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Apportioned Property Taxation Extended to Interstate Airlines

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APPORTIONED PROPERTY TAXATION EXTENDED TO INTERSTATE AIRLINES

IN a recent case, *Braniff Airways, Inc. v. Nebraska State Board of Assessment*,[1] the Supreme Court of the United States upheld the constitutionality of an apportioned property tax levied upon an airline by a state that was not the domicile of the taxpayer. Although the court has increasingly recognized the rights of states through which an interstate carrier travels to tax a part of the value of its property, an apparent exception to this trend had been in the field of air transportation. Before the *Braniff* case it had been thought that states could exercise very broad taxing powers over the property of airlines domiciled within their borders. Although this recent decision does not purport to overrule the previous leading case, *Northwest Airlines v. Minnesota*,[2] there is serious doubt as to their compatibility in either doctrine or results.

The carrier in the *Braniff* case regularly made eighteen stops each day in Nebraska, the taxing state. These stops were of short duration with the exception of one flight that remained overnight to await a more convenient departure time the following morning. Nebraska was not the domicile of the airline nor was it the home port or principal place of business. The contested tax was an apportioned ad valorem property tax upon the flight equipment of the carrier.[3] The taxpayer did not question the reasonableness of the plan of apportionment, but argued that Nebraska could not constitutionally tax its property. The Supreme Court of Nebraska held the tax valid,[4] and on appeal the Supreme Court of the United States affirmed this decision, declaring that this non-domiciliary tax was not a violation of the Due Process or Commerce Clauses.

There have been a few cases dealing with the taxation of airline property; thus the present case can be best evaluated in light of decisions involving state taxation of other types of interstate carriers. The general rule governing the powers of the several states to tax personal property is that such property is taxable by the state in which the property is located.[5] However, it is difficult to apply this principal when the property is not attached to one jurisdiction but travels among many states, all of which may have some claim to the right to tax under the general rule. In order to protect interstate carriers from multiple taxation, a special rule was formulated: tangible, movable property is to be taxed by the owner's domicile, its fictional situs, unless this property has acquired an actual "taxing

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[1] 347 U.S. 590 (1954).

[2] 322 U.S. 292 (1944).

[3] NEB. REV. STAT., 143, secs. 77-1244 to 77-1250.

[4] 157 Neb. 425, 59 N.W.2d 746 (1953).

[5] "The taxing power of a state is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the state . . ." "Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws . . . These are subjects of State regulation and State taxation. . . ." Nathan v. Louisiana, 8 How. 73, 82, 83 (U.S. 1850).

situs" elsewhere during the tax year.[6] While the wording of this special rule has remained unchanged over the years, significant changes in the definition of "taxing situs" in terms of the facts and circumstances necessary to establish it, have altered the application of the rule.

The earliest cases dealing with the taxation of interstate carriers, which principally involved water transportation, severely restricted the taxing powers of non-domiciliary states. A vessel did not acquire a "taxing situs" in a non-domicile even if it frequently visited the ports of that state,[7] was enrolled at one of its ports,[8] or was directed by a firm which had its main office within the state.[9] To establish a "taxing situs" away from the domicile, the non-domiciliary taxing authority would have had to show the "permanent presence" of specific ships within the waters of that state continuously throughout the tax year.[10] Consequently, domiciliary states could tax all vessels which did not spend the entire year within another single jurisdiction.[11]

Early cases concerning the taxation of railroad property followed the rules established in the water-carrier decisions,[12] until the first inroad upon the taxing powers of domiciliary states occurred in *Pullman Palace Car Co. v. Pennsylvania.*[13] Instead of requiring the "permanent presence," the Supreme Court adopted what has been called the "theory of apportionment." Under the rule of that case a "taxing situs" was established in a non-domiciliary state when it was shown that an average number of cars were within that state continuously during the tax year, although this average was not composed of the same property at all times. However, shortly after the *Pullman* decision the Supreme Court in *New York Central Railroad v. Miller,*[14] permitted New York to tax the full value of property owned by a

