

## THE HOME PORT DOCTRINE HELD APPLICABLE TO FOREIGN AIR COMMERCE

*Scandinavian Airline System, Inc. v. County of Los Angeles*  
56 Cal. 2d 1, 363 P.2d 25 (14 Cal. Rptr. 25) (1961),  
cert. denied, 368 U.S. 899 (1961)

The city and county of Los Angeles assessed personal property taxes on respondent's aircraft which were registered and based in foreign lands and engaged solely in foreign commerce. The aircraft averaged eight round-trips a year between Scandinavian ports and Canada. Each flight used the Los Angeles airport as its sole United States terminus for less than 34 hours per flight, thereafter leaving the United States. The taxable value of the aircraft was apportioned by means of a formula based on the length of time the aircraft were present in the country. From a judgment of the Los Angeles County Superior Court, which allowed plaintiff-airlines a refund of the taxes paid under protest, the city and county appealed. The California Supreme Court affirmed,<sup>1</sup> holding the tax to be a burden upon foreign commerce prohibited by the commerce clause of the Constitution of the United States. The theory of the majority was based on the United States Supreme Court's doctrine that ocean-going vessels engaged in foreign commerce are taxable only at their home port<sup>2</sup> as items of tangible personal property.<sup>3</sup>

The issue discussed by the California court was whether the home port doctrine or the more recent apportionment doctrine of taxation should be applied to foreign air carriers. While the Supreme Court has ruled on the taxable situs of ocean-going vessels,<sup>4</sup> inland waterway vessels,<sup>5</sup> domestic railroads,<sup>6</sup> motor carriers,<sup>7</sup> and interstate air carriers,<sup>8</sup> there has been no decision as to the taxable situs of foreign air carriers engaged only in foreign commerce.

The home port doctrine was announced in *Hays v. The Pacific Mail*

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<sup>1</sup> *Scandinavian Airline System, Inc. v. County of Los Angeles*, 56 Cal. 2d —, 363 P.2d 25 (4-2 decision) (1961).

<sup>2</sup> Home port has been interpreted to be the true domicile of the ship, the port nearest its owner, or its port of registration. *White's Bank v. Smith*, 74 U.S. (7 Wall.) 646, 651 (1868); *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1854).

<sup>3</sup> The court also based its decision on interpretation of treaties with Scandinavian Nations: Convention and Protocol with Sweden respecting double taxation, March 23, 1939, 54 Stat. 1759, T.S. No. 958; Convention with Denmark respecting double taxation, May 6, 1948, 62 Stat. 1730, T.I.A.S. No. 1854; Convention with Norway for the avoidance of double taxation, June 13, 1949, 2 U.S.T. (1951) Part 2, p. 2323, T.I.A.S. No. 2357, 2 U.S.T. Part 2, p. 2353, T.I.A.S. No. 2358.

<sup>4</sup> *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1854).

<sup>5</sup> *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1948).

<sup>6</sup> *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1890).

<sup>7</sup> *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1927).

<sup>8</sup> *Braniff Airways, Inc. v. Nebraska State Bd.*, 347 U.S. 590 (1954).

*Steamship Co.*<sup>9</sup> in 1854. This case held that a vessel engaged in interstate commerce, but plying foreign waters,<sup>10</sup> was taxable only at its domicile or home port, and that such vessels did not acquire a taxable situs in other ports which they entered only in transit. The Court stressed a lack of jurisdiction on the part of other than domiciliary states to impose personal property taxes, because such property did not become part of the personality of in-transit ports.<sup>11</sup> However, it should be noted that when this case was decided, systems of apportioned state taxation were not generally known or practiced as they are today.<sup>12</sup> The fact that the vessels plied international waters also seems to have had some significance in the decision, for such vessels are considered within federal jurisdiction exclusively.<sup>13</sup>

The dissenters in the principal case stress the fact that the home port doctrine has been repeatedly undercut or limited in Supreme Court decisions subsequent to the *Hays* decision.<sup>14</sup> The dissent relies on the latest Supreme Court decision in point, *Braniff Airways, Inc. v. Nebraska State Board*.<sup>15</sup> Braniff Airways was domiciled in Minnesota which was also its principal place of business, but Braniff made regularly scheduled stops in Nebraska.<sup>16</sup> The majority of the Court held that this was enough to establish a taxable situs for the Nebraska assessment of an apportioned personal property tax

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<sup>9</sup> *Supra* note 4.

<sup>10</sup> Pacific's vessels, upon leaving New York City, stopped in Panama as well as California.

<sup>11</sup> In *St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423 (1870), the Supreme Court applied the theory of the *Hays* case to bar a personalty tax by an in-transit port where plaintiff-corporation conducted a ferry-boat service across the Mississippi River. Thus the early rule that interstate commerce via inland waterways was taxable only at the home port. In 1948, in *Ott v. Mississippi Valley Barge Line Co.*, *supra* note 5, the Court ended the home port doctrine for this type of interstate commerce by holding it subject to apportioned taxation.

