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# STATE AND LOCAL TAXATION OF SCHEDULED LOCAL AIRLINES

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## BACKGROUND

THE air transportation industry has lost approximately 40 million dollars since December 31, 1945, is not a lucrative source of revenue for a tax agency at the present time, and there are no indications that it will become such in the immediate future.<sup>1</sup> The airlines do, however, present some novel and unusual problems in the applications of fundamental principles of taxation. Prior to the Supreme Court decision in *Northwest Airlines v. Minnesota*<sup>2</sup> in July of 1944, little attention was devoted to the tax problems of this young growing industry, but subsequently an unusual amount of time and effort has been devoted to the airline tax problem. A Congressional resolution<sup>3</sup> instructed the Civil Aeronautics Board to investigate and recommend means of avoiding multiple taxation which might unduly burden or impede the development of air commerce, and the carriers themselves appointed a tax committee to study the problem. The four large national tax associations<sup>4</sup> organized special committees too.

On April 3, 1945, the Civil Aeronautics Board issued its report<sup>5</sup> recommending a federal statute for the regulation of state and local taxation of interstate air carriers and creation of another federal agency to demonstrate this suggested legislation.

By the end of 1947, the tax associations had gone on record<sup>6</sup> opposing approach to this problem from the federal level.<sup>7</sup> While the industry was not in unanimous agreement, it appears that the current consensus in carrier circles is opposed to unusual methods of taxing

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<sup>1</sup> Air Transport Association releases. See 15 J. Air L. & C. 307. However, we have noted the CAB's program and statement of economic policy of Feb. 25, 1949, with considerable interest.

<sup>2</sup> 322 U.S. 292 (1944).

<sup>3</sup> Public Law, 416, 78th Cong., 2nd Sess. (7/3/44).

<sup>4</sup> National Tax Association, National Association of Tax Administrators, National Association of Assessing Officers, and North American Gasoline Tax Conference.

<sup>5</sup> H. D. No. 141, 79th Cong., 1st Sess.

<sup>6</sup> See note 4, *supra*.

<sup>7</sup> See annual reports of these associations for 1946, 1947, and 1948.

air commerce and its implements. It is worth noting that there has been a bill pending<sup>8</sup> in Congress since 1945 which incorporates the principles of the CAB report, but no action has been taken as yet.

On January 18, 1947, the Council of State Governments proposed approaching airline taxation from the state level by adoption of a "Model Bill" providing for taxation of flight equipment, gross receipts, net income or capital stock owned or received by air carriers at the state level, and use of a special formula to apportion these levies to the various states. Aircraft arrivals and departures, revenue tons handled, and originating revenue are the factors in that computation.

Review of the past four years of the growing study of airline taxation indicates the legislative results have been minor. The federal bills introduced in the 79th, 80th, and 81st sessions of Congress have not been passed, and while three state bills<sup>9</sup> were enacted, there has been no new change in aviation fuel taxation.<sup>10</sup> On the basis of personal observation and close association with the "problem" over the past four years, the "multiple" and other forms of burdensome taxation alleged to be facing the civil air transport industry seem to be largely the figments of the imaginations of the theorists who seek to justify articles, speeches, and notions on elimination of the "multi-tax problem" through enactment of a Congressional bill. One must consider that the federal legislation urged would restrict states' rights by creating another national agency to regulate state taxation of all businesses engaged in interstate commerce, and the fact that interstate airlines are no different from other interstate corporations from a tax viewpoint. Legislative or administrative action affecting taxation of air transportation should be taken with the realization:

- (1) that this is a very young industry;
- (2) that the industry is still harassed by financial problems of post-war adjustment and conversion to larger and faster aircraft;
- (3) that the industry is important to national defense.

It should not be made the target of legislative action which could only result in multiple or other forms of burdensome taxation which would impede the development and maintenance of a healthy air transport network. If it is determined that Congress must control taxation of integrated businesses in interstate commerce, the air transport industry would naturally come under this legislation. It is expected that it will bear its fair share of the tax burden in any case. If it is

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<sup>8</sup> H.R. 3446, 79th Cong.; H.R. 1241, 80th Cong., S. 2453, 81st Cong.

