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NOTES, COMMENTS, DIGESTS

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NOTES

A REVIEW OF THE CASES INVOLVING THE TAXATION OF GASOLINE MOTOR FUEL USED IN THE INTERSTATE OPERATION OF AIRPLANES.—Where an attack is made on the constitutionality of a state statute on the theory that it invades the exclusive power of Congress over interstate commerce, the courts must decide whether the burden alleged is a direct one on the particular instrumentality. In order to answer this question the court is called upon to determine the incidence of the tax. Therefore, in a review of the airplane gasoline tax cases, it will be noted that this question has been directly or indirectly answered, and an analysis of the following cases will tend to disclose this situation.

The airlines usually obtain their gasoline fuel supply either by direct purchases from distributors in the state of operation, or by purchases made outside the state, transporting the gasoline in tank car lots to a point within and storing the same in underground tanks near the company's hangars, from whence it is pumped into the tanks of the plane. The airline in its normal operation through a particular state will have one or more regular stops within the state where the plane may be refueled and passengers taken on or discharged. In most instances the carriage of passengers and property between points in the same state, i. e., intrastate carriage, is incidental to the interstate operation of the airline. In this method of operation it is practically impossible to determine that proportion of the gasoline consumed as motive power for interstate operation and that consumed for intrastate trips.

A classification of the cases thus far brought before the courts actually amounts to a classification of the type of statute under which the particular tax is sought to be imposed. It has therefore been attempted to group the cases under one or more of the usual three types of state gasoline tax statutes, and although the cases will, to a certain extent, overlap, the classification made will be of aid in the approach to a study of the cases and the problem presented.

The first group of cases arises from a situation where the legislature of the particular state has passed a statute imposing the tax upon the *sale* of gasoline. The leading case in this group is, perhaps, the case of *Eastern Air Transport v. South Carolina Tax Commission*.¹ The airline in this instance purchased its entire fuel supply within the State of South Carolina and carried on no intrastate commerce. The legislature passed an act as follows:

“That every person, etc. . . . engaged in the sale, consigning, using,

1. 53 S. Ct. 340, 1932 U. S. Av. R. 206 (March 14, 1932).

shipping, etc. . . . for the purpose of *sale* within the state . . . shall be subject to a *license* tax."²

The case was heard on appeal from a three-judge District Court, the court holding that the tax sought to be imposed was a valid exercise of state power; that the tax was a privilege tax for carrying on the business of *selling* gasoline within the state. The airline contended that the tax had been construed as an excise or privilege tax and not a property tax, to which contention the court stated the distinction to be unimportant, quoting from the opinion p. 207 (1932 U. S. Av. R.):

"If such a license tax for the privilege of making sales within the state were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the state and hence subject to the state's authority to tax, although the property might actually be used in interstate commerce. . . . Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions."

The court further stated that no distinction could be made between a tax on the sale of gasoline to be used to propel planes in interstate travel, and a tax on the sale of coal or wood to be used to generate motive power in the locomotive of an interstate carrier. The court distinguished the case from the *Helson* case, which will be referred to in the next classification. The case of *Mid-Continent Air Express v. Lujan* was heard before a three-judge District Court and decision rendered March 3, 1931.³ The court had before it the construction of two sections of the following statute of New Mexico:⁴

"Section 60-101—There is hereby levied and imposed an excise tax of 5c per gallon upon the *use* of all gasoline and motor fuel *used* in this state for any purpose"

"Section 60-203—There is hereby levied and imposed an excise tax of 5c per gallon upon the sale of all gasoline *sold* in this state, except gasoline sold in original packages or containers as purely interstate commerce sales."

