FOR SPECIAL FLIGHT AUTHORIZATIONS

FAA has extended until Dec. 31, 1989, a special authorization for non-revenue flights of Stage 1 aircraft if permission is submitted five days before the flight, but the agency says it does not intend to extend the authorization beyond that date (DAILY, Dec. 16). Current rule authorizing such flights expires Dec. 31, 1987. FAA began allowing the flights following the Jan. 1, 1985 deadline, which prohibits the operation of aircraft that do not comply with Stage 2 or 3 noise levels. Agency said that extension of the rule is not necessary beyond Dec. 31, 1989, because "most non-complying Stage 1 aircraft will either have been modified to meet Stage 2 noise standards or be out of service."

FLORIDA COURT STRIKES DOWN SERVICE TAX ON AIR FREIGHT

Circuit Court for Leon County, Fla., has struck down Florida's tax on services as it applies to air freight, the Air Transport Association said. Judge Charles Miner, who wrote the opinion for the court, said Section 1113 of the Federal Aviation Act which prohibits states from taxing air transportation also applies to cargo. Since the tax went into effect July 1 Florida has assessed a 5% tax on intrastate air freight and a 2.5% tax on intrastate shipments. The ruling was in response to a suit filed Aug. 18 against the state by ATA and DHL Airways. The Florida Department of Revenue had tried to get the suit dismissed on grounds the federal act prohibits states from establishing head taxes but did not apply to taxes on property moved by air.

Alaska State Legislature

SENATOR
BERT SHARP
DISTRICT P

CHAIRMAN
TRANSPORTATION COMMITTEE

MEMBER
FINANCE COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE
HEALTH & SOCIAL SERVICES

FAIRBANKS
DENALI BANK BUILDING
119 N. CUSHMAN, SUITE 201
FAIRBANKS, ALASKA 99701
(907) 452-7885/7886

SESSION ADDRESS
STATE CAPITOL, ROOM 514
JUNEAU, ALASKA 99801-1182
(907) 465-3004/4921

Senate

MEMORANDUM

DATE: February 23, 1994

TO: Members of the Community and Regional Affairs Committee

FROM: Senator Bert Sharp BMS

RE: Draft CS for CS SB 261

In response to concern over the prohibition of "use taxes" in CS SB 261, I am submitting the attached draft CS for consideration by the committee. The municipalities fear that "use tax" is so vague that it may interfere with the collection of landing fees, fuel flowage fees, etc. The new language contained in the attached draft eliminates "use taxes" altogether, and clearly prohibits taxation only of the transport of individuals or goods. The air carriers support this language, and the attorney for the City of Juneau agrees that it alleviates municipal concern regarding the vagueness of "use taxes".

In regards to narrowly defining "federally certificated air carrier", I stand opposed. The Federal Preemption Provision applies to all air carriers regulated by the FAA. Since it is the intent of this legislation to restate federal law, it would be unwise to include only those air carriers certified under Section 401 of the Federal Aviation Act as the municipalities have suggested. Doing so would merely leave open a window of opportunity for future, fruitless litigation.

The retroactive effective date remains in the draft CS to be dealt with as the committee so desires.

Thank you for your consideration.

8-LS156(NK
Cook
2/23/94

CS FOR SENATE BILL NO. 261( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR SHARP

A BILL

FOR AN ACT ENTITLED

"An Act relating to municipal taxes and fees on the transportation of individuals or goods by federally certificated air carriers; and providing for an effective date."

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

* **Section 1.** AS 29.10.200 is amended by adding a new paragraph to read:

(53) AS 29.47.470 (air carriers).

* **Sec. 2.** AS 29.47 is amended by adding a new section to read:

Sec. 29.47.470. TAXES OR FEES ON TRANSPORTATION BY CERTAIN AIR CARRIERS PROHIBITED. Notwithstanding other provisions of law, a municipality may not levy or collect a tax or fee on the transportation of individuals or goods by a federally certificated air carrier. This section applies to home rule and general law municipalities.

* **Sec. 3.** This Act is retroactive to January 1, 1993.

* **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

FEB 4 1993

Alaska State Legislature

SENATOR
BERT SHARP
DISTRICT P

CHAIRMAN
TRANSPORTATION COMMITTEE

MEMBER
FINANCE COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE
HEALTH & SOCIAL SERVICES

FAIRBANKS
DENALI BANK BUILDING
119 N. CUSHMAN, SUITE 201
FAIRBANKS, ALASKA 99701
(907) 452-7885/7886

SESSION ADDRESS
STATE CAPITOL, ROOM 514
JUNEAU, ALASKA 99801-1182
(907) 465-3004/4921

Senate

MEMORANDUM

TO: Senator Randy Phillips, Chairman
Senate Community & Regional Affairs Committee

FROM: Senator Bert Sharp

RE: Request for hearing -- CSSB 261

I am requesting that CS for Senate Bill 261, "An Act relating to municipal sales and use taxes; and providing for an effective date," be heard before the Senate Community & Regional Affairs Committee at your earliest convenience. The municipal fiscal impact note prepared by the DC&RA indicates that that passage of the bill would have a minimal impact on municipalities in the area of sales tax. Consequently, I would support an amendment replacing the retroactive effective date in the bill with a proactive date. Thank you for your consideration.

Patsy Fisher
Councilmember
P. O. Box 321
Cordova, AK 99574

February 08, 1994

Senator Randy Phillips
Alaska State Legislature
State Capital
Juneau, AK 99801-1182

Dear Senator Phillips,

I am writing in regards to SB 261 which states 'we can not levy or collect a sales tax or use tax on an activity that directly involves the carriage of individuals or goods for hire by an air carrier". Cordova is trying to increase tourism and this will limit the local ability of taxation. Exemptions of this kind should be done at the local level instead at the state level.

Please do not pass SB 261.

Sincerely

Patsy Fisher

Patsy Fisher
Councilmember

cc: Senator Robin Taylor
Senator Rick Halford
Senator Al Adams
Senator Fred F. Zharoff
Senator Georgianna Lincoln

Alaska State Legislature

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Senate

SPONSOR STATEMENT

SB 261 - "An Act relating to municipal sales and use taxes involving air carriers; and providing for an effective date."

SB 261 reinforces the Federal Preemption Provision of the Federal Aviation Act of 1958 which reserves to the federal government the power to regulate and tax air carriers engaged in air transportation or air commerce. The law explicitly states that no state or political subdivision may enact laws that affect the rates, routes or services of an air carrier engaged in air transportation. Despite the provision, several communities in Alaska have proposed sales and use taxes of this sort. Allowing such provincial taxing authority could soon strangle even the most effective transportation networks. Substantial case law demonstrates that this practice violates the Act, but communities, believing they have found yet another loophole in the law, periodically test the waters with a new tax. This has resulted in confrontation and costly litigation between the aviation community and the municipalities. SB 261 eliminates the illusions on which past efforts have been based and restates federal intent in the preemption provision.

BOGLE & GATES

FINAL

LAW OFFICES

JAMES N. REEVES

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Seattle
Bellevue
Portland
Tacoma
Vancouver, B.C.
Washington, D.C.
Yakima

January 21, 1994

Mr. Edgar R. Locke
Beaty, Draeger & Locke, P.C.
3900 Arctic Boulevard, Suite 101
Anchorage, Alaska 99503

Re: City of St. Mary's Sales Tax

Dear Mr. Locke:

We represent Northern Air Cargo and Alaska Airlines. Each of them recently received a letter from the City demanding that they provide the City with a "full account of tax reserves subject to the [City's] tax" and payment of all tax asserted to be due by a stated deadline. I called you earlier last week on behalf of Northern Air Cargo in response to that letter. You courteously agreed that the time for response to the letter could be extended to today.

As the City is aware, the air carriers have serious doubts as to the validity of the City's ordinance. These doubts were expressed in Mr. Hallford's letter to the City Manager dated June 11, 1993. There are several independent reasons why the City's attempt to tax the carriers' operations in this manner is illegal. These are summarized briefly in the following paragraphs of this letter.

1. The tax is preempted by 49 U.S.C. App. § 1305(a). This broad preemption provision was enacted as a part of the 1978 Airline Deregulation Act, which extensively amended the original 1958 Federal Aviation Act, as amended. It prohibits any state or local law "relating to rates, routes or services of any air carrier having authority [under the Act] to provide air transportation." In Morales v. Trans World Airlines, 112 S. Ct. 2031, 119 L.Ed. 2d 157 (1992), the U.S. Supreme Court confirmed that this preemption provision was intended by Congress to have a very broad effect. It prohibits all local laws "having a connection with or reference to" rates, routes or services. This

broad preemption statute leaves the states and their political subdivisions with very little authority. Local laws having only a "tenuous, remote or peripheral" effect upon the airlines' rates, routes and services are still allowed; but all other local laws are flatly preempted.

Even local laws which have a lesser effect upon air carriers than the City's tax ordinance have been held to be preempted by the federal statute. See, e.g., Morales v. Trans World Airlines; Mattox v. Trans World Airlines, 897 F.2d 773 (5th Cir. 1990). These cases involved attempts to regulate advertising practices. On the continuum ranging from substantial and direct effects upon "rates, routes and services" to effects that are only "tenuous, remote or peripheral," the local laws rejected in Morales and Mattox clearly exerted a more tenuous or peripheral effect upon rates than the tax levied directly upon the sale of transportation and the customer that the City is attempting to impose, yet they were ruled to be preempted.

3. The limited savings provision found in the Anti-Head Tax statute, 49 U.S.C. App. § 1513, does not authorize this tax. The savings provision allows certain forms of taxation of the sale of services other than air transportation itself. The cases of Wardair Canada v. Florida Dept. of Revenue, 477 U.S. 1 (1986), and Air Jamaica, Ltd. v. State Dept. of Revenue, 374 So.2d 575 (Fla. App. 1974), are of no help to the City. They upheld the imposition of a local sales tax on jet fuel and on pre-packaged meals. In each instance, the object of the local tax was not the provision of air transportation, but was the provision of goods and services supplied in connection with, or incidental to, airline operations.

3. Superior Court Judge Link's recent decision in the Homer Air case is inapposite. Homer Air is a non-certificated air taxi operator. Hence, the preemption provision (49 U.S.C. App. § 1305(a)) does not under § 1305(b) apply to Homer Air because it is not a federally-certificated carrier. Northern Air Cargo and Alaska Airlines both hold certificates of public convenience and necessity issued by the U.S. Department of Transportation under Section 401 of the Federal Aviation Act. State and local laws relating to their rates, routes and services are prohibited by federal law.

4. A carrier operating pursuant to a certificate of public convenience and necessity, carrying U.S. Mail (by definition "air transportation") and carrying freight in interstate commerce, is not subject to state regulation or state taxation with respect to any of the traffic carried, regardless of whether the origin and destination of the journey are entirely within the same state. See, Federal Express Corp. v. California

Public Utilities Commission, 716 F.Supp. 1299 (N.D. California, 1989), and Pioneer v. City of Kearney, 256 N.W.2d 324 (Nebraska 1977). Northern Air Cargo and Alaska Airlines are in this exempt category.