<sup>9</sup> Connecticut adopted the principles of the "Model" bill for income tax purposes and Nebraska adopted those principles for property tax purposes. Minnesota nullified the *Northwest Airlines* decision by requiring apportionment by 418 Minn. Sess. Laws, 811 (1945).

<sup>10</sup> See annual reports (1945-1948) of North American Gas Tax Conference.

decided that such interstate businesses should be regulated by state Model Bills, air carriers would function and pay taxes under those statutes.<sup>11</sup>

#### TAXATION OF PROPERTY

Generally speaking, property of airlines is assessed in the same manner as other property. Pennsylvania and New York exempt all personal property, while Ohio taxes airplanes when the owners are domiciled in that state. Louisiana has exempted flight equipment for 10 years. We find central assessment of airlines in Kentucky, Maryland, Nevada, North Dakota, Oregon, Utah, Washington, West Virginia, Wisconsin and Wyoming, while Florida has adopted a registration license or fee in lieu of property taxes on flight equipment.

Fixed assets of airlines do not create any special problem different from those encountered in the assessment of other fixed properties. However, in dealing with flight equipment there are differences of opinion on the *situs* for tax purposes, of the plane and, among those who believe that the value of the plane should be apportioned, differences as to method. In the important *Northwest Airlines* case<sup>12</sup> the court seemed to have a choice between the "railroad" theory<sup>13</sup> of apportionment and the "vessel" theory<sup>14</sup> of taxation of the plane by the domiciliary state. It is not clear that the court made such a choice, however. The decision indicated that four of the present Justices<sup>15</sup> would apply the "vessel" theory of *situs* if the airplanes are not to be found continuously in a state other than the domiciliary state. Mr. Justice Black apparently would concur because he did not believe that the "railroad" theory should be extended to aircraft operating in several states. The four dissenters<sup>16</sup> seemed to favor the "railroad" theory and criticized the majority opinion for its failure to state clearly that the "home port" state had the exclusive right to tax such airplanes.<sup>17</sup>

Directly relevant is the Supreme Court decision on February 7, 1949, in *Ott v. Mississippi Valley Barge Line, et al*<sup>18</sup> in which the court, holding that Louisiana and the city of New Orleans could levy *ad valorem* taxes on a portion of the tugboats and barges of a foreign corporation, despite the fact that they were a non-domiciliary State and City, said, "1) there is no difference between the *ad valorem* property

<sup>11</sup> In the meantime it appears to be illogical to suggest such Congressional action or such a State Model Bill for the Air Transport Industry under the disguise of promoting legislation which would eliminate or avoid multiple and other burdensome State Taxation on air commerce. One particularly wonders when we note that these proposed statutes authorize an apportioned gross receipts tax.

<sup>12</sup> 322 U.S. 292.

<sup>13</sup> *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149 (1900); *Union Transit Co. v. Ky.*, 199 U.S. 194 (1905).

<sup>14</sup> *Southern Pacific Co. v. Ky.*, 222 U.S. 63 (1911).

<sup>15</sup> Mr. Justices Frankfurter, Murphy, Douglas, and Jackson.

<sup>16</sup> Chief Justice Stone, Mr. Justices Roberts, Reed, and Rutledge.

<sup>17</sup> 322 U.S. 308.

<sup>18</sup> *Ott v. Mississippi Valley Barge Line*, 332 U.S. 69 (1949).

tax problem of an interstate railroad and an interstate vessel company operating on *inland* waters, 2) that the record in the 'domiciliary' state vessel cases did not involve the taxing rights of non-domiciliary states and such rights were not considered, 3) it was reserving the question of the proper method of taxing vessels operating *on the high seas*, 4) the tugboats and barges were not taxed in a domiciliary state although enrolled at ports outside of Louisiana, 5) it would not resolve the factual question whether taxpayers had an average number of vessels in Louisiana every day of the tax year, and pointed out that the state said it was applying the statute only to vessels thus situated." In this decision the court cited the *Northwest Airlines* case,<sup>19</sup> and that reference suggests the possibility of a tax by the domiciliary state of all rolling stock of all interstate businesses and a tax by non-domiciliary state of apportioned segments thereof.