The plaintiff purchased its motor fuels within the State of New Mexico and although the airline carried on some intrastate business, the court held it to be incidental to the interstate traffic and that the gasoline used for propelling the plane in inter- and intrastate traffic could not be segregated. The court concluded that the tax sought to be imposed was unconstitutional as burdening interstate commerce, inasmuch as it was levied on the *use* of gasoline within the state. However, the same statute again came before the state court of New Mexico in the case of *Trans-Continental & Western Air, Inc. v. Lujan*,⁵ where the court distinguished between the two sections of the statute above quoted and held that the first section imposed a tax on the *sale* of gasoline within the state and should be upheld as a valid exercise of state authority on the principle laid down in the *Eastern Air Transport* case, *supra*. The court ruled that although Trans-continental could not be held under the "use" section of the statute, it

2. Act of February 23, 1922, as amended (South Carolina Acts, 1922, pp. 835-838; 1929, pp. 107-112).

3. 47 F. (2d) 266, 1931 U. S. Av. R. 128.

4. New Mexico Statutes Annotated, codification 1929.

5. 8 P. 103, 1932 U. S. Av. R. 281, (1932).

could be held accountable to the state for the tax as levied upon the *sale* of the gasoline within the state.

The second classification concerns cases decided under statutes which attempt to impose a tax on the *use* or *consumption* of gasoline within the state. The consideration of this type of case requires a review of the holding in the case of *Helson v. Kentucky*,⁶ although this was not a case involving the use of gasoline in airplane operation; nevertheless it was an expression of the Supreme Court on the question of taxing purely the *use* of gasoline in interstate travel. In this case, the State of Kentucky attempted to levy a tax on persons who purchased gasoline without the state, and who "sell or distribute or *use* the same within the state."⁷ The State of Kentucky sued for the amount of the gasoline tax alleged to be due from a ferry company which operated exclusively in interstate travel on the Ohio River. The gasoline which the defendant company used was purchased in Illinois, where defendant's business was located, and used to propel a ferry-boat in the waters of the Ohio River. The evidence showed that 75% of the gasoline used was consumed while the ferry was operating on the river in the State of Kentucky. The court held that the tax levied was unconstitutional since it was a taxing of the *use* of a means of interstate transportation. It was apparent that the tax could be construed only as one upon the *use* of gasoline in interstate commerce since no situs of the property, i. e., gasoline, could be established in the State of Kentucky. Advantage was taken of the theory of this case in *U. S. Airways, Inc. v. Shaw*.⁸ In this instance the District Court had before it the following statute of Oklahoma:⁹

"9987—A—There is hereby levied an excise tax of 4c per gallon on all gasoline consumed in the State of Oklahoma to be reported and collected as hereinafter provided."

Here again the gasoline was bought within the state. The court held the state act to be unconstitutional on the theory that it was not a property tax but an excise or privilege tax which was not applicable to the airlines business. The court stated:

"If the state legislature intended by these enactments to tax gasoline bought in the state and consumed by patrons in the conduct of an interstate transportation business by airplanes, whether such consumption occurs within the state or without, the tax operates directly to burden interstate commerce, because it is a charge on an instrumentality thereof."

The court believed the *Helson* case to be directly in point and that the whole tax must fall since the inter- and intrastate business of the plaintiff were so comingled that a separation of the gasoline used in the respective operations could not be practicably determined. It might be noted at this point that the proceeds of this tax were to be used for the maintenance of highways, etc.

At this point in the classification of cases brought under the "*use*" type statute is injected the line of cases which deal with an act levying a tax on the *use* of gasoline within the state, but one in which the proceeds derived from the tax are used to foster airplane transportation and provide greater

6. 279 U. S. 235, 73 L. Ed. 683 (1928).

7. Sec. 1, Ch. 120, Acts of 1924.

8. 43 F. (2d) 148, 1930 U. S. Av. R. 179 (1930).

