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George W. Lupton Jr.

MOTOR FUEL TAXATION

GEORGE W. LUPTON, JR.*

The decisional law germane to the taxation of motor fuel used in aviation may be said to be settled for once and for all, at least insofar as the constitutionality of the statutes heretofore enacted is concerned. In the case of *Edelman* v. *Boeing Air Transport, Inc.*,[1] the United States Supreme Court held that a state license tax on gasoline brought into the State of Wyoming and stored until used by petitioners interstate airplanes was valid. The statute levied a "license tax on all gasoline used or sold" in the state. The court held that such a tax did not impose an unconstitutional burden on interstate commerce. So also, taxes on "storers" and "distributors" have been held valid upon the ground that storage and distribution are purely intrastate transactions.[2]

The sum result of the cases is that the tax is collectible in all cases except those in which the tax is levied directly on the "use" of gasoline in interstate commerce.[3] And the states taxing such "use" may be expected to change to conform to these decisions.

Although these cases have been severely criticized[4] as not having followed prior pronouncements of the Supreme Court[5] or as making an unwarrantedly fine distinction on the facts between these and earlier aviation use cases[6] nevertheless they are the last word on the subject. The aviation industry and the manufacturers and vendors of gasoline must be governed by the finality of these decisions.

Obviously the only relief is to be found in statutory enactments. The statutes which specifically exempt from the operation of the tax, gasoline not used on the highways of the particular state or which provide for a refund of part or all of the tax are familiar

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*Of the California Bar.

1. 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155, 1933 U. S. Av. R. 170 (1933); accord, *American Airways, Inc.* v *Grosjean*, 290 U. S. 596, 54 S. Ct. 129, 78 L. Ed. 116, 1933 U. S. Av. R. 213 (1933).

2. *American Airways, Inc.* v. *Wallace*, 287 U. S. 565, 53 S. Ct. Rep. 15, 77 L. Ed. 498, 1933 U. S. Av. R. 188 (1932).

3. H. O. Hale, "The Taxation of Gasoline Motor Fuel Used in the Interstate Operation of Airplanes," 4 JOURNAL OF AIR LAW 573 (1933).

4. William M. Allen, "The Aircraft Motor Fuel Tax," 4 Air Law Review 239 (1933).

5. *Helson* v. *Kentucky*, 279 U. S. 245, 49 S. Ct. Rep. 279, 73 L. Ed. 683 (1928).

6. *United States Airways, Inc.* v. *Shaw*, 43 F. (2d) 148, 1930 U. S. Av. R. 179 (1930); *Mid-Continent Air Express Corp.* v. *Lujan*, 47 F. (2d) 266, 1931 U. S. Av. R. 128 (1931).

to all. Section 603[7] of the Federal Revenue Act of 1934 imposes a tax of one cent a gallon on gasoline sold by the producer or importer thereof. Section 601 of the Revenue Act of 1932 imposes a tax of four cents a gallon on lubricating oil sold or imported.

The laws of the various states are summarized in an appendix to this paper. Although complete state legislative histories were not available this table is up to date as of a few weeks ago. This table discloses the variations in the state laws. The gasoline tax is, in effect, a retail sales tax on motor fuel. It is possible that the consumer may pay four taxes on the same gallon of gasoline—federal, state, county and municipal.

Many objections to the imposition of these federal taxes have been made. The states first began to tax gasoline in 1919. Within ten years every state was collecting a tax. Thus, it is argued, since the states have entered the field the federal government should not interfere, since the gasoline tax is a major source of revenue to the states. Insofar as the expenditures of the national government on highways and aviation facilities are concerned they can be justified for purposes of military necessity, the post office and other benefits and the entire tax burden therefor should not be placed on the motorist and the aviator. The federal tax statute, in any event, was originally adopted as a temporary measure[8] but in view of the government's crying need for tax income it may be expected to be continued indefinitely.

