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## Constitutional Law—Apportioned Ad Valorem Property Tax on Airplanes Engaged in Interstate Commerce

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## COMMENTS

### CONSTITUTIONAL LAW—APPORTIONED AD VALOREM PROPERTY TAX ON AIRPLANES ENGAGED IN INTERSTATE COMMERCE

*Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954)*

Braniff Airways, an Oklahoma corporation, operated in interstate air commerce throughout the central United States, including Oklahoma, making eighteen regularly scheduled stops per day in Nebraska. That state imposed upon the flight equipment of Braniff an apportioned ad valorem personal property tax which the latter sought to avoid on the ground that the aircraft had no situs in the state. The United States Supreme Court held that the airplanes had made sufficient contact with Nebraska to sustain that state's power to tax them.<sup>1</sup>

The power of a state to tax instrumentalities of commerce raises constitutional questions under both the Due Process Clause of the of the Fourteenth Amendment and the Commerce Clause.<sup>2</sup> A contention that a tax discriminates against an interstate carrier presents the Commerce Clause question.<sup>3</sup> When an argument is made, as in the principal case, that the property taxed has no situs within the taxing state, the due process question is raised; the constitutionality of the tax then depends upon whether the property has a situs within the taxing state.<sup>4</sup>

As a limitation upon the power of a state to tax the instrumentalities of interstate commerce, the Supreme Court has applied various concepts of situs with reference to personal property. The Roman law concept of situs, which is expressed by the maxim *mobilia sequuntur personam*, regards personal property, wherever it is located, as being subject only to the law of the owner's domicile.<sup>5</sup> This concept has been applied by the Court in cases wherein states attempted to levy a tax on the full value of ocean-going steamships engaged in coastal trade. Accordingly, a non-domiciliary state cannot tax ships engaged in interstate commerce and only intermittently within its borders.<sup>6</sup> The power to levy a property tax on the full value of the

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1. *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954).

2. HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* 13-20 (1953).

3. *Case of the State Freight Tax*, 15 Wall. 232 (U.S. 1873).

4. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

5. See HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* 79 (1953).

6. *Morgan v. Parham*, 16 Wall. 471 (U.S. 1872); *Hays v. The Pacific Mail S.S. Co.*, 17 How. 596 (U.S. 1854). See *St. Louis v. The Ferry Co.*, 11 Wall. 423 (U.S. 1870) (ferryboats operating on Mississippi River between St. Louis and Illinois).

vessels remains with the state of the owner's domicile even though the ships are never within the boundaries of that state.<sup>7</sup>

The Roman law fiction is giving way to the modern concept of *lex situs*, which regards tangible personal property as being subject to the laws of the state where it is permanently located regardless of where the owner is domiciled. A vessel continuously employed in coastal trade within the borders of one state<sup>8</sup> is, therefore, subject to the levy by that state of a property tax on its full value even though the owner is domiciled within another state.<sup>9</sup>

Either the Roman law fiction or the modern concept of *lex situs* could be applied to sustain a tax levy in cases where the state, attempting to levy a tax on the entire value of instrumentalities of interstate commerce, is the state of the owner's domicile and the vehicles are not outside of that state except while engaged in interstate transportation. The Supreme Court has upheld the validity of such a tax so long as it is not shown that the vehicles are continuously in any other state.<sup>10</sup>

In *Pullman's Palace Car Co. v. Pennsylvania*,<sup>11</sup> the Supreme Court also decided, without reference to the Due Process Clause of the Fourteenth Amendment,<sup>12</sup> that the instrumentalities of interstate land transportation may acquire a *tax situs* in each state through which they regularly pass, allowing each state to levy a property tax on the average number of vehicles which are within its borders during the tax year. As a corollary to this rule, the Court in *Standard Oil Co. v. Peck*<sup>13</sup> held that the acquisition of such a tax situs in other states

shore held not taxable by St. Louis). These cases were not decided under either the Due Process Clause or the Commerce Clause but by the application of common law concepts of situs. See Page, *Jurisdiction To Tax Tangible Movables*, [1945] Wis. L. Rev. 125, 143 *et seq.*

7. *Southern Pacific Co. v. Kentucky*, 222 U.S. 63 (1911).