9. Laws Okl. 1923, c. 239 and subsequent amendments.

aviation facilities. Although the case of *Varney Airlines v. Babcock*¹⁰ was not the first of the airplane cases dealing with this refinement of the problem, it is perhaps the most satisfactory example of a holding which is supported on the theory that a tax otherwise unconstitutional (as burdening interstate commerce) may be upheld where the proceeds from the tax are used for the maintenance of the particular instrumentality against which the tax is levied. This case was heard before a three-judge court in a District Court of Idaho. The plaintiff airline purchased its gasoline from without the state, transported and stored the same within the State of Idaho, from which it was withdrawn for filling the tanks of the plaintiff's planes. The tax which was sought to be imposed required each dealer engaged "in the sale of motor fuels"¹¹ to pay the tax on all motor fuels sold and/or used by such dealer. The proceeds of the tax were allocated to the upkeep and maintenance of certain aviation facilities. The airline contended that it was not a "dealer engaged in sale" and that the tax was a burden on interstate commerce. The court held that the tax imposed was not one upon the gasoline itself, but upon the "sale and/or use" of the gasoline within the state. The court said:

"The state has power to impose a property tax upon such gasoline as is situated within the state, but the plaintiff does not sell gasoline in the state. All that it does is to import it into the state for its own use in propelling its airplanes in interstate commerce. Therefore, the tax must fall upon the use of gasoline employed by the plaintiff in propelling its airplanes in such commerce, and when so, it falls directly upon the use of one of the means by which commerce is carried on."

The court cited the *Helson* case in support of this position and a number of cases which proceed to justify a particular tax on the theory that "even interstate commerce must pay its way." The argument in the latter group of cases is that since certain facilities are being offered by the state for the better carrying on of the particular type of interstate commerce, it is only fair that those who receive the benefit thereof should bear a portion of the expense of maintenance. The court, however, concluded by an inspection of the statute, noting that the tax was levied on dealers engaged in the sale of motor fuels "sold and/or used" and since plaintiff did not actually sell the gasoline but only used the same, that the act did not apply to it and therefore granted an injunction restraining the collection of the tax.

As a third classification, there has been grouped the so-called *storage* tax cases, i. e., where the statute which seeks to impose the tax is levied on the storage of gasoline within the state. As has been indicated, some airlines purchase their entire gasoline supply from without the state and store it in tanks located on the field of the airport. Reference should be made at this point to Mr. Cooper's article appearing in 4 JOURNAL OF AIR LAW, page 17, for an accurate review of the cases brought under storage tax statutes. The case of *American Airways, Inc. v. Wallace*,¹² and the case of *N. C. & St. L. R. R. v. Wallace*¹³ should be considered together, inasmuch as the respective courts had before them the interpretation of the Tennessee Gaso-

10. 1 F. Supp. 687 (1932).

11. Ch. 172, Laws 1923 of Idaho, as amended.

12. 57 F. (2d) 877, 1932 U. S. Av. R. 209 (1932).

13. 77 L. Ed. 444 (1933).

line Storage Tax. The statute originally imposed a tax upon all persons, etc., engaged in and carrying on the business of "selling" gasoline and distillate in the state. The act was amended in 1925 so as to include "storers" and "distributors" of gasoline. It provided that "storers and distributors shall compute and pay this tax on the basis of their withdrawals and distributions" and that the tax should accrue whether such withdrawal be for sale "or other use;" the tax is a "Special privilege tax, in addition to all other taxes, for engaging in such business in this state."¹⁴ In the *American Airways* case, the District Court rendered a full opinion in which they describe the nature of plaintiff's transportation. The planes stopped at three points within the state and a small intrastate business was done. The gasoline is brought in tank cars from without the state, pumped into private tanks and withdrawn only for plaintiff's use. The court said:

"It is not the intent with which the gasoline is to be used that determines the liability for taxes, but is the status of the gasoline at the time."

"The tax was not one on property but a privilege tax upon the business of storing and withdrawing the gasoline; the amount of the tax being based on the withdrawals."