The Bureau of Air Commerce estimates[9] that approximately fifty-eight and a half million of gallons of gasoline were consumed by civil and government aircraft during the year 1934; that about twenty-five millions of gallons were burned by air transport, nine and a half millions by miscellaneous flying and twenty-three and a half millions by government aircraft; that during the same period over two million gallons of oil were consumed. One of the large oil companies adds over ten millions of gallons to the government's gasoline estimate. Gasoline and oil constitute the second largest item of operating expense being exceeded only by piloting costs. What are the factors to be taken into consideration by those charged with the duty of presenting the needs of the aviation industry to legislative committees or to other bodies influencing tax legislation? Should motor fuel used for aviation purposes be

7. Amending Section 617 (a) and (b) of the Revenue Act of 1932.

8. See Report of the House Ways and Means Committee on Double Taxation, December 28th, 1932.

9. 6 Air Commerce Bulletin 286.

subject to the same tax as that levied on automobile gasoline or should it be exempt or should the tax be refunded?

At the outset, the fundamental differences between the airplane and the automobile should be taken into consideration. Let us consider first the privately-owned aircraft, the airplane used by an individual for pleasure or business only. From the standpoint of national defense it is to the interests of the United States that as many young men learn to fly as is possible. All agree that the next war will be fought in the air. That combatant which has not available great numbers of competent aircraft pilots will be handicapped from the day war is declared. For the average young man to learn to fly, to purchase his own airplane, to keep it in first class condition and to fly it enough hours "to keep his hand in" has heretofore been impossible. The Bureau of Air Commerce promises us a private plane in the near future the initial cost of which will be reasonable. Repair and maintenance costs will likewise be modest. Operation costs will depend to a great extent on the cost of gasoline and that in turn will depend on the amount of tax that must be paid on fuel. Thus if we would have thousands of pilots available for national emergency we must make it possible for them not only to become pilots but to remain good pilots by constant practice. Air lines pilots could not be called upon for military service for they would be sorely needed in war times to keep the transport network open.[10]

Again, let us consider the transport plane. As necessary to the national well-being as the railroad, the motorbus and the steamship it has many characteristics common to each, but from an operation standpoint is different from all. For example, the present gasoline taxes are primarily aimed at the automobile, the motor truck and the passenger bus. A thirty-three passenger motor-bus with a 175 horsepower engine averages 4.9 miles per gallon of gasoline. The revenue utilization of seats, summer and winter is about 85%. Thus the passenger miles per gallon of fuel are about 137. A popular model airliner developing 1100 horsepower uses 71.09 gallons of fuel per hour at any average block to block speed of 151.9 miles per hour. The revenue utilization of seats is about 60%, resulting in 12.8 passenger miles per gallon of gasoline, or less than one-tenth that of the motor-bus. A six place cabin plane uses seven times as much gasoline as the average seven passenger automobile. The conclusion is obvious. The air transport company is handicapped before it starts in its competition with the

10. Federal Aviation Commission Report, p. 79.

cheaper, slower means of transport, and although it can charge a greater fare because of its speed and convenience to the traveler yet this handicap is out of all proportion to the difference in chargeable fares.[11]

When the air transport companies ask tax exemption they are in effect asking a *pro tanto,* indirect subsidy. Why should they be entitled to such a subsidy? Has government ever subsidized other competitive forms of transport and if so to what extent?

The railroad and inland waterways were the first extensive methods of interstate transport, being the agencies directly responsible for our early national expansion and its concomitant prosperity. Just prior to the Civil War, before the country was a fraction as wealthy as it is now the government granted to the railroads lands then worth at least one hundred and twenty-five millions. States, cities and towns contributed cash or additional lands to induce the railroads to serve the particular community involved. Some of these lands are still owned by the railroad; some were sold years ago. It is true the railroads agreed to carry Government freight, mails and troops at reduced prices, but had it not been for these grants of land and money railroad expansion would have been impossible.

On inland waterways well over two billion dollars have been expended on river and harbor improvements, and approximately half of this stupendous sum has been expended since 1920. In addition the government has invested over thirty-one millions during the past ten years in the Inland Waterways Corporation, an admitted experiment in large scale transportation by barge, which, incidentally, is operated at a tremendous loss each year to the cost of the taxpayer.