However, in referring to the tax involved in the Pullman Car case cited in note 19, the court in the *Ott* case said:

"Moreover, that tax . . . has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally there is no claim in this case that Louisiana's tax discriminates against commerce."

In light of this text it is inconceivable that the court would allow all the rolling stock of an interstate airline or other interstate transport enterprises to be subjected to an *ad valorem* property tax in the domiciliary state and, at the same time, allow non-domiciliary states to tax a portion of the fleet by applying an apportionment formula.<sup>20</sup>

There seems to be a vast difference in the application of an *ad valorem* property tax on tangible property and such a levy on intangibles or net income or inheritances.<sup>21</sup> While taxation by a domiciliary state of vessels on the high seas appears justified under the due process clause,<sup>22</sup> there would appear to be no justification for multiple taxation of such tangible property by both domiciliary and non-domiciliary states. If multiple taxation of such tangibles is approved, one would find 100% taxation by the domiciliary state, fractional taxation by the non-domiciliary state, 100% taxation of all the fleet by the commercial domicile state, and 100% taxation of specific portions of the fleet by a business *situs* state.<sup>23</sup>

With the addition of Chief Justice Vinson and Mr. Justice Burton, it is believed that the Supreme Court may have completely reversed

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<sup>19</sup> *Northwest Airlines v. Minn.*, 322 U.S. 292-297; also, *Pullman Car Co. v. Pa.*, 141 U.S. 18; *Southern Pacific Co. v. Ky.*, 222 U.S. 63; *Ayer & Lord Tie Co. v. Ky.*, 202 U.S. 409; *Old Dominion S. S. Co. v. Va.*, 198 U.S. 299; *Union Transit Co. v. Ky.*, 199 U.S. 194, 206; *N. Y. Central R. R. Co. v. Miller*, 202 U.S. 584, 597-598.

<sup>20</sup> It must be observed that in this case, as in all the others cited in footnote 19, the rights of a domiciliary and a non-domiciliary state were not presented in the record at the same time.

<sup>21</sup> *First Bank Stock Corporation v. Minn.*, 301 U.S. 334 (1937).

<sup>22</sup> *Southern Pacific Co. v. Ky.*, 222 U.S. 63.

<sup>23</sup> *Wheeling Steel Corporation v. Fox*, 298 U.S. 193.

itself since the *Northwest Airlines* decision. However, it is submitted, no one can predict with any degree of accuracy what the court will do when a non-domiciliary state intends to levy an *ad valorem* property tax on part of an airline fleet. This is particularly true if the fleet has already been subjected to 100% taxation by the domiciliary state.<sup>24</sup>

It should be noted that nothing in the Supreme Court decisions questioning the suitability of judicial technique to multi-tax problems of interstate business favors either the "railroad" or "vessel" theory of taxation of property, income proper, etc.

It has been suggested that Congress consider a bill which would merely provide, (1) that states within which the rolling stock of interstate transport companies is operated may tax a portion of the value of such, (2) that each such state use a defined value for these purposes, and (3) that no state shall apportion to itself a greater value than it would tax if a revenue mileage and hours formula were applied. It appears that such a self-executing statute would eliminate the present confusion and, at the same time, interfere very little with states' rights.

Those favoring the "railroad" theory of assessment have differences of opinion among themselves regarding (1) the apportionment formula to be used in allocating fleet values to the various taxing jurisdictions, (2) the rights of "bridge" states,<sup>25</sup> (3) the effect of operations over "bridge" states on the taxes to be collected by the other states, (4) use of a uniform measure of value and what it should be, (5) whether state or federal legislation, or both, is required, (6) the effect of operation on the high seas and in and over foreign countries, (7) need for administrative agency if federal legislation be enacted, and (8) the proper "level" of assessment and collection, if the proponents of state legislation prevail.

