BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 98-092
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
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49 U.S.C. § 40116(b); ETB 321: B&O TAX --PUBLIC UTILITY TAX -- FEDERAL PRE-EMPTION -- AIR COMMERCE -- AIR AMBULANCE SERVICE: Income earned by an air ambulance service from the carriage of patients in air commerce (including interstate flights and intrastate ones, fixed wing or helicopter) is exempt by federal law from gross receipts taxes, such as the B&O tax and the public utility tax. Income from interstate non-passenger flights where only body organs, supplies, equipment, or other freight is transported is exempt by state law from the B&O tax and the public utility tax. Income earned from purely intrastate non-passenger flights that transport only body organs; supplies; equipment, or other freight for hire is subject to the public utility tax.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A consortium (the taxpayer) that provides air ambulance services protests the assessment of service business and occupation (B&O) tax on its gross receipts.[1]

FACTS:

De Luca, A.L.J. -- Several Washington hospitals recognized a need for regional air ambulance service that could provide rapid transport and in-flight care to critically ill or seriously injured patients requiring immediate transport to and from the hospitals. By written agreement, the four hospitals founded the taxpayer to provide such services. The taxpayer is licensed by the Washington Department of Health to operate an air ambulance service.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

The taxpayer offers a "fixed wing" program (three jets) to provide community hospitals in Washington and three other states with access for their patients to the tertiary care that can be provided by the four hospitals. The taxpayer also offers a "helicopter" program (three aircraft also) to provide community hospitals and medic units/fire departments in Washington with access for their patients to the tertiary care that the four hospitals offer. The aircraft are owned and operated by third parties who are licensed by the Federal Aviation Administration. The third parties operate the aircraft pursuant to their agreements with the hospitals. The medical staff members aboard the aircraft are employed primarily by the . . ., which operates [Hospital] and employs all of [Hospital]'s personnel. Some patients need no medical services in route other than monitoring. Other patients may require emergency treatment in route.

Each month, [Hospital] issues invoices in the taxpayer's name to various parties for transportation provided. The invoices specify a single charge for "Flight Expenses." The charge incorporates two components -- a "Lift-Off Fee" and a "Mileage Fee." The invoices do not include separate charges for medical services or supplies. The hospitals that are billed by the taxpayer, in turn, invoice their patients or their patients' insurance providers. These transportation charges are substantial. Charges for the state A flights were in the $ . . . range each and there were many such flights during the audit period. Charges for flights to . . . Washington were approximately $ . . . - $ . . . each. Flights to state B cost approximately $ . . . - $ . . . each. The helicopter flight charges were approximately $ . . . to $ . . . each. Apparently, the taxpayer also provided "organ procurement" flights, where body organs were transported from one location to another.

The Audit Division of the Department of Revenue (the Department) reviewed the taxpayer's books and records for the periods January 1, 1988 through December 31, 1990, and January 1, 1990 through December 31, 1995. The Audit Division assessed $. . . in taxes, interest and penalties for the earlier period (Document No. FY. . .), and $. . . in taxes, interest, penalties for the latter period (Document No. FY. . .). All of the assessed taxes, except for a few thousand dollars in uncontested use tax, consists of service B&O tax on the taxpayer's gross receipts earned from the emergency air transportation.

TAXPAYER'S EXCEPTIONS:

The taxpayer argues that the state is pre-empted by federal law from taxing the air transportation charges. The taxpayer cites as authority Section 7(a) of the Airport Development Acceleration Act of 1973, P.L. 93-94, § 7(a), 87 Stat. 90, formerly codified as 49 U.S.C. § 1513(a). Additionally, the taxpayer cites Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983), which held that that law forbids states from imposing a gross receipts tax on air commerce or air transportation. The taxpayer also cites some lower court cases that pertain to this federal statute, including F.A.A v. Landry, 705 F.2d 624, 634 (2d. Cir), cert. denied 464 U.S. 895 (1983) and Hill v. National Transportation Safety Board, 886 F.2d 1275, 1280 (10th Cir. 1989). The taxpayer notes that it has paid federal air transportation excise tax imposed under 26 U.S.C. §4261 on its transportation income.

