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Opinion No. 01-089

Validity of HB 2006 / SB 1973, Authorizing Tax on Car Rentals at Airports

## QUESTIONS

Does the federal Anti-Head Tax Act, 49 U.S.C. 40116 (the "AHTA"), prohibit the Legislature from enacting a rental vehicle tax if:

(1) such tax is levied only on vehicle rentals that are subject to "an airport access fee for an airport consolidated facility charge"?

(2) such tax is levied generally on all rental vehicles but excludes certain rentals made as replacement vehicles while a renter's vehicle is being serviced or repaired?

## OPINIONS

1. Because HB 2006 / SB 1973, as currently drafted, levies the tax on rental vehicles only when "an airport access fee" is included in the gross retail rental price of such rental, a court would likely find this rental tax in conflict with AHTA on the grounds that the "airport access fee" creates a sufficient nexus between the rental and the airport as to fall under the term "permittee" contained in the federal act regardless of whether the rental company subject to the tax is actually located at the airport.

2. Because the federal act prohibits only taxes levied ***exclusively*** on airport businesses, there is a strong argument that the proposed amendment to Section 1(a) of HB 2006 / SB 1973 authorizing counties to levy the tax generally on all vehicle rentals should not violate AHTA, even though certain categories of vehicle rentals are excluded from the tax. Notwithstanding the neutral language and general application of the proposed amendment to Section 1(a) of HB 2006 / SB 1973, the proposed tax might be challenged on the grounds that it is, in fact, designed to have a disparate impact on airport businesses. In a review of any such legal challenge, a court's inquiry will, in part, be guided by the *de facto* impact of the tax on the non-airport rental market and will likely conclude that the proposed tax is valid and enforceable.

## ANALYSIS

### A. HB 2006 / SB 1973, AS CURRENTLY DRAFTED, VIOLATES AHTA.

Clause (iv) of 49 U.S.C. 40116(d)(2)(A) prohibits the State from levying a tax on airport business that is not levied generally to all businesses.[1] Specifically, clause (iv) prohibits the imposition of a tax "***exclusively*** upon any business located at a commercial service airport or operating as a ***permittee*** of such an airport" unless the tax is "***wholly*** utilized for airport or aeronautical purposes" [emphasis added]. HB 2006 / SB 1973 (the "Rental Tax Bill"), in the current form that has been passed by the Senate, authorizes counties to levy a two percent (2%) tax on the gross retail rental price of vehicles subject to "an airport access fee for an airport consolidated facility charge."[2] This tax, when imposed by Shelby County, is expected to raise approximately $1.5 million per year in revenue which would be deposited in a county fund entitled the "NBA Arena Fund" to be used for the construction of an arena facility constructed for the National Basketball Association franchise expected to locate in Memphis. For the reasons set forth below, it is the opinion of this Office that Section (a) of the Rental Tax Bill, as currently drafted, would be in conflict with clause (iv) of AHTA.

#### 1. Analysis of Controlling Statutes and Regulations

A review of the legislative history of Public Law 103-305 confirms that clause (iv) of AHTA is intended to prohibit the enactment of discriminatory taxes against airport businesses. The conference report states that the prohibition contained in clause (iv) "does not apply to general taxes on all

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[1] On August 23, 1994, 49 U.S.C. 40116 was amended by Section 112(e) of Public Law 103-305 to add the following clause (iv) to section (d)(2)(A):

> (2)(A) A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce:
>
> . . .
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> (iv) Levy or collect a tax, fee, or charge, first taking effect after the date of the enactment of this clause, exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

[2] Section 1 (a) of the Rental Tax Bill currently reads as follows:

