U.S. Department
of Transportation

Office of the Secretary
of Transportation

General Counsel

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Washington, DC 20590

MAY 21 2014

Ms. Gina Amacher
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St. Paul, MN 55146-3331

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Re: MinnesotaCare Tax on Air Ambulance Services

Dear Ms. Amacher and Mr. Hogan:

You have each requested guidance from my office on whether the Anti-Head Tax Act (AHTA)[1] preempts the MinnesotaCare Provider Tax (Provider Tax) on the gross receipts of air ambulance operators providing services to persons in the State of Minnesota.

As a preliminary matter, please note that we are not providing an opinion on the merits of any particular proceeding before the State of Minnesota (nor have either of you asked us to do so). Instead, we offer only general guidance on this issue that we hope will assist both of you, and any interested persons, in understanding the application of Federal law to these matters. As we explain below, we believe the AHTA preempts the Provider Tax as applied to air ambulance operations, including those performed on a purely intrastate basis. We do not address Mr. Hogan's additional argument, that the Airline Deregulation Act[2] also preempts the Provider Tax.

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[1] The Anti-Head Tax Act, 49 U.S.C. Section 40116(b), states that except as provided in other sections not relevant here:

> [A] State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title 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.

[2] The Airline Deregulation Act preemption provision is codified at 49 U.S.C. Section 41713(a).

Based on your letters, we understand that Minnesota imposes a two percent Provider Tax on payments received by "health care providers," which includes air ambulance service operators transacting business in Minnesota. The Provider Tax excludes payments received for services provided outside Minnesota.[3] According to Mr. Hogan's letter, the Minnesota Revenue Department recently agreed with his clients' position that Federal law preempts the Provider Tax on air ambulance operators' revenue derived from *interstate* flights, but the State has not agreed that a tax on the revenues from *intrastate* flights also are preempted. Ms. Amacher's letter requests guidance on whether the AHTA prohibits the tax on either interstate or intrastate flights, but similarly distinguishes between the two, noting that "intrastate flights are not included in the definition [of 'air commerce'] and their taxability is not clear."

In requesting our concurrence that the AHTA preempts the Provider Tax on air ambulance revenues derived from intrastate operations, Mr. Hogan notes that the U.S. Supreme Court, in *Aloha Airlines v. Dir. of Taxation of Hawaii*, 464 U.S. 7 (1983), held that the AHTA prohibits a State's direct or indirect taxes on gross receipts derived from an individual traveling in air commerce, agreeing with an Arizona Supreme Court holding that the AHTA's prohibition of a tax on "an individual traveling in air commerce" effectively acts as "a ban on the direct or indirect taxation of *intrastate* airline fares." *Id.* at n. 11 (emphasis added) (citing *State ex rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P.2d 596 (Ariz. 1980)). Mr. Hogan also argues that air ambulance operations (similar to hot air balloon operations) occur in "air commerce" under the AHTA and, therefore, our January 29, 2010 opinion that the AHTA preempts a State gross receipts tax on hot air balloon operations applies to the Provider Tax as well. Ms. Amacher, however, suggests that a hot air balloon operates in "air commerce" because it is susceptible to drifting between States and endangering safety in interstate commerce, whereas a wholly intrastate air ambulance operation would not endanger interstate air commerce.

The AHTA Appears to Preempts the Provider Tax

The AHTA prohibits a State tax on the "gross receipts" derived from, among other things, "the transportation of an individual traveling in air commerce" or "the sale of air transportation." 49 U.S.C. Section 40116(b). The Provider Tax is a "gross receipts" tax, because it is levied on an air ambulance operator's gross revenues.[4] Moreover, interstate flights take place in "air transportation," defined in 49 U.S.C. Section 40102(a)(5) as "foreign air transportation, *interstate air transportation,* or the transportation of mail by aircraft." (Emphasis added.) Thus, the Provider Tax appears to violate the AHTA to the extent it imposes a tax on the gross receipts charged for interstate air ambulance flights.

The question remains whether a gross receipts tax on payments received for a flight between two points within Minnesota also violates the AHTA, on the ground that the flight takes place in "air commerce." "Air commerce" means --

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[3] *See* M.S. Sections 295.50, .52-.53; 144E.12.

[4] The Minnesota Provider Tax is "imposed on each health care provider equal to two percent of its gross revenues." M.S. Section 295.52, subd. 2.

> 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. 49 U.S.C. § 40102(a)(3).

Although the definition of "air commerce" does not expressly include "intrastate" flights, it does include 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." An air ambulance flight may occur, in whole or in part, within a Federal airway;[5] where it does, the flight takes place in "air commerce," and falls under the AHTA. In either event, the intrastate flight of an air ambulance certainly may endanger the safety of other flights, and thus falls within the scope of "air commerce" -- which has a much broader reach than flights operated within the limits of a Federal airway. *See United States v. Healy*, 376 U.S. 75, 84-85 (1964); *see also Hill v. NTSB*, 886 F.2d 1275, 1279-80 (10th Cir. 1989) (finding that intrastate helicopter operations outside Federal airways or navigable airspace occur in "air commerce"; "[t]he statutory definition of 'air commerce' is...clearly not restricted to interstate flights occurring in controlled or navigable airspace").

The statutory definition of "air commerce" is written in the disjunctive ("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"). Moreover, the definition of "air commerce" does not require a showing that an intrastate flight *actually* or *directly* "endanger[s] safety in interstate or foreign air commerce" for that operation to occur in "air commerce." A flight occurs in "air commerce" if "the operation of [the] aircraft *may* endanger safety in interstate or foreign air commerce."

