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Fuel tax on aviation
fuel for international
flights

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You have asked whether the State of Alaska could extend its motor fuel tax to aviation fuel sold within the state for use in international flights.

AS 43.40.010 now imposes a tax on motor fuel sold within the state of Alaska. For aviation fuel, the tax is four cents a gallon for gasoline and two and one-half cents a gallon for aviation fuel other than gasoline. AS 43.40.010(a)(1) and (3). By definition, however, "motor fuel" does not include "fuel sold for use in jet propulsion aircraft operating in flights to foreign countries." AS 43.40.100(2)(B). In a regulation implementing the motor fuel tax, a list of exemptions to the tax includes "fuel sold to, transferred to, or used on jet propulsion aircraft operating flights from the state to a foreign country, except flights to a foreign country with intermediate stops within the United States." 15 AAC 40.20(c)(13).

The legality of a state tax on aviation fuel for use in international flights was considered by the United States Supreme Court in the case of Wardair Canada, Inc., v. Florida Dept. of Revenue, 477 U.S. 1, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986). There the court upheld Florida's tax on all aviation fuel sold in the state, including fuel used on international flights. The court rejected Wardair's arguments:

-- that the Commerce Clause of the U. S. Constitution reserved taxation of fuel used in international flights to the U.S. Congress;

-- that in the Federal Aviation Act, 49 U.S.C. App. 1301ff., the Congress had enacted an exclusive air commerce regulatory scheme which "occupied the field" and preempted any state taxation; and

-- that the bilateral agreement with Canada expressed a federal policy to preclude states from imposing individual taxes.

In rejecting these arguments, the Supreme Court found that there was no evidence of a federal policy against state taxation. On the contrary, the court found an expression of an intent not to preclude state taxation. The court based this view on bilateral agreement language prohibiting national, but not state, taxation of fuel; and on 49 U.S.C. app. • 1513. 1/ This statute prohibits certain kinds of taxes on aviation, but specifically states that it does not preclude states from imposing taxes on goods and services for aviation. 2/

Wardair is a decision of the highest court of the land, and is still good law. It has not been overturned by any subsequent judicial ruling. Nor has there been any amendment to 49 U.S.C. app. • 1513 which might support the conclusion that Congress has subsequently moved to preempt or "occupy the field"

1/ In pertinent part, this statute provides:

Sec. 1513 State taxation of air commerce

(a) No State . . . 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 traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom. . . .

(b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State. . . . 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. . . . 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.

49 U.S.C.A. app. • 1513 (1976, 1990).

2/ In discussing this statute, the majority held that it alone was not dispositive. 106 S. Ct. at 2372. In a concurring opinion, however, Justice Burger expressed the opinion that this statute alone unequivocally authorizes the states to impose taxes of the kind you are considering. 106 S. Ct. at 2376.

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of taxation of fuel for international flights. Finally, I made a very informal inquiry to Courtney Railey, an AOCI staff member in Washington, D.C., who works extensively on bilateral agreements. She replied that she is not aware of any discussion of fuel taxation ever being raised in recent bilateral agreement negotiations.

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