5. Even if federal statutes left states and political subdivisions free to tax carriage of goods that travel strictly in intrastate commerce, we believe that most if not all of the air carriage activities of Northern Air Cargo and Alaska Airlines are nontaxable because they constitute interstate or foreign commerce. In determining whether transportation between two points in a state is intrastate or interstate in nature, the crucial consideration is the shipper's intent at the time of shipment. Rehaeus v. Levins, 921 F.2d 804, 81[illegible] (8th Cir. 1990). It would be impractical and unworkable for the City to force the air carriers to guess about each of its shipper's intentions with respect to each shipment.

Northern Air Cargo and Alaska Airlines both received form letters ("Dear Business Owner") from the City Manager requesting that they complete a "Consumer's Sales Tax" report form. The payments made by their shippers in respect of aircraft operations originating or terminating in the City of St. Mary's are exempt from taxation, for the reasons discussed earlier in this letter. Therefore, we believe that there is no legal justification or practical reason for the City to require them to file a "Consumer's Sales Tax" report form. If the City disagrees with this view, please notify us. In that event, we would be interested in knowing the City's position about which provision of the ordinance requires the filing of this form and what consequences might ensure in the event of a failure to file.

As is probably clear from the tone of this letter, Northern Air Cargo and Alaska Airlines are confident of their legal position in this matter and are strongly committed to defending their rights to be free of local government taxation efforts that Congress has seen fit to prohibit. Northern Air Cargo has consulted on this matter with its lawyer in Washington, D.C. with whom it has worked for many years on regulatory matters. The lawyer, Mr. Theodora Seamon, has concentrated his practice in federal airline regulation matters for more than forty years and has been actively representing Northern Air Cargo and other Alaska clients on these matters since before statehood. Mr. Seamon and I are available to confer with you at your convenience regarding this matter and to provide a more detailed discussion of the legal principles mentioned in this letter should you desire. In fact, we would encourage such a meeting.

Northern Air Cargo and Alaska Airlines have always honored their legal obligations, and they certainly intend to do

so in this instance. At the same time, the City cannot expect them to penalize their customers by collecting and remitting to the City a tax that is clearly prohibited by federal law.

Very truly yours,

BOGLE & GATES

James N. Reeves

Alaska Statutes

Title 29. Municipal Government.

Chapter
10. Home Rule Municipalities (§ 29.10.200)
20. Municipal Officers and Employees (§ 29.20.090)
35. Municipal Powers and Duties (§§ 29.35.055, 29.35.131 — 29.35.137, 29.35.200, 29.35.210, 29.35.625)
45. Municipal Taxation (§ 29.45.050)
55. Municipal Programs (§ 29.55.020)
60. State Programs (§§ 29.60.450, 29.60.600, 29.60.650)

Chapter 10. Home Rule Municipalities.

Article
2. Home Rule Limitations (§ 29.10.200)

Article 2. Home Rule Limitations.

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Sec. 29.10.200. Limitation of home rule powers. Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided. These provisions supersede existing and prohibit future home rule enactments that provide otherwise:

(1) AS 29.05.140 (transition);
(2) AS 29.06.010 (change of municipal name);
(3) AS 29.06.040 — 29.06.060 (annexation and detachment);
(4) AS 29.06.090 — 29.06.170 (merger and consolidation);
(5) AS 29.06.190 — 29.06.420 (unification of municipalities);
(6) AS 29.06.450 — 29.06.530 (dissolution);
(7) AS 29.10.100 (charter amendment);
(8) AS 29.20.010 (conflict of interest);
(9) AS 29.20.020 (meetings public);
(10) AS 29.20.050 (legislative power);
(11) AS 29.20.060 — 29.20.120 (assembly composition and apportionment);
(12) AS 29.20.140 (qualifications of members of governing bodies);
(13) AS 29.20.150 (term of office);
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(26) AS 29.35.050 (garbage and solid waste services);
(27) AS 29.35.055 (local air quality control program);
(28) AS 29.35.060 (franchises and permits);
(29) AS 29.35.070 (public utilities);
(30) AS 29.35.080 (alcoholic beverages);
(31) AS 29.35.120 (post audit);
(32) AS 29.35.131 (enhanced 911 system);
(33) AS 29.35.145 (regulation of firearms);
(34) AS 29.35.160 (education);
(35) AS 29.35.170(b) (assessment and collection of taxes);
(36) AS 29.35.180(b) (land use regulation);
(37) AS 29.35.250 (cities inside boroughs);
(38) AS 29.35.260 (cities outside boroughs);
(39) AS 29.35.340 (acquisition of areawide power);
(40) AS 29.35.500 — 29.35.590 (hazardous materials and wastes);
(41) AS 29.40.160(a) — (c) (title to vacated areas);
(42) AS 29.40.200 (subdivisions of state land);
(43) AS 29.45.010 — 29.45.570 (property taxes);
(44) AS 29.45.650(c), (d), (e), and (f) (sales and use tax);
(45) AS 29.45.700(d) (sales and use tax);
(46) AS 29.47.200(b) (security for bonds);
(47) AS 29.47.260 (construction);
(48) AS 29.60.050(c) (limitation on computation and use of payment);
(49) AS 29.60.120(a) and (c) (state aid for health facilities and hospitals);
(50) AS 29.65 (general grant land);
(51) AS 29.71.040 (procurement preference for state agricultural and fisheries products);
(52) AS 29.71.050 (procurement preference for recycled Alaska products). (§ 6 ch 74 SLA 1985; am §§ 1, 2 ch 38 SLA 1986; am § 6 ch 70 SLA 1986; am § 12 ch 80 SLA 1986; am § 3 ch 108 SLA 1986; am § 49 ch 14 SLA 1987; am § 1 ch 30 SLA 1988; am § 2 ch 63 SLA 1988; am § 1 ch 64 SLA 1988; am § 3 ch 57 SLA 1993; am § 5 ch 74 SLA 1993)

NOTES TO DECISIONS

City's imposition of higher property tax mill rate on oil and gas invalid. — City's imposition of a higher property tax mill rate on oil and gas property than on other property in the city, for the purpose of paying the cost of providing oil spill prevention and response services, was invalid, because the tax violated AS 43.56.010(b), which specifically prohibits a municipal tax rate higher than that which applies to "other property taxable by the municipality." City of Valdez v. State, Dep't of Community & Regional Affairs, 793 P.2d 532 (Alaska 1990).

Sec. 29.45.590. Limited property taxing power for second class cities. A second class city may by referendum levy property taxes as provided for first class cities. However, levy by a second class city may not exceed one-half of one percent of the assessed value of the property taxed, except that the limit does not apply to a levy necessary to avoid a default upon payment of principal and interest of bonded or other indebtedness that is secured by a pledge to levy ad valorem or other taxes without limit to meet debt payments. (§ 12 ch 74 SLA 1985)

Sec. 29.45.600. Combining property tax with incorporation of a second class city. A petition for second class city incorporation may request that a property tax proposal be placed on the same ballot. The petition must state the proposed tax rate. The petition may request that incorporation be dependent on the passage of the property tax proposition. If so, the incorporation proposition fails if the property tax fails. (§ 12 ch 74 SLA 1985)

Article 4. Borough Sales and Use Tax.

Section
650. Sales and use tax
660. Notice of sales and use tax
670. Referendum, adoption, and modification
680. Combining sales and use tax with incorporation of a borough

Sec. 29.45.650. Sales and use tax. (a) Except as provided in AS 04.21.010(c) and in (f) and (h) 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.

(b) A borough levying a sales tax may also by ordinance levy a use tax on the storage, use, or consumption of tangible personal property in the borough. The use tax rate must equal the sales tax rate and the use tax shall be levied only on buyers.

(c) A person who furnishes proof, in the form required by the borough tax collector, that the person has paid a sales tax on the source on which a use tax is levied by the borough is required to pay the use tax only to the extent of the difference between the amount of the

sales tax paid and the amount of the use tax levied by the borough. This subsection applies to a sales tax levied in any taxing jurisdiction whether inside or outside the state.

(d) If the assembly charges interest on sales taxes not paid when due, the rate of interest may not exceed 15 percent a year on the delinquent taxes and shall be charged from the due date until paid in full. This subsection applies to home rule and general law municipalities.

(e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales and use tax, and the interest, penalties, and administration costs in the event of delinquency. When recorded, the sales tax lien has priority over all other liens except (1) liens for property taxes and special assessments; (2) liens that were perfected before the recording of the sales tax lien for amounts actually advanced before the recording of the sales tax lien; (3) mechanics' and materialmen's liens for which claims of lien under AS 34.35.070 or notices of right to lien under AS 34.35.064 have been recorded before the recording of the sales tax lien. This subsection applies to home rule and general law municipalities.

(f) A borough may not levy and collect a sales tax on a purchase made with (1) food coupons, food stamps, or other type of certificate issued under 7 U.S.C. 2011 — 2025 (Food Stamp Act); or (2) food instruments, food vouchers, or other type of certificate issued under 42 U.S.C. 1786 (Special Supplemental Food Program for Women, Infants, and Children). This subsection applies to home rule and general law municipalities.

(g) *[Repealed, § 2 ch 159 SLA 1990.]*

(h) A borough may not levy or collect a sales tax on sales, rents, and services, or a use tax on the storage, use, or consumption of personal property on the following activities:

(1) the sale, lease, rental, storage, consumption, or distribution in this state of or the provision of services relating to an orbital space facility, space propulsion system, or space vehicle, satellite, or station of any kind possessing space flight capacity, including the components of them;

(2) the sale, lease, rental, storage, consumption, or use of tangible personal property placed on or used aboard an orbital space facility, space propulsion system, or space vehicle, satellite, or station of any kind, regardless of whether the tangible personal property is returned to this state for subsequent use, storage, or consumption; an exemption under this paragraph is not affected by the failure of a launch to occur, or the destruction of a launch vehicle or a component of a launch vehicle. (§ 12 ch 74 SLA 1985; am §§ 3, 4 ch 38 SLA 1986; am § 1 ch 20 SLA 1987; am § 2 ch 30 SLA 1988; am §§ 1, 2 ch 96 SLA 1989; am §§ 1, 2 ch 159 SLA 1990; am §§ 4, 5 ch 88 SLA 1991)

[¶ 1572] STATE TAXATION OF AIR COMMERCE

Sec. 1113 [49 App. U. S. Code 1513] (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (c) except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sale or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, or other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans, the provisions of subsection (a) shall not apply to such authority until December 31, 1973.

[the rest is not relevant]

(d)(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a state used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber

FEB 4 1993

Alaska State Legislature

SENATOR
BERT SHARP
DISTRICT P

CHAIRMAN
TRANSPORTATION COMMITTEE

MEMBER
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Senate

MEMORANDUM

TO: Senator Randy Phillip[illegible]nan
Senate Community & [illegible]l Affairs Committee

FROM: Senator Bert Sharp

RE: Request for hearing -- CSSB 261

I am requesting that CS for Senate Bill 261, "An Act relating to municipal sales and use taxes; and providing for an effective date," be heard before the Senate Community & Regional Affairs Committee at your earliest convenience. The municipal fiscal impact note prepared by the DC&RA indicates that that passage of the bill would have a minimal impact on municipalities in the area of sales tax. Consequently, I would support an amendment replacing the retroactive effective date in the bill with a proactive date. Thank you for your consideration.

