

702.0285

Memorandum

To Chief
Ret. Anal. & Alloc. Div. (MIC:32)

Date: November 22, 1996

From John L. Waid
Senior Tax Counsel

Subject: [No Permit Number]
County of Sacramento
Fees on Airport Rental Car Operations
Conflict with Local Sales and Use Tax

I am responding to Ms. Joan Albu's memorandum dated April 19, 1996, to Assistant Chief Counsel Gary J. Jugum. She asked for advice as to whether or not the Sales and Use Tax Law preempts the fee imposed by Sacramento County on rental car companies operating off the grounds of Sacramento International Airport. She attached to her memorandum copies of an article dated April 14, 1996, from an unidentified magazine indicating the airport fee adds 10% to the bill for renting a car at the airport, and of Sacramento County Board of Supervisors Resolution Number 92-0861, dated June 2, 1992, by which the Board of Supervisors imposed the fee on off-airport car rental agencies ("the Resolution"). At my request, Local Revenue Allocation Section Supervisor Larry Micheli obtained a copy of Chapter 11.09 of Title 11 of the Sacramento County Code, which the Resolution cites as the authority for its action. Mr. Micheli supplied further information in his memorandum dated October 22, 1996. He stated that the On-Airport Transportation Service providers agree to pay the fees as part of their contract with the airport to provide service and attached a copy of a sample contract. He also indicated that the rental car companies did not appear to be separately passing the fees through to their customers.

The Resolution repeatedly refers to the fee being a "privilege fee" for the right to conduct operations at the airport. It indicates that such a fee had been charged on-site operators for many years.

It turns out, as noted above, that the fees are exacted from On-Airport providers by contract rather than ordinance. Since the obligation to pay fees is created by contract between the airport and the provider, they cannot be taxes at all. (Perry v. Washburn (1862) 20 Cal. 318, 350.) Therefore, no matter the nature of the fees imposed on Off-Airport transportation service providers, those collected from On-Airport providers afford no conflict with Sacramento County's local sales and use tax ordinance.

The fees collected from the Off-Airport providers are_ another matter. Chapter 11.09 requires that all ground transportation businesses and operators shall pay such fees as may be established by the Board of Supervisors, including "privilege fees, administrative fees for the issuance and renewal of ground transportation permits, [and] administrative fees for the filing of appeals relating to the denial of such permits or the revocation thereof." The fees for issuance and renewal of permits are paid concurrently with the filing of an application for issuance or renewal. (§ 11.09.160.) Although the Resolution refers to the privilege fees being due annually, Chapter 11.09 does not specify a due date. Failure to pay fees is not given as a ground for denying an application for renewal of a permit (§ 11.09.230) but is one ground for revocation of a permit. (§ 11.09.250(b)(I).) This argues that the fee is due annually at a time established by the airport authority which is not necessarily the renewal date. The term "ground transportation business" is defined as "the practice of owning or possessing an ownership interest in ground transportation vehicles or providing direction, management or control, for the purpose of providing, assisting in the provision of, or coordinating the provision of ground transportation services" as defined in the chapter.

The Resolution sets the fee at 10% of gross receipts, due annually. The measure of the fee includes only those gross receipts generated by airport-related customers. Presumably, the measure of all of the fees charged On-Airport businesses is the business' entire gross receipts. The fee is imposed "without regard to the manner in which, or place at which, the vehicles are furnished to the businesses customers," Finally, the Resolution exempts from the measure of the fee the first \$12,500 per month of gross receipts "in recognition of certain costs incurred by Off-Airport Rental Car Businesses in accessing the Airport, and in recognition of the impact on the small or disadvantaged business enterprise...." Federal, state, county, and municipal sales or use taxes "which are separately stated and collected from customers of the business" are also excluded from gross receipts by the Resolution. Neither it nor Chapter 11.09 provide that the rental company may collect reimbursement for these fees directly from the customer.