That an air ambulance operation may occur wholly within a State does not mean that the potential to endanger safety in air commerce is not present. As stated in *Hill*, the "potential for such endangerment, however slight," is sufficient for the aircraft operation to occur in "air commerce." *Id.* at 1280. Indeed, the Federal Aviation Administration (FAA) broadly regulates the safety of piloted helicopter operations under its "air commerce" authority, including intrastate flights.[6] Thus, an aircraft operating on a purely intrastate basis -- regardless of whether the aircraft operates within a Federal airway, or actually endangers safety in interstate commerce -- is subject to FAA regulation for safety in "air commerce," given the potential for unsafe situations caused by the flight. *See Rosenham v. United States*, 131 F.2d 932, 935 (10th Cir. 1942) (FAA may lawfully regulate operations in "air commerce" by requiring a pilot operating civil aircraft in wholly intrastate flights to have an airworthiness certificate, without a finding that his operations posed an "actual danger"); *Gorman v. NTSB*, 558 F.3d 580, 591 (D.C. Cir. 2009) (FAA may regulate intrastate cargo flights under its "air commerce" authority); *Ickes v.*

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[5] A "Federal airway" is classified as certain airspace that "extends upward from 1,200 feet to, but not including, 18,000 feet MSL [mean sea level]." *See* FAA Order JO 7400.9X (8/7/13) Sections 6008-6011; 14 CFR Part 71.

[6] *See, e.g.*, 14 CFR Part 135, including Sections 135.1(a) and 135.3(a) (governing "on demand" operations, with requirements differing only based on whether a flight takes place "within" or "without" the United States); *see also*, 49 U.S.C. § 44701 (mandating that FAA regulate the safety of flights in "air commerce" -- not just "air transportation" -- and even that FAA distinguish between the two when regulating the safety of each).

FAA, 299 F.3d 260, 263 (3rd Cir. 2002) (FAA may regulate a recreational aircraft operated at a local air show because, in part, the ultralight poses a potential threat to airplanes, which "constitute instrumentalities of interstate commerce").[7] Because an intrastate flight may endanger air safety, it occurs in "air commerce." The NTSB has found:

> ...[E]ven [with respect to] an exclusively intrastate [flight], the courts have uniformly held that Congress has the authority, which it has assigned to the FAA, to regulate such flights because of their impact on safety in interstate air commerce.[8]

The same definition of "air commerce" that supports the FAA's authority to regulate the safety of intrastate flights applies to the AHTA, and the courts have so recognized. As explained in *Cochise Airlines*, 626 P.2d at 600 (upheld in *Aloha Airlines*, 464 U.S. 7 at n. 11), the AHTA prohibition on State taxation of an individual traveling in "air commerce" reaches passengers traveling on intrastate flights, and supplements the AHTA prohibition on State taxation of interstate passenger flights:

> From its wording, it seems reasonable to conclude that [the prior codification of 49 U.S.C. Section 40116(b)] is reflective of a [Congressional intent] to curb the freedom of the states to impose taxes and charges ultimately paid by the consumer in this area [that is, taxation of air fares]. Such a conclusion is indicated by the fact that Congress enacted a law which in one part prohibits any direct or indirect tax or charge "on the sale of air transportation or on the gross receipts derived therefrom." This is a prohibition against a tax on interstate or foreign air fares. The prohibition of a tax on the "carriage of persons traveling in *air commerce," apparently added late in the legislative process, is in effect a ban on the direct or indirect taxation of intrastate airline fares.* These dual prohibitions would assure Congress a large measure of control over the taxation economics of airline travel. Such a concern is expressed throughout the reported legislative history. (Emphasis added.)

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[7] As the court stated in *Rosenham:*

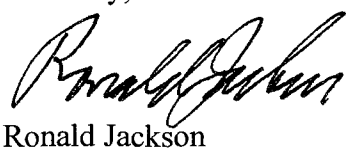
> [The pilot of a non-certificated aircraft] cannot avoid the incidence of [the Civil Aeronautics Act of 1983] by showing that these particular flights did not actually endanger interstate commerce. Congress has not seen fit to limit the question of safety in these circumstances to a manifestation of actual danger, rather it has sought to eliminate all potential elements of danger. The declaration that no aircraft shall operate in a designated civil airway, without having currently in effect an airworthiness certificate, evinces congressional judgment that such an operation is detrimental to the safety of those engaged in interstate commerce, or those who make use of its facilities. We cannot say that this exerted regulation does not have any reasonable relationship to the promotion of safety in air commerce, or that it does not rest upon any rational basis, when considered in the light of the broad legislative purpose. We conclude that such statutory precautions do not transcend the powers granted to the Congress over interstate commerce, or unduly encroach upon the powers reserved to the sovereign states." 131 F.2d at 935.

[8] *Administrator v. Gajewski*, 2 N.T.S.B. 1703 (Sept. 10, 1975), citing *In re Veteran's Air Express Co.*, 76 F. Supp. 684 (D.N.J. 1948) (Federal law controls recordation of aircraft lien, including aircraft operated solely on an intrastate basis).

In sum, because air ambulance flights may occur within a Federal airway, but in any event involve the operation of aircraft that may endanger the safety of "air commerce," such flights themselves take place within "air commerce," 49 U.S.C. Section 40102(a)(3), and are covered by the AHTA. Moreover, in interpreting the AHTA, the courts have so held, finding that the AHTA prohibits taxes on the gross receipts received from intrastate flights, as part of "air commerce." We, therefore, believe that the AHTA prohibits the MinnesotaCare Provider Tax on the gross receipts from an air ambulance operation, even one occurring entirely within Minnesota.

We hope that you both find this discussion of the AHTA informative. Please be advised that this letter provides only guidance and does not constitute a final action of the Department on the matters you raised, nor an opinion on the merits of any particular proceeding. Please contact me at (202) 366-9151 if you have any questions concerning this matter.

Sincerely,



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