Alaska Statutes

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2. Home Rule Limitations (§ 29.10.200)

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(9) AS 29.20.020 (meetings public);
(10) AS 29.20.050 (legislative power);
(11) AS 29.20.060 — 29.20.120 (assembly composition and apportionment);
(12) AS 29.20.140 (qualifications of members of governing bodies);
(13) AS 29.20.150 (term of office);
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(15) AS 29.20.270(e) (ordinance veto by mayor);
(16) AS 29.20.630 (prohibited discrimination);

(17) AS 29.20.640 (reports);

(18) AS 29.25.010(a)(10) (municipal exemption on contractor bond requirements);

(19) AS 29.25.050 (codification);

(20) AS 29.25.060 (resolutions);

(21) AS 29.26.030 (notice of elections);

(22) AS 29.26.050 (voter qualification);

(23) AS 29.26.250 — 29.26.360 (recall);

(24) AS 29.35.020 (extraterritorial jurisdiction);

(25) AS 29.35.030 (eminent domain);

(26) AS 29.35.050 (garbage and solid waste services);

(27) AS 29.35.055 (local air quality control program);

(28) AS 29.35.060 (franchises and permits);

(29) AS 29.35.070 (public utilities);

(30) AS 29.35.080 (alcoholic beverages);

(31) AS 29.35.120 (post audit);

(32) AS 29.35.131 (enhanced 911 system);

(33) AS 29.35.145 (regulation of firearms);

(34) AS 29.35.160 (education);

(35) AS 29.35.170(b) (assessment and collection of taxes);

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(38) AS 29.35.260 (cities outside boroughs);

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(42) AS 29.40.200 (subdivisions of state land);

(43) AS 29.45.010 — 29.45.570 (property taxes);

(44) AS 29.45.650(c), (d), (e), and (f) (sales and use tax);

(45) AS 29.45.700(d) (sales and use tax);

(46) AS 29.47.200(b) (security for bonds);

(47) AS 29.47.260 (construction);

(48) AS 29.60.050(a) (limitation on computation and use of payment);

(49) AS 29.60.120(a) and (c) (state aid for health facilities and hospitals);

(50) AS 29.65 (general grant land);

(51) AS 29.71.040 (procurement preference for state agricultural and fisheries products);

(52) AS 29.71.050 (procurement preference for recycled Alaska products). (§ 6 ch 74 SLA 1985; am §§ 1, 2 ch 38 SLA 1986; am § 6 ch 70 SLA 1986; am § 12 ch 80 SLA 1986; am § 3 ch 108 SLA 1986; am § 49 ch 14 SLA 1987; am § 1 ch 30 SLA 1988; am § 2 ch 63 SLA 1988; am § 1 ch 64 SLA 1988; am § 3 ch 57 SLA 1993; am § 5 ch 74 SLA 1993)

NOTES TO DECISIONS

City's imposition of higher property tax mill rate on oil and gas invalid. — City's imposition of a higher property tax mill rate on oil and gas property than on other property in the city, for the purpose of paying the cost of providing oil spill prevention and response services, was invalid, because the tax violated AS 43.56.010(b), which specifically prohibits a municipal tax rate higher than that which applies to "other property taxable by the municipality." City of Valdez v. State, Dep't of Community & Regional Affairs, 793 P.2d 532 (Alaska 1990).

Sec. 29.45.590. Limited property taxing power for second class cities. A second class city may by referendum levy property taxes as provided for first class cities. However, levy by a second class city may not exceed one-half of one percent of the assessed value of the property taxed, except that the limit does not apply to a levy necessary to avoid a default upon payment of principal and interest of bonded or other indebtedness that is secured by a pledge to levy ad valorem or other taxes without limit to meet debt payments. (§ 12 ch 74 SLA 1985)

Sec. 29.45.600. Combining property tax with incorporation of a second class city. A petition for second class city incorporation may request that a property tax proposal be placed on the same ballot. The petition must state the proposed tax rate. The petition may request that incorporation be dependent on the passage of the property tax proposition. If so, the incorporation proposition fails if the property tax fails. (§ 12 ch 74 SLA 1985)

Article 4. Borough Sales and Use Tax.

Section
650. Sales and use tax
660. Notice of sales and use tax
670. Referendum, adoption, and modification
680. Combining sales and use tax with incorporation of a borough

Sec. 29.45.650. Sales and use tax. (a) Except as provided in AS 04.21.010(c) and in (f) and (h) 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.

(b) A borough levying a sales tax may also by ordinance levy a use tax on the storage, use, or consumption of tangible personal property in the borough. The use tax rate must equal the sales tax rate and the use tax shall be levied only on buyers.

(c) A person who furnishes proof, in the form required by the borough tax collector, that the person has paid a sales tax on the source on which a use tax is levied by the borough is required to pay the use tax only to the extent of the difference between the amount of the

sales tax paid and the amount of the use tax levied by the borough. This subsection applies to a sales tax levied in any taxing jurisdiction whether inside or outside the state.

(d) If the assembly charges interest on sales taxes not paid when due, the rate of interest may not exceed 15 percent a year on the delinquent taxes and shall be charged from the due date until paid in full. This subsection applies to home rule and general law municipalities.

(e) A borough may provide for the creation, recording, and notice of a lien on real or personal property to secure the payment of a sales and use tax, and the interest, penalties, and administration costs in the event of delinquency. When recorded, the sales tax lien has priority over all other liens except (1) liens for property taxes and special assessments; (2) liens that were perfected before the recording of the sales tax lien for amounts actually advanced before the recording of the sales tax lien; (3) mechanics' and materialmen's liens for which claims of lien under AS 34.35.070 or notices of right to lien under AS 34.35.064 have been recorded before the recording of the sales tax lien. This subsection applies to home rule and general law municipalities.

(f) A borough may not levy and collect a sales tax on a purchase made with (1) food coupons, food stamps, or other type of certificate issued under 7 U.S.C. 2011 — 2025 (Food Stamp Act); or (2) food instruments, food vouchers, or other type of certificate issued under 42 U.S.C. 1786 (Special Supplemental Food Program for Women, Infants, and Children). This subsection applies to home rule and general law municipalities.

(g) *[Repealed, § 2 ch 159 SLA 1990.]*

(h) A borough may not levy or collect a sales tax on sales, rents, and services, or a use tax on the storage, use, or consumption of personal property on the following activities:

(1) the sale, lease, rental, storage, consumption, or distribution in this state of or the provision of services relating to an orbital space facility, space propulsion system, or space vehicle, satellite, or station of any kind possessing space flight capacity, including the components of them;

(2) the sale, lease, rental, storage, consumption, or use of tangible personal property placed on or used aboard an orbital space facility, space propulsion system, or space vehicle, satellite, or station of any kind, regardless of whether the tangible personal property is returned to this state for subsequent use, storage, or consumption; an exemption under this paragraph is not affected by the failure of a launch to occur, or the destruction of a launch vehicle or a component of a launch vehicle. (§ 12 ch 74 SLA 1985; am §§ 3, 4 ch 38 SLA 1986; am § 1 ch 20 SLA 1987; am § 2 ch 30 SLA 1988; am §§ 1, 2 ch 96 SLA 1989; am §§ 1, 2 ch 159 SLA 1990; am §§ 4, 5 ch 88 SLA 1991)

Alaska State Legislature

SENATOR
BERT SHARP
DISTRICT P

CHAIRMAN
TRANSPORTATION COMMITTEE

MEMBER
FINANCE COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE
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Senate

MEMORANDUM

DATE: February 23, 1994

TO: Members of the Community and Regional Affairs Committee

FROM: Senator Bert Sharp BMS

RE: Draft CS for CS SB 261

In response to concern over the prohibition of "use taxes" in CS SB 261, I am submitting the attached draft CS for consideration by the committee. The municipalities fear that "use tax" is so vague that it may interfere with the collection of landing fees, fuel flowage fees, etc. The new language contained in the attached draft eliminates "use taxes" altogether, and clearly prohibits taxation only of the transport of individuals or goods. The air carriers support this language, and the attorney for the City of Juneau agrees that it alleviates municipal concern regarding the vagueness of "use taxes".

In regards to narrowly defining "federally certificated air carrier", I stand opposed. The Federal Preemption Provision applies to all air carriers regulated by the FAA. Since it is the intent of this legislation to restate federal law, it would be unwise to include only those air carriers certified under Section 401 of the Federal Aviation Act as the municipalities have suggested. Doing so would merely leave open a window of opportunity for future, fruitless litigation.

The retroactive effective date remains in the draft CS to be dealt with as the committee so desires.

Thank you for your consideration.

8-LS1560\K
Cook
2/23/94

CS FOR SENATE BILL NO. 261( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR SHARP

A BILL

FOR AN ACT ENTITLED

"An Act relating to municipal taxes and fees on the transportation of individuals or goods by federally certificated air carriers; and providing for an effective date."

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

* **Section 1.** AS 29.10.200 is amended by adding a new paragraph to read:

(53) AS 29.47.470 (air carriers).

* **Sec. 2.** AS 29.47 is amended by adding a new section to read:

Sec. 29.47.470. TAXES OR FEES ON TRANSPORTATION BY CERTAIN AIR CARRIERS PROHIBITED. Notwithstanding other provisions of law, a municipality may not levy or collect a tax or fee on the transportation of individuals or goods by a federally certificated air carrier. This section applies to home rule and general law municipalities.

* **Sec. 3.** This Act is retroactive to January 1, 1993.

* **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

FEB 16 1993

OFFICE
OF THE
CITY AND BOROUGH MANAGER

MARK R. PALESH
MANAGER

February 16, 1994

The Honorable Senator Randy Phillips, Chair
Senate Community & Regional Affairs Committee
Alaska State Senate
Capitol Building, Room 103
Juneau, Alaska 99811

Re: Senate Bill 261

Dear Senator Phillips:

Thank you for the opportunity to testify on this legislation. The City and Borough of Juneau continues to oppose both the federal legislation limiting the tax base of local government, and state attempts to fill in the gaps in the federal law. SB 261 goes well beyond federal law.

If legislation is to pass, the CBJ would appreciate three amendments:

First, on page 1, line 12, please delete the phrase "use tax" from the Transportation CS. The reason for this amendment is that the CBJ is unsure what is intended by "use tax," and we are concerned about, for example, landing fees.

Second, on page 1, lines 13-14, please define "federally certificated air carrier." We suggest substituting the phrase "an air carrier holding a certificate of public convenience and necessity issued by the U.S. Department of Transportation under Section 401 of the Federal Aviation Act."

Third, on page 1, line 14, after "municipalities" and before the period, please add: "except that it does not apply to flights conducted entirely within the boundaries of a municipality levying a sales tax." This amendment would exclude from the bill's limitation on municipal ability to tax, certain flights such as the glacier tours conducted from Juneau harbor. The CBJ sees these tourist flights as a potentially significant source of municipal revenue and would prefer it not to be preempted by state legislation.

Finally, we would like to point out that SB 261 as it now stands goes beyond the federal law limiting local governments. Even under the interpretation of the General Counsel for the U.S.

Department of Transportation, which seems to bend over backwards to prohibit local taxation -- and whose opinion differs from that of Judge Link of the Alaska Superior Court -- taxation of intrastate air cargo is permitted by federal law. The present version of SB 261 would go beyond the federal limitation and prohibit even intrastate air cargo taxation. (See Page 1, line 13: "carriage of individuals or goods for hire.") If the purpose of SB 261 is to restate the federal law, the phrase "or goods" should be dropped.

