Taxability of ... to St. Tx purchases

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AUGUSTA, MAINE 04333

August 1, 1977

Richard A. Dieffenbach
State Controller
Department of Finance and Administration
State of Maine
Augusta, Maine 04333

Re: Constitutionality of federal use tax on commercial airfares

Dear Mr. Dieffenbach:

This responds to your request for advice concerning the application of Section 4261(a) of the Internal Revenue Code to commercial airline tickets purchased for state employees traveling on official state business.

FACTS:

The Airport and Airway Revenue Act of 1970, Pub L. 91-258, 84 Stat. 236, terminated an exemption previously granted under 26 U.S.C. § 4292 to state governments from the federal excise tax on commercial airfares imposed by 26 U.S.C. § 4261.

QUESTION:

May the federal government constitutionally levy an excise tax upon commercial airfares purchased by state governments for the use of state employees traveling on official state business?

ANSWER:

THE FEDERAL GOVERNMENT MAY CONSTITUTIONALLY LEVY AN EXCISE TAX UPON COMMERCIAL AIRFARES PURCHASED BY STATE GOVERNMENTS FOR THE USE OF STATE EMPLOYEES TRAVELING ON OFFICIAL STATE BUSINESS.

REASONING:

The instant question has been specifically dealt with in two cases. In Texas v. United States, 72-2 U.S. Tax Cas. ¶ 16,048 at 86,128 (W.D. Tex. 1972), aff'd mem., 73-1 U.S. Tax Cas. ¶ 16,085 at 81,394 (5 Cir. 1972), the tax was characterized as a user charge rather than a tax and the doctrine of intergovernmental immunity therefore held to be inapplicable. The court, however, expressed by dictum the opinion that, even if the user charge were considered to be a tax, such tax would be constitutional since it would not discriminate against state governments (i.e. would be applied to all air travelers) and would not unduly interfere with plaintiff's functions as a sovereign entity.

In City of New York v. United States, 394 F. Supp. 641 (S.D.N.Y. 1975), aff'd without opinion 538 F.2d 308 (2 Cir 1976), the federal excise tax was again upheld, this time under the theory that intergovernmental tax immunity does not extend to nondiscriminatory federal taxes which do not unduly burden the governmental functions of New York City. This result was based upon a United States Supreme Court decision, New York v. United States, 326 U.S. 572 (1946), in which a federal tax imposed on mineral water was upheld as applied to the mineral water business owned and operated by the State of New York.

In view of the strength of the above authority, it appears that no basis exists for requesting either a refund of the federal excise tax or a specific ruling on the question from the Internal Revenue Service.

Sincerely,

Clifford B. Olson

Clifford B. Olson
Assistant Attorney General

CBO:gr