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[6] Historically there were two bases of taxation: 1) *lex situs*—in which property was taxable at its location; and 2) *lex domicilii*—in which property was taxable at the home of the owner. An outgrowth of the latter was the maxim *mobilia sequunter personam,* that is, movable property followed by the owner and was taxable at his domicile. The maxim originated during the Middle Ages when movable personal property consisted mainly of gold and jewels which could be easily concealed and taxes thereby evaded. As a practical measure the domicile was chosen as the situs for taxation. In later years the maxim was largely discredited and there has been a trend in the direction of *lex situs* away from that of *lex domicilii.* WHARTON, CONFLICT OF LAWS, §297 (3rd ed. 1905).

[7] Hays v. Pacific Mail S. S. Co., 17 How. 596 (U.S. 1854).

[8] Morgan v. Parham, 16 Wall. 471 (U.S. 1872).

[9] St. Louis v. The Ferry Co., 11 Wall. 423 (U.S. 1870).

In Ayer and Lord Tie Co. v. Kentucky, 202 U.S. 409, 421 (1906), the Court said:

> "The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwide trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

[10] Old Dominion S. S. Co. v. Virginia, 198 U.S. 299 (1905).

[11] An inland domicile might even tax an ocean-going vessel which had never entered the domicile. Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911).

[12] DESTY, AM. LAW OF TAXATION, 399 (1884). Sangamon & Morgan Railroad Co. v. County of Morgan, 14 Ill. 163 (1852); Baltimore & O. R. R. v. Allen, 22 Fed. 376 (1884).

[13] 141 U.S. 18 (1891).

[14] 202 U.S. 584 (1906). There the domicile was permitted to tax railroad cars based on their full value despite the fact that between 12% and 6% of the rolling stock was outside of the state continuously throughout the tax year. Speaking of the Miller case in Chicago v. Willett Co., 344 U.S. 574, 581 (1953), the court said: "The validity to so tax turned on the railroad's failure to show, by some form of apportionment, taxability in other states."

railroad domiciled there, although it was shown that a certain percentage of property was outside that state the entire year. The court did not assume that the proportion of the rolling stock which was away from home would be taxable elsewhere.

The *Pullman* "theory of apportionment" has subsequently been applied to boats traveling on inland waters. In *Ott v. Mississippi Valley Barge Line Co.*,[15] a non-domiciliary state sought to tax vessels under a statute[16] that was not expressly limited to specific property permanently within the state or to a fixed number of fungible units that were continuously within the waters of the taxing jurisdiction although some such fact situation would have been required under the rules developed in the railroad cases. The Supreme Court affirmed the validity of this statute upon receiving assurance from the Attorney General of the taxing state that the restrictions which had been imposed by other decisions would be observed. This decision thus adopted the usual version of the apportionment theory. However, the case of *Standard Oil v. Peck*[17] announced further restrictions on the taxing power of the domicile. In that case, the domicile of an interstate carrier sought to tax the full value of boats although they were only in that state a short time during the year. The taxpayer did not show that the property had been taxed by another state, nor did it show the facts that customarily established a taxing situs apart from the domicile—that particular vessels or a fixed number of different boats were continuously located in another state. However, the court assumed the property acquired a taxable situs elsewhere[18] and thus was exempted from domiciliary taxation upon its full value regardless of whether it was actually being taxed in other jurisdictions. This presumption of taxibility elsewhere, without definite proof that such liability existed, was unique in the history of property tax cases.[19] Thus this decision appears to reflect a trend in opposition to taxation by the domicile or fictional situs and in favor of taxation by the state where the property is actually used. Presumably the *Peck* rationale would also reduce the proof necessary to validate a non-domiciliary tax.