8. A vessel carrying goods destined for interstate commerce is itself engaged in interstate commerce although it remains permanently within one state. *The Daniel Ball*, 10 Wall. 557 (U.S. 1871).

9. *Old Dominion S.S. Co. v. Virginia*, 198 U.S. 299 (1905). Nor can the domiciliary state of the owner tax the full value of vehicles permanently located outside of its borders. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

10. *New York ex rel. New York Central R.R. v. Miller*, 202 U.S. 584 (1906). The Court treated the tax as if it were a property tax although the New York statute in question called the tax a franchise tax. *Id.* at 596. The Court used the Roman law concept of situs as a basis for the decision. *Id.* at 597.

11. 141 U.S. 18 (1891); see *Marye v. Baltimore & Ohio R.R.*, 127 U.S. 117, 123 (1888).

12. The case was decided on the basis of the Commerce Clause and common law concepts of situs, but this rule was followed after the Due Process Clause was recognized as raising the constitutional point of whether the property taxed has a situs within the state. *Adams Express Co. v. Ohio*, 165 U.S. 194 (1897); *accord*, *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899).

13. 342 U.S. 382 (1952).

prevents the domiciliary state from taxing the full value of the vehicles.<sup>14</sup>

In *Northwest Airlines, Inc. v. Minnesota*,<sup>15</sup> the first case decided by the Supreme Court involving state taxation of flight equipment, airplanes flying on fixed routes through eight states were held taxable for their entire value by Minnesota inasmuch as that state was the domicile of the owner and it was not shown that the planes had acquired a taxable situs in any other state; on the contrary, they were only shown to have acquired a taxable situs within the taxing domiciliary state. The principal case, the second decision concerning state taxation of planes, involves the taxation of that proportion of aircraft acquiring a tax situs within a taxing non-domiciliary state. The power of a state to levy such an apportioned ad valorem tax on an instrumentality of commerce, other than airplanes, was previously held valid with<sup>16</sup> and without reference<sup>17</sup> to the Due Process Clause of the Fourteenth Amendment. The holding in the principal case that eighteen stops per day in Nebraska were sufficient contact for the planes to acquire a tax situs within that state is a reasonable application of the previous cases.<sup>18</sup> The benefits and opportunities of an interstate air carrier doing business within, and operating through, a state are no less than those afforded to interstate land and water carriers.

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CONSTITUTIONAL LAW—USE TAX—JURISDICTION TO REQUIRE OUT-OF-STATE VENDOR TO COLLECT USE TAX

*Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954)

Maryland's use tax statute requires the vendor, whether he is located in or out of state, to collect and remit to the State of Maryland the use tax on all goods sold to Maryland residents for use in Maryland.<sup>1</sup> Miller Brothers Company, a Delaware corporation, sold goods to Maryland residents only at its store in Delaware. Some of the goods were carried home by the purchasers; others were delivered in Maryland by Miller Brothers' trucks. This was Miller Brothers' only

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14. Nor can a non-domiciliary state tax the full value of vehicles merely because they have a tax situs within that state. *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158 (1933).

15. 322 U.S. 292 (1944).

16. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

17. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18 (1891).

18. The doctrine of *Standard Oil Co. v. Peck*, *supra* note 13, would probably prevent the domiciliary state from levying a tax on the entire value of flight equipment engaged in interstate commerce even though the aircraft have a tax situs within the domiciliary state if the aircraft are shown to have acquired a tax situs in other states.

1. MD. ANN. CODE GEN. LAWS art. 81, §§ 368 to 396 (1951). See especially §§ 368(b), 368(k), 369 and 371. Of course, if the state sales tax has been paid, the use tax need not also be paid. *Id.* § 370(a).