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## Constitutional Law - Article 1 Section 8 - The Commerce Clause - Aviation Fuel, Purchased in Indiana, Stored and Loaded Aboard Aircraft in Illinois and Consumed in Interstate Commerce, Is Subject to the Illinois Use Tax

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CONSTITUTIONAL LAW—ARTICLE 1 SECTION 8—THE COMMERCE CLAUSE—AVIATION FUEL, PURCHASED IN INDIANA, STORED AND LOADED ABOARD AIRCRAFT IN ILLINOIS AND CONSUMED IN INTERSTATE COMMERCE, IS SUBJECT TO THE ILLINOIS USE TAX.

The recent decision by the United States Supreme Court in *United Airlines Inc., v. Mahin, et al.*,<sup>1</sup> upheld the constitutionality of the Illinois Use Tax.<sup>2</sup> The use tax in this case applied to aviation fuel, purchased by United Air Lines<sup>3</sup> in Indiana, transported to Illinois for temporary storage and subsequently consumed in UAL's interstate flights. The Court viewed the tax in *United* as one levied upon the storage or the withdrawal therefrom of the aviation fuel, and not one upon the loading of, or consumption in interstate commerce.<sup>4</sup> Because of this characterization of the levy, the Court also held that the Federal Constitution<sup>5</sup> did not prohibit Illinois from measuring UAL's use tax liability by the amount of fuel actually *consumed* in Illinois' airspace.<sup>6</sup>

I. STATUTORY AND FACTUAL BACKGROUND

A. *The Retailers' Occupation Tax Act*

In order to provide the proper framework for a discussion of the decision in *United*, an examination of the basic provisions of the Retailers' Occupation Tax Act<sup>7</sup> and its complement, the Use Tax Act<sup>8</sup> is necessary. The ROT was enacted in 1933 to help fill revenue needs arising out of the depression and still remains, along with the Use Tax, the backbone of state revenue.<sup>9</sup> The ROT imposes an occupation tax upon persons engaged in

1. 410 U.S. 623 (1973).

2. ILL. REV. STAT. ch. 120, § 439.1-439.22 (1971).

3. Hereafter referred to as UAL.

4. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973). States are not at liberty to tax the loading or unloading of interstate commerce. *Puget Sound Stevedoring Co. v. Tax Cmm'n*, 302 U.S. 90, 92-94 (1937) and *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 427, 433-34 (1947). Mere consumption in interstate commerce is also not subject to state taxation. *Helson & Randolph v. Kentucky*, 279 U.S. 245, 252 (1929).

5. The section referred to is the Commerce Clause which reads as follows: "Congress shall have Power To . . . regulate Commerce with . . . and among the several states . . ." U.S. Const. art. I, § 8.

6. *United Air Lines, Inc. v. Mahin*, 410 U.S. (1973). This measurement was known as the 'burn-off' rule. Discussion of this measurement is omitted here as it is dealt with in succeeding sections.

7. ILL. REV. STAT. ch. 120 § 440-453 (1971). The Retailers' Occupation Tax Act is hereafter referred to as ROT.

8. ILL. REV. STAT. ch. 120 § 439.22 (1971).

9. ICE, RETAILERS' OCCUPATION TAX AND RELATED TAX LAWS, 1961 LAW FORUM 614.

the business of selling tangible personal property at retail in this state.<sup>10</sup> The Act defines a retailer as anyone who engages in the business of selling tangible personal property to buyers for use or consumption and not resale.<sup>11</sup> It is not a tax upon sales although the tax is measured by the gross receipts from such sales.<sup>12</sup> Liability is upon the retailer, not his buyer, however, this did not prevent the seller from passing his tax burden onto the purchaser separately stated and in addition to the sales price, or in the form of a higher sales price.<sup>13</sup> This continued until the Use Tax Act was enacted in 1955.

