THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

March 28, 1960

Hon. E. J. Elam
County Attorney
Somervell County
Glen Rose, Texas

Opinion No. WW-818

Re: Whether the aircraft of a commercial airline are taxable on an ad valorem basis when such aircraft are based in the county of the company's domicile even though the aircraft fly in interstate commerce.

Dear Mr. Elam:

You have requested an opinion on two questions:

"1. Are the aircraft of a commercial airline [taxable] on an ad valorem basis when such aircraft are based in the county where the company is domiciled, even though the aircraft fly in interstate commerce?

"2. If these aircraft are taxable would the apportionment rule as laid down by the Federal Courts in the Flying Tigers and other cases be legally applicable in Texas, or should the assessment be made on all the aircraft on the basis of total value?"

Article VIII, Section 11, of the Texas Constitution provides:

"All property, whether owned by persons or corporations, shall be assessed for taxation, and the taxes paid in the county where situated, but the Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts."

Article 7153 of Vernon's Civil Statutes of Texas states:

"All property, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where

> it is situated; and all personal property, subject to taxation and temporarily removed from the State or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated."

The foregoing provisions have been construed to mean that property shall be taxed at its proper tax situs. Great Southern Life Insurance Company v. City of Austin, 243 S.W. 778 (Tex.Sup.Ct. 1922); Fielder, The Texas Tax Structure, V.C.S., Volume 20, page XIII. Under the common law, personal property is taxable at the domicile of its owner unless such property has acquired a fixed or permanent situs elsewhere. See Great Southern Life Insurance Company v. City of Austin, supra. Under the facts presented in question No. 1, it is apparent that the aircraft, which are based in the county where the company-owner is domiciled, have a situs in that county (and only in that county) for the purpose of Texas ad valorem taxation. See Chemical Express, et al. v. City of Roscoe, 310 S.W.2d 694 (Tex.Civ. App. 1958, error ref.). It remains to determine whether the county may, consistently with the Federal Constitution, impose ad valorem taxes upon the full value of the aircraft.

The answer to question No. 2 is controlled by four cases decided by the United States Supreme Court. The first is Northwest Airlines, Incorporated v. Minnesota, 322 U.S. 292 (1944). This case held that the State of Minnesota, in which the subject airline was domiciled, had constitutional power to tax the airline's entire fleet of aircraft at the full value thereof, even though all the planes were continuously engaged in interstate flight. A vigorous dissenting opinion was written by Chief Justice Stone, in which it was contended that Minnesota could only impose an apportioned ad valorem tax.

In 1949 the Supreme Court held in Ott v. Mississippi Barge Line, 336 U.S. 169, that Louisiana, a non-domiciliary state, could tax barges and tugs moving in and out of the state, on an apportioned ad valorem basis according to the commerce carried on within the state.

Standard Oil Company v. Peck, 342 U.S. 382 (1952), which involved vessels traveling on the Mississippi River, adopted the rule that a domiciliary state could not tax, on an ad valorem basis, the full value of property located only part of the time within its borders, and which must have

acquired a tax situs elsewhere, without constituting an unreasonable burden on interstate commerce. The court stated at page 310:

> "The rule which permits taxation by two or more states on an apportioned basis precludes taxation of all the property by the state of the domicile."

The court distinguished the Northwest Airlines case on the ground that in that case it had not been shown that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere.