ISSUES:

Is this state pre-empted by federal law from assessing its service B&O tax on the gross receipts earned by the taxpayer from transporting patients by air to and from the . . . hospitals?

DISCUSSION:

The Audit Division in the present matter relied on Det. No. 93-132, 13 WTD 271 (1993) in support of the service B&O tax assessment. That case concerned a business that provided motor vehicle ambulance service by transporting patients from Washington into Oregon. The Audit Division had assessed service B&O tax on that business' gross receipts without allowing that business to apportion its income between the two states. The Department held in Det. No. 93-132 that the gross income from the ambulance service was taxable under the service B&O tax classification, but was subject to apportionment. Similarly, in the present matter, the Audit Division apportioned the taxpayer's gross receipts earned from interstate flights.

We do not find Det. No. 93-132, supra, controlling because it did not concern transporting persons by air. Rather, that case pertained only to surface transportation. Accordingly, the federal pre-emption issue before us was not present in that case.

The Airport Development Acceleration Act has been recodified in substantially similar form from 49 U.S.C. § 1513(a) to 49 U.S. C. § 40116(b) by P.L. 103-305 in 1994. The current statutory language is as follows:

> (b) **Prohibitions.** -- Except as provided in subsection (c) of this section and section 40117 of this title, a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on --
>
> (1) an individual traveling in air commerce;
> (2) the transportation of an individual traveling in air commerce
> (3) the sale of air transportation; or
> (4) the gross receipts from that air commerce or transportation.

49 U.S. C. §40102(a)(3) defines "air commerce" . . .

> means foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.

"Aircraft" means "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. §40102(a)(6).

"Interstate air commerce" means "the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation" between states, possessions of the U.S., or the District of Columbia. 49 U.S.C. §40102(24).

The U.S. Supreme Court reviewed these statutes, as they were previously codified, in Aloha Airlines, supra. Aloha Airlines is a commercial airline that was carrying passengers, freight , and mail among the islands of Hawaii. According to the Court, Congress intended to stop the proliferation of local taxes burdening interstate air transportation and resulting in double taxation of air travelers. 464 U.S. at 9-10. The Court continued by declaring:

> Section 1513(a) expressly pre-empts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce, and Haw. Rev. Stat. §239-6 is a state tax on the gross receipts of airlines selling air transpiration and carrying persons traveling in air commerce.

Id., 464 U.S. at 11. The Supreme Court next stated:

> First, when a federal statue 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).

Id., 464 U.S. at 12. Finally, the Court declared at 464 U.S. at 14-15:

> In conclusion, ...§ 1513(a) proscribes the imposition of state and local taxes on gross receipts derived from air transportation or the carriage of persons in air commerce.

See also Niagara Frontier T.A. v. Eastern Airlines, 658 F. Supp. 247 at 250 (W.D. N.Y. 1987), which held that air passengers, companies who carry persons in air commerce, and companies who sell air transportation are protected from the proscribed conduct under former 49 U.S.C. 1513(a). It is clear in the present matter that the taxpayer carries persons in "air commerce" as that term is defined above, including "interstate air commerce."

Excise Tax Bulletin 321.16.179.224 (Second Revision, Issued April 1, 1991) purports to incorporate Aloha Airlines, supra, into its discussion of the various tax classifications which apply to gross receipts earned from services performed with the use of aircraft. The ETB states in part:

> In ALOHA AIRLINES the Court concluded that under Section 7(a) of the Airport Development Acceleration Act of 1973 (ADAA) a State cannot impose a gross receipts tax on the activity of hauling persons or U.S. mail for hire within the limits of any Federal airway. This includes flights that begin and end in Washington (intrastate flights) when the operation of the aircraft is within 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. (See 49 U.S.C. § 1301 and § 1513(a)). There is no prohibition in federal law from taxing the intrastate transportation of freight with the exception of U.S. mail.

The Department has concluded that a distinction cannot be made between charter flights and regularly scheduled commercial flights. Transporting passengers or U.S. mail is not a taxable activity when the aircraft flies in air space within Washington that affects the safety of interstate, overseas, or foreign air commerce and is within the limits of any Federal airway, either by air charter or regularly scheduled commercial flights. Thus, income from hauling persons or U.S. mail by aircraft from a Washington location to another Washington location is not taxable. This exclusion from tax does not apply to persons hauling freight by aircraft when the flight begins and ends in Washington or to flights which are in the nature of sightseeing or similarly related activities.