### B. *The Use Tax Act*

The Use Tax Act<sup>14</sup> was directed at protecting the ROT base from reduction by the buying of property by Illinois users from out-of-state retailers.<sup>15</sup> In addition, the Use Tax Act was designed to protect local retailers against diversion of their business to out-of-state sellers.<sup>16</sup>

The Use Tax is levied upon the purchaser as the tax is imposed upon the privilege of using in Illinois tangible personal property purchased at retail.<sup>17</sup> Although the tax is aimed chiefly at out-of-state purchases by Illinois users, it is also levied upon users who purchase at retail in Illinois.<sup>18</sup> The retailer, in Illinois, collects the Use Tax from the buyer (user), but he retains it to the extent he remits his ROT.<sup>19</sup> Should an Illinois user purchase property out-of-state from a retailer not required to collect the tax for Illinois, the purchaser must pay the tax directly to the state.<sup>20</sup>

Use is defined as the exercise by any person of any right or power over tangible personal property incident to the ownership of that property.<sup>21</sup>

10. ILL. REV. STAT. ch. 120 § 441 (1971). For a case discussing this definition, see, *Fischman & Sons, Inc. v. Dep't of Revenue*, 12 Ill. 2d 253, 146 N.E. 2d 54 (1957).

11. ILL. REV. STAT. ch. 120 § 440 (1971). For a brief discussion of this definition, see, *Franklin County Coal Co. v. Ames*, 359 Ill. 178, 194 N.E. 268 (1934).

12. *Superior Coal Co. v. Dep't of Revenue*, 4 Ill. 2d 459, 123 N.E.2d 713 (1954).

13. ICE, *supra* note 9, at 615.

14. ILL. REV. STAT. ch. 120 § 439.1-439.22 (1971).

15. *Turner v. Wright*, 11 Ill. 2d 161, 166, 142 N.E.2d 84, 87 (1957).

16. *Id.*

17. *Id.* at 163, 142 N.E.2d at 86.

18. *Id.* at 167, 142 N.E.2d at 88.

19. ILL. REV. STAT. ch. 120 § 439.9 (1971).

20. ILL. REV. STAT. ch. 120 § 439.3 (1971). Use tax litigation has often involved the collection of the tax from the out-of-state seller rather than in-state purchasers because the effectiveness of the use tax often depends on such collections. It would be nearly impossible to collect the tax from the numerous persons that purchase products in other states. B. SCHATZ, *CONSTITUTIONAL LAW* 124 (1972). *Turner v. Wright*, 11 Ill. 2d 161, 166, 142 N.E.2d 84, 87 (1957). Unless the out-of-state retailer has some activity within the state, i.e. office, solicitors, etc., the state cannot force collection of the Use Tax without offending the principles of due process. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954). For an Illinois case on this issue, see, *National Belas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967).

21. ILL. REV. STAT. ch. 120 § 439.2 (1971). *Turner v. Wright*, 11 Ill. 2d 161, 163, 142 N.E.2d 84, 86 (1957).

It is the privilege of this use that is taxed, not the actual use or consumption of the tangible personal property.<sup>22</sup> Consequently, it matters not the extent to which one exercises the privilege.<sup>23</sup> For example, the tax on a three-thousand dollar automobile is the same whether or not the user drives one-thousand miles a year or twenty-thousand miles a year.

While there are a number of exemptions from the tax found in the Act,<sup>24</sup> the temporary storage exemption played the decisive role in *United*. That exemption, in part pertinent here, provides,

To prevent actual or likely multistate taxation, the tax shall not apply to the use of . . . property in this State under the following circumstances:

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used *solely* outside this State . . . .<sup>25</sup> (Emphasis added.)

The entire discussion of the Illinois Use Tax Act begs the question of whether or not the Commerce Clause prohibits the taxation of property purchased out-of-state and brought into the state for future use via interstate commerce. Authority to exact a use tax upon goods acquired in interstate commerce without offending the Commerce Clause was upheld in *Henneford v. Silas Mason Co.*<sup>26</sup> In the decision, Mr. Justice Cardozo indicated that once the goods were brought into the state for use, interstate commerce was over. Certain factors in the decision that have also served as guidelines for future use taxes in other states were the equality of rates between the state's sales and use taxes<sup>27</sup> and the use tax credit allowance for any previously paid sales or use tax.<sup>28</sup>

Of particular significance here is the true operation of the tax because use taxes, such as the Illinois Use Tax, are often broad and encompassing excise taxes. Through their application, use taxes often reach activities or uses so intricately a part of interstate commerce that the tax directly burdens the free flow of commerce. The loading of property into interstate commerce<sup>29</sup> or the mere consumption or use of property in interstate commerce,<sup>30</sup>—while certainly the exercise of dominion and control incident to

22. *Turner v. Wright*, 11 Ill. 2d 161, 164, 165, 142 N.E.2d 84, 86-87 (1957).