> (a) In addition to the state tax provided in Section 67-4-1901, any county that meets the requirements of subsection (d) of this section is authorized to levy a surcharge or tax of two percent (2%) of the gross proceeds derived from the lease or rental of any private passenger motor vehicle, truck or trailer for periods of thirty-one (31) days or less if the gross retail rental price of the vehicle includes an airport access fee for an airport consolidated facility charge levied on the rental vehicle. The surcharge or tax shall apply to the gross proceeds from the rental agreement, excluding any sales taxes imposed by chapter 6 of this title. The surcharge or tax shall be subject to the exemptions provided in Section 67-4-1906. The surcharge or tax shall not be subject to the credit provided in Section 67-4-1903.

businesses, although a state or subdivision would be prohibited from imposing a general tax that purports to apply to all businesses when in reality it applies only to airport businesses." H.R. Conf. Rep. 103-667. No regulations have been promulgated by the Federal Aviation Administration (the "FAA") or any other federal agency under AHTA.

2. Analysis of Case Law

While no controlling legal precedent exists, *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 76 Cal. Rptr. 297 (Cal. Ct. App., 1998) ("*Burbank")* is relevant to our inquiry and serves as support for the proposition that a general tax on all businesses will not violate AHTA notwithstanding a disparate adverse impact on those businesses located at or near airports. *Burbank* is the only published opinion known to this Office regarding the application of AHTA since the federal act was amended in 1994.

In *Burbank*, the California Court of Appeals upheld a tax (the "TPT") levied generally on parking lot revenues. In support of its finding that AHTA did not operate to prohibit the application of this general tax on parking lots operated at or near the Burbank Airport, the court cited the following three reasons in its decision: (i) AHTA does not apply to taxes on airport ground transportation services, such as parking, citing *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. *en banc* 1992) ("*Alamo*"); (ii) because the tax is paid by the customer, not parking lot operator, it is analogous to the "sales or use taxes" expressly permitted by § (e)(1) of AHTA; and (iii) the tax is not imposed exclusively upon airport business because it one of general application collected by all qualified parking lots in the city.

This Office does not rely upon the first reason cited by the California Court of Appeals and, instead, believes that AHTA, as amended in 1994, applies to ground transportation services. In *Alamo*, the Ninth Circuit Court of Appeals, siting *en banc* prior to the 1994 amendment of AHTA, held in dicta that the federal act did not apply to ground transportation services.[3] However, the question of whether the 1994 amendment to AHTA, which added clause (iv) to section (d)(2)(A), supercedes or alters the decision in *Alamo* has never been decided by the Ninth Circuit. The California Court of Appeals suggested in *Burbank* that the Ninth Circuit's dicta in *Alamo* remains good law despite the 1994 amendment to the federal act. However, this conclusion was not supported by any findings of evidence or legal reasoning. Indeed, there is no indication that the California court even considered the question of whether the AHTA amendment had any effect on the dicta expressed in the *Alamo* decision. Unlike the California court, this Office is of the opinion that the plain language of clause (d)(2)(A)(iv) of AHTA does apply to ground

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[3] In *Alamo*, The Ninth Circuit stated:

> Nothing in the text or legislative history of § 1513(a) suggests that it was intended to have any applicability to fees on ground transportation service. Thus, we agree with those courts that have held that §1513(a) does not prohibit fees on ground transportation service.

*Id.* at 31 (fn 1).

transportation services.

Secondly, this Office finds that the Rental Tax Bill would most probably be construed, under Tennessee law, as a tax levied on businesses that is collected from customers. Like the sales and use tax under Title 67 of the Tennessee Code Annotated, a failure to collect the tax would impose an affirmative obligation upon the business to pay the uncollected tax to the State. The rental tax is calculated by, and applies to, "the gross proceeds from the rental agreement" and, therefore, like a sales tax is passed on to customers by the taxpayer. The California Court of Appeals noted in *Burbank* that the parking lot operators were obligated to pay the TPT, plus a penalty, if they did not collect it from customers but held that, under California law, the incidence of tax was on the customers and not on airport businesses. While this Office appreciates the distinction under California law that the court draws in *Burbank* (*i.e.*, that the tax is imposed upon customers and not airport businesses), this Office finds that this distinction cannot be maintained under the proposed act, which clearly imposes the tax on a business and its proceeds, not directly on its customers.

