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Op. No. 69-7

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii 96813

April 10, 1969

The Honorable William E. Fernandes, Chairman  
Senate Committee on Economic Development,  
Tourism and Transportation  
Hawaii State Capitol  
Honolulu, Hawaii

Dear Senator Fernandes:

This is in response to your letter of March 7, 1969, regarding the legality of S.B. No. 749 entitled "A Bill for an Act Relating to an Airport Facilities Tax."

The bill proposes to impose a \$2.00 capitation tax upon all persons arriving in the State (with certain exceptions) by commercial aircraft.

The purpose of the tax is to defray the cost of improving airport facilities, including highways to and from the airport as well as highways to resort facilities or tourist destination areas.

You ask whether such a tax is legal.

We conclude that such a tax is unconstitutional.

It has long been held by the Supreme Court of the United States that a state does not have the right to levy a tax upon residents or nonresidents leaving a state. Crandall v. Nevada, 6 Wall. 35, 73 U.S. 35 (1867). Crandall involved an 1865 act of the Nevada legislature, which levied a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach, or other vehicle engaged in the transportation of persons for hire, and mandated that the owners or corporations pay the tax.

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The United States Supreme Court struck down the tax on the ground that the right to move freely through the nation was a right of national citizenship. Mr. Justice Miller in writing for the court quoted with favor from the dissenting opinion of the Passenger cases, 7 How. 283 (1849), as more clearly setting forth the principles supporting the Supreme Court's holding:

"We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." 73 U.S. at 49.

While the case is not of recent vintage, it has not been overruled and is still good law.

The right to pass freely from state to state is a right of national citizenship protected by the privileges and immunities clause of the 14th Amendment. Edwards v. California, 314 U.S. 160 (1941).

We see no difference between a statute which levies a tax upon a person leaving a state from a statute levying a tax upon a person entering a state, relative to the application of this constitutional provision. In both instances, the constitutional right of the person to move freely from state to state is directly impaired. Any attempt to levy a tax upon a person's right to move freely from state to state is repugnant to the privileges and

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immunities clause of the 14th Amendment and as a consequence,  
is, in our opinion, unconstitutional. <sup>1/</sup>

Very truly yours,

/s/ Tany S. Hong

TANY S. HONG  
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI  
Attorney General

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1/ The proposed tax may also be violative of the commerce clause, section 8, of the U.S. Constitution. However, we do not think it necessary to express our opinion thereon in view of our conclusion on the basis of the privileges and immunities clause.