23. *Id.* at 165, 142 N.E.2d at 87.

24. ILL. REV. STAT. ch. 120 § 439.3 (1971).

25. *Id.*

26. 300 U.S. 577 (1937).

27. *Id.* at 584. Equality of rates eliminates any claims of discrimination against interstate commerce.

28. *Henneford v. Silas Mason*, 300 U.S. 577, 587 (1937). Although the Court was undoubtedly influenced by the credit allowance, the constitutional requirement was not expressed and it has not been litigated, since most states allow the credit.

29. Case cited *supra* note 4.

30. Case cited *supra* note 4.

the ownership of that property are not uses that states may levy taxes upon. Such taxes would be violative of the Commerce Clause. Consequently, the courts are faced with the troublesome task of line-drawing, often through linguistic manipulation in an effort to find what use the tax is truly levied upon. With the Illinois statutory scheme in proper perspective, (tax levied on the *privilege* of use) and keeping in mind the potential Commerce Clause violations that might attach to a tax levy on the *use* of tangible personal property, the problem in *United* can be explored.

### C. *The Purchase by UAL*

Since 1953, UAL has purchased large quantities of aviation fuel in Indiana from the Shell Oil Company in order to facilitate its operations at O'Hare and Midway airports in Illinois.<sup>31</sup> The fuel is transported from Indiana by common carrier pipeline or truck to storage facilities near the airports where it remains for from two to twelve days.<sup>32</sup> After purification, the fuel is then transferred into the tanks of United's aircraft that are embarking upon or continuing in interstate or foreign commerce.<sup>33</sup> Since the purchase and delivery of the fuel was in Indiana,<sup>34</sup> and could not validly be made the incident<sup>35</sup> of the Illinois Retailers' Occupation Tax, the State's supplemental weapon, the Use Tax came into focus.

### D. *Application of the Illinois Use Tax by the Department of Revenue*

In 1955, the Illinois Use Tax in general, and its temporary storage exemption in particular, were administratively construed by the Illinois Department of Revenue to afford benefit of the temporary storage exemption to that amount of fuel although stored, withdrawn, and loaded into the tanks of UAL's aircraft, not actually consumed within the state.<sup>36</sup> Since the rate of fuel consumption was precise, and airline routes well regulated, computation of the tax was possible without much difficulty. Application of this construction, known as the *burn-off* rule pertained to all interstate

31. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 624 (1973).

32. *Id.* at 624, 625 nn. 1, 2. The parties stipulated as to the time the gas remained in storage.

33. *Id.* at 625, n.3. Some of the gas utilized was for intrastate activities. The tax upon this was paid and was not in issue.

34. *United Air Lines, Inc. v. Mahin*, 49 Ill. 2d 45, 273 N.E.2d 585 (1971). The Department of Revenue had early in the litigation stipulated to the sale and delivery in Indiana. Consequently, they were not able to assert with any success that the delivery and sale actually occurred in Illinois. Had it been established that the sale took place in Illinois, the transaction would have been subject to the ROT without raising any constitutional issues. See Brief for Appellee at 42, *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

35. A taxable incident is the event the tax is levied upon. It is distinguished from the measurement which is merely a device used to arrive at the amount of the tax. Here the sale (incident) was in Indiana and it could not validly be subject to the Illinois ROT. Throughout the discussion incident, event and use will be used interchangeably.

36. *United Air Lines, Inc. v. Mahin*, 49 Ill. 2d 45, 48, 273 N.E.2d 585, 586 (1971).

common carriers who, having acquired fuel outside the state, stored it in the state for subsequent use as motive power for vehicles in interstate commerce. Since UAL stored huge quantities of aviation fuel in order to facilitate its Chicago operations, and, by comparison, *burned-off* insignificant quantities of fuel within the state, its use tax liability was also insignificant.<sup>37</sup>

The constitutionality of the *burn-off* rule appeared questionable in light of the principles expressed in *Helson & Randolph v. Kentucky*.<sup>38</sup> In *Helson*, Kentucky sought to impose a privilege tax upon the fuel consumed by a ferry boat that stored and loaded its fuel in Illinois but consumed 75 percent of the gas while traveling through Kentucky on its interstate voyage. The taxpayers' office, business, and property were all in Illinois. Products in transit in interstate commerce, in addition to the mere consumption of goods while in transit, are not proper incidents for state taxation.<sup>39</sup> The tax in *Helson* was beyond all doubt a direct and undue burden levied upon interstate commerce for the mere consumption of fuel while engaged in strictly interstate commerce.<sup>40</sup> At this juncture, the *burn-off* theory cannot be distinguished from the unconstitutional tax in *Helson*.