Finally, this Office considers more persuasive the third reason cited by the California Court of Appeals to uphold the TPT. In *Burbank*, the court held that because the tax is one of general application, the tax is not levied exclusively upon airport businesses and, therefore, does not violate AHTA. Because the TPT exempts parking at medical facilities, metered spaces and monthly parking spaces, the court found that approximately 90% of the total revenue from the tax was derived from parking lots located at or near the airport. Nonetheless, the court upheld the TPT on the grounds that the tax was one of general application and did not apply exclusively to airport businesses. In support of its interpretation of "exclusively", the court cited several precedents: *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1985); *Alaska Airlines, Inc. v. Department of Food & Agriculture*, 39 Cal. Rptr.2d 426 (Cal. Ct. App. 1995)(for a tax to be prohibited, "it must bear some rational relation to persons or the carriage of persons traveling in air commerce. A fee which is based on other criteria is permitted, although passed on to passengers in the form of increased fares.")

This narrow interpretation of the term "exclusively" is consistent with general principles of federalism and a strong presumption that "Congress [does] not intend to preempt areas of traditional state regulation." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). In *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the U.S. Supreme Court held that a federal act which prohibited discrimination against railroads in ad valorem property taxes did not prevent the State of Oregon from granting certain exemptions from taxes to non-railroad property that excluded approximately 25% of the non-railroad property from the tax. The Court declared:

> Had Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt nonrailroad property, we are confident that it would have spoken with clarity and precision. Property tax exemptions are an important aspect of state and local tax policy.

*Id.* at 344. *See also Burlington Northern v. Wisconsin Dept. of Revenue*, 59 F.3d 55 (7th Cir. 1995)(exemption of 80% of non-railroad property upheld).

3. Interpretation of the Term "Permittee" under AHTA.

AHTA's prohibition against a tax levied on airport businesses is defined broadly to prohibit exclusive taxation of "any business located at a commercial service airport or operating as a ***permittee*** of such an airport" [emphasis added]. The term "permittee" is nowhere defined under the federal act. Therefore, an argument might be made that the term "permittee" should be interpreted narrowly and should be applied only to a class of businesses that are required to obtain a legal permit to operate at an airport facility. This interpretation would exclude those businesses that, while they operate at an airport, neither are physically located at the airport nor are required to obtain any permit relating to their business operations.

The Rental Tax Bill, as currently drafted, levies the rental tax upon only those rentals "if the gross retail rental price of the vehicle includes an airport access fee for an airport consolidated facility charge levied on the rental vehicle." The following facts are not clear to this Office but are not dispositive to our inquiry: (i) whether this airport access fee will be charged to only those rental companies that are located on airport property or will be charged to all rental companies that operate at the airport; and (ii) if this airport access fee could be construed as a *de facto* permit for those companies not located on airport property. However, it is clear to this Office that the Rental Tax Bill has authorized a tax that will be levied only on a class of vehicle rentals that are subject to the airport access fee. The fact that certain other rentals, which are not subject to the access fee, might be excluded is irrelevant to our inquiry. The plain language of the Rental Tax Bill limits the application of the tax to those companies that operate at the airport and pay the airport access fee. This attempt to tax airport businesses is in direct conflict with the plain language of AHTA and, accordingly, would not, in our opinion, withstand judicial scrutiny.