Compare these figures with the help that has been given the airplane industry. The Federal Aviation Commission estimates that the approximately seven hundred municipally owned airports in this country represent an investment of about ninety millions public funds. Although in many instances these airports are used by air transport companies yet at the same time they are used by the private owner. The expenditure of a fraction of this amount would have provided ample facilities for the air transport lines. In the fiscal year of 1933, the last full, normal year of air mail operation, the government paid out on air mail contracts only slightly more than the postage revenue to certain of the major lines.

11. *C. C. Thompson,* "Air Transport Operators Oppose Air Craft Fuel Tax," 4 JOURNAL OF AIR LAW 239 (1933).

Other lines, on which the postage revenue was substantially less than the payments to such lines, served cities which demanded air mail service regardless of costs. Thus the so-called subsidy was to such communities rather than to the air lines serving them. The expense to the government of the Bureau of Air Commerce benefits private flying to a considerable degree and should not be charged wholly to the credit of the air transport companies.

The statistics which I give here, are, like most partial statistics, but a caricature of the whole situation. To paint the picture in complete mathematical color would take a small volume but sufficient figures are given to prove beyond a doubt that aviation has not been given a fair proportion of assistance in its struggle to reach the sunlight of economic independence. For aviation to ask that its fuel be exempt from taxation is asking but little. The revenue to the states collecting such a tax would be proportionately negligible but the same difference to an air transport company might mean the difference between death and survival.

In several states the statute provides that that part of the gasoline tax allocable to aviation use shall be used for the improvement of aviation facilities. The intention of such states is commendably paternalistic but this method of assisting the aviation industry is uneconomic. A good proportion of the tax collected must be spent in the collection of the tax, leaving that much less available for useful purposes. The mere cost of collection of the gasoline tax in the United States amounts to twenty-two and a half millions a year. Again, although the persons responsible for the expenditure of the tax may have the best of intentions yet in many cases they are not well informed as to the crying needs of the industry and are thus apt to authorize expenditures for non-essentials. The operator of the airplane may be depended upon to use what money he has available for the most important purposes only. Thus it is readily seen that statutes providing for application of the tax to aviation promotion, while well-intentioned are, in fact, ill-advised because wasteful. Thus the exemption clause statute is the most advantageous for the aviation industry and for the public at large.

Many of the objections to the gasoline tax made by the automobile and petroleum industries are equally applicable to aviation gasoline. For example, statistics prove that the higher the tax the less the amount of taxes collected. Thus, during the first year after the imposition of the federal tax of only one cent a gallon state gasoline tax receipts diminished $23,000,000. In Pennsylvania an increase from a three to a four cent tax rate resulted in a six per cent decrease in the amount of revenue collected. Pennsylvania assessed the four cent rate for about one year after which it returned to the three cent rate. The ordinary private operator obviously will buy less gas the higher its cost to him. He is the consumer and it is the consumer who ultimately pays.

The chief objection to the exemption of any property from taxation is that the remaining property must assume an increased tax burden, resulting in an inequitable distribution of the tax burden.[12] Thus the only reason for granting exemptions is to encourage new industries. This of course is a laudable object. However such exemptions may result in state and municipal competition and friction. Thus in California great bitterness between Los Angeles and San Francisco has been engendered by the bidding of these cities against each other for new industrial enterprises. The state of Florida is reported to have offered the movie industry a ten year exemption from taxes if it would desert Hollywood and move to Florida. Exemption from the tax on aviation fuel could not result in such local jealousies and competition to any great extent for the aviation industry, by its very nature, is nation-wide in extent. Its ultimate object is to serve all communities equally well.

It has been said that exemptions provide an easy method of violating the law; that it is practically impossible to prevent abuse of the exemption privilege. Thus in many states gasoline used for farm purposes is exempt and the individual farmer uses his tax exempt gasoline for his pleasure car. Such abuse of the exemption clause by aviators is impossible because aviation gasoline is used only for airplanes and is sold only at airports, making the administration of the law a simple problem.