This interpretation (*burn-off* theory of the temporary storage exemption) continued until the Department of Revenue abruptly reversed its position in 1963. The temporary storage provision was reinterpreted to mean that "temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and placed into the tank of the airplane, railroad engine, or truck."<sup>41</sup> Consequently, all fuel *loaded* onto UAL's planes at O'Hare and Midway Airports *measured* the tax.<sup>42</sup>

## II. LITIGATION IN THE ILLINOIS COURTS BY UAL

UAL promptly contested the new assessment and sought to enjoin the collection of the tax arguing Commerce and Due Process Clause violations.<sup>43</sup> In addition, plaintiff contended that the Use Tax Act required them to pay the tax upon only that amount of fuel consumed in Illinois.<sup>44</sup> The Circuit Court of Cook County upheld the tax and denied the injunction.<sup>45</sup> UAL's

37. The precise amount of tax paid is not known to the writer but according to the elaborate charts, diagrams, and computations submitted by UAL, it appears to be *de minimis* amounts. Brief for Appellant at 11-16, *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

38. 279 U.S. 245 (1929).

39. *See, e.g.*, *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922).

40. *Helson & Randolph v. Kentucky*, 279 U.S. 245, 252 (1929).

41. *United Air Lines, Inc. v. Mahin*, 49 Ill. 2d 45, 48, 273 N.E.2d 585, 586 (1971).

42. *Id.* at 49, 273 N.E.2d at 587.

43. Discussion of these arguments are omitted here as they are dealt with in detail later in the review.

44. *United Air Lines, Inc. v. Dep't of Revenue No. 63 C. 17049* (Cir. Ct. Cook County Dec. 9, 1968).

45. *Id.*

claim of small amounts of use (consumption) in the state and storage of the remainder until consumption out of the state was rejected. The court observed that the imposition of tax was upon the privilege of use, not the extent.<sup>46</sup> Therefore, small amounts of fuel consumed within the state did not exempt the amounts consumed elsewhere. Since the temporary storage exemption applied to property used *solely* outside the state after being temporarily stored here and UAL failed to show that *none* of the fuel was consumed in Illinois, the exemption was not available to them. The court stated that to qualify for the exemption the property itself must be capable of interstate mercantile transaction after it leaves Illinois<sup>47</sup> which UAL's was not. UAL, not only exercised, in Illinois, the dominion and control over the fuel to meet the "privilege of use" test invoking Illinois' Use Tax, but, indeed, UAL itself was the ultimate user and consumer of the fuel it acquired at retail outside the State of Illinois.

The Illinois Supreme Court in a 4-3 *per curiam* opinion, affirmed the lower court decision.<sup>48</sup> According to the court the tax upon all the fuel stored and withdrawn was constitutional. The *burn-off* theory, pursued by UAL as an alternative and asserted to be part of the temporary storage exemption, was deemed not constitutional under *Helson*, even if it were possible to construe it from the language of the exemption.<sup>49</sup> The principle reason relied on by the court in denying the constitutionality of the *burn-off* rule was that if Illinois could tax the *consumption* of fuel to the extent consumed in, and over Illinois, it would follow that every state over which the planes fly could also tax the *consumption* of that fuel consumed in flying between its borders. The result would be an intolerable burden upon interstate commerce in the form of multistate taxation.<sup>50</sup> Chief Justice Underwood and Justice Goldenhersh concurred (in the *per curiam* opinion) but were not convinced that the *burn-off* rule offended the principles expressed in *Helson*.<sup>51</sup> They agreed with the result reached by that court because the plain and ordinary meaning of the statutory temporary storage exemption supported Illinois' revised interpretation of that exemption.<sup>52</sup> The fuel was not temporarily stored here for use *solely* outside the state.

46. *Id.* See, e.g., *Turner v. Wright*, 11 Ill. 2d 161, 142 N.E.2d 84 (1957).