The court stated further:

"Plaintiff's gasoline is brought into the state in interstate commerce, and it comes to rest in the state, where it may remain for an indefinite period, or for all time as to that matter, thereby terminating the interstate transportation, and is, therefore, not being transported in interstate commerce when it is withdrawn which is the time the tax accrues. The storage and withdrawal, being completed in Tennessee, is an intrastate transaction, and not a transaction in interstate commerce. . . . There is no doubt of the power of the state to impose a license tax upon the conducting of a business in the state."

"There is an obvious distinction between taxing gasoline used for motor fuel in interstate commerce, and taxing the business of storing gasoline within the state, and distributing or allowing the same to be withdrawn from storage for sale or other use. This is not a tax on the gasoline but is a tax upon the privilege of storing and distributing it within the state. Here, we have property located within the state, and used in such a way as constitutes a business subjecting it to a privilege or excise tax."

The court distinguished the case before it from the *Shaw* and *Lujan* cases, to which reference has herein previously been made.

"In the *Shaw* case, the act levied an excise of 4c a gallon on all gasoline consumed in the state, and in the *Lujan* case the law imposed an excise tax upon all gasoline used or sold in the state. The Tennessee statute imposes an excise or privilege tax upon the business of storing and distributing gasoline, and this tax accrues whether the gasoline is used in interstate commerce or otherwise."

The order denying the interlocutory injunction was affirmed by the U. S. Supreme Court.¹⁵ The upper court did not go into the merits of the application by reason of the fact that the injunction had been denied by a three-judge court, which it concluded had not abused its discretion. The U. S. Supreme Court, in rendering an opinion on the same point and on the same statute in the *N. C. & St. L. R. R.* case, said as to the tax:

"Hence there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline,

14. Ch. 58 Pub. Acts of 1923, amended by Ch. 67 Pub. Acts 1925.

15. 77 L. Ed. 12.

which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, supra. Here the tax is imposed on the successive exercises of two of those powers, the storage and withdrawal from storage of gasoline. Both powers are completely exercised before the use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one on the use of gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. (Citing *Eastern Air Transport* case.)"

The court then considered the argument made that the tax violated the 14th Amendment, in that the tax was levied as a charge for the use of the highways, which plaintiff did not use. The court disposed of this question with citation of authority and concluding that the constitutional power to levy taxes does not depend upon enjoyment by the tax payer of any special benefit from the use of the funds raised by taxation. Ordinarily in these cases the question of a violation of the 14th Amendment does not arise until the court has concluded that there is a burden on interstate commerce. Then, the state, in order to sustain their statute, may show, as in the *Varney Airlines* case, that it is a reasonable charge for the facilities provided to the interstate carrier. See in connection with this classification of cases *Western Air Express, Inc. v. Welling*.¹⁶

The history in the case of *Boeing Air Transport, Inc. v. Edelman*¹⁷ furnishes an excellent example of the problems to be faced in the attacking of the constitutionality of a state taxing statute. The case arose in Wyoming where the plaintiff airline maintained within the state fueling facilities at two of its stops, Cheyenne and Rock Springs. Part of the gasoline used by the plaintiff company was purchased within the state and part brought from outside the state and stored in tanks located on the field. The District Court, in sustaining the tax, apparently reached the conclusion that it was a tax imposed on use and that their holding would necessarily be consistent with the *Helson*, *Lujan* and *Shaw* cases, were it not for the fact that the proceeds of the tax were to be used in the promotion of aviation, through the furnishing of certain facilities (the doctrine that even interstate commerce must pay its way). The statute provided essentially as follows:

"Each and every wholesaler . . . who is now engaged . . . in the sale or use of gasoline as herein defined, shall . . . render . . . a statement of all gasoline sold or used by them in the state . . . and pay . . . the license tax of 4c per gallon on all such gasoline. . . . Every person, etc., who shall use any gasoline in this state upon which the said tax had not been paid shall . . . etc."¹⁸

The complainant in the Circuit Court of Appeals¹⁹ contended that although the tax was levied on the wholesaler, it was actually a tax on the consumer. Secondly, that the complainant airline could not buy from distributors without paying the tax. The Circuit Court of Appeals held that as to gasoline purchased within the state, the tax was one levied against the wholesaler and was a tax of the type sustained in the *Eastern Air Transport* case. As to gasoline purchased without the state, reference was

16. 1931 U. S. Av. R. 146 (3d Jud. Dist. Ct., Utah, 1930).