In the field of air carriers, the leading decision before the *Braniff* case was *Northwest Airlines v. Minnesota*[20] which had been decided before the *Ott* and *Peck* cases. Although the airline in the *Northwest* case proved that its flight equipment was in other states a substantial portion of the time, Minnesota was permitted to tax all the aircraft. Justice Frankfurter, in delivering the conclusion of a divided court[21] said: ". . . no judicial restric-

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[15] 336 U.S. 169 (1949).

[16] 6 LA. GEN. STAT. § 8370 (Dart 1939).

[17] 342 U.S. 382 (1952).

[18] "No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Valley Barge Line Co., *supra*, could be taxed by the several states on an apportionment basis." 342 U.S. 382, 384 (1952). However, on the facts in *Peck*, the vessels would not be taxable under the *Ott* rule which required proof of the permanent presence of fungible units in the non-domiciliary state. A further reflection of apportionment basis is seen in Inland Navigation Co. v. Chambers, 274 P.2nd 104 (Ore. 1954), where a tax based on ton-miles traveled within the state was upheld by the Oregon Supreme Court.

[19] Justice Minton, dissenting in the *Peck* case said: "The record in this case is silent as to whether any proportion of the vessels were in any one state for the whole of a taxable year. The record does show that no other state collected taxes on the vessels for the years in question or any other year. Until this case, it has not been the law that the state of the owner's domicile is prohibited from taxing under such circumstances." 342 U.S. 382, 386, 387 (1952).

[20] 322 U.S. 292 (1944).

[21] Two justices concurred with Justice Frankfurter in the judgment and conclusion; two wrote separate concurring opinions; and four justices joined in the dissent.

tion has been placed against the domiciliary state except when property (or a portion of fungible units) is permanently situated in a state other than the domiciliary state. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks."[22] Thus the prevalent opinion favored applying to airlines a narrow definition of "taxing situs." In accordance with this narrow construction the Court followed the *Miller* case[23] in refusing to assume that property that was absent from the domicile most of the year was probably taxable elsewhere. This rationale was probably no more than a somewhat conservative version of the then current "apportionment" rule, but it could not be reconciled with the later *Peck* case. However, since the *Peck* case involved only inland water transport, it left doubt as to whether the doctrine of the *Northwest* case would be narrowed in accordance with the philosophy enunciated in *Peck.*

The answer to this and other questions[24] created by the *Northwest* case may now be found in the decision of the Court in *Braniff v. Nebraska State Board of Assessment.* In the earlier case the Supreme Court refused to consider the validity of taxes by non-domiciliary states upon airline property because those taxes were not then being contested. The *Braniff* case squarely presented the question of what standard would be applied to such taxes. The criterion that the Court chose for "taxing situs" in a non-domiciliary state was not the requirement of permanent presence of specific property, nor was it the test of the *Pullman* case which demanded the continuous presence of fungible property. The majority of the Court phrased their criterion in terms of the "sufficiency of contact" of the non-domiciliary state with the property it sought to tax. Thus, referring to Braniff's eighteen stops each day in the taxing state, they said: "We think that such regular contact is sufficient to establish Nebraska's power to tax even if the same aircraft do not land every day and even though none of the aircraft is continually within the state."[25] This standard is considerably different than the one suggested in the *Northwest* case and shows a greater appreciation for the interests of states other than the domicile.

Not only does *Braniff* enunciate a new standard governing taxability of personal property outside of the domicile, but it also appears to undermine the *Northwest* rule for domiciliary taxing. Assuming the proposition that the same property may not be taxed both by the domicile on its full value and by other states on an apportioned basis without violating the Commerce Clause, it is doubtful that these two cases can be reconciled. The result of the *Northwest* case was to permit Minnesota to tax the entire property of an airline domiciled within its borders. In the *Braniff* case a non-domiciliary state was allowed to tax a portion of the property of the carrier that represented its proportional share of the use of those aircraft. It would therefore appear that if these cases cannot be reconciled on factual differences, that is on the basis of the contacts of the airlines with their respective domiciles and the other states into which their property entered, the *Northwest* case has been effectively overruled. Previous property tax

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[22] 322 U.S. 292, 298 (1944).