In 1954 the Supreme Court held in Braniff Airways, Inc. v. Nebraska Board of Equalization and Assessment, 347 U.S. 590, that the State of Nebraska could subject the aircraft of a non-domiciliary interstate airline to an apportioned ad valorem tax, even though the airline made only 18 regularly scheduled stops in the state. In holding that the regularly scheduled stops formed a sufficient nexus with the taxing jurisdiction to allow taxation of a properly apportioned fraction[1] of the airline's property, the court ratified and adhered to Standard Oil v. Peck, and distinguished the Northwest Airlines case in the following language:

> "While no one view [in the Northwest case] mustered a majority of this court, it seems fair to say that without the position stated in the Conclusion and Judgment which announced the decision of this court, the result would have been the reverse. That position was that it was not shown 'that a defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere.' 322 U.S. at page 295, 64 S.Ct. at page 952. That opinion recognized the 'doctrine of tax apportionment for instrumentalities engaged in interstate commerce,'

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[1] The concurring opinion of Mr. Justice Douglas states, in effect, that this fraction is the amount of property that justifiably can be said to be within the taxing jurisdictions at all times during the taxing period. The validity of this proposition is somewhat dubious in view of the apportionment formulas that have received either direct or tacit approval. See the discussion above.

> 322 U.S. at page 297, 64 S.Ct. at page 953, but held it inapplicable because no 'property (or a portion of fungible units) is permanently situated in a state other than the domiciliary state.'"

In view of the foregoing, it appears that where a non-domiciliary state has acquired the power to impose an apportioned ad valorem tax, the domicile must also impose an apportioned tax. See the analysis in Flying Tiger Line v. County of Los Angeles, 333 P.2d 323 (Cal.Sup.Ct. 1958); and see Slick Airways, Inc. v. County of Los Angeles, 295 P.2d 46 (Cal.Ct.App. 1956), and Flying Tiger Line v. County of Los Angeles, 323 P.2d 1065 (Cal.Ct.App. 1958). Under the Braniff case, it is clear that regularly scheduled arrivals and departures in a state are sufficient to establish an ad valorem tax situs in that state. However, though there has been no concrete rule established on this point, it does not appear that intermittent, irregular or sporadic flights into another state will form a sufficient nexus with that state to allow the imposition of even an apportioned ad valorem tax. See Braniff case, 347 U.S. at pages 592-3. Therefore, we are unable to answer your second question since you have not set forth sufficient facts upon which to base a conclusion. If, in fact, the airline to which you refer has not acquired a taxable situs in another state within the purview of the Braniff case, then all aircraft based in your county are taxable at their full value. If, however, a taxable situs has actually been acquired in another state, then the ad valorem tax by your county must be apportioned.[2] In this connection,

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[2] Texas has no uniform apportionment rule. Therefore, the formula to be used is within the discretion of the county. All that is required is that it comport with the traditional concept of due process, i.e., that it have some relation to the benefits and protection afforded by the taxing state. See Flying Tiger Line v. County of Los Angeles, 333 P.2d 323 (Cal. Sup.Ct. 1959); Braniff Airways v. Nebraska, supra. If the formula meets this test, then, under the rationale of the Braniff case, there will be no violation of the Commerce Clause of the Federal Constitution.

In the Flying Tiger cases in California the apportionment formula was based upon the equalization board's determination of the amount of time spent by the aircraft in the county during an arbitrary period during the taxable year. In the Braniff case the apportionment was based upon a three-factor allocation formula, the three factors being (1) arrivals and departures, (2) revenue tons and (3) originating revenue. Justice Frankfurter, in footnote 3 to his dissenting opinion in this case (347 U.S. at page 606), points out that three other apportionment formulas have been proposed.

it makes no difference whether the aircraft are actually being taxed in another state, so long as a taxable situs in another state has been acquired. Flying Tiger Line v. County of Los Angeles, 333 P.2d 323.

SUMMARY

Aircraft of a commercial airline are taxable on an ad valorem basis when such aircraft are based in the county where the company is domiciled even though the aircraft fly in interstate commerce. Whether or not such aircraft are taxable at their full value or on an apportioned basis depends upon whether such aircraft have obtained a taxable situs in another state within the purview of the case of Braniff Airways v. Nebraska State Board of Equalization and Assessment. 347 U.S. 590 (1954).

Very truly yours,

WILL WILSON
Attorney General

By Jack N. Price
Assistant

JNP:bct

APPROVED:

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APPROVED FOR THE ATTORNEY GENERAL:
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