

1936

## TAXATION -INTERSTATE COMMERCE- LEVY ON USE BY INTERSTATE CARRIER OF GASOLINE BOUGHT OUTSIDE STATE

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [State and Local Government Law Commons](#), and the [Taxation-State and Local Commons](#)

---

### Recommended Citation

*TAXATION -INTERSTATE COMMERCE- LEVY ON USE BY INTERSTATE CARRIER OF GASOLINE BOUGHT OUTSIDE STATE*, 34 MICH. L. REV. 1260 (1936).

Available at: <https://repository.law.umich.edu/mlr/vol34/iss8/30>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

TAXATION — INTERSTATE COMMERCE — LEVY ON USE BY INTERSTATE CARRIER OF GASOLINE BOUGHT OUTSIDE STATE — A statute of New Mexico imposed "an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel. . . ." <sup>1</sup> The effect of the statute was to compel the appellee corporation, a common carrier, to pay a tax upon the use of motor fuel purchased in and brought from another state and used only in such transportation. This suit was brought to enjoin enforcement of the foregoing statutory provision on the ground that it constituted a regulation of interstate commerce in contravention of the commerce clause of the Federal Constitution. *Held*, the statute as applied to appellee was invalid in that it imposed an excise tax for the use of an instrumentality of interstate commerce. *Bingaman v. Golden Eagle Western Lines*, (U. S. 1936) 56 S. Ct. 624.

A state may not impose a tax on interstate commerce in any form.<sup>2</sup> Thus a tax for the privilege of using one of its instrumentalities is invalid.<sup>3</sup> In the absence of federal legislation, however, a reasonable tax upon vehicles engaged exclusively in interstate commerce is valid as a fair contribution to the cost of constructing and maintaining public highways.<sup>4</sup> In holding the tax a charge for the use of an instrumentality of interstate commerce, the decision follows a previous case wherein the Supreme Court held that a state tax on gasoline used within the state was invalid when imposed upon gasoline purchased outside the state and consumed by a ferry engaged in interstate commerce.<sup>5</sup> Since even interstate commerce must pay its way,<sup>6</sup> the Court might have considered

<sup>1</sup> N. M. Laws (1933), c. 176, § 2.

<sup>2</sup> *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1 (1824); *Reading R. R. v. Pennsylvania*, 15 Wall. (82 U. S.) 232 (1872); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 S. Ct. 826 (1885); *Lyng v. Michigan*, 135 U. S. 161, 10 S. Ct. 725 (1890); *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 45 S. Ct. 184 (1925).

<sup>3</sup> *Helson v. Kentucky*, 279 U. S. 245, 49 S. Ct. 279 (1929); *Harman v. Chicago*, 147 U. S. 396, 13 S. Ct. 306 (1893); *United States Airways, Inc. v. Shaw*, (D. C. Okla. 1930) 43 F. (2d) 148.

<sup>4</sup> *Kane v. New Jersey*, 242 U. S. 160, 37 S. Ct. 30 (1916); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 48 S. Ct. 230 (1928); *Hendrick v. Maryland*, 235 U. S. 610, 35 S. Ct. 140 (1915); 42 *YALE L. J.* 402 (1933).

<sup>5</sup> *Helson v. Kentucky*, 279 U. S. 245, 49 S. Ct. 279 (1929).

<sup>6</sup> There is a strong line of decisions holding that corporations engaged in interstate commerce must bear their proportion of the burden of governments under

this as a tax on property measured by its use in interstate commerce as suggested in the concurring opinion of Mr. Justice Stone in *Helson v. Kentucky*.<sup>7</sup> But the fact that all of the gasoline was purchased outside of the state seems to furnish more ground for considering this as a tax for the privilege of using an instrumentality of interstate commerce. An interesting aspect of the present problem is presented by statutes imposing a tax on gasoline used exclusively in interstate air transportation.<sup>8</sup> Such a tax has been held valid when construed as compensation for the use of state aviation facilities.<sup>9</sup> In the instant case it might have been argued that a tax on gasoline used to propel busses over state highways was a proper charge for the use of facilities furnished by the state.<sup>10</sup> The Court, however, was bound by previous decisions<sup>11</sup> of the New Mexico Supreme Court holding that the tax in question was not imposed for the use of New Mexico roads but was a general excise tax on the use of gasoline in New Mexico.

P.M.C.

whose protection they conduct their operations. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 S. Ct. 305 (1896); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 38 S. Ct. 373 (1917). Justice Brandeis, in discussing a tax upon motor vehicles operating as common carriers engaged exclusively in interstate commerce, says "You users [of highways] although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep." *Clark v. Poor*, 274 U. S. 554 at 557, 47 S. Ct. 702 (1927); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 48 S. Ct. 230 (1928); 23 ILL. L. REV. 402 (1928). But compare, *Interstate Transit Co. v. Lindsey*, 283 U. S. 183, 51 S. Ct. 380 (1931), and note in 9 TENN. L. REV. 245 (1931).

<sup>7</sup>In *Helson v. Kentucky*, 279 U. S. 245 at 253, 49 S. Ct. 279 (1929), Justice Stone said that he could find no justification "for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce."

For an interesting article ably presenting the constitutional views of Justice Stone, see Dowling, Cheatham, Hale "Mr. Justice Stone and The Constitution," 36 COL. L. REV. 351 (1936).

<sup>8</sup>For a general discussion and summary of state gasoline tax laws, as applied to air transportation, see Tell, "Taxation of Aircraft Motor Fuel," 2 J. AIR LAW 342 (1931).

<sup>9</sup>See 4 J. AIR LAW 573 (1933); 17 CORN. L. Q. 131 (1931); *Varney Air Lines v. Babcock*, (D. C. Idaho, 1932) 1 F. Supp. 687. Cf. *Edelman v. Boeing Air Transport, Inc.*, 289 U. S. 249, 53 S. Ct. 591 (1933).

<sup>10</sup>The court considers the suggestion that the proceeds were devoted by law to building and improvement of state highways but felt that this would not alter the fact that the tax was not exacted for the privilege of using these highways.

<sup>11</sup>*Breece Lumber Co. v. Mirabal*, 34 N. M. 643, 287 P. 699 (1930); *Transcontinental & Western Air, Inc. v. Lujan*, 36 N. M. 64, 8 P. (2d) 103 (1931).