

ORAL ARGUMENT — 12/3/97
97-0404
APPRAISAL REVIEW BOARD V. TEX-AIR HELICOPTERS

BOWER: As this court knows, Respondent Tex-Air has a helicopter fleet in Galveston that's used to take supplies to oil and gas facilities in the Gulf of Mexico. It's undisputed that Tex-Air pays taxes on its helicopters only in Galveston County, and claims no tax situs elsewhere. And, yet, they seek an allocation under §21.05 of the Tax Code. The issue then is whether applying §21.05 under these circumstances would constitute an unconstitutional tax exemption.

Before I jump into the constitutional issue, let me remind the court of what we think are two particularly troubling facts about §21.05, and how it works. First and foremost, this section does not require that the taxpayer establish a second tax situs outside of Texas. That's a point we will be coming back to again and again. No requirement with a second tax situs.

GONZALEZ: Why is that important?

BOWER: Because it is said that an exemption not authorized by the Texas Constitution is null and void unless it's required by federal law. And I will be arguing that if there is no second tax situs nothing in federal law would require an allocation.

OWEN: You cite two cases for that proposition about the exemption, that unless it's required by federal law it's null and void. Are there any other cases other than *Aransas* and *Dallas County* that you know of that stand for that proposition?

BOWER: I am sure there are. I cited those two cases because they are so factually on point and other respects in this appeal.

OWEN: Are there any cases out of this court that say that?

BOWER: I would have to look at the *Enron* decision again to see if it's in there.

OWEN: Well *Enron* doesn't say that. I can tell you that.

BOWER: I cannot give you specifically a SC case off hand that says that. But it's been my impression that it is well settled in this state that if the constitution does not authorize an exemption, the legislature cannot create it. And I'm sure there are SC cases that say that.

The second prong of the analysis is that, "well if an exemption or some type of allocation is required by federal law, due to say a double taxation problem, then federal supremacy kicks in according to the US SC. And then we have a problem and perhaps something analogous to an exemption that is required.

The other interesting and troubling thing about 21.05 is this: According to the allocation formula, the more trips Tex-Air makes to the Gulf, the greater the tax. That's how the formula works. The greater the portion of the value of the helicopters is taxable to Galveston County. The greater the number of revenue departures, the more Galveston County gets according to the formula. Yet, that contradicts the heart of Tex-Air's position, which is that because they spend so much time in the Gulf in international waters without the benefits of protections in the State of Texas they should get a tax break.

PHILLIPS: So you're saying the statute is not rationally related to its purpose or what is the point?

BOWER: If I say it's not rationally related to its purpose, you would ask me its purpose. I can't figure its purpose. I can't see how it was ever intended to apply in this type of situation. As applied to this situation, I would call it "utterly arbitrary and capricious." I don't think whoever wrote this statute had a domicile carrier in mind. The only way the statute makes any kind of superficial sense to me is if you have in mind an airline located in another state that comes into Texas, picks up people and goes on. And if this state wanted to measure in some way that airline's use of this state, departures might make sense. The more departures obviously would mean the more the presence in this state, because they had to come here to leave. But when we're talking about a carrier domiciled in this state and specifically in Galveston County it just doesn't make any sense at all.

So we have a taxpayer claiming they should get a break, because they spend so much time outside Texas, and make so many departures from Texas. And, yet, this taxpayer is invoking a statute which works just the opposite: the more departures, the greater the tax. According to the formula, if a helicopter makes 10 trips into the Gulf only .17% of the value of the helicopter is taxable in this state. If it makes 200 trips it goes up to roughly 3.4%, which I think is close to the facts in this case. If it makes 365 trips everyday, then Texas gets 6.25%.

OWEN: But you're attacking the formula there, not the statute per se. It may be that the formula doesn't accurately capture market value in the state. But that's not the statute.

BOWER: Well it's §B of the statute. It's formula is a statutory formula. Obviously something has gone wrong if that type of formula applies in this type of situation.

PHILLIPS: If it stays on the ground and makes one trip a year, and it's otherwise on the ground in Texas, how much is it?

BOWER: It's going to be a fraction of 1%; .017%. It just doesn't seem possible that the statute was written with this sort of situation in mind.

OWEN: You don't raise that in your briefs here though do you?

BOWER: We haven't focused on the formula. But I wanted the court to be aware of the formula. I think it's an additional argument for why it is an unconstitutional exemption to apply this statute in a situation.

ENOCH: If this was a boat would you be making this same argument?

BOWER: There's a different statute that applies to boats. Say for example, shrimp boats that operate in the Gulf, that statute does not contain this formula. This formula is found in a special statute for commercial aircraft alone.

ENOCH: Your argument is, it's not fair to permit this aircraft not to be taxed at its full value when it is clear the allocation is designed to keep taxing authorities from taxing full value for equipment that's not in the state full time. So my question is: I've got a boat that takes passengers from Galveston out to the rig that's in international waters, spends a few days out there, it comes back to Galveston, would your argument be any different? Would it be unconstitutional to permit the boat owner to say you shouldn't tax my boat for the time I'm spending out in international waters?