In considering these matters, one should keep in mind: (a) that a taxing agency is limited to property *located* in its jurisdiction and it appears obvious that "bridge" states can not tax portions of a fleet flying over their areas. It is believed that it is not material that a "bridge" state may not constitutionally tax any segment of the fleet, assuming that Congress or the Courts approve the "railroad" theory of assessment, or that a foreign country does not exercise its power, or that the portion of the fleet "allocated" over the oceans is not taxed by any tax agency.

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<sup>24</sup> Maybe the court will say that an airplane operates outside the jurisdiction of a non-domiciliary state because the navigable airspace is comparable to the high seas. Therefore, *Southern Pacific Co. v. Kentucky*, 222 U.S. 63, is applicable. In any event, it would seem that interstate airlines (and other interstate businesses) should, insofar as it can be done as a practical matter, see that the state of incorporation is also the (1) state of most activity, (2) state of commercial domicile, (3) state of business *situs*, and (4) Home Port state.

<sup>25</sup> *U.S. v. Causby*, 328 U.S. 256 (1946); *Judicial Determination of Rights in Airspace*, 51 Dickinson L. Rev. (1947); *The Octroi and the Airplane*, 32 Cornell L. Q., 161 (1946).

(b) Various groups have proposed that flight equipment be apportioned by a formula using as factors aircraft arrivals and departures, originating and terminating tonnage, and originating revenues. It appears that not one of these factors is definitely correlated to the "time" an airplane spends in a taxing jurisdiction, and only arrivals and departures are even remotely correlated thereto. It is suggested that consideration be given to a two factor formula composed of plane hours and revenue mileage, segregated according to types of planes. Such a formula would seem to be more definitely correlated to location of the fleet and favors neither the "terminal" states nor all other states.

(c) If taxation of flight equipment is to be handled legislatively, it appears that uniformity can only be achieved by a single definition of value. Value must be specifically defined and uniformly applied.

(d) In regard to the arguments of competing taxing agencies relative to the merits or demerits of state or local level assessments, it is believed that each state's legislative body must make its own decisions. In any event, air carriers should be treated precisely as other taxpayers in the jurisdiction.

(e) If federal legislation is approved, it is believed the statute should be self-executing and the language on allocation should be general in nature. It should limit each taxing jurisdiction's share of the fleet value apportioned to that segment it would receive if the plane hour and revenue mileage formula were used. Further, each taxing unit should be bound by the uniform definition of value.

#### AVIATION FUEL TAXES

On September 15, 1948, seven states taxed aviation fuel at the regular gas tax rates, thirteen taxed aviation fuel at some fraction of that rate, while 29 states exempted or refunded the full amount levied upon gasoline used as aviation fuel.<sup>26</sup> The Federal government levies a 1½c per gallon tax on aviation fuel consumed in domestic flights.

States such as Pennsylvania and Virginia collect a tax on fuel purchased in the state to the extent that it is consumed within these states. Most states, however, make no allowance for out-of-state consumption. No state collects a tax on aviation fuel purchased outside its jurisdiction and consumed within the state as a source of motive power for interstate movement, with the possible exception of Virginia.<sup>27</sup>

The states have the power to levy a tax upon aviation fuel purchased, stored or withdrawn from storage in a state.<sup>28</sup> On the other

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<sup>26</sup> Resolution adopted by the North American Gas Tax Conference on Sept. 15, 1948.

<sup>27</sup> See, *Mason & Dixon Lines, Inc. v. Va.*, 185 Va. 877, (1947); *American Airlines, Inc. v. Battle*, 181 Va. 1,23 S.E. (2nd) 796 (1943).

