MEMORANDUM

TO: Steve S. Rosenthal
FROM: Linda A. Arnsbarger
DATE: March 11, 1987
RE: Florida Chapter 86-166 Advice

You asked me to consider whether the federal anti-head tax statute, 49 U.S.C. § 1513, would preclude Florida from imposing a sales tax on services rendered in shipping air cargo, e.g., Federal Express-type service businesses. While the answer is far from clear, I find nothing in the case law that would indicate that the federal statute has been interpreted to pre-empt the state in this context.

Section 1513(a) prohibits certain state taxation of air commerce;

"No state . . . 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 . . . .


The statute, however, does not prohibit all state taxation of air commerce. Rather, it expressly permits a wide range of state taxation that is not expressly precluded by subsection (a):

"Nothing in this section shall prohibit a state . . . 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 sales of goods or services . . . ."
Based on the language of the statute, it appears that it may not be limited strictly to carriage of persons. "[O]r on the sale of air transportation" appears to be not just a modifier, but a prohibition coequal with that on taxation of carriage of persons. I have found nothing in the legislative history, however, to suggest that Congress was concerned with anything but the proliferation of locally imposed head taxes on passengers. The legislative history reveals that this provision was prompted by the U.S. Supreme Court's approval of a head tax in Evansville-Vanderburgh Airport. See S. Rep. No. 93-12, 93d Cong., 1st Sess., at 17 (1973); H.R. Rep. No. 93-157; 93d Cong., 1st Sess., at 4-5 (1973). The legislative discussions address only the burden of head taxes on passengers, discussing even gross receipts only in terms of possible efforts to evade the general prohibition on head taxes. There is no discussion of cargo. See Wardair Canada, 54 U.S.L.W. at 4690 (Burger, J., concurring); S. Rep. No. 93-12, at 17, 20-21; H. Rep. No. 93-157, at 4-5.

There is little case law addressing this statute (three U.S. Supreme Court cases, a half-dozen federal, and a half-dozen state cases); the courts have given the statute a very strict reading. In Wardair Canada, the United States Supreme Court found that Congress had expressly and unequivocally permitted the states to exercise their taxing authority in the area of sales or use taxes on the sale of goods or services. 54 U.S.L.W. at 4687 (sales tax on aircraft fuel). In Aloha Airlines, the Court held that the statute was unambiguous; Congress had specifically distinguished between gross receipts taxes and net income or sales taxes. 464 U.S. at 7. In Aloha Airlines, the Court held that section 1513(a) proscribed the imposition of Hawaii's "public service" tax on gross receipts derived from air transportation or the carriage of persons in air commerce.

In a footnote in support of its holding in Aloha Airlines, the Court included a cf. citation to Arizona Department of Revenue v. Cochise Airlines, 626 P.2d 596 (Ariz. App. 1980), adding a parenthetical describing Cochise Airlines as holding that section 1513(a) pre-empts state gross receipts taxes on the carriage of passengers, but not freight, in air commerce. Aloha Airlines, 464 U.S. at 14 n. 11. In Cochise Airlines, the Arizona Court of Appeals held that the Arizona transaction privilege tax was pre-empted to the extent that it taxed the transportation of persons. However, the court specifically held that there is no
prohibition against the Arizona transaction privilege tax on transporting freight. 626 P.2d at _____. (The Arizona Supreme Court declined to review this decision in 1981.)

The question of the taxation of freight was the central issue in Air Polynasia v. Freitas, a case in which a cargo shipper, DHL Cargo, challenged the same Hawaii gross receipts "public service" tax as that challenged in Aloha Airlines. Air Polynasia filed suit in Hawaii state court and also filed suit in federal court. The Ninth Circuit declined to take jurisdiction under the Tax Injunction Act, but added, "we express no opinion as to Air Polynasia's constitutional claim. We observe, however, that questions remain as to the application of the Aloha Airlines decision to airlines engaged in air freight rather than passenger service. Those questions must be resolved before the constitutionality of the assessments against Air Polynasia can be determined. . . . That determination must be made by the state courts." 742 F. 2d 546 (9th Cir. 1984). Unfortunately, if there is a state court decision in the Hawaii litigation, it is unreported.

Aside from the question whether the federal statute addresses state taxation of freight, there are several cases emphasizing that the language of the federal statute strictly limits its scope to "air commerce" and "air transportation," meaning only transportation by aircraft. In Island Aviation, the court held that terminal service charges, which were measured by the cost of the service provided, were not a tax on transportation by aircraft and were not emplanement or deplanement fees. Such service charges were upheld. Island Aviation, Inc. v. Guam Airport Authority, 562 F. Supp. 951 (D. Guam 1982). In Salem Transportation, the court held that section 1513(a) was limited to aircraft transportation, and consequently did not include ground transportation fees for passengers even when measured by gross receipts. Salem Transportation Company of New Jersey, Inc. v. Port Authority of New York and New Jersey, 611 F. Supp. 254 (S.D.N.Y. 1985).

In short, the application of the federal anti-head tax act to air cargo would appear to be an open question. Prior litigation, as well as the legislative history, has focused on various attempts to tax passengers. The Supreme Court and lower courts have concluded that the act's proscription will be viewed as quite narrow, precluding only certain forms of taxation on aircraft transportation. The cases have applied the statute's preemptive scope only to passenger taxes or broad-based gross receipts taxes. Moreover, this narrow interpretation of the extent of the congressional prohibition must be further delimited by the broad range of state taxation, including sales and use taxes on services, expressly permitted in section 1513(b).