New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(16)S
Sales Tax
May 20, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S110110A

Petitioner challenges, on Federal preemption grounds, the policy of the Department of Taxation and Finance that a storage-in-transit service provided by interstate household goods motor carrier lasting more than 30 days is subject to New York's state and local sales and use tax on storage (Tax Law § 1105[c][4]). We conclude that the policy is not preempted by Federal law.

Facts

Petitioner, an association of companies in the household goods moving business ("movers"), gives the following description of the moving business. The national van lines contract for a move from one state to another. The national van lines have contracts with local movers in each of these states and arrange for the move on behalf of the customer. The national van line may also arrange for storage of the customer's goods on either end of the move prior to the final delivery of the goods ("storage-in-transit") by entering into contracts with local moving companies that have storage facilities. During the storage-in-transit period, the national van line remains liable to the customer for the safe storage of the goods.

Known as household goods motor carriers under Federal law, movers must file tariffs with the Surface Fleet Board of the Federal Department of Transportation, which tariffs must define the maximum length of time for which they will provide storage-in-transit services. If storage continues after the expiration of the maximum storage-in-transit period, the movers generally cease to have responsibility for the goods, as the responsibility for the goods transfers to the local company performing the storage service. The tariffs must also state the rate for storage-in-transit services. According to Petitioner, the average period for which household goods movers will offer storage-in-transit services is 180 days. The petition does not disclose the percentage of interstate moves that require storage-in-transit for more than 30 days.

Analysis

Tax Law § 1105(c)(4) imposes sales tax on the service of storing tangible personal property not held for resale in the regular course of business. In TSB-M-82(22)S, the Department stated that storage-in-transit is taxable for the full period during which storage occurs if it lasts longer than 30 days.

Petitioner contends that this policy is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub.L. No. 103-305, § 601(c), 108 Stat. 1569, 1606, 49 U.S.C. §§ 14501-14505).[1] Specifically, USC section 14501(c)(3) provides that:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

Petitioner points out that the Act defines "transportation," in pertinent part, as follows:

> the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage

(49 USC § 13102[23][B]). Under regulations enacted by the Department of Transportation, interstate movers must file a tariff with the Surface Transportation Board, stating a charge for storage-in-transit and the length of time that such storage-in-transit will continue before converting to permanent storage provided by the warehouse where the goods are being stored and no longer the responsibility of the interstate carrier.

Whether a Federal law preempts State law is a question of Congressional intent (*see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 [1992]). Preemption analysis starts with a presumption against preemption (*see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 [1995]). This presumption against preemption is stronger in areas of traditional state law regulation (*see Id.* at 655). Thus, state laws concerning matters traditionally regulated by states are preempted only if Congress's intent to suppress state powers is "clear and manifest" (*City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 438 [2002]). Where the Federal statute in question has an express preemption clause, the preemption analysis must start with "the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent" (*Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 [2002]).

The issue here then is whether the Department's policy under which storage-in-transit by an interstate mover lasting beyond 30 days is subject to sales tax violates section 49 USC 14501(c), which preempts State laws "related to a price, route, or service of any motor carrier." Section 14501(c) is identical to the preemption provision in the Airline Deregulation Act (49 USC § 1301 et seq., [ADA]). In *Morales, supra*, the Supreme Court interpreted the "relate to" language in the ADA to mean that a State law that only indirectly affected the rates, routes or services of an air carrier could run afoul of the ADA

[1] The FAAAA was amended by section 103 of the Interstate Commerce Commission Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803, 899 (1995), and recodified at 49 U.S.C. §§ 14501-14505.

(*see Id.* at 385-386). The Court acknowledged, however, that it was possible for a State law to affect an air carrier's fares in "too tenuous, remote, or peripheral a manner" to have preemptive effect (*Id.* at 390).

The movers already separately charge for storage-in-transit. The only issue is whether the State can tax the storage service. The petition does not supply facts that would justify the conclusion that application of the sales tax would have more than a de minimis effect on pricing. The petition does not quantify the percentage of interstate moves that require storage-in-transit lasting longer than 30 days. Moreover, the petition does not set forth facts that would establish that the addition of sales tax would be material in relation to a mover's typical charge for an interstate move. In addition to requiring movers to collect sales tax on their storage-in-transit charges, the Department's policy would require Petitioner to comply with all the duties of a vendor, i.e., registering for sales tax purposes, filing returns, and maintaining proper records. While these additional duties would impose some costs on movers, the additional costs seem "too tenuous and remote" from movers' rates, routes, or services to be preempted by section 14501(c) (*see Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 [3d Cir 1998] *cert. denied* 526 U.S. 1060 [1999][holding that California's prevailing wage law was not preempted by the FAAAA notwithstanding the defendant's contention that complying with the law would increase its prices by 25%, compel it to use independent contractors, and re-direct and re-route equipment to compensate for lost revenue]; *DiFiore v. American Airlines, Inc.*, 561 F.Supp.2d 131 (D.Mass. 2008][Massachusetts Tips Law that made air carrier's baggage handling fee illegal found not to violate ADA]). Moreover, applying the State's sales tax to a mover's storage charges is not the type of economic regulation of interstate carriers that was the target of the FAAAA (*see City of Columbus v. Ours Garage & Wrecker Service, Inc., supra,* 536 U.S. at 440 [2002]).

Against this conclusion petitioner relies on the Supreme Court's decision in *Rowe v. New Hampshire Motor Transport Ass'n*, *supra*, which held that section 14501(c) preempted a Maine law insofar that it required Maine tobacco retailers to only ship their tobacco products by those carriers who, before releasing the products to the addressees, could verify certain information about the recipients, including that they were of legal age to consume the tobacco products. This case is distinguishable, however. Whereas the Maine law clearly required motor carriers to provide an additional service to customers, the Department's imposition of sales tax on storage lasting longer than 30 days does not require carriers to provide any additional services to the customer.

In any event, petitioner's assumption that the preemption provision in the FAAAA that applies to a State tax provision is section 14501(c) appears faulty. The FAAAA has a separate preemption provision for State taxes, 49 USC section 14505, which provides:

> A State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on--
>
> (1) a passenger traveling in interstate commerce by motor carrier;
> (2) the transportation of a passenger traveling in interstate commerce by motor carrier;

(3) the sale of passenger transportation in interstate commerce by motor carrier; or
(4) the gross receipts derived from such transportation.

Thus, the only State tax provisions that the FAAAA preempts are tax provisions that apply to transportation of passengers. Here, because the tax at issue is a sales and use tax that only applies to storage of property, section 14505 does not apply. More significantly, the fact that Congress considered it necessary to add a preemption provision that applies specifically to State taxes makes clear that Congress did not intend for section 14501(c) to apply to taxes.

In sum, the FAAAA does not preempt the Department's policy that a mover's charges for storage of tangible personal property lasting more than 30 days are subject to sales tax under Tax Law § 1105(c)(4).

DATED: May 20, 2011

/S/
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