<sup>28</sup> *Eastern Air Transport, Inc. v. S. Carolina*, 284 U.S. 147 (1932); *Edelman Air Transport, Inc. v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933); *Trinity-farm Construction Co. v. Grosjean*, 291 U.S. 468 (1934); *Nashville, etc. Ry. v. Wallace*, 288 U.S. 249 (1933).

hand, the Supreme Court has ruled that a state cannot levy a use tax on aviation fuel, purchased outside the state, for the privilege of using it in the state as a source of motive power in an airplane moving in interstate commerce.<sup>29</sup>

The Civil Aeronautics Board and other groups have reported against continuance of state aviation fuel taxes,<sup>30</sup> and the Committee on the Taxation of Airlines of the North American Gasoline Tax Conference was divided on the question until Sept. 15, 1948 when they adopted a resolution opposing aviation fuel taxes.<sup>31</sup>

In 1947 the Joint Committee of the American Bar Association, the National Tax Association, and the National Association of Tax Administrators on Coordination of Federal, State, and Local Taxes reported that the states should have the exclusive right to levy aviation fuel taxes.<sup>32</sup> However, the report also discloses that five members of the Committee were of the opinion that the states should withdraw from that field of taxation.<sup>33</sup>

There appear to be two arguments in support of state aviation fuel taxes. The first is that the Supreme Court has ruled that the states have the power to levy taxes on the sale, storage and withdrawal from storage of such fuel,<sup>34</sup> and the second is that it is a fair source of revenue which can be collected at a minimum cost. However, there are many arguments against such a tax:

(1) The gasoline tax has always been recognized as a "user" tax levied for special benefits rendered to a special group. The states render a minimum of special benefits to the airline industry;

(2) There is little comparison between taxing the fuel used by motor vehicles operating upon the highways and taxing fuel used in airplanes of interstate services. This is becoming more pronounced as the industry adds larger airplanes and schedules longer non-stop flights. There is a direct correlation between motor vehicle fuel taxes and state benefits to owners of motor vehicles which does not exist between state aviation fuel taxes and state benefits to owners of commercial airplanes;

(3) Unless every state adopts such a tax, the revenue argument fails because the levy can be avoided in many states by buying, storing, etc., aviation fuel in the non-taxing states;

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<sup>29</sup> *Helson v. Ky.*, 279 U.S. 245 (1929). See note 31, *supra*. See, *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931).

<sup>30</sup> Page 64 of H.R. Doc. No. 141, 79th Cong., 1st Sess. (1945); page 18 of Sen. Doc. No. 69, 78th Cong., 1st Sess. (1943).

<sup>31</sup> Annual Reports of N.A.G.T.C. for 1945, 1946, 1947, and 1948 and Resolution of September 8, 1948.

<sup>32</sup> See pp. 53 to 63 inclusive of the Joint Committee's Report.

<sup>33</sup> Note 40 on page 63 of the Joint Committee's Report.

<sup>34</sup> See note 28, *supra*.

(4) A very small percentage of such fuel is actually used in any one state;

(5) A tax on aviation fuel can be truly multiple and discriminatory in the sense that one state may tax the purchase, another its storage, and a third its use in that state. It can be extremely burdensome to the airline industry;

(6) The federal government and municipalities have financed the cost of constructing and maintaining airports, airways, and other facilities used in commercial aviation. When one considers that the commercial airlines are not the sole beneficiaries of these facilities and that they pay federal aviation fuel and other taxes, in addition to landing fees, rentals, and taxes to municipalities, it appears that a conclusive argument has been made against the imposition of state aviation fuel taxes;

(7) The profit margin of the air transportation industry is presently quite small. Any increase in operating costs by way of additional state aviation fuel taxes would ultimately have to be borne by the federal government in the form of increased mail pay to the certificated airlines;

(8) Landing fees imposed by municipalities have the same relationship to the air transport industry as motor vehicle fuel taxes have to users of the highways. The former should not be required to pay an additional "user tax" to the states for alleged benefits never received from the states.