I have attached a copy of a 1986 letter from the U.S. Department of Transportation which sets out their understanding of the federal preemption. The last sentence of the letter notes that taxation of carriage of property (freight) is not preempted. Note also that the federal law has changed since this letter: head taxes are now allowed for purposes of maintaining airports. SB 261 would prohibit that -- again going beyond federal law. Also attached is a 1984 letter from Jana E. McIntyre, an attorney for the FAA; this shows that there are differences of opinion among lawyers as to the reach of the federal preemption.

Another concern is the breadth of the language in the bill, page 1, lines 12-13: "or use tax on an activity that directly involves the carriage of individuals or goods for hire ..." This language is so broad that it might endanger assessment of landing fees. Landing fees are projected at $849,000 in Juneau next year. Should this legislation be so interpreted, this would be a major loss. Airports around the state would be impacted.

Again, our preference is no bill; with state municipal assistance and revenue sharing expected to be reduced over the next few years, legislative efforts to reduce the municipal tax base are inappropriate.

This bill creates an unfunded mandate. Municipalities provide municipal services to air carriers -- police, fire, schools, roads, etc. -- but now will be prohibited by state statute from taxing this industry. Other industries may soon follow. The CBJ opposes both federal and state unfunded mandates.

Thanks again for the opportunity to comment.

Sincerely,

David R. Palmer
Deputy City Manager

DRP/JWH/mjm
Attachments
cc: Senate Community & Regional Affairs Committee Members

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

OCT - 3 1986

Ms. D. Elizabeth Cuadra
Robertson, Monagle, Eastaugh
Attorneys at Law
Post Office Box 1211
Juneau, Alaska 99802-1211

Re: Municipal Taxation of
Air Commerce

Dear Ms. Cuadra:

I appreciate the opportunity to respond to your questions to the Department concerning the legitimacy of municipal taxation on airline ticket sales. You state that your municipal clients assess or wish to assess sales taxes on the sale of transportation by air. It is my opinion that, to the extent these ordinances tax the sale of passenger transportation by air - whether intrastate, interstate, overseas, or foreign transportation - they are preempted by Section 1113 of the Federal Aviation Act of 1958, as amended (49 U.S.C. Section 1513). Sales taxes on the intrastate air carriage of property are permissible.

As the General Counsel explained in his December 18, 1985 letter to Riggs Air Service, these ordinances would largely fall within the plain prohibitions of Section 1113(a):

> "No State (or political subdivision thereof...) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom..."

By taxing the air fare at the point of sale to the consumer, the municipalities are, in effect, taxing "persons traveling in air commerce." Section 1113(a) clearly preempts such a tax.

Congress intended, by including this provision in the 1973 Airport Development Acceleration Act, to preclude not only head taxes but also to prevent states or municipalities from burdening interstate commerce by assessing various other taxes on air transportation. 1/

1/ See especially 119 Cong. Rec. Part 3, p. 3349, (statement of Mr. Cannon, introducing S. 38); and 3350 (statement of Mr. Pearson.)

As you note, Congress, in Section 1113(b), excepted several types of taxes from the general prohibition, including as most relevant here "sales and use taxes on the sale of goods or services." However, given the language of Section 1113(a), this exception hardly can be read as allowing a "sales tax" which is imposed, directly or indirectly, upon "persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation...." Otherwise, the exception would wholly swallow the rule. 2/ Rather, we believe Congress intended in (b) to permit States and municipalities to maintain taxes on the sale of goods and services which are incidental to air transportation, such as the sale to the airline of aviation fuel or of food to be provided to the airline passenger.

This view is in full accord both with Congressional intent and the results obtained in court cases. The inclusion of (b) was intended to allow States and localities to retain traditional sources of revenues, and they had historically imposed sales and use taxes on goods and services supplied in connection with airline operations. 3/ This interpretation is also consistent with the results obtained in the two cases most relevant to the issue, Air Jamaica, Ltd. v. State Department of Revenue, 374 So. 2d 575 (Fla. App. 1979), cert. den. 392 So. 2d 1371 (Fla. 1980), which you cite, and Wardair Canada v. Florida Department of Revenue, 106 S. Ct. 2369, (1986), L. Ed. 2d 1, 14-15 (Burger, C. J., concurring) (June 18, 1986). Air Jamaica found lawful a sales tax on packaged meals purchased by airlines and served to their passengers, while Wardair upheld a State sales tax on jet fuel. Both are taxes imposed on airlines for goods or services incidental to their provision of air transportation.

Accordingly, in response to the specific situations you raised in your letter of February 20th, local sales taxes would not be permissible with regard to (a) sightseeing tours by helicopter or light plane; (b) air taxi or charter fishing trips; (c) nonscheduled air taxi operators; (d) scheduled interstate commuter airline trips, regardless of the passenger's ultimate destination; and (e) airline tickets sold, regardless of the passenger's routing. This is because the preemption extends to all carriers regulated by the FAA (including helicopters, etc.) as well as to all passenger transportation involving air commerce.

2/ See also State v. Cochise Airlines, 626 P.2d. 596, 601 (Ariz. App., 1981), observing that the "sales taxes referred to in [§1113(b)] on the sales of goods and services cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air commerce. If [§1113] were interpreted otherwise, it would be self-contradictory."

3/ See Hearings on H.R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong. 2d Sess. at 91 (1972). Compare H.R. 2337, 92d Cong. 1st Sess. (1971) and S. 3611, 92d Cong. 2d Sess. (1972), which, without any exceptions, prohibited State or local taxes, fees, etc. on the carriage of persons in air transportation, with Pub. L. 93-44, 93d Cong. 1st Sess. §7 (1973) as ultimately enacted.

With regard to the transportation of property by air, however, I believe Section 1113 preempts state or local sales taxes on interstate air transportation only. The operative statutory provision precludes a "tax...on the sale of air transportation". This excludes taxes on the sale of intrastate air transport of property, cf. 49 U.S.C. § 1301(10). Accordingly, to the extent the municipal ordinances assess sales taxes on the intrastate transportation by air of property, they are not preempted by Section 1113. 4/

Sincerely,

Rosalind Knapp

Rosalind Knapp
Deputy General Counsel

4/ Accord, State v. Cochise Airlines, supra at 601.

US Department
of Transportation

Federal Aviation
Administration

800 Independence Ave. S.W.
Washington D.C. 2059[illegible]

APR 16 1984

Elizabeth Quadra, Esq.
Robertson, Monagle, Eastaugh and Bradley
P.O. Box 1211
Juneau, Alaska 99802

Dear Ms. Quadra:

As we agreed on the telephone on April 11, 1984, I am enclosing a copy of an opinion I wrote to the Virgin Islands Port Authority interpreting 49 U.S.C. 1513 and a copy of the Guam District Court's opinion in Island Aviation, Inc. v. Guam Airport Authority. Although both of these deal with "head charges," the analysis contained therein is applicable to sales taxes as well.

As a general matter, it appears that a municipal sales tax on goods and services that is collected as a percentage of revenue probably would be permitted under Section 1513(b) if the cost of the tax is included in the price of the ticket and if the proceeds of the tax are not used to finance airport development that would be eligible for Federal financial assistance from the Airport and Airway Trust Fund. This interpretation is based largely upon the legislative history of Sections 1513(a) and (b). I am enclosing some relevant portions of this legislative history. Since the scope of the Sec. 1513(a) prohibition of taxes on the sale of air transportation and the scope of the 1513(b) allowance of sales taxes on goods or services are unclear from the face of the statute, it is appropriate to examine the legislative history of this section in answering your question.

You also asked whether imposition of the sales tax on tickets for flights crossing international boundaries would be permitted. I do not believe that the international nature of the flight would require a different result under Section 1513 than occurs for sales taxes collected from domestic flights. Such taxes may, however, be subject to restrictions other than those contained in the Federal Aviation Act.

I hope you find chese comments helpful. Please contact me or Len Ceruzzi if you have any further questions. I have also sent a copy of this response to Don Boberick, the FAA Regional Counsel for Alaska. If you prefer, you may contact him in Anchorage ((907) 271-5269) for further assistance.

Len Ceruzzi sends his best wishes.

Sincerely,

Jana E. McIntyre

Jana E. McIntyre
Attorney
Airports & Environmental
Law Branch
Office of the Chief Counsel

Enclosures

ALASKA MUNICIPAL LEAGUE

217 Second Street, Suite 200 ▪ Juneau, Alaska 99801 ▪ Tel (907) 586-1325, Fax (907) 463-5480

FEB 15 1993

February 15, 1994

TO: Senator Randy Phillips, Chair
and Members
Senate Committee on Community and Regional Affairs

FROM: Chrystal Smith, Alaska Municipal League

RE: **SB 261 - Exempting air carriers from municipal sales and use tax**

Thank you for the opportunity to present additional information on HB 261, which would prohibit municipalities from levying sales or use taxes on air carriers. Individuals who can provide additional information on the legal aspects of the issue are scheduled to participate on the teleconference on Thursday. It is my understanding that teleconference participants will be able to discuss both the "Kenai case" (*Homer Air v. Kenai Peninsula Borough, Kenai Peninsula Borough School District, and City of Homer*) we were discussing on Tuesday and the situation with regard to the efforts of the City of St. Mary to collect a municipal sales tax on freight (mainly fish) being shipped through its airport to other Alaskan locations.

As I will be out of town on Thursday, I wanted to take this opportunity to share some additional comments on the bill and to reiterate AML's opposition to the limitations on municipal authority to raise local revenue that would be imposed by SB 261.

First, with regard to the sponsor's and supporters' statements that this bill just clarifies federal law. If the federal law is clear, no state statute is needed.

Second, with regard to the contention that federal law prohibits municipalities from imposing taxes on both passengers and freight. It is my understanding that the issue of taxing passengers in certain types of circumstances, e.g., local flightseeing, is still in dispute and is, in fact, the focus of the *Homer Air* case which is yet to be decided in the court. AML asks that the legislature wait for the courts to decide what federal law means.

With regard to freight, Superior Judge Jonathan M. Link, in a May 1993 ruling on a motion for partial in the case mentioned above, said:

> Finally, it is appropriate to note that the court's analysis in this decision is limited solely to the carriage of persons. Homer Air has not asked the court to address the question of freight. The court notes in passing that the doctrine of preemption is one that is generally limited by specific legislation. Section 1513 as enacted relates only to the carriage of "persons" and, accordingly, does not prohibit sales taxes on the transportation of freight.

A 1986 letter from Len Ceruzzi, Office of the General Counsel, Department of Transportation, includes the statement, "Sales taxes on the intrastate air carriage of property are permissible."

An exemption on the taxation of freight thus goes beyond the intent of the federal law. It unduly limits municipalities' ability to raise revenues locally to provide municipal services at the same time state-shared revenues are being cut back.

If you do decide to move this bill out of committee, please consider the following amendments:

1. Change the effective date to January 1, 1995, to give any municipalities that do collect taxes of this type to plan for reduced revenues in their budget cycle.

2. Rewrite Section 3 to clearly limit the type of tax being prohibited to "sales tax on passenger tickets." The existing language, including the phrase "and use" is too broad. What does "an activity that directly involves the carriage of individuals or goods for hire by a federally certificated air carrier" mean? Does it include carriage of individuals on land as part of a package deal put together by an air carrier?

3. If you opt to use the term "federally certificated air carriers" in the bill, please define what type of certification the bill refers to. It is my understanding that there are several types of federal certification.