47. *United Air Lines, Inc. v. Dep't of Revenue No. 63 C 17049* (Cir. Ct. Cook County Dec. 9, 1968). United advanced throughout the litigation a Hot-Cold Gas theory whereby planes landing in Chicago with altitude chilled fuel used that fuel first upon takeoff because the warm gas loaded in Chicago always rose to the top of the tank. Since Federal regulation required them to always have sufficient fuel to reach alternate destinations out of the state, all the gas loaded in Chicago was still in temporary storage. For a detailed discussion see Brief for Appellant, *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

48. *United Air Lines, Inc. v. Mahin*, 49 Ill. 2d 45, 273 N.E.2d 585 (1971).

49. *Id.* at 50, 273 N.E.2d at 587.

50. *Id.* at 51, 273 N.E.2d at 588.

51. *Id.* at 56, 273 N.E.2d at 591 (concurring *per curiam*).

52. *Id.* at 50, 273 N.E.2d at 587 (concurring *per curiam*).

The dissent of Justice Kluczynski, joined by Justices Shaefer and Davis, did not find the tax upon all the fuel stored and withdrawn to be unconstitutional but they agreed that the *burn-off* rule as applied by the Department of Revenue for eight years, was definitely within the language of the temporary storage exemption.<sup>53</sup> The dissent reasoned that since the higher tax, measured by all the fuel loaded on UAL's planes did not offend the Commerce Clause, *a fortiori* a lower tax, measured by the amount *burned-off* would also be constitutional.<sup>54</sup>

The *per curiam* opinion of the Illinois Supreme Court contained the views of two Justices of the majority seemingly predicated on the anomaly that the lesser tax under the *burn-off* rule was an intolerable burden upon interstate commerce and therefore not permissible while the higher tax on all the fuel was no burden at all.<sup>55</sup>

### III. IN THE UNITED STATES SUPREME COURT

In a 6-3 decision the Supreme Court of the United States upheld the validity of the Illinois Use Tax as it applied to all the fuel stored, withdrawn, and loaded by UAL into the tanks of its planes. The decision made little mention of the elaborate characterizations offered by UAL of the event taxed.<sup>56</sup> The Court did eliminate the uncomfortable conclusion of the Illinois Supreme Court by holding the *burn-off* rule to be constitutional when used as a *measurement* of use tax liability as opposed to the use taxed.<sup>57</sup>

In affirming the use tax liability for all the fuel stored, the Court relied primarily upon the decisions in *Edelman v. Boeing Air Transport, Inc.*,<sup>58</sup> and *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*,<sup>59</sup> as well as the Illinois court's characterization of the taxable use as being either the storage or withdrawal therefrom.<sup>60</sup> This procedure eliminated the burden of sorting out the arguments of the parties because storage and withdrawal are events that may be taxed without violating the Commerce Clause.<sup>61</sup> *Edelman* and *Nashville* definitely authorize state use taxes upon the storage or the withdrawal of fuel despite its commitment to consumption in interstate commerce. *Edelman* involved a gasoline use tax levied upon fuel

53. *Id.* at 57-8, 273 N.E.2d at 591-92 (dissenting opinion).

54. *Id.* at 57, 273 N.E.2d at 591 (dissenting opinion).

55. *Id.* at 57, 273 N.E.2d at 591 (dissenting opinion).

56. Citations omitted here as this point will be discussed more thoroughly *infra*.

57. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 632 (1973).

58. 289 U.S. 249 (1933).

59. 288 U.S. 249 (1933).

60. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 627 (1973).

61. This points out the importance of the litigation in the State Supreme Court as the Court stated, "This Court usually has deferred to the interpretation placed on a state tax statute by the highest court of the State . . ." *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973).

brought into the state, stored in tanks and subsequently loaded into planes embarking on interstate flights. The *Nashville* case dealt with a Tennessee privilege tax imposed upon the fuel brought into the state and stored for the sole purpose of furnishing the motive power for the taxpayers' interstate and intrastate railroad operations. In both instances, the taxes did not offend the Commerce Clause since the taxable events were storage and withdrawal. As the Court stated in *Nashville*,

[T]here can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* . . . . Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations.<sup>62</sup>

The Court quoted the foregoing passage in *Edelman* and concluded, "such a tax [in *Edelman*] cannot be distinguished from that considered and upheld in . . . *Nashville*. . . ."<sup>63</sup> These cases indicate nothing more than the constitutionality of a state tax upon storage or the withdrawal from storage.