It has been suggested that the states relinquish the aviation fuel tax field to the federal government and the latter give the motor fuel tax field to the states.<sup>35</sup> While this might be done with the consent of the states, it does not appear that it may be forced upon the states under the commerce, general welfare, war or tax clauses of the Constitution of the United States. It does not seem likely that many states would voluntarily consent to have their powers thus curtailed.<sup>36</sup>

If the states should decide to tax scheduled airlines under Model State Bills such as that proposed by the Council of State Governments in January 1947,<sup>37</sup> the formula proposed for property, income, gross receipts, and capital stock taxes should be used. The aviation fuel tax could be imposed on that percentage purchased in a state, which could be determined by the formula for other tax bases covered by the Model Bill.<sup>38</sup> This allocation of aviation fuel taxes would recognize that only a portion of such fuel is used in any one state and the use of such formula would be consistent with the general theory of the sponsors of the Model Bill, that one formula be used for all taxes.

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<sup>35</sup> Federal, State and Local Fiscal Relations, Sen. Doc. No. 69, 78th Cong., 1st Sess. p. 527.

<sup>36</sup> See notes 31 and 32, *supra*.

<sup>37</sup> See note 10, *supra*.

<sup>38</sup> See 1947 Annual Report of N.A.G.T.C. for a statement that this should not be done.

If aviation fuel taxes are not abandoned by the states, and it appears in the material presented thus far that they should be, then it seems to be equitable that they should tax that portion of aviation fuel purchased in the state which is used in the state. If a Model Bill is adopted by a state, the formula used in computing other taxes should be applied to determine the amount of aviation fuel used in that state.

The following factors tend to promote additional and new aviation state fuel taxes: (a) rapid expenditure of state surpluses which were created during the war years. The need of general revenue will suggest the aviation fuel tax, although it is only a fair source of revenue but easily collected at a minimum cost; (b) the Federal Airport Aid Act requires matching funds from the state, and many are short of money; (c) the creation and growth of state aeronautical commissions seeking fields for expansion and to justify their operations; (d) lobbying activities of competing older forms of transportation.

### GROSS RECEIPTS TAXES

The gross receipts or earning tax has not been generally levied against the airlines any more than it has been against other taxpayers.<sup>39</sup> With few exceptions it has been limited to intrastate gross receipts or earnings, because it was generally believed that, with the exception in lieu of property tax, a state did not have the power to levy even an apportioned gross receipts tax.<sup>40</sup>

Recent cases indicated that the Supreme Court might sustain an apportioned gross receipts tax if it is fairly apportioned to the commerce carried on within the state.<sup>41</sup>

A formula which would give weight to the factors which create receipts such as mileage, wages, and property, would appear to be a fair apportionment method.

<sup>39</sup> Carrier Taxation, pp. 71-77, 327-328, H.D. No. 160, 79th Cong., 1st Sess.

<sup>40</sup> *Galveston Etc., Ry. Co. v. Texas*, 210 U.S. 217 (1908); *U.S. Express Co. v. Minn.*, 223 U.S. 335 (1912).

<sup>41</sup> *Western Live Stock v. Bureau*, 303 U.S. 250 (1938); *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Freeman v. Hewit*, 329 U.S. 439 (1946); *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947). On Feb. 7, 1949, the Supreme Court in *Ott v. Mississippi Valley Barge Line*, said: "There is such an apportionment under the formula of the Pullman case. Moreover, that tax, like . . . taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. . . ." (Emphasis supplied.) It would appear that the Supreme Court would sustain a gross receipts tax if the tax is fairly apportioned to the commerce carried on within the state. 60 Harv. L. Rev., 501-710; 57 Harv. L. Rev., 40; 53 Harv. L. Rev., 909; 52 Harv. L. Rev., 617; 28 Calif. L. Rev., 168; 36 Ill. L. Rev., 727. The Federal bill sponsored by the CAB and the State Model Bill sponsored by the State Tax Associations provide for the allocation of operating gross receipts of interstate scheduled airlines. Both propose to apportion such receipts by a formula composed of originating and terminating tonnage, originating revenue, and aircraft arrivals and departures. Such a formula would apportion approximately eighty (80%) percent of the gross receipts for a transcontinental airline ticket to the two terminal states although the modern airplane wouldn't operate more than twenty minutes of a ten hour flight in both states while it was actually earning such receipts. If the statutes purported to cover overseas commerce the unfairness of the formula would become more pronounced. However, see, *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946).

