



U.S. Department
of Transportation
**Federal Aviation
Administration**

DEC 23 2009

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

Ronald S. Depue, Esq.
SHAMBERG, WOLF, McDERMOTT & DEPUE
308 North Locust Street, Suite 501
P.O. Box 460
Grand Island, NE 68802-0460

Re: Proposed State Sales Tax on Aircraft Fuel

Dear Mr. Depue:

This letter is in response to your November-17 request by electronic mail, on behalf of the Hall County Airport Authority, operator of the Central Nebraska Regional Airport in Grand Island, for an advisory opinion from the Federal Aviation Administration (FAA) concerning a proposed state tax on aviation fuel. You advise that Nebraska has a statewide general sales tax upon retail sales of products and service, but that since at least 1992, the sale of aircraft fuel has been exempt from the sales tax by state statute. You further advise that the Nebraska Legislature is proposing to repeal the current state sales tax exemption on aircraft fuel and make the aircraft fuel tax proceeds payable to the state general fund. You therefore request an opinion concerning whether the proposed sales tax upon aircraft fuel would violate 49 U.S.C. § 40116 (the Anti-Head Tax Act), 49 U.S.C. § 47107, or other federal statutes, rules, or regulations.

Title 49 U.S.C. § 40116, the Anti-Head Tax Act, permits a state to levy and collect sales or use taxes on the sale of goods or services which could include aviation fuel. However, in accordance with 49 U.S.C. §§ 47107(b) and 47133, for those airports that have accepted FAA airport development grants or are the subject of federal assistance, state or local taxes on aviation fuel are considered to be "airport revenue" and using such tax revenue for non-airport purposes is prohibited. According to the FAA's *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7716 (Feb. 16, 1999),

State or local taxes on aviation fuel (except taxes in effect on December 30, 1987) are considered to be airport revenue subject to the revenue-use requirement. However, revenues from state taxes on aviation fuel may be used to support state aviation programs or for noise mitigation purposes, on or off the airport.

Since the passage of the Airport and Airway Improvement Act (AAIA) on September 3, 1982, Congress has required that all revenue accruing to grant-obligated airports be used for the airport's capital or operating costs. On December 30, 1987, the Airport and Airway Safety and Capacity Expansion Act amended this revenue use requirement to include local taxes on aviation fuel, such that the provision then read, "... all revenues generated by the airport, if it is a public airport, and

any local taxes on aviation fuel (other than taxes in effect on December 30, 1987) will be expended ...” for airport purposes. This provision is currently codified at 49 U.S.C. §§ 47107(b)(1) and 47133(a). Congress also added that the revenue use requirement “does not prevent the use of a State tax on aviation fuel to support a State aviation program or the use of airport revenue on or off the airport for a noise mitigation purpose”. 49 U.S.C. § 47107(b)(3).

In short, therefore, while a sales tax on aviation fuel is permitted in accordance with § 40116, the proceeds derived from such a tax are subject to the revenue use requirements of 49 U.S.C. §§ 47107(b)(1) and 47133(a).

Any action by the State Legislature to impose a sales tax on aviation fuel sold on an airport and to use the proceeds derived from the tax to support non-aviation activities would be inconsistent with federal law. Monies from such a tax would have to be spent to support either (1) the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, or (2) a state aviation program or for a noise mitigation purpose. Accordingly, enactment of the legislation to permit general use of the proceeds from the aviation fuel tax could jeopardize continued federal funding of airport and noise abatement projects at federally-assisted airports throughout the State of Nebraska.

This letter is based upon the accuracy of the representations provided to the FAA in your November 17 communication. This letter provides only the present views of the FAA Counsel's Office regarding relevant federal requirements. It does not preclude or constrain the FAA's enforcement discretion or preclude any changes in our legal views. This letter also does not bind the FAA to any particular resolution in the event that a complaint is filed regarding the issues addressed herein.

If you have any questions, please do not hesitate to contact either Jonathan Cross (202-267-7173) or Elizabeth Newman (202-267-7713) of my staff.

Sincerely,

Daphne A Fuller

Daphne A. Fuller
Assistant Chief Counsel for
Airports and Environmental Law

cc: Charles Erhard, Manager, Airport Compliance