In conclusion, the Alaska Municipal League opposes SB 261 as an unnecessary piece of legislation and one that will place unfair restrictions on the ability of municipalities to raise local revenues.

LEGIS94:sb261.15

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STEVEN W SILVER

* Admitted in Washington, D.C. & Alaska
(All others admitted in Alaska)

February 20, 1986

Len Ceruzzi, Esq.
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Re: The Municipal Sales Tax Preemption Question

Dear Mr. Ceruzzi:

As I explained in our February 19 telephone conversation, part of my law practice is to serve as municipal attorney for some very small municipalities in southeastern Alaska. Many of these municipalities (as well as some larger ones in southeastern Alaska) have a municipal sales tax ordinance which requires the seller of goods and the provider of services to collect from their clients and purchasers a sales tax on those goods and services and remit the tax collected to the municipality. These ordinances consider the provision of transportation services to be a taxable "service" if either the sale of the service takes place within the municipal boundaries or the service itself is provided within the municipal boundaries. Thus, absent federal preemption, our sales tax ordinances would apply to the sale of air taxi and air charter services, when that sale is made within the taxing municipality's borders.

As you may well imagine, with so few roads in Alaska, travel by air taxi, air charter and small commuter (scheduled and non-scheduled) airline is one of the major ways of getting both people and cargo from one place to another. Therefore, it would be a very expensive mistake for us to make, if we were to erroneously believe that there is federal preemption preventing levying of our sales taxes on the carriage of passengers and cargo by air.

As I explained on the phone, my own legal research (in 1984) had brought me to the conclusion that there was no federal preemption. The pertinent statute is 49 U.S.C. § 1513, in which subsection (a) advises us what it is unlawful to tax, and then subsection (b) advises

us what is lawful to tax (subsection (b), of course, mentions sales or use taxes on the sale of goods or services as not being prohibited by the statute, whereas subsection (a) mentions such things as taxes on gross income as being prohibited].

My research of the case law at that time told me that all the court decisions had been on topics such as taxing gross income (which fall into the prohibited categories in subsection (a) of the statute), and that there had been no court decision holding sales taxes on services to be unlawful. After completing my own research, I had contacted the FAA Chief Counsel's Office, was directed to Ms. Jana McIntyre, then an attorney in the Airports and Environmental Law Branch, who orally expressed to me her agreement with my conclusions. She then followed up with a letter dated April 16, 1984, copy enclosed herewith.

I was greatly surprised, therefore, when within the past week, the sales tax enforcement official for the City/Borough of Juneau brought to my attention a letter issued by the General Counsel's Office at DOT, dated December 18, 1985, giving exactly the contrary opinion. That letter had been addressed to one of our local air service companies, and apparently had arisen in the context of the City/Borough of Sitka's sales tax. A copy of that letter is enclosed. The cases cited in the last paragraph of that letter had been part of my research in 1984, and in my view, do not support the conclusion reached in DOT's letter. 1/

1/ If my memory is correct, the Aloha Airline case was about a tax on gross income, and fell within subsection (a) of 49 U.S.C. § 1513. As I read the Cochise Airline case, the type of tax being challenged there was not a sales tax; in fact the Cochise court specifically said so:

> "Our own Supreme Court has repeatedly held that the subject Arizona tax is not a sales tax." 626 P.2d 596, 601

Any other discussion regarding sales taxes in the Cochise opinion must, therefore, be taken as purely dictum.

The case that seems to come the closest (the only one I have found that does deal with a sales tax) is Air Jamaica, Ltd. v. State Dept. of Revenue, 374 So.2d 575 (Fla. App. 1979), cert. denied 392 So.2d 1371 (Fla. 1980). The Air Jamaica case concerned a sales tax being levied on packaged meals going aboard airliners for consumption in flight, on international flights. The Air Jamaica court noted that the price of the meal was buried in the price of the ticket, and held that the sales tax was not unlawful, since the statute prohibiting states and political subdivisions from taxing carriage of persons in commerce specifically exempted sales taxes from that prohibition.

I am grateful that you are willing to coordinate this matter with the DOT General Counsel's office and jointly decide what clarification may be appropriate. Naturally, we hope the result may be to confirm our own interpretation, which rests upon the plain wording of subsection (b) of 49 U.S.C. § 1513, cases construing that statute to the extent they exist, and Ms. McIntyre's research of the legislative history of that statute.

A clear delineation of the extent to which (if any) there is federal preemption prohibiting the levying of municipal sales taxes on local air charters and other types of air service would be helpful and timely not only for two of my own municipal clients (the cities of Skagway and Craig), but also for at least two other southeastern Alaska municipalities I believe to be presently concerned about the subject: the City and Borough of Juneau and the City and Borough of Sitka.

The varied kinds of situations concerning which we need clarification include the following examples.

(a) Sightseeing tours of the locality (such as our local glaciers), by light plane or helicopter, where the only airport involved is within the city limits;

(b) Air taxi or air charter trips (e.g. to a nearby lake for fishing, or in support of local mineral exploration activities);

(c) Nonscheduled air taxi operations from the tax levying city to a nearby town, by an intrastate carrier.

(d) Scheduled commuter airline trips from the tax levying city to a nearby town, by an intrastate carrier.

(e) Any relevant distinctions between (c) and (d) above, depending on whether the passenger does or does not continue on, with an interstate carrier, to a point outside the State.

(f) Any pertinent distinctions depending on whether the service is carriage of a <u>passenger</u> or carriage of freight/cargo.

(g) Any relevant distinction depending on whether the passenger ticket sold includes a segment with a point of landing at an airport in another state or another country.

We shall greatly appreciate any help that you, your staff, and the Office of the General Counsel at DOT can give us in an official clarification of this question.

Sincerely,

D. Elizabeth Cuadra

D. Elizabeth Cuadra
City Attorney for Skagway and Craig

DEC:sd/1.17
Enclosures
cc: Malcolm Boyle (City Manager, Skagway)
David Palmer (City Administrator, Craig)

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

OCT - 3 1986

Ms. D. Elizabeth Cuadra
Robertson, Monagle, Eastaugh
Attorneys at Law
Post Office Box 1211
Juneau, Alaska 99802-1211

Re: Municipal Taxation of
Air Commerce

Dear Ms. Cuadra:

I appreciate the opportunity to respond to your questions to the Department concerning the legitimacy of municipal taxation on airline ticket sales. You state that your municipal clients assess or wish to assess sales taxes on the sale of transportation by air. It is my opinion that, to the extent these ordinances tax the sale of passenger transportation by air - whether intrastate, interstate, overseas, or foreign transportation - they are preempted by Section 1113 of the Federal Aviation Act of 1958, as amended (49 U.S.C. Section 1513). Sales taxes on the intrastate air carriage of property are permissible.

As the General Counsel explained in his December 18, 1985 letter to Riggs Air Service, these ordinances would largely fall within the plain prohibitions of Section 1113(a):

> "No State (or political subdivision thereof...) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom..."

By taxing the air fare at the point of sale to the consumer, the municipalities are, in effect, taxing "persons traveling in air commerce." Section 1113(a) clearly preempts such a tax.

Congress intended, by including this provision in the 1973 Airport Development Acceleration Act, to preclude not only head taxes but also to prevent states or municipalities from burdening interstate commerce by assessing various other taxes on air transportation. 1/

1/ See especially 119 Cong. Rec. Part 3, p. 3349, (statement of Mr. Cannon, introducing S. 38); and 3350 (statement of Mr. Pearson.)

As you note, Congress, in Section 1113(b), excepted several types of taxes from the general prohibition, including as most relevant here "sales and use taxes on the sale of goods or services." However, given the language of Section 1113(a), this exception hardly can be read as allowing a "sales tax" which is imposed, directly or indirectly, upon "persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation...." Otherwise, the exception would wholly swallow the rule. 2/ Rather, we believe Congress intended in (b) to permit States and municipalities to maintain taxes on the sale of goods and services which are incidental to air transportation, such as the sale to the airline of aviation fuel or of food to be provided to the airline passenger.

This view is in full accord both with Congressional intent and the results obtained in court cases. The inclusion of (b) was intended to allow States and localities to retain traditional sources of revenues, and they had historically imposed sales and use taxes on goods and services supplied in connection with airline operations. 3/ This interpretation is also consistent with the results obtained in the two cases most relevant to the issue, Air Jamaica, Ltd. v. State Department of Revenue, 374 So. 2d 575 (Fla. App. 1979), cert. den. 392 So. 2d 1371 (Fla. 1980), which you cite, and Wardair Canada v. Florida Department of Revenue, 106 S. Ct. 2369, (1986), L. Ed. 2d 1, 14-15 (Burger, C. J., concurring) (June 18, 1986). Air Jamaica found lawful a sales tax on packaged meals purchased by airlines and served to their passengers, while Wardair upheld a State sales tax on jet fuel. Both are taxes imposed on airlines for goods or services incidental to their provision of air transportation.

Accordingly, in response to the specific situations you raised in your letter of February 20th, local sales taxes would not be permissible with regard to (a) sightseeing tours by helicopter or light plane; (b) air taxi or charter fishing trips; (c) nonscheduled air taxi operators; (d) scheduled interstate commuter airline trips, regardless of the passenger's ultimate destination; and (e) airline tickets sold, regardless of the passenger's routing. This is because the preemption extends to all carriers regulated by the FAA (including helicopters, etc.) as well as to all passenger transportation involving air commerce.

2/ See also State v. Cochise Airlines, 626 P.2d. 596, 601 (Ariz. App., 1981), observing that the "sales taxes referred to in [§1113(b)] on the sales of goods and services cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air commerce. If [§1113] were interpreted otherwise, it would be self-contradictory."

3/ See Hearings on H.R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong. 2d Sess. at 91 (1972). Compare H.R. 2337, 92d Cong. 1st Sess. (1971) and S. 3611, 92d Cong. 2d Sess. (1972), which, without any exceptions, prohibited State or local taxes, fees, etc. on the carriage of persons in air transportation, with Pub. L. 93-44, 93d Cong. 1st Sess. §7 (1973) as ultimately enacted.

Ms. D. Elizabeth Cuadra (3)

With regard to the transportation of property by air, however, I believe Section 1113 preempts state or local sales taxes on interstate air transportation only. The operative statutory provision precludes a "tax...on the sale of air transportation". This excludes taxes on the sale of intrastate air transport of property, cf. 49 U.S.C. § 1301(10). Accordingly, to the extent the municipal ordinances assess sales taxes on the intrastate transportation by air of property, they are not preempted by Section 1113. 4/

Sincerely,

Rosalind Knapp

Rosalind Knapp
Deputy General Counsel

4/ Accord, State v. Cochise Airlines, supra at 601.

Faxed to clerk 5/15/93

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT HOMER

C. & L., INC., d/b/a HOMER AIR,

Plaintiff,

vs.

KENAI PENINSULA BOROUGH, A Municipal Corporation; KENAI PENINSULA BOROUGH SCHOOL DISTRICT; and CITY OF HOMER, A Municipal Corporation,

Defendants.

3HO-92-159-CI

DECISION

Plaintiff, C. & L. Inc., d/b/a Homer Air (hereinafter Homer Air) moves for partial summary judgment on two theories. Plaintiff contends that Homer City Code (hereinafter HCC) 9.16.040 is unenforceable because it violates provisions of the Alaska Constitution and Statutes requiring uniformity in sales tax applications. In addition, plaintiff postulates that the sale of passenger seat tickets is exempt from taxation by the City of Homer (hereinafter City or Homer) and/or the Kenai Peninsula Borough and the Kenai Peninsula Borough School District (hereinafter collectively Borough) because that taxing authority has been pre-empted by 49 U.S.C. § 1513.

