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Opinion No. 00-097

Legality of a Transfer of Funds from the Tennessee Transportation Equity Trust Fund

QUESTION

Would a legislative enactment that authorizes a transfer of funds from the Tennessee Transportation Equity Trust Fund violate the provisions of 49 U.S.C. § 47107 or 49 U.S.C. § 47133 or the final policies promulgated thereunder by the Federal Aviation Administration?

OPINION

It is the opinion of this Office that, because Tenn. Code Ann. § 67-6-217 was in effect on December 30, 1987, the provisions of 49 U.S.C. § 47107(b) and 49 U.S.C. § 47133(a), as well as the policies promulgated thereunder by the Federal Aviation Administration, do not apply to the 4.5% tax on aviation fuel levied by the Tennessee statutory provision. Therefore, it is the view of this Office that any revenues derived from the 4.5% tax on aviation fuel authorized by Tenn. Code Ann. § 67-6-217 may, at the discretion of the Legislature, be transferred from the Transportation Equity Trust Fund to other uses without violating the provisions of either § 47107 or § 47133. However, the Federal Aviation Administration reserves the right, in reliance on 49 U.S.C. § 47115(f), to withhold future grants of discretionary funds to Tennessee under a State Block Grant Program if the revenues derived from the 4.5% tax are transferred from the Transportation Equity Trust Fund.

ANALYSIS

The United States Congress enacted the Airport and Airway Improvement Act in 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987 (49 U.S.C. § 47107), and the Federal Aviation Administration Authorization Act of 1994 (49 U.S.C. § 47133), pursuant to which the Federal Aviation Administration is authorized to administer a State Block Grant Program (the "FAA Program") to disburse certain funds to participating States for use in the development and maintenance of general aviation airports. According to the Aeronautics Division of the Tennessee Department of Transportation, Tennessee participates in this FAA Program. The final policies promulgated by the Federal Aviation Administration under §§ 47107 and 47133 are codified in 64 F.R. 7696 (1999) (the "Final FAA Policies").

As a result of a concern that local officials would be tempted to raise airport fees rather than local taxes, §§ 471017 and 47133 contain provisions[1] that require local taxes on aviation fuel enacted after December 30, 1987 to be spent on the airport or, in the case of state taxes on aviation fuel, state aviation or noise mitigation programs[2]. See *H.R. Report No. 104-714*, 100th Congress, 1st Sess. 37.

The Final FAA Policies expressly recognize the "grandfather provisions" contained in §§ 47107 and 47133 that permit non-restricted use of tax revenues on aviation fuel enacted prior to December 30, 1987. The example cited in Section V(D)(1)(c), that refers to a 1955 state statute for assessing of a five percent surcharge on all receipts and deposits in an airport revenue fund to defray central service expenses of the state, is directly on point. *Final FAA Policies* at 7719.

The Tennessee tax on aviation fuel is codified in Tenn. Code Ann. § 67-6-217[3]. These statutory provisions were enacted on May 1, 1986 by Chapter 931 of the Public Act of 1986 ("Chapter 931"), effective July 1, 1986, and were amended on April 8, 1987 by Chapter 90 of the Public Acts of 1987. Therefore, this tax was in effect on December 30, 1987 and clearly qualifies for the exemption set forth in the grandfather provisions of §§ 47107 and 47133.

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[1] 49 U.S.C. § 47107(b)(1) provides:

> (b) Written assurances on use of revenue. - (1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that local taxes on aviation fuel (***except taxes in effect on December 30, 1987***) and the revenues generated by a public airport will be expended for the capital or operating costs of -
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> (A) the airport;
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> (B) the local airport system; or
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> (C) other local facilities owned or operated by the airport owner or operator and directly or substantially related to the air transportation of passengers or property [emphasis added].

49 U.S.C. § 47133 (a) provides:

> (a) Prohibition - Local taxes on aviation fuel (***except taxes in effect on December 30, 1987***) or the revenues generated by an airport that is the subject of Federal assistance may not be expended for any purpose other than the capital or operating costs of -
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> (1) the airport;
>
> (2) the local airport system; or
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> (3) other local facilities owned or operated by the airport owner or operator and directly or substantially related to the air transportation of passengers or property [emphasis added].

[2] 49 U.S.C. § 47107 (b)(3) provides:

> (3) This subsection 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 program.

49 U.S.C. § 47133 (c) provides:

> (c) Rule of construction - Nothing in this section may be construed to 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.

[3] Tenn. Code Ann § 67-6-217 provides:

> Aviation Fuel - Notwithstanding other provisions of this chapter, tax imposed with respect to the sale, the use, the consumption, the distribution, and the storage of aviation fuel that is actually used in the operation of airplane or aircraft motors, shall be at the rate of four and one-half percent (4.5%).