<sup>12</sup> State apportioned taxation of interstate commerce was not established until the advent of nation-wide railroad systems which raised problems of how to properly tax rolling stock which remained or passed through many states during the tax year. See, generally, *Pullman's Palace Car Co. v. Pennsylvania*, *supra* note 6, and *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

<sup>13</sup> Such a theory was propounded in *Cooley v. Bd. of Wardens of Philadelphia*, 53 U.S. (12 How.) 298, 319 (1851), which did not explicitly deal with the home port doctrine, but did hold that while there are, under the commerce clause, certain areas of commerce requiring exclusive federal control, there are local areas of interstate and foreign commerce which the states may regulate, such as harbor pilot regulations.

<sup>14</sup> *Scandinavian Airline System, Inc. v. County of Los Angeles*, 363 P.2d 25, 46, 14 Cal. R. 25, 46 (1961).

<sup>15</sup> *Supra* note 8. The dissenters also relied on the cases upholding apportioned taxation of other forms of interstate commerce in an attempt to demonstrate the home port doctrine had become obsolete. See the cases cited in notes 5-8, *supra*. It should be noted that in none of these cases did the Supreme Court reach the question of apportioned taxation of foreign commerce, nor was the home port doctrine, as applied to foreign commerce, overruled in any of the cases.

<sup>16</sup> *Braniff Airways, Inc. v. Nebraska State Bd.*, *supra* note 8, at 600. Appellant's aircraft made eighteen stops per day in Nebraska.

on Braniff's aircraft. Since the Court had previously ruled that interstate commerce via railroad, inland waterway or motor carriage was subject to apportioned taxation among the several states, it permitted the apportioned taxation of interstate air commerce<sup>17</sup> on the same basis.<sup>18</sup>

The California courts have followed the rule of *Braniff* in two cases prior to the principal case. In *Slick Airways, Inc. v. County of Los Angeles*,<sup>19</sup> a California District Court of Appeals held that a Delaware corporation's fleet of airplanes, engaged in interstate commerce and principally located in California, was taxable only on an apportioned basis.<sup>20</sup> In *Flying Tiger Line, Inc. v. County of Los Angeles*,<sup>21</sup> a portion of plaintiff's fleet of aircraft domiciled in the county had been engaged principally in foreign commerce.<sup>22</sup> The California Supreme Court cited and followed the *Braniff* case, holding that the aircraft were taxable by the county only on an apportioned basis. The court reasoned that the *Braniff* and *Standard Oil*<sup>23</sup> decisions prohibited a full-value tax by the domiciliary county because the aircraft were receiving substantial benefits and protections while in foreign jurisdictions.

The majority in the instant case was concerned with multiple taxation of foreign air carriers, holding that such taxation was a violation of the commerce clause. The court reasoned that *Braniff* was not controlling because it concerned only interstate air carriers. The theory of the decision in this respect was that *Standard Oil*<sup>24</sup> judicially protects interstate air carriers

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<sup>17</sup> *Ibid.* "A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats." Again, it is significant that the Court does not extend its holding to foreign commerce, but limits it to domestic interstate air carriage.

<sup>18</sup> *Pullman's Palace-Car Co. v. Pennsylvania*, *supra* note 12. In the land carrier cases, because such carriers necessarily establish extended periods of physical contact with the taxing non-domiciliary states, it was not too difficult to find that multiple tax sites had been established. But air carriers, in the course of flying into and out of a state, normally do not establish such clear physical contact with the non-domiciliary jurisdictions. This is the point made in the dissent to *Braniff*, in contending that apportioned taxation of air carriers may be an encroachment upon the commerce clause by reason of multiple taxation.

<sup>19</sup> 140 Cal. App. 2d 311, 295 P.2d 46 (1956).

<sup>20</sup> *Ibid.* The decision involved one airplane purchased by Slick which had not yet joined its interstate fleet. The rest of the fleet was apportionately taxed, and the court held the same basis applicable to the new airplane. No question of foreign commerce was involved.

<sup>21</sup> *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P.2d 323 (1958).

<sup>22</sup> *Ibid.* The greater part of Flying Tiger's fleet was engaged in interstate commerce and had been taxed apportionately. Ten aircraft were operated under U.S. military control, flying in airlifts from California to Japan, and full value taxes were assessed on five of the aircraft.

<sup>23</sup> *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952).

<sup>24</sup> *Ibid.* "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of domicile."

from multiple taxation but could not similarly protect foreign air carriers. The court assumed that extension of the home port doctrine to foreign-based air carriers met the commerce clause problem of multiple taxation, but this conclusion was not valid. The majority did not go far enough. The other half of the commerce clause problem concerns air carriers domiciled in the United States and flying solely in foreign commerce, *e.g.*, California-based airlines flying into Mexico. Allowing California to tax full value as the home port would not meet the problem of multiple taxation as a commerce clause issue since Mexico is not bound, in the absence of treaty, to refrain from taxing such air carriers. A tax which raised the threat of multiple taxation of interstate commerce has been held to be prohibited by the commerce clause<sup>25</sup> on the basis that such a tax would discriminate against interstate commerce in favor of local or intrastate commerce. The *threat* of double taxation is not enough. It must be established that the tax makes interstate commerce more expensive than intrastate commerce, the theory being that an economic advantage to local commerce hampers the development of a free-flowing national commerce.<sup>26</sup> In the instant case, since Scandinavian Airways had paid a full value tax at its home port, upholding California's apportioned-value tax would subject it to multiple taxation of its property. However, when the tax is considered on a commerce clause basis alone, there does not seem to be a commerce clause violation because there is no discriminatory burden imposed on the airline by the tax.