The Validity of HCC 9.16.040

Homer Air owns and operates an air taxi business in the Borough. Its principle place of business is at the Homer Airport;

5/11/93

located within the City limits. Homer Air's flights begin entirely within the Borough but may terminate outside the Borough (on a one-way basis). Except for take-offs and landings (and attendant approaches), flights take place outside City limits.

Article I, § 2 of the Alaska Constitution provides that the State may delegate taxing powers to organized boroughs and cities. AS 29.45.650 authorizes boroughs to levy sales taxes on, *inter alia*, "services provided for in the borough." AS 29.45.700 permits cities to levy sales taxes "on all services taxed by the borough and in the manner provided for boroughs."

Kenai Peninsula Borough Code (hereinafter KPB) 5.18.100(A) levies a 2% sales tax on all retail sales, rents and services made or rendered within the borough, measured by the gross sales price of the seller, subject to specific exemptions.

KPB 5.18.200(A)(11) exempts the sale of passenger seat tickets by a commercial airline and specifically does not exempt air charter sales. Within the scope of this exemption Homer Air is engaged in the business of air charter sales and, accordingly, is not exempted under KPB 5.18.200(A)(11).

KPB 5.18.400(B) provides:

> The place of delivery of goods or services is the place of sale. Sellers of services which lack a definite place of delivery may, upon Borough approval, collect the tax based on the office location of the business selling such services.

In addition to the 2% Borough sales tax, the City has levied a sales tax at the rate of 3.5% on all sales, rents and services within the City, unless exempted by law. (HCC 9.16.010).

The City has adopted the Borough sales tax code by reference, except the provisions contained in KPB 5.18.400(B) relating to the place of sale. HCC 9.16.040 provides:

> The place of sale under this chapter shall be the point of origin and/or the business location of the transaction. The place of sale for electric utility companies, however, is the point of delivery to the consumer.

Alaska Statute 29.45.700(a) provides, in part:

> A city in a borough that levies and collects area wide sales and use taxes may levy sales and use taxes on all sources taxed by the borough in the manner provided for boroughs.

Homer Air argues that the Borough's definition of place of sale (place of delivery) is inconsistent with the city's definition of place of sale (point of origin and/or business location of the transaction). In Homer Air's view this inconsistency invalidates the ordinance pursuant to the principles articulated in *City of Homer v. Gangl*, 650 P.2d 396 (Alaska 1982).

The City contends that its code definition of the place of sale does not violate the principle of uniformity because the Borough's interpretation of the Borough code coincides precisely with the City code. In substance, the City asserts that the Borough has authority under KPB 5.18.140(A) to designate the place of sale for Homer Air as its office location under KPB 5.18.400(B) and, since it has done so, the collection of the City tax is not violative of AS 29.45.700.

Homer Air maintains that KPB 5.18.400(B) does not

require a seller of services which lack a definite place of delivery to collect sales taxes, but rather provides a mechanism whereby sellers of services outside the Borough may collect sales taxes upon application and approval by the Borough. Homer Air relies on the fact that it has made no such application. This interpretation is flawed. The authority to determine the "place of delivery" of a good or service does not rest with Homer Air. It rests with the taxing authority which, in this case, is the Borough.

KPB 5.18.140(A) gives the Borough Mayor authority to implement and interpret the ordinance relating to sales and use taxes. The Affidavit of Lawrence A. Semmens attached to the Borough's opposition establishes that the Borough taxes the sale of air charter services based on the business location. Utilizing that interpretation the Borough has determined that the tax location for all of Homer Air's sales is within the City of Homer. This is precisely the result achieved by application of HCC 9.16.040.

City of Homer v. Gangl, supra, requires the City to uniformly tax all sources taxed by the Borough. In *Gangl* the City attempted to levy a 5% bed tax (sales tax) on commercial sleeping accommodations for the first seven days of occupancy. This tax was to be in addition to a 2% sales tax and a 1% sales tax already levied by the Borough and the City respectively. The Alaska Supreme Court ruled that this was a selective tax, rejecting the City's argument that it was a permissible tax because the Borough

was then taxing the same source. The court held that the difference in rate made it a selective tax since it clearly imposed a burden on one transaction that was not imposed on other transactions. This case requires a City to uniformly tax all sources taxed by the Borough.

The City taxing ordinance in this case does not run afoul of the principles articulated in *Gangl*. The City is uniformly taxing all sources taxed by the Borough.

For the foregoing reasons plaintiff's Motion for Summary Judgment on this basis is DENIED.

Pre-emption by Federal Law

Homer Air contends that 49 U.S.C. § 1513(a) pre-empts the Borough's and City's authority to levy a sales tax on the carriage of passengers by an air charter service.

Sections (a) and (b) of 49 U.S.C. § 1513 read, in their pertinent part, as follows:

> (a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons travelling in air commerce or on the carriage of persons travelling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any (State, etc., that has grandfather rights may tax until December 31, 1973).
>
> (b) Nothing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing

> in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

For the purpose of this decision this court treats Homer Air as an intrastate carrier transporting passengers to and from various locations within the State. The Borough and the City assert that the collection of a sales tax on passenger revenues is not prohibited by 49 U.S.C. § 1513.

The Borough argues that "§ 1513(a) prohibits State and local 'head' taxes on airline passengers in addition to the Federal head tax found in 26 U.S.C. § 4261; while § 1513(b) authorizes State and local taxation on air travel, including sales and use taxes, except for the head tax restrictions found in § 1513(a)." (Borough Brief p.10). To support this position the Borough examines at length two U.S. Supreme Court cases dealing with § 1513: *Aloha v. Director of Taxation*, 464 U.S.7 (1983) and *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1 (1986).

The Borough summarizes its position as follows:

> Taking these two cases together, it is obvious that Congress intended to allow broad state and local taxation of air commerce in § 1513(b), except for the narrow circumstances listed in § 1513(a). In addition, the entire purpose of the narrow restrictions in § 1513(a) was to avoid double taxation of air travelers; § 1513(a) was not intended to prohibit taxation of air travel where there is no federal taxation, and this view is supported by the Supreme Court language found above. Thus, since C. & L. (Homer Air) does not collect the federal head tax on its passengers, then § 1513(a) cannot be applied to prohibit borough and city taxation of C. & L.'s goods and

services.

(Borough Brief at 12-13)

In *Aloha Airlines, supra* two intrastate carriers sought refunds for taxes paid under a Hawaii tax on gross income derived from the airline business. The Tax Appeal Court of the State of Hawaii rejected the airlines' arguments that the Hawaii tax was pre-empted by Federal Statute and was affirmed by the Hawaii Supreme Court. The United States Supreme Court, expressing an unanimous view, held that Congress had the authority to regulate state taxation of air transportation in intrastate commerce, and that Hawaii's statute was pre-empted by 49 U.S.C. § 1513(a), prohibiting state taxes on the gross receipts derived from the sale of air transportation.

In upholding the gross receipts tax the Hawaii Supreme Court looked beyond the plain language of § 1513(a) and concluded that Congress' intent was to deal with the proliferation of local and state head taxes on airline passengers. It reasoned that since the State statute was imposed on air carriers, as opposed to passengers, it did not come within the ambit of § 1513(a)'s prohibitions.

The U.S. Supreme Court disagreed saying:

> We cannot agree with Hawaii Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted. Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).

> Second, even if the absence of an express proscription made it necessary to go beyond the plain language of § 1513(a), nothing in the legislative history of the ADDA (Airport Development Acceleration Act of 1973) suggests that Congress intended to limit § 1513(a)'s pre-emptive effect to taxes on airline passengers or to save gross receipt taxes like section 239-6. Although Congress passed § 1513(a) to deal primarily with local head taxes on airline passengers, the legislative history abounds with references to the fact that § 1513(a) also pre-empts state taxes on the gross receipts of airlines . . . . (Footnotes omitted.)

464 U.S. at 15.

In *Wardair, supra* the U.S. Supreme Court upheld a sales tax on airline fuel imposed at the site of sale. Chief Justice Burger wrote a concurring opinion disagreeing with the majority's reliance on the "dormant Foreign Commerce Clause" doctrine indicating that the case should have been decided solely on the express language of §1513(b).

Chief Justice Burger's comments are instructive:

> We subsequently addressed (referring to the *Aloha Airlines* decision, *supra*) the scope of § 1513(a)'s prohibition when confronted with Hawaii's state tax on the gross income of airlines operating within that state. Reviewing the legislative history, the Court pointed out that § 1513 was enacted out of congressional concern that "the proliferation of local taxes burdened interstate air transportation." We concluded unanimously that Hawaii's tax was expressly pre-empted by the plain language of § 1513(a) (citing the "plain language" passage from *Aloha Airlines* set forth above).
>
> In the course of our discussion of § 1513(a) we addressed the Hawaii Supreme Court's "professed confusion over the 'paradox' between § 1513(a)'s prohibition on certain state taxes

on air transportation and § 1513(b)'s reservation of the States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes and sales or use taxes." Our resolution of this "paradox" is enlightening;

> We find no paradox between § 1513(a) and § 1513(b). Section 1513(a) preempts a limited number of state taxes including gross receipts taxes imposed on the sale of air transportation or the carriage of persons travelling in air commerce. § 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a)," such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice."

Careful review of the legislative history indicates that it is not entirely silent as to why Congress chose to make this particular distinction. The Senate's first proposal to limit state taxation would have prohibited *any* state tax - direct or indirect - on air transportation. The States, however, complained loudly at the hearings that this sweeping provision would prohibit even unobjectionable taxes such as landing fees, fuel taxes, and sales taxes on food provided to airline passengers. This broad interpretation was supported by officials from the Civil Aeronautics Board and the Federal Aviation Administration, who objected to any such broad prohibition because it would deprive local governments of funds necessary for maintenance of airport. In reply, members of Congress assured these officials that the prohibition was intended to apply only to "head taxes" and

> the like, and that some clarification of the bill's intent would be in order. The final bill enacting § 1513 therefore appears to be a compromise following careful consideration by Congress as to the permissible scope of state taxation in the area of air commerce. (Citations omitted). 477 U.S. at 14-15.

Section 1513(a) restricts state and local taxation in four situations: (1) on persons travelling in air commerce, (2) on the carriage of persons travelling in air commerce, (3) on the sale of air transportation, and (4) on the gross receipts derived from the sale of air transportation.

Air Transportation "means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." (49 U.S.C. App. § 1301(10)).

Homer Air has not set forth facts sufficient to show that it is engaged in the sale of air transportation.

Air Commerce "means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas, or foreign air commerce." (49 U.S.C. § 1301(4)).

Homer Air has submitted the Affidavit of Larry Thompson dated July 31, 1992 stating that "the vast majority of Homer Air flights are flown within federal air space." Mr. Thompson's affidavit, however, is not sufficient to meet Homer Air's burden in this case. The "air commerce" definition set forth above requires "any operation or navigation of aircraft within the limits

of any Federal airway".

Federal airway "means a portion of the navigable airspace of the United States designated by the Secretary of Transportation as a Federal airway." (49 U.S.C. App. § 1301(21)).