In addition to the objections to the tax on gasoline there are many special objections to a tax on motor lubricating oil. In the first place it produces but little revenue. In Arkansas a tax of ten cents per gallon produced only $60,000 a year and over half of the revenue was spent in the administration of the tax statute. The Federal tax has yielded only $822,000 per month as against an estimated yield of $2,750,000. Although the Federal law exempts certain oils, yet it has been impossible to distinguish between lubricating oils and other oils. Again, since lubricating oils are often shipped in comparatively small containers it is difficult to trace the

12. *Harold Hughes*, "Tax Exemptions," 13 Tennessee Law Rev. 79 (1935); *C. W. Stimson*, "The Exemption of Property from Taxation in the United States," 18 Minnesota Law Review 411 (1934).

taxable classifications. This results in "bootlegging" and tax evasion.

The Joint Committee of Railroads and Highways Users recommended in 1933 that

> The public is entitled to the benefit of the most economical and efficient means of transportation by any instrumentalities of transportation which may be suited to such purpose, and no legislation should be enacted which has for its purpose the stifling of any legitimate form of transportation. The supreme test must always be the interest of the public. The public's right to the selection of the agency of transportation which it wants and which it finds most useful must be respected.[13]

To impose a tax upon fuel used in aircraft is to stifle this legitimate form of transportation. It is to the interest of the public that the aviation industry be accorded that same degree of help given the railroad, the inland waterway and the motor bus during their infancy.

SUMMARY OF STATE GASOLINE TAX LAWS

State	*Tax (cents)*	*Disposition*	*Refund or Exemption On Aviation Use*
Alabama	6	Highways	No
Arizona	5	Highways; R.F.C. Fund	Refund
Arkansas	6½	Highways; Airports	Exemption
California	3	Highways	Refund
Colorado	4	Highways; Relief	Refund
Connecticut	2	Highways	Exemption
Delaware	4	Highways	Refund
Dist. of Columbia	2	Highways	Refund
Florida	7	Roads; Schools	Exemption, if stored and used in interstate commerce.
Georgia	6	Roads; Schools	No
Idaho	5	Airfuel tax to Aeronautics Fund	Refund
Illinois	3	Highways; Schools	Refund
Indiana	4	Highways	Refund, gasoline sold at airports tax free.
Iowa	3	Highways	Refund
Kansas	3	Highways	Exemption
Kentucky	5	Highways	No
Louisiana	5	Highways; Relief	Exemption on over 40 gal. purchase.
Maine	4	Highways	¾ of Tax
Maryland	4	Highways	Refund
Massachusetts	3	Highways; General Fund	Refund and/or Exemption.

13. Declaration of Policy, Paragraph 1, part 1, p. 7.

State	Tax (cents)	Disposition	Refund or Exemption On Aviation Use
Michigan	3	Highways; Aeronautics	Refund of 1½c on proof of interstate schedules.
Minnesota	3	Highways	Refund
Mississippi	6	Highways	Refund and Exemption upon carriage of United States mail.
Missouri	2	Highways	Refund
Montana	5	Highways	Refund
Nebraska	5	Highways	No
Nevada	4	Highways	Refund
New Hampshire	4	Highways	Refund
New Jersey	3	Traffic; Waterways	Exemption
New Mexico	5	Highways	Refund on purchase of 50 gallons or more.
New York	4	Highways; General Fund	Refund
North Carolina	6	Highways	Refund and exemption of aviation gasoline not adaptable to automobile use.
North Dakota	3	Highways	Refund
Ohio	4	Highways; Schools; Poor Relief	Refund
Oklahoma	4	Highways	No, unless used in interstate commerce.
Oregon	5	Highways; Aeronautics	Refund
Pennsylvania	3	Highways; Relief; Aeronautics	No
Rhode Island	2	Highways	Refund
South Carolina	6	Highways	No
South Dakota	4	Highways	Refund
Tennessee	7	Highways; General Fund except $50,000 to Airways	No
Texas	4	Highways; Schools	Refund
Utah	4	Highways	No, unless used in interstate commerce.
Vermont	4	Highways	No
Virginia	5	Highways; Bridges	Refund
Washington	5	Highways	Refund
West Virginia	4	Highways	Refund
Wisconsin	4	Highways	Refund
Wyoming	4	Highways	Refund