The majority opinion also stresses the issue of jurisdiction to tax property of foreign carriers and, taken with the commerce clause question, the court seems to have blurred the constitutional issue of due process with commerce clause issues. Due process, in its proper perspective, relates to the justification for taxation of a carrier's property by a non-domiciliary jurisdiction. There must be a justification for the tax premised on the taxing jurisdiction's police-power protections and other benefits conferred on the carrier engaged in foreign or interstate commerce within the taxing jurisdiction.<sup>27</sup> Had the California court kept the due process issue separate from the commerce clause question, it could have reached its decision of invalidity of the California tax on the due process issue alone by holding that the justification for the tax was lacking. If due process is not satisfied in the imposition of a property tax on carriers, the tax should be held invalid without touching upon the separate issue of a commerce clause violation. In the instant case, the amount of police power protections<sup>28</sup> afforded

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<sup>25</sup> It is now substantially agreed that prohibition of taxes raising the threat of multiple taxation, as an undue burden of commerce, springs from the commerce clause and the intent of the framers to have a free-flowing national commerce. *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Standard Oil Co. v. Peck*, *supra* note 23; *Ott v. Mississippi Valley Barge Line*, 336 U.S. 169, 174 (1948); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905); *Old Dominion S.S. Co. v. Virginia*, 198 U.S. 299 (1905).

<sup>28</sup> *E.g.*, fire and police protection.

Scandinavian Airlines was not great. The tax may have had some relation to the benefits, opportunities or protections afforded the tax carrier, and the need of the taxing state for additional revenue may have been genuine, but the physical relationship between the carrier and the taxing state and the production of revenue derived by the carrier within the state must be substantial enough to justify the tax.<sup>29</sup> The justification should be balanced against the activity of the carrier within the taxing state, considering time spent in physical contact with the state, whether benefits were afforded the carrier by the state, and possibly whether the benefits conferred on the carrier were compensated in other ways, *via* payment of airport rentals and gasoline taxes.<sup>30</sup> What constitutes a substantial relationship justifying an apportioned property tax has not been explicitly defined, but if due process was satisfied in *Braniff*, it could well be satisfied in the instant case as well. To reach the majority decision, the *Braniff* hurdle of due process must be overcome, and the majority might have properly reasoned on such a basis because the commerce clause and due process issues were not clearly distinguished in *Braniff*.<sup>31</sup>

The majority of the California court alternatively held that the tax could be held invalid on the basis of treaties between the United States and the Scandinavian countries regarding multiple taxation. Applicability of these treaties to property taxation of air carriers is not clear because of an absence of specific provisions to that effect, but the majority construed the treaties to be applicable at least to part of Scandinavian's aircraft.<sup>32</sup> If the majority decision is to be maintained, a much greater reliance on the treaties is necessary, especially if it were to be determined that due process was satisfied. Federal uniform legislation is the proper solution to this type of property taxation which does impose some degree of double

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<sup>29</sup> *Ott v. Mississippi Valley Barge Line*, *supra* note 27, at 174: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state."

<sup>30</sup> While no figures are available for the instant case, the dissenting opinion of Mr. Justice Frankfurter in *Braniff* points out that where *Braniff's* aircraft made eighteen five-to-twenty minute stops per day in Nebraska, it paid \$22,000 for use of the airport facilities, gasoline taxes of \$14,000 and other property taxes for its equipment continuously located in Nebraska during the tax year. Even where airport facilities are privately owned and leased to local governments, various income and corporate taxes imposed on the private owners result in portions of such revenue reaching the state treasury.

<sup>31</sup> *Braniff Airways, Inc. v. Nebraska State Bd.*, *supra* note 8. The Court based its due process decision on the amount of time *Braniff* spent in the state of Nebraska, the amount of revenue derived from Nebraska operations, and presumably on unspecified protections conferred on the carrier.

<sup>32</sup> The court held that the language of the treaties precluded state property taxation of foreign carriers only for aircraft owned and registered in Sweden. The dissenting opinion felt that judicial interpretation of the treaties did not preclude any state property taxation of foreign carriers, showing again that the applicability of the treaties to the case at hand was primarily a matter of judicial discretion.

taxation.<sup>33</sup> But in the absence of international treaties or federal legislation, apportionment may be the best solution the courts can adopt.

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<sup>33</sup> Congress enacted a resolution directing the Civil Aeronautics Board to develop "the means for eliminating and avoiding, as far as practicable, multiple taxation of persons engaged in air commerce . . . which has the effect of unduly burdening or impeding the development of air commerce." 58 Stat. 723. The C.A.B. thereafter recommended that Congress enact a uniform allocation formula to apportion taxes among the states, but no legislation has yet resulted. H.R. Doc. No. 141, 79th Cong., 1st Sess.