BOWER: Yes, it would be the same argument, and yes, it would be unconstitutional. And in fact, that is precisely the holding from the Corpus Christi CA in the *Aransas County* case, which found §21.03 unconstitutional. And that was a case dealing with shrimp boats that spent considerable time in international waters, but never established a second tax situs anywhere. And the Corpus Christi court held for the same reasons we're arguing this statute is unconstitutional, that 21.02 is likewise unconstitutional. Not an exemption not authorized by the Texas Constitution and an allocation not required by federal law. So, yes, it's the same idea. Both claim it shouldn't matter absence from the state. Mere absence from the state is never a reason for an allocation.

OWEN: You've made a facial challenge as well as an applied challenge. At least with respect to the facial challenge, the statute is necessary to take into account the law that you say is the law. You have to recognize under federal law you cannot constitutionally tax certain portions of certain pieces of property that are taxed by other states?

BOWER: That's correct. But this statute doesn't say anything about the need to establish a second tax situs.

OWEN: But it would apply to those kinds of situations. If helicopters are going to Oklahoma everyday and would spend a day in Oklahoma and a day in Texas, this statute would not be unconstitutional as to that situation would it?

BOWER: Not part A. I would still have problems with Part b.

OWEN: You don't challenge Part B in this court?

BOWER: That's right. That's really not the focus. We would be focusing a lot more on Part B if we actually had a separate tax situs.

OWEN: So Part A isn't unconstitutional under all sets of circumstances?

BOWER: The only problem with Part A is that it provides for an allocation without regard whether the taxpayer has a second tax situs. There's no requirement there. Now if you want to read that requirement into the statute, then I guess that would save the statute's constitutionality on its face. And if you want to hold in a particular case that an allocation is constitutionally required under the federal constitution, you could hang your hat on §21.05. You could likewise hang your hat on §21.03, which is entitled Interstate Allocation would accomplish the same thing, or you could do it even without a statute. I mean the federal constitution is what's driving the need for an allocation in this case.

Properly construed 21.05(a) by itself, and when I say properly construed, construed to require a second tax situs elsewhere, would have no unconstitutionality on its face.

I guess the question I have is if you read into it a requirement that there be a second tax situs are you construing it or changing it? In *Aransas County*, the court said that 21.03, similar provision, was unconstitutional on its face, because it did not require proof of a tax situs elsewhere. And if that's right, it would likewise apply here.

The CA understood that exemptions not authorized by Art. 8 are null and void and that's required by federal law. However, the CA wrongly held that 21.05 is a valuation statute rather than an exemption.

The problem with this analysis is three-fold. First, as this court explained in *Enron*, a valuation statute is a statute that purports to measure or determines how to measure property value - evaluation. Section 21.05 does not purport to measure the property value of a helicopter. Instead, it takes a given value, whatever it is, and then determines what part of that value goes untaxed. That's an exemption.

BAKER: Can't you say it the other way: Determines what value is taxed for the benefit of the appraisal?

BOWER: Yes, it carves up from the tax portion and separates it from an untaxed portion. But of course, we are concerned with the part that was declared nontaxable, the exemption part. But, yes, you can say it both ways.

We think the CA misunderstood the *Enron* decision, and misrelied on a Ft. Worth decision called *Tarrant Appraisal District v. Colonial Country Club*. Those are two cases that upheld tax statutes as valuation statutes, and the cases were correctly decided. Those cases did

not address 21.05. In *Enron* this court held that the tax statute which says: Inventory can be measured on Sept. 1 of January 1 is a valuation statute, and upheld it as such.

In *Tarrant Appraisal District*, the statute providing that land use restrictions must be considered when determining that land's value was upheld as a valuation statute.

Those cases are final. They uphold provisions that determine when and how to measure value. Those statutes do not purport to exempt any part of that value. In contrast, 21.05 doesn't determine value. It just determines what part goes untaxed and what part is taxed. Nothing there about a method of value.

OWEN: Could the federal government impose a tax if they so chose, or the time that these helicopters spent on the intercontinental shelf?

BOWER: I don't no. I don't know if the federal government could or not. Nothing like that was ever suggested in this case. I'm not even aware that the federal government has ad valorem taxes. I am not aware of any ad valorem tax plan in existence at the federal level.

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RESPONDENT

HOLLAND: I don't come here today to try to be creative or to make new law. I come here seeking this court's support to enforce the law as it has been written in this state for more than 100 years. My client is not a tax dodger. Indeed my client pays taxes. He pays the taxes that are assessed against him in Galveston County. He pays the taxes that are assessed against his maintenance facilities in Harris County where he maintains facilities. He comes here asking you simply to give him what the constitution and the statutory rights that he is entitled to in this State.

I think I should begin by simply relying on the case law that has been so thoroughly analyzed by this court handed down, beginning in 1907 with the *Shannon* case. I think the issue before this court is simply whether the legislature has authority to set the parameters and guidelines and modes and methods in determining how property is classified and taxed. Not necessarily the amount of tax. But in *Shannon* this court said that the legislature indeed has constitutional grant of authority to set the parameters or ascertain the value and classifying property for ad valorem tax purpose.