UAL never disputed the principles expressed in *Edelman* and *Nashville*, but disputed their application to the Illinois tax because UAL maintained that the taxable event of the Illinois Use Tax was the loading, not the storage or withdrawal.<sup>64</sup> In support of such construction UAL maintained,

It is neither the temporary ground storage of the fuel nor its withdrawal from such storage because, according to the Illinois Court's reasoning, what occurs after such withdrawal is decisive as to whether the tax is imposed. The per curiam opinion is explicit in stating that, if after withdrawal the fuel were transported from Chicago to Milwaukee in a tank truck for use at the Milwaukee airport, no tax would be due. (App.202) It follows that under the Illinois Court's decision, the taxable event is, and can only be, the act of loading it aboard United's aircraft in Illinois preparatory to their interstate journeys. As thus interpreted, the Illinois Use Tax is imposed on an integral and inseparable component of the interstate transportation process.<sup>65</sup>

Despite UAL's characterization of the event intended to invoke imposition of the tax,<sup>66</sup> the Illinois court's construction of Illinois' statute prevailed.<sup>67</sup>

62. *Nashville, Chatanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 268 (1933).

63. *Edelman v. Boeing Air Transport*, 289 U.S. 249, 252 (1933).

64. Brief for Appellant at 20-30, *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

65. *Id.* at 21.

66. *Id.* at 20. United urged principles fundamental to Constitutional Law

However, despite the adoption of this interpretation, the Court did offer, in a rather lengthy footnote, their explanation of how the taxable event was complicated by the temporary storage exemption.<sup>68</sup> The Court stated,

The Illinois court's interpretation of the temporary-storage provision makes it clear that loading into the tanks of the airplane is a relevant event but is not the taxable event. The court indicated that the temporary storage exemption suspended the effect of otherwise taxable events:

To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw the fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax. 49 Ill. 2d, at 55, 273 N.E.2d, at 590.

Under this view all the fuel is 'used' and subject to Illinois tax when it is temporarily stored or withdrawn from storage. The taxable event is nullified, however, if the fuel is transported from the State for consumption elsewhere.

Although this use of a subsequent event to determine the effect of a prior event may appear somewhat unusual, the result may be said to be compelled since fuel in transit may not be constitutionally taxed . . . .<sup>69</sup>

The above enlightenment into the operation of the Illinois temporary storage exemption appears reasonable. However, while the use of a subsequent event to define the effect of a prior event was, as the Court stated, unusual, the constitutional necessity of this was not clear. If the tax was upon storage, the tax could constitutionally be measured by withdrawal regardless of its destination. The "in-transit" reference by the Court would not apply to gasoline stored and mingled with gasoline not destined for out-of-state use.<sup>70</sup> The mere explanation, that the transportation to and use in another state

quoting from *Am. Oil Co. v. Neill*, 380 U.S. 451, 455 (1965). The validity of state taxation depends on "the practical operation of the tax, that is, the substance rather than form . . . ." and this requires a probing into the "operating incidence." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). And as stated in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 608 (1951), "it is not a matter of labels. The incidence of the tax provides the answer."

67. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973).

68. *Id.* at 628, 629, n.5.

69. *Id.*

70. The storage of gasoline is a taxable use unless brought into the state and delayed due to the circumstances. The break in transit by mingling the gas with gas for local use would deprive the gas of its "in transit" protection, as the gas could not be said to be committed to interstate commerce. *See, e.g., Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 266-68 (1933).

only served to nullify the taxable event of storage and withdrawal, appeared more reasonable. However, this could be phrased that if the fuel is not transported, but is loaded for consumption, there is a tax.<sup>71</sup> Consequently, the Court never adequately explained why storage and withdrawal were the taxable events.

Discussion of, and agreement with UAL's assertions were found in the two dissenting opinions (one by Justice Douglas with Justices Stewart and White and a concurring dissent by Justice White). The dissenters agreed with the force of the *Edelman* and *Nashville* cases:

For Illinois to tax the storage of fuel within its borders is, of course, constitutionally permissible, even though in time the fuel may be used in interstate or foreign commerce. In *Edelman* . . . 'The tax was applied to the stored gasoline as 'it is withdrawn from the storage . . . ' It is at *the time of withdrawal alone* that 'use' is measured for the purposes of the tax . . . .<sup>72</sup>

However, all three Justices considered Illinois' position to be that the storage or the withdrawal were not the events taxed. As Mr. Justice Douglas stated:

[B]y contrast the taxable event on which Illinois levies her tax is not storage for future use, or withdrawal from storage, but only *loading in the tanks* of planes preparing for interstate or foreign journeys. It is therefore inescapably a tax on the actual motive power for an interstate or foreign journey . . . .<sup>73</sup> (Emphasis added.)