[23] 202 U.S. 584 (1906). See Note 14 *supra.*

[24] Braniff also contended that federal statutes governing the regulation of air commerce exempted aircraft from state regulation by taxation. The majority held that the power to regulate navigable air space has the Commerce Clause as its source in the same manner as does the power to regulate navigable waters, and that the power to regulate such commerce does not deny the right of the states to impose valid taxes upon the carriers.

[25] 347 U.S. 590, 601 (1954).

cases emphasized that the significant relationship controlling the validity of the various claims against an interstate carrier is the degree of contact between the property and the non-domiciliary states concerned; the validity of a tax by the domicile, the fictional situs, is determined by the absence of facts showing a "taxing situs" elsewhere. Reviewing the facts of this relationship in both of these cases fails to reveal any indication that there was a greater frequency or length of contact between Braniff and Nebraska than there was between Northwest and the non-domiciles into which it sent its aircraft. Furthermore, the court, in deciding the *Braniff* case, did not attempt to draw such a distinction.[26]

Justice Frankfurter's dissent in the *Braniff* case goes to the heart of the problem presented by that litigation. Clarifying the views he expressed in delivering the opinion of the Court in the *Northwest* case, Justice Frankfurter said: ". . . . boats and railroad cars which spend hours and days at a time in a state have a closeness and duration of relationship with that state obviously not true of planes which make brief stopovers for a few minutes."[27] Thus, the *Pullman* and *Ott* apportionment theories were not rejected by the dissent, but rather limited to other forms of transportation. Justice Frankfurter based his decision on the argument that since it would be extremely difficult for the judiciary to arrive at a fair method of resolving the tax claims of the various states, the regulation of these interests should be left to the legislature. Until Congress acts, he believes that the courts should protect carriers against multiple taxation by permitting only the state of the domicile to tax airline property.[28]

The primary conclusion that may be drawn from the *Braniff* case is that it represents another step in the direction of dividing the taxing powers of the states in a manner more consistent with the actual facts of property use, rather than concentrating this power in states that have only a technical claim to tax the property. To achieve this result the Supreme Court

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[26] Other possible distinctions have been suggested but seem unsatisfactory. In the *Northwest* case, Minnesota was not only the domicile of the airline, but was also the home port and principal place of business. In the *Braniff* case the airline was domiciled in Delaware, had its principal place of business in Missouri, and its home port in Minnesota. It might be said that the cases are distinguishable because the combination of benefits afforded by Minnesota in the Northwest case was such as to give it the right to tax the full value of the aircraft, whereas there was no such combination of benefits afforded by any one state in the Braniff case. Another ground of distinction that might be urged is the fact that it was not shown in the Braniff case that the planes entered the domicile during the tax year (or ever), and that in the Northwest case Minnesota taxed only that equipment which entered the domicile during the tax year. But to propose either of these two grounds as a distinction would be to ignore the basic theory of taxation of movables. Both of these grounds are founded upon the relationship of the carrier and the domicile, while the basis of the tax of Nebraska, a non-domiciliary state, is *its* relationship to the carrier. The acquisition of a "taxing situs" by a carrier in a non-domiciliary state is not based upon a relationship outside of the state, but upon the contact between the property and *that* state. The power of the domicile to tax the full value, however, is based upon factors elsewhere. It is only in the absence of a "taxing situs" elsewhere that a domicile may so tax.

[27] 347 U.S. 590, 607 (1954).