Although the Federal Aviation Administration might argue that the provisions of Section 2 of Chapter 931, now codified in Tenn. Code Ann. § 67-6-103(b)(1)(A)[4], would operate to prohibit Tennessee from altering the use of revenues collected from the aviation fuel tax[5], this Office is of the opinion that any such argument would fail. Any tax levied by the Legislature must be enacted under the authority of Article II, § 28 of the Tennessee Constitution. Any appropriation or expenditure of public moneys, including without limitation moneys raised by duly authorized taxes, by the Legislature must be enacted under the authority of Article II, § 24 of the Tennessee Constitution. Because the taxing and spending powers of the Legislature have been made distinct and separate by the fundamental law of this State, any argument that confuses or combines these functions in the construction of a specific tax would fail. Secondly, were the provisions of Tenn. Code Ann. § 67-6-103(b) repealed in their entirety, the tax levied by Tenn. Code Ann. § 67-6-217 would stand unaffected by such repeal and any revenues derived therefrom would be subject to the spending provisions of Tenn. Code Ann. § 67-6-103(a). Therefore, by statutory construction, the use of revenues derived from this tax must be completely distinguished from the tax itself. Moreover, even though Tenn. Code Ann. § 67-6-103(a) does establish the Transportation Equity Trust Fund, this fund includes revenues from sources other than aviation fuel taxes and it may be expended for air, rail or waterway related programs and activities. Thus, Tennessee's tax and allocation system predates the federal acts and has never maintained a strict allocation of aviation fuel tax receipts to airport-related programs.

Notwithstanding the foregoing arguments, the risk of entering into a legal proceeding with the Federal Aviation Administration is not insignificant. The penalties for a violation of §§ 47107 and 47133, outlined in Section VIII(E) of the Final FAA Policies, are substantial and include withholding future grants; withholding payments under, or increases of, existing grants; injunction; and imposition of civil penalties up to $50,000 and three times the amount of the illegally diverted airport revenues. See *Final FAA Policies* at 7723. Therefore, even were Tennessee ultimately to prevail on the merits, the Federal Aviation Administration could withhold both the non-discretionary and the discretionary funds under the FAA Program during the course of the action.

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[4] Tenn. Code Ann. § 67-6-103(b)(1)(A) provides:

> Notwithstanding the allocations provided for in subsection (a), all moneys received under the provisions of this chapter from the sale, use, consumption, distribution, or storage for use or consumption of fuels used for aviation, railways, or water carriers on or after July 1, 1988, shall be deposited by the commissioner in a separate account to be known as the "transportation equity trust fund." The funds in this account shall be used by the department of transportation for railways, aeronautics, and waterways related programs and activities. The provisions of this subsection do not supercede or affect the provisions of § 67-3-501 [repealed].

The provisions of Section 2 of Chapter 931, which differ slightly from the provisions of § 67-6-103(b)(1)(A), have been amended to change the effective date from July 1, 1987 to July 1, 1988 and to change the name of the fund from the "Transportation Equity Fund" to the"Transportation Equity Trust Fund."

[5] See Section II (C) of the Final FAA Policy at 7716 ("Unlawful revenue diversion is the use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated and directly and substantially related to the air transportation of passengers or property when the use is not 'grandfathered' under 49 U.S.C. §47107(b)(2). When a use would be diversion of revenue but is grandfathered, the use is considered lawful revenue diversion.") The Federal Aviation Administration has stated that it interprets this policy to prohibit altering the use of tax revenue from the use that was in effect on 30 December 1987. Because the Transportation Equity Trust Fund was in effect on such date and, according to the Federal Aviation Administration, was represented by officials in the Tennessee Department of Transportation to be a qualified use of the tax revenue, the Federal Aviation Administration would not consider the tax levied by Tenn. Code Ann. § 67-6-217 to be grandfathered under the federal acts.

In addition, the Federal Aviation Administration has stated that it reserves the right to penalize states that exercise their rights under the grandfather provisions by withholding discretionary funds under the FAA Program. Section V(D)(2) of the Final FAA Policy provides, in part:

> 2. Under the authority of 49 U.S.C. 47115(f)[6], the FAA considers as a factor militating against the approval of an application for AIP discretionary funds the fact that a sponsor has exercised its rights to use airport revenue for nonairport purposes under the grandfather clause...

Final FAA Policy at 7719 (footnote added). Thus, even if Tennessee's tax on aviation fuel is protected by the grandfather provisions of §§ 47107 and 47133, it is clear that the Federal Aviation Administration may use the transfer of funds from the Transportation Equity Trust Fund as a proper factor to reduce the discretionary funds allocated to Tennessee under the FAA Program.

Based on the foregoing, this Office is of the opinion that the proposed legislative enactment would be exempted from the provisions of §§ 47107 and 47133 by virtue of the grandfather provisions contained in those acts. However, such legislative enactment would be subject to retaliation by the Federal Aviation Administration under Section V(D)(2) of the Final FAA Policies.

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[6] 49 U.S.C. 47115(f) provides:

> (f) Consideration of diversion of revenues in awarding discretionary grants.--
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> (1) General rule.--Subject to paragraph (2), in deciding whether or not to distribute funds to an airport from the discretionary funds established by subsection (a) of this section and section 47116 of this title, the Secretary shall consider as a factor militating against the distribution of such funds to the airport the fact that the airport is using revenues generated by the airport or by local taxes on aviation fuel for purposes other than capital or operating costs of the airport or the local airports system or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property.
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> (2) Required finding.--Paragraph (1) shall apply only when the Secretary finds that the amount of revenues used by the airport for purposes other than capital or operating costs in the airport's fiscal year preceding the date of the application for discretionary funds exceeds the amount of such revenues in the airport's first fiscal year ending after August 23, 1994, adjusted by the Secretary for changes in the Consumer Price Index of All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

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