

Cite as 10 WTD 349 (1990).

APPEALS DIVISION

BEFORE THE INTERPRETATION AND
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In The Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment)
of) No. 90-400
)
. . .) Registration No. . . .
) . . ./Audit No. . . .
)

[1] RULE 224: SERVICE B&O TAX -- AIRLINE CANCELLATION FEES -- 49 USC 1513 -- FEDERAL PREEMPTION. Airline cancellation fees are gross receipts derived from the sale of air transportation. As such, the state cannot subject such receipts to tax because of 49 USC 1513, in which the federal government has explicitly exempted such receipts from state taxation. Aloha Airlines, Inc., v. Director of Taxation of Hawaii, 464 U.S. 7 (1983).

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Taxpayer protests the assessment of tax on amounts received as cancellation fees on airline flights.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer is an airline. Its books and records were audited for the period . . . , 1984 through . . . , 1987. An assessment was issued and has been paid. Taxpayer objects to the assessment of service B&O tax on cancellation fees.

Taxpayer explains that the amounts taxed are for air transportation reservation cancellation fees. Cancellation fees are charged to passengers who have purchased a ticket at a discount price and later decide not to travel. Taxpayer explains that most cancellations occur after the flight has left, while only a small number cancel before the flight. The fees are charged because the seat often cannot be resold prior to the flight. This is a fairly new phenomenon, because the "super-saver" fares have only emerged fairly recently. Taxpayer argues that taxing this income is in violation of federal law that prohibits state taxation on air transportation revenues.

DISCUSSION:

49 U.S.C. §1513 (7) provides as follows:

- (a) No state (or political subdivision thereof) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.
- (b) Nothing in this section shall prohibit a State (or political subdivision thereof) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

The question is whether the cancellation fees are equivalent to the "sale of air transportation" and, therefore, not taxable by the state of Washington.

Taxpayer argues that:

The amounts recorded in the accounts in question relate to the activity of selling air transportation only. There is no other service provided or goods sold for the gross receipts. Therefore, the only thing that could be taxed is the sale of air transportation.

The section [49 USC 1513] goes further to prevent the taxing of gross receipts derived from the sale of air transportation, not just the selling activity itself. The section prevents a state [or] local taxing authority from reaching preempted income by merely recharacterizing or compartmentalizing it. In other words, you cannot tax through the backdoor what is forbidden through the frontdoor. Any tax on any portion of the receipts in question is, at best, an indirect tax on the carriage of persons in air commerce or the sale of air transportation. The section preempts indirect taxes as well as direct taxes.

The Audit Division assessed the tax because the fees were collected for "not travelling in air commerce" and thus 49 USC 1513 did not apply.

Aloha Airlines, supra, explicitly states that states are prohibited from taxing, directly or indirectly, gross receipts derived from air transportation:

§1513(a) expressly prohibits states from taxing "directly or indirectly" gross receipts derived from air transportation. . . .

Aloha, at 14.

We agree with taxpayer that the charges are receipts derived from the sale of air transportation. The charges are incurred as a result of purchasing air transportation, and the federal government has preempted this area of taxation.

DECISION AND DISPOSITION:

Taxpayer's petition is granted.

DATED this 11th day of December, 1990.