While the majority viewed the loading as relevant in determining whether or not the temporary storage exemption operated, the dissent saw loading as the event Illinois itself, had determined was the taxable provocation. Constitutional approval by the Court of Illinois' Use Tax application to all the fuel was a mere reaffirmation of *Edelman* and *Nashville*.

Significantly however, the Court declared that the *burn-off* theory is not *per se* constitutionally offensive, and that *Helson* was not authority for such blanket condemnation.<sup>74</sup> In *Helson*, the incident and measurement was consumption, while in *United* the incident (use) was storage and withdrawal with consumption as the measurement. The Court stated,

The use of a method of tax measurement that is intimately related to interstate commerce is not automatically unconstitutional. Tolls on the use of facilities that aid interstate commerce have been upheld even when measured by passengers or by mileage traveled on the highways of a State.<sup>75</sup>

71. This was precisely UAL's contention.

72. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 638-39 (1973) (dissenting opinion).

73. *Id.* at 639.

74. *Id.* at 631.

75. *Id.* at 632.

The effects of the Court's declaration here cannot be precisely predicted. It did, however, remove the suspicion of Commerce Clause violation that previously attached to taxes measured directly in interstate commerce. While this could have opened the door for local incident searching by the states, the result in *United* was understandable. In likening the situation to tolls,<sup>76</sup> the Court apparently saw no difficulty in allowing its application to general state taxes, since *Helson* was not expressly overruled. Under *Helson*, states still are forbidden to tax mere consumption.<sup>77</sup>

*United* was remanded to the Illinois Supreme Court as two of the majority Justices in a 4-3 *per curiam* opinion of that court felt compelled to reject the *burn-off* theory because as apprehended by them, the United States Supreme Court had considered, and, in *Helson* had declared such tax imposition constitutionally offensive.<sup>78</sup> Consequently, it was not decided whether or not the *burn-off* rule was within the language of the temporary storage exemption. On remand, the Illinois Supreme Court did not incorporate the *burn-off* rule into the temporary storage exemption.<sup>79</sup> The judgment of the Circuit Court of Cook County was affirmed and UAL's use tax liability applied to all the fuel it brought into the state for storage. The decision in *United* affects all interstate carriers who store fuel in the state. The Use Tax continues, along with the ROT, to be the strength of the state's revenue.

#### IV. CONCLUSION

The principles expressed in *Edelman* and *Nashville* were affirmed in *United*. In this respect the *United* decision has maintained a consistency with past decisions.

An additional principle remains quite lucid after considering the *United* case. Interstate commerce must pay its own way. Perhaps that best explains the rationale of *United*, because until the decision, UAL paid virtually no tax on the bulk of its fuel and if Illinois was not able to tax it no one else, under *Helson*, could either.

However, by upholding the constitutionality of the *burn-off* rule, the Court has added perhaps another case to an area the Court itself has la-

76. *Id.* The court failed to distinguish tolls from general revenue taxes such as the Illinois Use Tax. Toll represents fair compensation to the state for the use of state facilities and the revenue obtained is usually utilized to maintain these state facilities. In *United*, the revenue exacted by the Illinois Use Tax does not have to be used to defray costs that the state expends policing the storage facilities. The tax in *United* was upon the privilege of use; it is not related to the state's just compensation for the use of state facilities. See, e.g., *Evansville-Vanderburgh Airport Authority Dist. v. Delta Air Lines, Inc.*, 405 U.S. 707, 31 L. Ed. 2d 620, 628 (1972).

77. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 631 (1973).

78. *Id.* at 632.

79. *United Air Lines, Inc. v. Mahin*, 54 Ill. 2d 431, 298 N.E.2d 161 (1973).

belled a "quagmire"<sup>80</sup> of opinions "not always clear . . . consistent or reconcilable."<sup>81</sup> While the entry of the *burn-off* theory into the realm of constitutional measurement of general state taxation might well prove to be a useful and just tool for tax measurement, it has assured the Court of more "quagmires" and at least, many years of sophisticated games of verbal ping-pong.

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80. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959).

81. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954).