

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**July 20, 2018**

**Opinion No. 18-32**

**Authority of Municipal Airport Authority to Levy and Collect Fuel Flowage Fees**

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**Question 1**

Does a municipal airport authority have the authority to levy and collect fuel flowage fees under Tenn. Code Ann. § 42-3-108 and § 42-3-112?

**Opinion 1**

Yes. Because an airport authority has discretion to determine the fees applicable to businesses operating on its property when it enters into contracts or other agreements with those businesses, it may impose a fuel flowage fee as part of those agreements.

**Question 2**

If municipal airport authorities are authorized to levy and collect fuel flowage fees, are non-profit entities exempt from paying this fee?

**Opinion 2**

No.

**ANALYSIS**

In 1957 the General Assembly enacted legislation to allow municipalities to establish, operate, regulate, and maintain airports. *See* 1957 Tenn. Pub. Acts, chs. 375, 376. Under the Municipal Airport Act, Tenn. Code Ann. §§ 42-5-101 to -205, municipalities may perform these functions themselves. Alternatively, under the Airport Authorities Act, Tenn. Code Ann. §§ 42-3-101 to -205, municipalities may establish municipal or regional airport authorities to perform these functions. *See* Tenn. Att’y Gen. Op. 16-14 (April 5, 2016).

The Airport Authorities Act grants an authority “all powers necessary or convenient” to operate airport facilities, but does not permit an authority to levy and collect taxes or special assessments. Tenn. Code Ann. § 42-3-108(a). The Act also empowers an airport authority to, among other things, enter into leases, agreements, or other arrangements that “[d]etermin[e] the charges, rentals or fees for the use of any properties under its control, and the charges for any services or accommodations, and the terms and conditions under which the properties may be used[.]” *Id.* §42-3-112(a)(1)(D). The fees and conditions imposed by an authority must be “reasonable and uniform for the same class of privilege or service” and established with “due regard” to the property and operational expenses of the airport authority. *Id.* § 42-3-112(a)(2).

1. In its contracts, leases, and other agreements with entities operating on its property, an airport authority may levy a fuel flowage fee pursuant to its authority to determine “charges, rentals or fees” for the use of its facilities or for services provided on its property.

A fuel flowage fee is a fee levied by an airport operator on each gallon or unit of fuel sold at the airport. These fees are typically established in a contractual agreement between the authority and the entity wishing to sell fuel on airport premises. *See, e.g., Exec. Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 569-70 (8th Cir. 2008) (breach of contract claim involving contractual provision for fuel flowage fees). Airport authorities and municipalities use the money collected from these fees to, among other things, operate, improve, and maintain the airport, particularly common areas such as fuel farms, runways, and taxiways, and to ensure the safety of fuel and fuel transfers. *See Haile v. Town of Addison*, 264 F. Supp. 2d 464, 464-65 (N.D. Tex. 2003).

A fuel flowage fee levied by an airport authority would be a “charge” or “fee” related to the services rendered by the airport and the privilege of operating on airport property. The fee would not be a tax. No statute grants airport authorities the power to impose taxes; to the contrary, airport authorities are prohibited from levying and collecting taxes by § 42-3-108(a). As the Tennessee Supreme Court has explained, “[a] tax is a revenue raising measure levied for the purpose of paying the government’s general debts and liabilities.” *City of Tullahoma v. Bedford Cty.*, 938 S.W.2d 408, 412 (Tenn. 1997). By contrast, a fee “is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the fee.” *Id.*; *see also* Tenn. Att’y Gen. Op. 12-11 (Feb. 3, 2012) (noting that the “essential test to determine whether fees are really taxes is whether they are, or are not, paid into the general public treasury and disbursable for general public expenses”). Fuel flowage fees are not imposed by the municipality to raise revenue and are not deposited into the public treasury; rather, they are earmarked by the airport authority to help maintain, operate, and improve the airport facilities and regulate and defray the costs of fuel sales on airport property. The fuel flowage fees are thus not a tax, and an airport authority does not contravene § 42-3-108(a) by choosing to impose the fees.

In short, because an airport authority has discretion to “[d]etermine the . . . fees” applicable to businesses operating on its property when it enters into contracts or other agreements with those businesses, it may impose a fuel flowage fee as part of those agreements.

2. An airport authority may enter into agreements that require non-profit entities to pay fuel flowage fees. The statutory authority of a municipal airport authority to assess fuel flowage fees is not limited to assessing those fees to for-profit entities. The Airport Authorities Act states that “[t]he powers granted by this chapter may be exercised without regard to requirements, restrictions or procedural provisions contained in any other law or chapter, except as expressly provided in this chapter.” Tenn. Code Ann. § 42-3-118(b). Nothing in the Airport Authorities Act limits assessment of fuel flowage fees to for-profit entities or prohibits assessment of fuel flowage fees to not-for-profit entities. *See* Tenn. Att’y Gen. Op. 07-32 (Mar. 23, 2007) (opining that because “[n]othing in the Airport Authority Act expressly prohibits an authority from charging a parking fee to a handicapped driver,” an airport authority could charge parking fees to handicapped drivers “without regard” to the general prohibition on such fees).

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