17. 51 F. (2d) 130 (1931).

18. Session Laws of Wyoming 1929, Special Session.

19. 61 F. (2d) 319.

made to a section of the Wyoming statute which required every wholesaler, person, firm, corporation, etc., which transported gasoline into the State of Wyoming to keep a record of all purchases, receipts, sales, etc.

The court concluded:

"Conceding that appellant might make purchase of gasoline outside the state under given circumstances, bring that gasoline to Cheyenne and Rock Springs and use it in interstate flights and not be subject to account to the State Treasury for the statutory tax on gasoline so used, it is the writer's opinion that the pleadings and facts in this case are too meager and indefinite to require and sustain a ruling, and decree thereon."

However, the court did remand the case with directions to issue the writ enjoining collection of the tax on all gasoline procured by appellant on purchases completed outside the State of Wyoming and then brought into that state and used in its planes in interstate commerce. The Circuit Court of Appeals therefore enjoined the collection of the tax on purchases completed outside the State of Wyoming, but whether on the theory that the tax did not apply to that situation or whether the tax, as applied, would amount to a burden on interstate commerce, was not determined, as was pointed out in the opinion rendered in the case when it finally reached the U. S. Supreme Court.²⁰ Although the Supreme Court did not definitely refer to the Wyoming statute as a "storage" act, without question it so considered it. The court said:

"As the statute has been construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes, either on coming into the state, or on going out. It is at the time of the withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the state and therefore subject to the tax, when it is withdrawn from the tank. (Citing the *N. C. & St. L. R. R. Co. v. Wallace* as a comparison case.)

"A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in the *N. C. & St. L. R. R. Co. v. Wallace*."

"But the officers of Wyoming, charged with the enforcement of the taxing statute, are giving no such application to it as was given to that in *Helson v. Kentucky*, supra, and it is not suggested that they will."

We may therefore conclude that a state gasoline tax based on any one of the three following premises may be sustained by the U. S. Supreme Court:

- (1) *A tax directed at the sale of gasoline within the state.*
- (2) *A tax directed at the storage of gasoline within the state where the tax is construed as an excise tax for the privilege of withdrawing, or where it is construed as one on property within the state.*
- (3) *Where the statute is one on the "use" of gasoline within the state, but where the proceeds derived therefrom are directed towards the maintenance of airplane operation facilities. (Although we have no expression of the U. S. Supreme Court on this point as applied to airplanes, we do find numerous District Court cases previously referred to.)*

20. 233 C. C. H. 3049, decided April 17, 1933.

As a result of the holdings indicated, it appears that the only opportunity for a successful attack on a gasoline tax statute is upon one in which the tax is levied directly and purely on the "use" of the gasoline in interstate commerce.²¹

An attack was recently made on the Louisiana statute in *American Airways, Inc. v. Grosjean*,²² in which the court rendered an opinion on June 19, 1933, denying the airlines' prayer for interlocutory injunction and dismissing the bill. The authority relied upon for this holding was the U. S. Supreme Court's decision in the *Boeing Air Transport* case and the *N. C. & St. L. R. R. Co. v. Wallace*. Whether those cases cited are authority for the holding, in view of the foregoing discussion, is a matter of some doubt, and until a definite ruling on a purely "use" statute by the U. S. Supreme Court is made,²³ the airlines may feel justified in continuing their opposition to this form of taxation.

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21. See *W. M. Allen*, "Aircraft Motor Fuel Tax," 4 AIR LAW REVIEW 239.

22. 233 C. C. H. 3097.

23. *American Airways v. Grosjean* is being appealed to the U. S. Supreme Court.