

OPINION NO. 73-117

Syllabus:

1. The Attorney General may advise that a state statute is invalid insofar as it conflicts with a federal statute.

2. The provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973, to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax, R.C. 5745.02.

**To: Robert G. Kosydar, Tax Commissioner of Ohio, Dept. of Taxation,
Columbus, Ohio**
By: William J. Brown, Attorney General, November 20, 1973

I have before me your request for my opinion which reads in part as follows:

Do the provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973 to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax?

Before reaching your substantive question, I consider it appropriate to note that questions of this type are within the province of this office's opinions. Former Attorneys General have advised that certain statutes conflicted with federal enactments, and therefore were superseded to the extent they were inconsistent. See Opinion No. 2065, Opinions of the Attorney General for 1933; Opinion No. 818, Opinions of the Attorney General for 1937; Opinion No. 2891, Opinions of the Attorney General for 1962.

The rationale for these opinions can be summed up that the Attorney General is required by his oath of office to support and defend the Constitution of the United States of America. When and if there is a conflict between the state law and the federal law in areas where the federal law is applicable, the Supremacy Clause controls and the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See Ex parte Young, 209 U.S. 123, 159-160 (1908); Delchamps, Inc. v. Alabama State Milk Control Board, 324 F. Supp. 117, 118 (1971); Whitehill v. Elkins, 258 F. Supp. 589, 596 (1966); and cf. Hansen v. Barlow, 456 P.2d 177, 181 (1969).

On June 18, 1973, the President signed into law the "Airport Development Acceleration Act of 1973" (P.L. 93-44). Of particular importance is Section 7 (A) of this act which amends Title XI of the Federal Aviation Act of 1958 to read as follows:

State Taxation of Air Commerce

Sec. 1113. (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) 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; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied 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; prior to May 21, 1970, shall be exempt from the pro-

visions of this subsection until December 31, 1973.

(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) 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; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which--

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans.

the provisions of subsection (a) shall not apply to such authority until December 31, 1973.

The problem posed by your question is to determine whether the language of Section 1113 of the Federal Aviation Act is inclusive of the Ohio Airlines Excise Tax. The authority for the establishment of the Ohio Airlines Excise Tax is provided by R.C. 5745.02 which states in part:

[A]n excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons or property by air within this state.

The tax is as follows:

(A) Four per cent of the receipts derived from transportation which begins and ends within this state;

(B) Where the transportation does not begin and end within this state, four per cent of the receipts derived therefrom attributable to busi-

ness carried on within this state based on the proportion of the mileage within the state to the entire mileage over which the persons or property are transported, into or out of the state.

All moneys received in the state treasury from the tax levied in this section shall be deposited to the credit of the general revenue fund.

Upon examination of the language of Section 1113 of the Federal Aviation Act of 1958, it becomes readily apparent that it provides a broad and inclusive prohibition of certain taxes on air commerce levied by state governments. The provisions reach much further than the prohibition of individual "head taxes." Rather, Section 1113 prohibits both direct and indirect state taxation of the sale of air transportation. Section 1113 clearly states that:

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 language of this section is clearly inclusive of the Ohio Airlines Excise Tax (R.C. 5745.02) which by its terms, falls within the category of a tax upon the gross receipts derived from the sale of air transportation.

The power to regulate air commerce is vested in the federal government by the commerce clause of the United States Constitution (Article I, Section 8, U.S. Constitution), and such regulatory power is expressed by the Federal Aviation Act of 1958. Upon examining the federal regulatory power, it is clear that any power which the states have exercised over interstate commerce by reason of congressional inaction ceases to exist the moment Congress asserts its authority over interstate commerce through the enactment of legislation that conflicts with or covers the same subject as a state statute.

In the case of United Airlines v. Porterfield, 28 Ohio St. 2d 97 (1971), the Ohio Supreme Court held that the Ohio Airlines Excise Tax was not violative of the Ohio and United States Constitutions as an undue interference with interstate commerce. However, at the time that case was decided, Congress had taken no action on the question of state taxation of air commerce. Congress has since acted on the taxation problem with the enactment of Section 1113 of the Federal Aviation Act of 1958 which prohibits state taxation of the sale of air transportation. Section 1113 also provides that those taxes which were in force prior to May 21, 1970 are exempted from the provisions of the section until December 31, 1973.

Because of the broad language of Section 1113 of the Federal Aviation Act of 1958, the Ohio Airlines Excise Tax (R.C. 5745.02) falls within the provisions of Section 1113 and must be discontinued as of December 31, 1973.

In specific answer to your request it is my opinion,

and you are so advised that:

1. The Attorney General may advise that a state statute is invalid insofar as it conflicts with a federal statute.

2. The provisions of Section 1113 of the Federal Aviation Act of 1958 apply after December 31, 1973, to prohibit the levy, collection, and enforcement of the Ohio Airlines Excise Tax, R.C. 5745.02.