Thus, if Homer Air can make a showing that it is engaged in "air commerce" by virtue of the fact it operates within "Federal airways" § 1513(a) will bar the collection of Borough and/or City sales taxes as a result of Federal pre-emption. Thus far, Homer Air has failed to meet that burden.

The Borough and City also argue that local sales taxes on passenger air travel are permissible under § 1513(b). That section permits state and local governments to levy and collect "sales or use taxes on the sale of goods or services." It does not follow, however, that goods and services as used in this section include revenue from passenger air travel. To adopt such an interpretation would emasculate § 1513(a). To prevent the statute from being self-contradictory the term "sales of goods or services" cannot logically include sales or air transportation or sales directly connected with the carriage of persons in air commerce. Decisions of other courts adopt this interpretation. *See for example: State of Arizona v. Cochise Airlines*, 626 P.2d 596 (Arizona App. 1981) invalidating a transaction privileged tax on the transportation of persons; *Wardair, supra*, validating a sales tax on aviation fuel; *Air Jamaica Ltd. v. State Dept. of Revenue*, 374 S.2d 575 (Florida App. 1979) validating a sales tax on prepackaged meals, and; *Allegheny Airlines, Inc. v. City of*

Philadelphia, 309 A.2d 157 (PA. 1973) finding a Philadelphia head tax on air passengers pre-empted.

Civil Rule 56(d) provides in its pertinent part:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practical ascertain what material fact exists without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just . . . .

The court makes the following findings to assist the parties in the future litigation of this case:

1. Homer Air is an intrastate air carrier;

2. The sales taxes in question are not exempt under 49 U.S.C. § 1513(b) and;

3. If Homer Air can establish that its passengers are "travelling in air commerce" § 1513(a) pre-empts the Borough and City's sales tax ordinance.

Finally, it is appropriate to note that the court's analysis in this decision is limited solely to the carriage of persons. Homer Air has not asked the court to address the question of freight. The court notes in passing that the doctrine of pre-emption is one that is generally limited by specific legislation. Section 1513 as enacted relates only to the carriage of "persons" and, accordingly, does not prohibit sales taxes on the

transportation of freight.

For the foregoing reasons plaintiff's Motion for Partial Summary Judgment is DENIED WITHOUT PREJUDICE to make an affirmative showing that Homer Air is engaged in "air commerce."[1]

DATED at Kenai, Alaska this 11th day of May, 1993.

JONATHAN M. LINK
Superior Court Judge

CERTIFICATION OF DISTRIBUTION
I certify that a copy of the foregoing was mailed to the following at their addresses of record.
DATE: 5/12/93 CLERK

[1]This decision was dictated on May 1 & 2, 1993. It was typed in draft form sometime during the week of May 3, 1993. On May 6, 1993 Plaintiff submitted a pleading entitled "Supplemental Memorandum in Support of Motion for Summary Judgment". On the evening of May 11, 1993 the undersigned "cleaned up" the draft version of this decision. All changes made related to form, not substance. The court does not consider Plaintiff's "Supplemental Memorandum" properly submitted because it does not contain true supplemental authority. In reality, the materials presented were available at the time Plaintiff's original motion was filed; as such, they cannot be considered in rendering this decision.

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S.Ct. 84, 449 U.S.

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to the search. U.S. v. Edwards, C.A.Mass.1979, 602 F.2d 458.

This chapter in no way expanded traditional common-law authority of carriers to open and inspect packages and in fact, it seems to limit carriers' authority by permitting inspection only after shipper has been notified that carrier might open the shipment and, thus, statute did not operate as federal grant of power to carriers which might turn their conduct into government activity. U.S. v. Rodriguez, C.A.Mich.1979, 596 F.2d 169.

Nondiscriminatory searches of passengers and their carryon luggage is mandated by this section and section 1356 of this title and regulations promulgated pursuant to those sections, but requirements of search implicit in those sections and regulations must comport with reasonableness requirement of U.S.C.A. Const.Amend. 4. Com. v. Vecchione, Pa.Super.1984, 476 A.2d 403.

Absent any indication that airline agent's conduct, in opening packages and discovering marijuana, was aimed at discovering weapons, explosives or other destructive substances, such search by agent had not been made pursuant to this subchapter, and, thus, the search could not be considered a "governmental activity" subject to constitutional prohibitions of unreasonable searches and seizures on theory that this subchapter was involved. Snyder v. State, Alaska 1978, 585 P.2d 229.

7. Negligence

In absence of showing of arbitrariness, airline was not negligent in failing to obtain information necessary to make decision as to whether to transport plaintiff, who had undiagnosed illness, and who was paralyzed from waist down. Adamsons v. American Airlines, Inc., 1982, 444 N.E.2d 21, 58 N.Y.2d 42, 457 N.Y.S.2d 771, reargument denied 447 N.E.2d 89, 58 N.Y.2d 971, 460 N.Y.S.2d 1029, certiorari denied 103 S.Ct. 3540, 463 U.S. 1209, 77 L.Ed.2d 1390.

8. Discretion

Airline did not abuse its discretion in refusing to transport plaintiff from Haiti to New York, where airline saw passenger for first time three quarters of an hour before departure time, it was obvious that she was very ill, illness was undiagnosed, possibility of infectious origin had not been ruled out, her legs were paralyzed, no special preparations, other than wheelchair, or any modification of seats, had been made or requested to accommodate her, she was traveling alone, and there was no way of knowing what assistance she might need in course of proposed three-hour flight, much of it over ocean. Adamsons v. American Airlines, Inc., 1982, 444 N.E.2d 21, 58 N.Y.2d 42, 457 N.Y.S.2d 771, reargument denied 447 N.E.2d 89, 58 N.Y.2d 971, 460 N.Y.S.2d 1029, certiorari denied 103 S.Ct. 3540, 463 U.S. 1209, 77 L.Ed.2d 1390.

§ 1512. State or subdivision income tax on compensation paid to interstate air carrier employees

(a) Compensation subject to income tax laws of State or subdivision; requirements respecting applicability

No part of the compensation paid by an air carrier to an employee who performs his regularly assigned duties as such an employee on an aircraft in more than one State, shall be subject to the income tax laws of any State or subdivision thereof other than the State or subdivision thereof of such employee's residence and the State or subdivision thereof in which such employee earns more than 50 per centum of the compensation paid by the carrier to such employee.

(b) State or subdivision where employee deemed to have earned 50 per centum of compensation

For the purposes of subsection (a) of this section, an employee shall be deemed to have earned 50 per centum of his compensation in any State or subdivision in which his scheduled flight time in such State or subdivision is more than 50 per centum of his total scheduled flight time in the calendar year while so employed.

(c) Definitions

For the purposes of this section the term "State" also means the District of Columbia and any of the possessions of the United States; and the term "compensation" shall mean all moneys received for services rendered by the employee in the performance of his duties and shall include wages and salary.

(As amended Pub.L. 96–193, Title IV, § 402, Feb. 18, 1980, 94 Stat. 57.)

HISTORICAL AND STATUTORY NOTES

1980 Amendment

Subsec. (a). Pub.L. 96–193 substituted provisions relating to applicability of income tax laws of any State or subdivision on compensation paid to interstate air carrier employees, for provisions relating to requirements respecting State or subdivision income tax withholding on compensation paid to interstate air carrier employees.

Subsec. (b). Pub.L. 96–193 reenacted provisions without change.

Subsec. (c). Pub.L. 96–193 struck out applicability of definition under subsec. (a) of this section.

Legislative History

For legislative history and purpose of Pub.L. 96–193, see 1980 U.S.Code Cong. and Adm.News, p. 89.

§ 1513. State taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (e) of this section and except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Permissible acts; taxes and fees

Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this

section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

[See m. in volume for text of (c)]

(d) Acts which unreasonably burden and discriminate against interstate commerce; definitions

(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) In this subsection—

(A) "assessment" means valuation for a property tax levied by a taxing district;

(B) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(C) "air carrier transportation property" means property, as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;

(D) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and

(E) "State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.

(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.

(e) Authority for imposition of passenger facility charges

(1) In general

Subject to the provisions of this subsection, the Secretary may grant a public agency which controls a commercial service airport authority to impose a fee of $1.00, $2.00, or $3.00 for each paying passenger of an air carrier enplaned at such airport to finance eligible airport-related projects to be carried out in connection with such airport or any other airport which such agency controls: For purposes of this subsection, financing an eligible airport-related project includes making payments for debt service on bonds and other indebtedness incurred to carry out such project.

(2) Use of revenues and relationship between fees and revenues

The Secretary may grant a public agency which controls a commercial service airport authority to impose a fee under this subsection to finance specific projects only if the Secretary finds, on the basis of an application submitted for such authority—

ty taxes, net income taxes, franchise taxes, and sales or use
ds or services; and nothing in this section shall prohibit a
ision thereof, including the Commonwealth of Puerto Rico,
n, the District of Columbia, the territories or possessions of
tical agencies of two or more States) owning or operating an
collecting reasonable rental charges, landing fees, and other
craft operators for the use of airport facilities.

[See main volume for text of (c)]

nly burden and discriminate against interstate commerce; defini

s unreasonably burden and discriminate against interstate
subdivision of a State, or authority acting for a State or
ay not do any of them:

rrier transportation property at a value that has a higher
ket value of the air carrier transportation property than the
ed value of other commercial and industrial property of the
me assessment jurisdiction has to the true market value of
l and industrial property;

ct a tax on an assessment that may not be made under
this paragraph; or

t an ad valorem property tax on air carrier transportation
ate that exceeds the tax rate applicable to commercial and
n the same assessment jurisdiction.

—

means valuation for a property tax levied by a taxing

jurisdiction" means a geographical area in a State used in
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ransportation property" means property, as defined by the
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and industrial property" means property, other than trans-
and land used primarily for agricultural purposes or timber
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District of Columbia, the territories or possessions of the
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d relationship between fees and revenues

grant a public agency which controls a commercial service
impose a fee under this subsection to finance specific
Secretary finds, on the basis of an application submitted for

(A) that the amount and duration of the proposed fee will result in revenues (including interest and other returns on such revenues) which do not exceed amounts necessary to finance the specific projects; and

(B) that each of the specific projects is an eligible airport-related project which will—

(i) preserve or enhance capacity, safety, or security of the national air transportation system,

(ii) reduce noise resulting from an airport which is part of such system, or

(iii) furnish opportunities for enhanced competition between or among air carriers.

(3) Limitation regarding passengers of air carriers receiving essential air service compensation

If a passenger of an air carrier is being provided air service to an eligible point under section 1389 of this Appendix for which compensation is being paid under such section, a public agency which controls any other airport may not impose a fee pursuant to this subsection for enplanement of such passenger with respect to such air service.

(4) Limitation regarding obligations

No fee may be imposed pursuant to this subsection for a project which is not approved by the Secretary under this subsection on or before September 30, 1993, if, during fiscal year 1993, the amount available for obligation under section 1389 of this title is less than $38,600,000. This limitation on the authority to impose a fee shall not apply if the amount available in fiscal year 1993 for obligation under section 1389 of this title is less than $38,600,000 as a result of sequestration or other general appropriations reductions applied proportionately to appropriations accounts throughout an appropriations Act. The provisions of this paragraph shall not affect the authority of the Secretary to approve the imposition of a fee or the use of revenues derived from a fee imposed pursuant to an approval made under this subsection by a public agency which has received an approval to impose a fee under this subsection prior to September 30, 1993, regardless of whether such fee is being imposed on September 30, 1993.