[28] Justice Jackson's dissent in the Braniff case supported the same theory of taxation which he espoused in the Northwest case. He likened planes alighting from the sky to ships arriving in port from sea, and asserted that both should be taxed at their "home ports." He distinguishes aircraft from railroad cars in that the latter actually travel on the land of a state, whereas aircraft simply touch the ground for the purpose of loading and unloading. However, the "home port" theory was never accepted as a basis for taxation of either ships or planes and thus remains only a theory.

has brought another form of transportation, air carriers, into the orbit of the "theory of apportionment." But of greater general significance is the fact that in the decade between the *Northwest* and *Braniff* cases the court has found a new manner of describing its standard for taxability of property by non-domiciliary states: instead of the old concept of "presence" the court now speaks of "sufficiency of contact"; instead of permanency of location it looks to the frequency and regularity of the relationship. While the *Peck* case foreshadowed this change of attitude, it was in the *Braniff* decision that the concept of "taxable situs" was redefined to give greater weight to the interests of all states in which the equipment of interstate carriers is used.

One of the laudable aspects of this case is that it should eliminate the possibility that "direct" multiple taxation of airline property might be permitted notwithstanding the Commerce and Due Process Clauses. It is not expected that one state now may tax all the aircraft of a firm domiciled within that state, while another state levies upon the same property because of its frequent presence within the jurisdiction. However, there is still the possibility that the several states may elect methods of apportionment[29] that are most favorable to them, thus providing some measure of overlap or "marginal double taxation." Since a court merely reviews the reasonableness of a plan before it, and does not ordinarily investigate the total impact of all apportionment programs upon the carrier to determine the constitutionality of one plan, there is little likelihood that the judiciary will prevent this overlapping.[30] To what extent this overlap, if any in fact occurs, will affect interstate air carriers will be determined by future state legislation. Another beneficial aspect of the *Braniff* case is that it will discourage "domicile shopping" to find low tax rates since there will no longer be immunity from taxation by non-domiciliary states.

While the *Braniff* decision establishes a more equitable method of apportioning tax rights among the states, it may also introduce a degree of uncertainty that was not present under previous law. With standards like "permanent presence" and related tests, the respective taxing powers of the various states were somewhat more predictable than under the now-vague concept of "sufficiency of contact." The *Braniff* case establishes that eighteen stops daily by aircraft is sufficient contact with non-domiciliary states to support an apportioned property tax. The question remains whether some lesser frequency or regularity of contact may also be the basis for constitutional taxation.[31] Furthermore there is doubt whether similar criterion will be applied to other types of transportation, for example non-scheduled

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[29] Some bases of apportionment are ton miles, gross revenue, plane miles, and number of stops. Any one or some combination of these may be chosen. See Multiple Taxation of Air Commerce, H. R. Doc. No. 141, 79th Cong., 1st Sess. (1945).

[30] Compare Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) and Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939).

[31] We do not know whether a greater amount of frequency will permit taxation where there is little or no regularity, and whether a constant regularity will permit a lowering of the frequency requirement. If the lower limit of the standard is so low as to include all carriers, and thereby eliminate any discrimination between large and small carriers, what is to prevent non-domiciles from taxing sporadic visits of private planes and boats (and maybe busses, trucks and automobiles as well)? The basis of the tax is not the fact that the carriers transport goods of commerce between the states. The tax is based upon the presence of the property within the jurisdiction of the non-domiciliary state.

airlines, ocean vessels[32] and interstate trucking concerns. This will probably have to be clarified by further litigation. Despite the warning by Justice Frankfurter that it will involve the judiciary in a legislative function, the Supreme Court has undertaken to alter the rule governing the taxability of interstate air carriers. The nearly total rights of the domicile apparently have been narrowed by giving greater rights to non-domiciles. The Court's determination to entangle itself in such detailed litigation is probably quite justified in view of the traditional reluctance of Congress to interfere with state taxation.

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[32] With the trend continuing in the direction of apportionment of taxation it seems improbable that a notable exception to this method of taxation, ships engaged in the coastal trade, will keep their immunity to non-domiciliary taxes. It might be said that a ship leaves the jurisdiction of a state when it enters the open sea, but the courts may treat this distinction in the same manner as the airline's claim that planes leave the jurisdiction of a state when they enter the public domain of the airways.