The following is a list of activities with the tax classification identified which applies to the activity. This list is intended to be representative of activities performed with aircraft, but should not be considered as all inclusive.

Other Public Service (Public Utility Tax):

1. Hauling freight by air when the haul begins and ends in Washington. As noted above, hauling passengers or U.S. mail is exempt. Any additional charge to a passenger for transporting excess luggage is considered incidental to hauling of the passenger and is not considered to be for hauling freight.

Service and Other Activities (B&O Tax):

1. Crop dusting, seeding, spraying, cattle roundup, and similar agriculture related activities.
2. Banner towing.
3. Aerial photography.
4. Fire fighting.
5. Rescue Operations.
6. Air ambulance operations where the operator provides medical technicians and emergency treatment while in flight.
7. Powerline or pipeline patrol.
8. Sightseeing. A flight which starts and ends at the same location and does not touch down at a public airfield in the course of a flight will be presumed to be for sightseeing or some other taxable activity and not a charter flight.
9. Student instruction and training flights. This includes solo flight training where the pilot is a registered student in a bona fide training program, is at all times flying in a regulated pattern, and is at all times under the control of the instructor. A charge to a student for the use of an airplane for a solo flight which does not meet the above conditions is taxable under retailing B&O tax and retail sales tax liability as the bare rental of an aircraft.

Extracting For Hire (B&O Tax):

> 1. The movement of logs from the location where the tree was cut to a "landing" within close proximity where the logs will be accumulated for later transportation by some other mode to the mill is part of the extracting activity.

(Emphasis ours.) Thus, the ETB acknowledges that the state cannot tax income from transporting persons by charter aircraft or by common carrier aircraft in interstate commerce or in a federal airway in Washington, or from one location in Washington to another location in Washington. Nonetheless, the ETB concludes that the state can tax air ambulance operations when the operator provides medical technicians and emergency treatment while in flight. We find this conclusion does not comport with the language of 49 U.S.C. § 40116(b) and Aloha Airlines, supra, and even with the ETB's own language that precedes its listing of air ambulance operations as taxable. In short, the Department has assessed a gross receipts tax on the income earned from the carriage of passengers in interstate air commerce (the fixed wing flights carrying patients to and from Seattle and the other states, such as Alaska, Idaho, and Montana.) The Department has also assessed a gross receipts tax on the income earned from transporting passengers by fixed wing or helicopter in air commerce from points in Washington to Seattle. Such assessments are impermissible under federal law.

However, the taxpayer also provided what its records describe as "organ procurement" flights. If these flights did not carry patients or other passengers for hire, but carried only body organs, medical supplies, or medical equipment or other cargo for hire, then such income is subject to the public utility tax when the hauls began and ended in Washington. ETB 321.

We choose not to follow only the air ambulance operations example in ETB 321 because, on its face, it conflicts with 49 U.S.C. § 40116(b) and Aloha Airlines, supra. Obviously, we are not declaring the remainder of the ETB invalid because we find that it correctly determines whether income from intrastate freight flights is taxable. That portion of the ETB appears consistent with what the Supreme Court stated in Aloha Airlines 464 U.S. at 15 in footnote 11. . .

> Arizona Dept. of Revenue v. Cochise Airlines, 128 Ariz. 432, 626 P. 2d 596 (Ariz. Ct. App. 1980) (§ 1513(a) preempts state gross receipts taxes on the carriage of passengers, but not freight, in air commerce):

Each of the other examples in ETB 321 will have to stand or fall on its own merits.

In conclusion, income from the carriage of passengers in air commerce (including interstate flights and intrastate ones, fixed wing or helicopter) is exempt from the gross receipts tax. Income from interstate non-passenger flights where only organs, supplies, equipment, or other freight is transported for hire is exempt from the gross receipts tax. Income from purely intrastate non-passenger flights that transport only organs, supplies, equipment, or other freight for hire is subject to the public utility tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

Dated this 20th day of May 1998.