OPINION

Section 7203.5 provides, in part, as follows:

"The State Board of Equalization shall not administer and shall terminate its contract to administer any sales or use tax ordinance of a city, county, redevelopment agency, or city and county, if such city, county, redevelopment agency, or city and county imposes a sales or use tax in

addition to the sales and use taxes imposed under an ordinance conforming to the provisions of Sections 7202 and 7203. [ii] Nothing in this section shall be construed as prohibiting the levy or collection by a city, county, redevelopment agency, or city and county of any other substantially different tax authorized by the Constitution of California or by statute or by the charter of any chartered city." [Emphasis added.]

The California Supreme Court has discussed the purpose of a business license tax as follows:

"A business or occupation tax is usually defined as a revenue-raising levy upon the privilege of doing business with the taxing jurisdiction. [Citations.] The tax or 'license fee' is often measured by gross receipts [citations], and payment is ordinarily a condition precedent to continued exercise of the privilege made subject to tax. [Citation.]

"The *gross receipts occupation tax* has a venerable history as a revenue-raising measure for California cities. [Citations.]"

(Weekes v. City of Oakland (1978) 21 Cal.3d 386, 394. Italics in original.)

The nature of a tax is not determined from the legislative designation but rather from its incidents, although the designation is of some weight. "It has been long established that the *measure, or mode of ascertaining* a particular tax is not conclusive as to its type or nature." (Ibid. at 392, 396. Italics in original.) The Resolution repeatedly states that the fees are levied for the privilege of gaining access to Sacramento International Airport and providing ground transportation services there, are charges for the use of the Airport facilities, and are used to defray the expense of operating the Airport. It is notable that, as noted above, the fee is charged to the service provider regardless of the ownership of the vehicle which actually comes and gets the customer and so is not tied to the transfer of tangible personal property. Indeed, although the Resolution specifically concerns Off-Airport car rental agencies, the definition of "ground transportation business" set forth in Section 11.09.010 is broad enough to encompass any operator which provides transportation services to Airport customers, not just car rental agencies. Most significantly, there are no pass-through provisions in Chapter 11.09--i.e., the rental agency is not given authority to collect reimbursement for the fee directly from its customers. It is thus limited to recovering the money paid for fees as a component of its rental price.

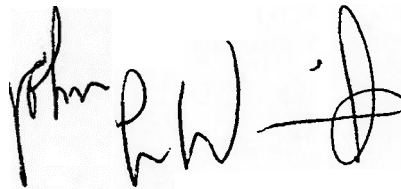
Based on the above authority, we conclude that, as to the Off-Airport car rental agencies, the fee is exactly what it says it is--a fee imposed on rental car agencies located outside the Airport for the privilege of coming onto its property to rent cars to customers. The Resolution makes it clear that a primary consideration for the fee is to prevent off-site operators from having an unfair advantage over on-Airport operators and to provide the latter a disincentive to move off the Airport when their contracts come up for renewal.

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The fee is not linked to a taxable use of a car, and any sales or use taxes that the operator pays are excluded from the gross receipts subject to the fee. As the incidents of the fee indicate that it is not a sales or use tax, the fact that it is measured by gross receipts does not, under the above authority, convert the fee into a use tax.

The lack of a pass-through feature is also highly important. The description of the fee given in the newspaper article is highly ambiguous on this point. Mr. Micheli's memorandum shows, however, that the Off-Airport car rental agencies do not appear to be passing the fees through to their customers. The fee is thus not "substantially similar" to a sales or use tax and so is not pre-empted by the State under Section 7203.5.

I am returning your original packet to you for your files.

A handwritten signature in black ink, appearing to read "John P. Wils". The signature is written in a cursive style with a large, stylized initial "J" and "W".

JLW:sr

cc: Mr. E. L. Sorensen, Jr. (MIC:73)
Mr. Glenn A. Bystrom (MIC:43)
Mr. Larry Micheli (MIC:27)
Mr. Robert Wils (MIC:39)
Mr. Dan Cady (MIC:27)
Mr. Gary J. Jugum