(5) Linkage

The Secretary may not grant a public agency authority to impose a fee pursuant to this subsection unless the Secretary has—

(A) issued a final rule establishing a program for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft pursuant to section 2153(a) of this Appendix; and

(B) issued a notice of proposed rulemaking to consider more efficient allocation of existing capacity at high density airports under section 9126 of the Aviation Safety and Capacity Expansion Act of 1990.

(6) Two enplanements per trip limitation

Enplaned passengers on whom a fee may be imposed by a public agency pursuant to this subsection include passengers of air carriers originating or connecting at the commercial service airport which the agency controls. A fee may not be collected pursuant to this subsection from a passenger with respect to any enplanement of such passenger, on a one-way trip and on a trip in each direction of a round trip, after the second enplanement for which a fee has been collected pursuant to this subsection from such passenger.

(7) Air carrier rates, fees, and charges

(A) Treatment of fee revenues

Revenues derived from fees collected pursuant to this subsection shall not be treated as airport revenues for the purpose of establishing a rate, fee, or

FEB 13 1993

OFFICE
OF THE
CITY AND BOROUGH MANAGER

MARK R. PALESH
MANAGER

February 16, 1994

The Honorable Senator Randy Phillips, Chair
Senate Community & Regional Affairs Committee
Alaska State Senate
Capitol Building, Room 103
Juneau, Alaska 99811

Re: Senate Bill 261

Dear Senator Phillips:

Thank you for the opportunity to testify on this legislation. The City and Borough of Juneau continues to oppose both the federal legislation limiting the tax base of local government, and state attempts to fill in the gaps in the federal law. SB 261 goes well beyond federal law.

If legislation is to pass, the CBJ would appreciate three amendments:

First, on page 1, line 12, please delete the phrase "use tax" from the Transportation CS. The reason for this amendment is that the CBJ is unsure what is intended by "use tax," and we are concerned about, for example, landing fees.

Second, on page 1, lines 13-14, please define "federally certificated air carrier." We suggest substituting the phrase "an air carrier holding a certificate of public convenience and necessity issued by the U.S. Department of Transportation under Section 401 of the Federal Aviation Act."

Third, on page 1, line 14, after "municipalities" and before the period, please add: "except that it does not apply to flights conducted entirely within the boundaries of a municipality levying a sales tax." This amendment would exclude from the bill's limitation on municipal ability to tax, certain flights such as the glacier tours conducted from Juneau harbor. The CBJ sees these tourist flights as a potentially significant source of municipal revenue and would prefer it not to be preempted by state legislation.

Finally, we would like to point out that SB 261 as it now stands goes beyond the federal law limiting local governments. Even under the interpretation of the General Counsel for the U.S.

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Department of Transportation, which seems to bend over backwards to prohibit local taxation -- and whose opinion differs from that of Judge Link of the Alaska Superior Court -- taxation of intrastate air cargo is permitted by federal law. The present version of SB 261 would go beyond the federal limitation and prohibit even intrastate air cargo taxation. (See Page 1, line 13: "carriage of individuals or goods for hire.") If the purpose of SB 261 is to restate the federal law, the phrase "or goods" should be dropped.

I have attached a copy of a 1986 letter from the U.S. Department of Transportation which sets out their understanding of the federal preemption. The last sentence of the letter notes that taxation of carriage of property (freight) is not preempted. Note also that the federal law has changed since this letter: head taxes are now allowed for purposes of maintaining airports. SB 261 would prohibit that -- again going beyond federal law. Also attached is a 1984 letter from Jana E. McIntyre, an attorney for the FAA; this shows that there are differences of opinion among lawyers as to the reach of the federal preemption.

Another concern is the breadth of the language in the bill, page 1, lines 12-13: "or use tax on an activity that directly involves the carriage of individuals or goods for hire ..." This language is so broad that it might endanger assessment of landing fees. Landing fees are projected at $849,000 in Juneau next year. Should this legislation be so interpreted, this would be a major loss. Airports around the state would be impacted.

Again, our preference is no bill; with state municipal assistance and revenue sharing expected to be reduced over the next few years, legislative efforts to reduce the municipal tax base are inappropriate.

This bill creates an unfunded mandate. Municipalities provide municipal services to air carriers -- police, fire, schools, roads, etc. -- but now will be prohibited by state statute from taxing this industry. Other industries may soon follow. The CBJ opposes both federal and state unfunded mandates.

Thank you again for the opportunity to comment.

Sincerely,

David R. Palmer
Deputy City Manager

DRP/JWH/mjm
Attachments
cc: Senate Community & Regional Affairs Committee Members

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

OCT - 3 1986

Ms. D. Elizabeth Cuadra
Robertson, Monagle, Eastaugh
Attorneys at Law
Post Office Box 1211
Juneau, Alaska 99802-1211

Re: Municipal Taxation of
Air Commerce

Dear Ms. Cuadra:

I appreciate the opportunity to respond to your questions to the Department concerning the legitimacy of municipal taxation on airline ticket sales. You state that your municipal clients assess or wish to assess sales taxes on the sale of transportation by air. It is my opinion that, to the extent these ordinances tax the sale of passenger transportation by air - whether intrastate, interstate, overseas, or foreign transportation - they are preempted by Section 1113 of the Federal Aviation Act of 1958, as amended (49 U.S.C. Section 1513). Sales taxes on the intrastate air carriage of property are permissible.

As the General Counsel explained in his December 18, 1985 letter to Riggs Air Service, these ordinances would largely fall within the plain prohibitions of Section 1113(a):

> "No State (or political subdivision thereof...) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom..."

By taxing the air fare at the point of sale to the consumer, the municipalities are, in effect, taxing "persons traveling in air commerce." Section 1113(a) clearly preempts such a tax.

Congress intended, by including this provision in the 1973 Airport Development Acceleration Act, to preclude not only head taxes but also to prevent states or municipalities from burdening interstate commerce by assessing various other taxes on air transportation. 1/

1/ See especially 119 Cong. Rec. Part 3, p. 3349, (statement of Mr. Cannon, introducing S. 38); and 3350 (statement of Mr. Pearson.)

As you note, Congress, in Section 1113(b), excepted several types of taxes from the general prohibition, including as most relevant here "sales and use taxes on the sale of goods or services." However, given the language of Section 1113(a), this exception hardly can be read as allowing a "sales tax" which is imposed, directly or indirectly, upon "persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation...." Otherwise, the exception would wholly swallow the rule. 2/ Rather, we believe Congress intended in (b) to permit States and municipalities to maintain taxes on the sale of goods and services which are incidental to air transportation, such as the sale to the airline of aviation fuel or of food to be provided to the airline passenger.

This view is in full accord both with Congressional intent and the results obtained in court cases. The inclusion of (b) was intended to allow States and localities to retain traditional sources of revenues, and they had historically imposed sales and use taxes on goods and services supplied in connection with airline operations. 3/ This interpretation is also consistent with the results obtained in the two cases most relevant to the issue, Air Jamaica, Ltd. v. State Department of Revenue, 374 So. 2d 575 (Fla. App. 1979), cert. den. 392 So. 2d 1371 (Fla. 1980), which you cite, and Wardair Canada v. Florida Department of Revenue, 106 S. Ct. 2369, (1986), L. Ed. 2d 1, 14-15 (Burger, C. J., concurring) (June 18, 1986). Air Jamaica found lawful a sales tax on packaged meals purchased by airlines and served to their passengers, while Wardair upheld a State sales tax on jet fuel. Both are taxes imposed on airlines for goods or services incidental to their provision of air transportation.

Accordingly, in response to the specific situations you raised in your letter of February 20th, local sales taxes would not be permissible with regard to (a) sightseeing tours by helicopter or light plane; (b) air taxi or charter fishing trips; (c) nonscheduled air taxi operators; (d) scheduled interstate commuter airline trips, regardless of the passenger's ultimate destination; and (e) airline tickets sold, regardless of the passenger's routing. This is because the preemption extends to all carriers regulated by the FAA (including helicopters, etc.) as well as to all passenger transportation involving air commerce.

2/ See also State v. Cochise Airlines, 626 P.2d. 596, 601 (Ariz. App., 1981), observing that the "sales taxes referred to in [§1113(b)] on the sales of goods and services cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air commerce. If [§1113] were interpreted otherwise, it would be self-contradictory."

3/ See Hearings on H.R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong. 2d Sess. at 91 (1972). Compare H.R. 2337, 92d Cong. 1st Sess. (1971) and S. 3611, 92d Cong. 2d Sess. (1972), which, without any exceptions, prohibited State or local taxes, fees, etc. on the carriage of persons in air transportation, with Pub. L. 93-44, 93d Cong. 1st Sess. §7 (1973) as ultimately enacted.

With regard to the transportation of property by air, however, I believe Section 1113 preempts state or local sales taxes on interstate air transportation only. The operative statutory provision precludes a "tax...on the sale of air transportation". This excludes taxes on the sale of intrastate air transport of property, cf. 49 U.S.C. § 1301(10). Accordingly, to the extent the municipal ordinances assess sales taxes on the intrastate transportation by air of property, they are not preempted by Section 1113. 4/

Sincerely,

Rosalind Knapp

Rosalind Knapp
Deputy General Counsel

4/ Accord, State v. Cochise Airlines, supra at 601.

U.S. Department
of Transportation

Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

APR 16 1984

Elizabeth Quadra, Esq.
Robertson, Monagle, Eastaugh and Bradley
P.O. Box 1211
Juneau, Alaska 99802

Dear Ms. Quadra:

As we agreed on the telephone on April 11, 1984, I am enclosing a copy of an opinion I wrote to the Virgin Islands Port Authority interpreting 49 U.S.C. 1513 and a copy of the Guam District Court's opinion in Island Aviation, Inc. v. Guam Airport Authority. Although both of these deal with "head charges," the analysis contained therein is applicable to sales taxes as well.

As a general matter, it appears that a municipal sales tax on goods and services that is collected as a percentage of revenue probably would be permitted under Section 1513(b) if the cost of the tax is included in the price of the ticket and if the proceeds of the tax are not used to finance airport development that would be eligible for Federal financial assistance from the Airport and Airway Trust Fund. This interpretation is based largely upon the legislative history of Sections 1513(a) and (b). I am enclosing some relevant portions of this legislative history. Since the scope of the Sec. 1513(a) prohibition of taxes on the sale of air transportation and the scope of the 1513(b) allowance of sales taxes on goods or services are unclear from the face of the statute, it is appropriate to examine the legislative history of this section in answering your question.

You also asked whether imposition of the sales tax on tickets for flights crossing international boundaries would be permitted. I do not believe that the international nature of the flight would require a different result under Section 1513 than occurs for sales taxes collected from domestic flights. Such taxes may, however, be subject to restrictions other than those contained in the Federal Aviation Act.

I hope you find these comments helpful. Please contact me or Len Ceruzzi if you have any further questions. I have also sent a copy of this response to Don Boberick, the FAA Regional Counsel for Alaska. If you prefer, you may contact him in Anchorage ((907) 271-5269) for further assistance.

Len Ceruzzi sends his best wishes.

Sincerely,

Jana E. McIntyre

Jana E. McIntyre
Attorney
Airports & Environmental
Law Branch
Office of the Chief Counsel

Enclosures