Many believe that it is unwise to extend the use of gross receipts taxes as a means to make the domestic airlines pay their fair tax burden. Actually the airlines are in no position to meet a tax not correlated to their ability to pay. It is submitted that a gross receipts tax is a truly burdensome one which will tend to retard the growth and development of our domestic airlines. Therefore, Congress should, in the suggested bill, consider limiting a state's right to tax operating gross receipts to those receipts from intrastate operations. If taxed anywhere, airline gross receipts from non-operating property should be taxed at the commercial domicile of the airline company unless the property has a business *situs* elsewhere, in which case they would be taxed at the other point.

#### TAXES ON INCOME OR FRANCHISES OF SCHEDULED AIRLINES

State taxes paid by the airlines on or measured by net income and franchise taxes measured by net income or capital stock contributed very little to state revenue prior to 1941 and 1945, and it does not appear that these taxes will have much effect upon any state treasury in the immediate future.<sup>42</sup>

It is clear that domiciliary states have the power to levy taxes on or measured by the entire net income or capital stock of the airlines.<sup>43</sup> It is also obvious that non-domiciliary states have the right to levy direct net income taxes or taxes measured by net income or capital stock taxes if a foreign corporation is engaged in some intrastate activities.<sup>44</sup> Further, it has been decided that non-domiciliary states may levy a direct net income tax on the net income derived from sources within such state by a foreign corporation.<sup>45</sup>

It is questionable, however, whether a non-domiciliary state can levy a net income or franchise tax upon a foreign corporation for the privilege of engaging exclusively in interstate commerce.<sup>46</sup> Actually, no domiciliary state levies a non-apportioned income or franchise tax and no non-domiciliary state has, for some time, attempted to levy a privilege tax on a foreign corporation engaged only in interstate commerce.

The CAB sponsored bill would apparently give Congressional approval to any type of a net income or capital stock levy provided the airlines were taxed in accordance with the prescribed Formula.<sup>47</sup> This

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<sup>42</sup> Unless the CAB's action of Feb. 25, 1949, results in considerable changes.

<sup>43</sup> *United States Glue Co. v. Oak Creek*, 247 U.S. 321 (1918); *Shaffer v. Carter*, 252 U.S. 37 (1920).

<sup>44</sup> *Butler Bros. v. McColgan*, 315 U.S. 501 (1943).

<sup>45</sup> *West Publishing Co. v. McColgan*, 166 Pac. (2d) 861, 328 U.S. 823 (1946).

<sup>46</sup> *Leloup v. Port of Mobile*, 127 U.S. 640 (1888); *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910); *Cheney Bros. Co. v. Mass.*, 246 U.S. 147 (1918); *Alpha Portland Cement Co. v. Mass.*, 268 U.S. 203 (1925); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948); *Spector Motor Service, Inc. v. McLaughlin*, 303 U.S. 101 (1944).

<sup>47</sup> Tonnage, revenue and wage for net income taxes and the same for capital stock taxes except that aircraft arrivals and departures would supplant the wage factor.

is another example<sup>48</sup> of how that bill would expand present taxing rights against the carriers without applying the same principles to other interstate businesses. Present decisions do not definitely approve apportioned gross receipt taxes or the imposition, by non-domiciliary states, of privilege taxes against foreign corporations engaged in interstate commerce. The proposed state Model Bill also purports to authorize any type of net income or capital stock tax for the sky carriers provided the tonnage, revenue, and aircraft arrivals and departures formula is applied as above.