**B. HB 2006 / SB 1973, AS PROPOSED TO BE AMENDED, CONFORMS TO AHTA.**

It is the understanding of our Office that the Legislature is contemplating an amendment to Section 1(a) of the Rental Tax Bill that would authorize a county to levy the proposed rental tax upon all rentals within the county. This proposed amendment would exclude certain rentals of replacement vehicles while a renter's vehicle is being serviced or repaired.[4] Because the tax authorized by the amended Section 1(a)

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[4] The text of the proposed amendment to Section 1(a) of the Rental Tax Bill is as follows:

> (a) In addition to the state tax provided in Section 67-4-1901, any county that meets the requirements of subsection (d) of this section is authorized to levy a surcharge or tax of two percent (2%) of the gross proceeds derived from the lease or rental of any passenger motor vehicle, truck or trailer for periods of thirty-one (31) days or less, provided, however, said tax and/or surcharge shall not apply to an automobile rented by an insurance company as a replacement vehicle for a policy holder or by an automobile dealer as a replacement vehicle while a customer's vehicle is being serviced or repaired, or to any individual or business who rents a vehicle as a replacement vehicle while his vehicle is being repaired, provided the individual

is one of general application, this Office is of the opinion that the proposed tax of general application would not be in conflict with AHTA.

As noted *supra* in our analysis of AHTA, Congress has prohibited only the levy of an ***exclusive*** tax on airport businesses. Therefore, any tax of general application that applies to airport businesses and non-airport businesses alike would presumably be valid. On its face, the plain language contained in amended Section 1(a) is neutral and non-discriminatory. Unlike the exemptions contained in the TPT analyzed in *Burbank*, which were geographic in scope and excluded only non-airport businesses, the exemptions contained in amended Section 1(a) of the Rental Tax Bill are, like the tax, generally applicable to all rentals made in the county. Such exemptions that relate to replacement vehicles apply to rentals from an airport rental business the same as rentals from non-airport rental business.

While clause (iv) of the AHTA does not speak with "clarity and precision" as to the issue of exemptions from general taxes, a use of exemptions to levy a tax exclusively on airport businesses would fail. The Conference Report states that "a state or subdivision would be prohibited from imposing a general tax that purports to apply to all businesses when in reality it applies only to airport businesses." H.R. Conf. Rep. 103-667. The issue of whether the amended Rental Tax Bill is valid will turn on a question of fact regarding the actual application of the tax and exemptions to non-airport businesses. It seems obvious that many car rentals unrelated to airport businesses would be subject to the tax under the amended version of the bill, even though the bill does exempt a significant number of non-airport rentals. In *Burbank*, the California Court of Appeals upheld the TPT in which 90% of the levied tax was borne by airport parking lot operators. It could be argued that Congress' use of the clear and unambiguous term "exclusively" in clause (iv) of AHTA would support a tax designed to apply to ***any*** non-airport business, although no court has yet so held. On balance, this Office concludes that the amended Rental Tax Bill is defensible against a challenge on the theory that it conflicts with AHTA.

We note that, while the judicially-created doctrine of the Dormant Commerce Clause might be implicated in any legal challenge of the Rental Tax Bill, in this context a court can resolve any legal challenge by construing AHTA, an act of Congress that specifies exactly how the Commerce Clause operates in this area. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (the U.S. Supreme Court expressly applied and re-affirmed the oft-quoted rule of statutory construction that "statutes should be construed so as to avoid difficult constitutional questions"); *See also Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); *Haynes v. United States*, 390 U.S. 85, 92, 88 S.Ct. 722, 727, 19 L.Ed.2d 923 (1968); *Schneider v. Smith*, 390 U.S. 17, 27, 88 S.Ct. 682, 687, 19 L.Ed.2d 799 (1968); *United States v. Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 545, 97 L.Ed. 770 (1953); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) (the Tennessee Supreme Court reaffirmed that "[i]n construing

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presents to renter upon return of the rental vehicle, a copy of the repair or service invoice or signs a statement, under penalty of perjury, that his lease or rental of the vehicle meets the exemptions authorized in this statute.

statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution"); *State v. Sliger*, 846 S.W.2d 262 (Tenn.1993); *State v. Lyons*, 802 S.W.2d 590 (Tenn.1990); *Shelby County Election Comm'n v. Turner*, 755 S.W.2d 774 (Tenn.1988); *Forrest City Grocery Co. v. Tenn. Dept. of Revenue*, 917 S.W.2d 247 (Tenn. 1995).

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