

Are Airlines on the Hook for State and Local Taxes Addressing Homelessness?

Alert

02.04.2020

By Roy Goldberg

The tech explosion in West Coast cosmopolitan areas has exacerbated homelessness in the region, prompting state and local governments to enact or at least propose new taxes on large metropolitan businesses. This includes the so-called “Amazon Tax” recently introduced in the Washington state Legislature (House Bill 2907), which would authorize “counties with populations exceeding two million” to impose an excise tax on businesses in order “to reduce homelessness, save lives, and improve public safety.” The sole county in Washington state with that population is King County, the home of Seattle and its airport, Seattle-Tacoma Washington International Airport (Sea-Tac). The levy would take the form of “an annual payroll expense tax on employers engaging in business in” King County, and would be “measured by the employer’s payroll expense for the tax year attributable to work performed or services rendered by the employer’s employees in the county... multiplied by a rate of not more than two-tenths of one percent, but not less than one-tenth of one percent.” As currently drafted, the law would expressly exempt sellers of “groceries,” “motor vehicle fuel” and “liquor,” but not airlines. Failure to exempt airlines from such taxes renders such social welfare tax regimes subject to legal challenge.

The proposed King County tax, which seeks to raise approximately \$121 million per year, follows in the footsteps of a new \$300 million gross receipts tax enacted by San Francisco in late 2018 to address a rise in homelessness attributed to skyrocketing rental and housing prices. The San Francisco 0.5% Homelessness Gross Receipts Tax is imposed on gross receipts from business activities attributable to the city. A California lower court judge in 2019 rejected a legal challenge to the San Francisco law, but a state court appeal of that decision remains pending. The city has been collecting the tax but cannot spend it depending on the outcome of the court case.

Are Airlines on the Hook for State and Local Taxes Addressing Homelessness?

Potential Protection Under the Anti-Head Tax Act

This new trend in the creation of social welfare taxes to help address homelessness problems raises an important issue: Will airlines, which already must face a litany of burdensome federal taxes and airport fees, be forced to pay these new social welfare taxes, despite the fact that they are not part of the tech sector that has purportedly caused more homelessness in major U.S. cities? The answer may be “no,” if governments and ultimately courts agree that the federal Anti-Head Tax Act, 49 U.S.C. § 40116(b), shields airlines from having to pay such social welfare taxes. The proposed Washington state law expressly states that, “Nothing in this chapter shall be construed as requiring the payment of any tax for engaging in business when such payment would be in violation of any federal or state law.” The Anti-Head Tax Act may be one such “federal” law.

The Anti-Head Tax Act prohibits state and local governments from imposing “a tax, fee, head charge, or other charge on, among other things” “the sale of air transportation” or “the gross receipts from that air... transportation.” 49 U.S.C. § 40116(b)(3), (4). The act’s purpose was to limit state and local taxation of aviation, a congressional purpose which is at odds with requiring airlines and their customers to subsidize community efforts to fund homelessness programs.

Limits of State and Local Taxation on Aviation

In *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7, 12-13 (1983), the court held that a Hawaii statute which imposed a tax on the annual gross income of airlines operating within the state was preempted by the Anti-Head Tax Act. The court stated that the “manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines.” *Id.* at 13-14. The court went on to say that “property tax that is measured by gross receipts constitutes at least an ‘indirect’ tax on the gross receipts of airlines,” and is “therefore preempted.” *Id.* at 14.

Unlike the 2018 San Francisco tax which is expressly based on a businesses’ “gross receipts,” the King County tax reflects the gross amount paid by businesses to cover employee payroll. Yet this appears to be a distinction without a difference given that both methodologies would require payment of taxes based on the company’s above-the-line profits or expenses, rather than net profits or costs. There is an undeniable a link—even if an indirect one—between the amount of gross receipts taken in by an airline from selling air transportation, and the gross amount of payroll expenses incurred by the airline for that same year.

Significantly, the Anti-Head Tax Act covers not only state and local taxes that are “directly” related to the sale of air transportation, but also such taxes that are indirectly related to the sale of air transportation. As originally enacted in 1973, the act stated that the charge could not relate directly or *indirectly* to persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air

Are Airlines on the Hook for State and Local Taxes Addressing Homelessness?

transportation or on the gross receipts derived therefrom. Courts properly construed this language to mean that in order to be unlawful, the charge could be either “directly or indirectly” related to gross receipts derived from air transportation. More generally, the term “indirectly” is extremely broad. In addition, although the 1994 recodification of the act deleted the term “indirectly,” Congress, the Department of Transportation and the courts have made clear that no substantive change was being made to the law. The recodification expressly enacted the Transportation Code “without substantive change.” Pub. L. No. 103-272, 108 Stat. 745 (July 5, 1994). *Id.* at 25. *See also* H. Rpt. No. 180, 103d Cong., 1st Sess. (1993).

The practical import is that even if the King County tax is technically based on payroll expenses rather than “gross receipts,” an argument can be made that the tax is preempted by the Anti-Head Tax Act because the amount owed by the airline is at least *indirectly* related to “the sale of air transportation,” or the “gross receipts” taken in by the airline from the sale of air transportation.” As stated above, the total amount an airline can pay in payroll bears at least an indirect link to the gross receipts earned by the carrier. In addition, the fact that some industries are exempt from the tax, but not airlines, may violate the antidiscrimination language in 49 U.S.C. § 40116(d)(2)(v), which prohibits imposition of a tax “upon any business located at a commercial service airport” that “is not generally imposed on sales or services” in the jurisdiction.

Narrow Scope of Exceptions

Finally, the statutory exceptions to Anti-Head Tax Act are narrow in scope, and should not be construed in a manner that would nullify the protection to airlines and their passengers and shipping customers afforded by the act. Specifically, the property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services that are allowed under 49 U.S.C. § 40116(e), cannot be used to authorize taxes which violate the ban against taxes imposed *directly or indirectly* on the sale of air transportation or the gross receipts derived from the sale of air transportation, or which improperly discriminate against airlines. As stated by the Arizona state superior court in a November 22, 2019 ruling titled *Sedona-Oak Creek Airport Authority v. Dakota Territory Tours A.C.C.*, No. V1300CV201780272: “The savings clause of § 40116(e) (2) does not apply to the specific commercial activity fee at issue,” because the fee “is similar to the ‘personal property tax’ in *Aloha*. The manner in which the [government] has titled and categorized the fee ‘cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines.’”

In sum, state and local governments should consider including airlines in the statutory exemptions from the new taxes aimed at tackling homelessness, and airlines will want to consider apprising tax-collectors of the protections afforded airlines by the Anti-Head Tax Act.

Are Airlines on the Hook for State and Local Taxes Addressing Homelessness?

For more information on the proposed and pending new taxes and how they might affect the airline industry, please contact [Roy Goldberg](#) or the Stinson LLP contact with whom you regularly work.

CONTACT

Roy Goldberg

RELATED CAPABILITIES

Aviation & Aerospace

Transportation

STINSON

STINSON LLP \ STINSON.COM