Both proposed bills ignore the fact that states have separated net income into apportionable and non-apportionable income and that throughout the years certain formulas have received judicial approval and have become well established in the states.<sup>49</sup>

Unless we are going to provide for unification of income and franchise taxes of all multi-state corporations, it is submitted that accepted and well-established rules should be applied to this field of taxation in regard to the air transport industry.

The Massachusetts formula, consisting of property, payroll, and revenue factors, is as readily and easily applied to airlines as it is to other interstate businesses. This formula has been more generally accepted by most states than any other, and it has repeatedly received judicial approval.<sup>50</sup> Certainly, property used and wages paid to employees should be used in any formula allocating net income of an interstate business.

#### SALES AND USE TAXES PAID BY THE AIRLINES

Sales and use levies result in multiple taxation for the airlines and this is one field where taxes are genuinely burdensome. The air transport industry can centralize purchasing and warehousing while engines, parts, and supplies are inventoried, used, repaired, inventoried, and used again. The same aircraft may be utilized in domestic and foreign flight on any one flight or as a matter of routine change or reassignment of equipment. A sales tax may be paid to a state of purchase or of delivery<sup>51</sup> and thereafter a use tax paid to several states and cities for subsequent storage, withdrawal from storage, or other use in those jurisdictions.<sup>52</sup>

Some states recognize that the use tax is not applicable unless the personal property was purchased with the specific intention of using

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<sup>48</sup> See gross receipts, *supra*.

<sup>49</sup> Address by Bernard L. Tighe, Jr., before the Section of Taxation of the American Bar Association of its 1948 Annual Meeting, titled, "A Treatise on the Formulae for Income and Franchise Taxation of Multi-State Corporations."

<sup>50</sup> *Butler Bros.* case, see note 49, *supra*. ALTMAN AND KEESLING, ALLOCATION OF INCOME IN STATE TAXATION, pp. 129-159 (1946).

<sup>51</sup> *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

<sup>52</sup> *Southern Pacific Co. v. Gallagher*, 306 U.S. 167.

the same in that particular state. Other states say a general vague "universal" intention to so use is sufficient.<sup>53</sup> Many ignore prior use elsewhere, while a few do not levy the use tax if the property has had a "substantial use" elsewhere.<sup>54</sup>

There is no uniformity in the various use tax statutes or in the several administrative interpretations thereof.

The recent trend towards municipal sales and use taxes makes the problem even more serious. An unapportioned sales tax on aviation fuel purchased in the various states results in multiple discriminatory and burdensome levies on air commerce<sup>55</sup> if combined with a use tax in other states. Jurisdictions such as New York levy a sales tax on aviation fuel purchased and used as a source of motive power on foreign flights. This appears to be in clear violation of the export clause of the Federal Constitution.<sup>56</sup>

If a federal bill or a state Model Bill is going to be adopted to cover the tax problems of all multi-state corporations, such a bill might handle this matter by limiting the state taxing power to the imposition of one use or sales tax, whichever tax first becomes applicable.

#### CONCLUSION

While it is believed that the inequities discussed above and the recent *Ott v. Mississippi Valley Barge Line* case suggest the advisability of remedial federal legislation to avoid the possibility of multiple and burdensome taxes being imposed, it is also submitted from the material treated above in this study that any such legislation should be drafted with great care and should be very limited in scope. It should tie in with similar legislation for the benefit of all other multi-state corporations, for, as has been demonstrated in this brief treatment, many of the taxation problems are shared generally. The air transportation industry is not looking for any particular favors in the field of taxation but merely wishes those levies to be imposed in such way that they will not interfere with the development of a strong and successful sky network.

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<sup>53</sup> *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. (2d) 162, 119 Pac. (2d) 945.

<sup>54</sup> California raised a question as to whether 100 hours of engine use was such a substantial one.

<sup>55</sup> See notes 40 and 41, *supra*.

<sup>56</sup> See *Richfield Oil Case*, note 41, *supra*.