OWEN: Assuming that this statute weren't on the books, is there anything that you know of that would prohibit Galveston from taxing the full value of the helicopters?

HOLLAND: Other than what protection would be offered under federal constitutional protections, the 14th Amendment, the due process of equal protection clause, I believe that was enumerated in the *Central Railroad v. Pennsylvania* case, which is cited in my brief. Other than that

case, and cases subsequent to it, for example, the *Complete Auto Transit* case, I believe sets some guidelines. And that was followed by *Japan Lines*. Now we have 6 different criteria to follow with respect to those properties that are taxed, that are involved in interstate or international commerce.

Since my client does operate as an entity involved in interstate commerce, then I believe he would be subject to the protections offered by the federal constitution.

OWEN: But since no other taxing authority actually does tax the helicopters, do you know of any reason, assuming this statute weren't on the books, why Galveston County couldn't assess taxes on a 100% of the value?

HOLLAND: Other than what I've just quoted to you, that is that a fair apportionment and whether or not it's subject to the protections, immunities and privileges offered by the state for that period of time that it operates in the state my answer to you is no. I do not know of any other reason why they could not tax at 100%.

GONZALEZ: Would you briefly address Mr. Bower's argument that the formula has the opposite effect, the more trips you make offshore the more you are taxed. And it seems to me very illogical to be working in the opposite direction.

HOLLAND: That sort of issue, and I'm not going to try to circumvent your question, but that formula was created of course by the legislature. So we must assume that they were acting in a rational manner when they created that. That issue was somewhat addressed in the *Republic Insurance v. Highland Park ISD*, where a similar statute although it wasn't a formula, it was still a constitutional challenge on a statute that allowed the insurance companies to deduct their reserves off of the gross value _____ for taxes purposes. So you see it wasn't a formula exactly, but it had the same effect of reducing the taxable value of their assets.

Again, the same sort of a situation arose in the *Enron* case. I believe Justice Owen wrote the unanimous opinion for this court where the tax statute in question was attacked on a constitutional basis much as they are attacking 21.05. And that is, that the inventory part of it went untaxed because they were allowed to use an alternative date for taxation purposes. Thus, their inventory went down.

I can't really address how that formula works, because I've never set down and computed it. But the legislature obviously must have had in mind more than just Tex-Air in Galveston County. We have American Airlines and every airline in the country flying into this state and they obviously are given an allocation, and it may not be based upon that precise formula. But I do know that they are not taxed 100% in the state because of the interstate portion of requirements.

Again, a tax statute that is attacked in a similar manner under *Tarrant Appraisal Dist. v. Colonial Country Club*, same idea where we are going to value this property at

less than fair market value because the statute allows us to do that when we consider the use that the land is put to. Actually it has the effect of lowering the value, it lowers the taxes. In retrospect if you apply that formula it has the ultimate effect of lowering the taxes. Does it lower the value? Well you know it's kind of a hybrid argument. If you're going to give these people that are entitled to an apportionment that are not required to be taxed 100% just by the nature of their operations within the state of Texas and other states, how are you going to do it? Well you can create a formula like the legislature did or you can just turn around and say: Ok, we are just going to let you value the aircraft at less than market value. But how are you going to arrive at that when the law says that to be fair and equitable all property has to be valued at fair market value. I don't know how you arrive at that. The legislature would probably have to address that. If in fact, this court finds that that formula somehow infringes upon the King's pursers right to take everything that the poor and oppressed have. I just don't know how you otherwise arrive at that.

Every two years this gang of bandits next door meets in a smoke-filled room to figure out how to pick the pockets of the King's subjects, and there is no end to it. The only protection that these people have is this high court from _____ of the minority. And so they somehow manage to come out the front door with that formula. I am not certain that I am answering your question, but I may not be capable of doing it. But I have not set down and worked that formula out.

GONZALEZ: I am just amused by you calling our elected representative "the gang of bandits."

HOLLAND: Well that's what they remind me of the way they treat the rest of us. A similar question was raised in the *Travis Central Appraisal District v. the FM Properties* case. That was another constitutional attack on a statute. And in that case, the same argument comes up. By appraising the property at fair market value based on individual units, you're increasing the value of the property; hence, the amount of taxes that would be raised. And the Austin court held again the legislature has the constitutional authority to devise methods and means of valuing property.

I am sure that this court would agree through all of its opinions that all taxation is not really equal or uniform. And in this state it is impossible to arrive at that center point. Just by the nature of the animal of taxation and the things that have to be taxed it is just an impossibility. We try to arrive at what is fair and reasonable. And to suggest that these people are entitled to tax my client to property 100% simply because they are not taxed some place else is ludicrous. Why? Well my clients could be taxed in Louisiana. But they are not. Why? Well the State of Louisiana for whatever reason, it may be to promote economic industry, economic expansion - don't want to tax them. You tell me. What fire truck from Galveston County is going to show up at an oil platform out there to help my client. What emergency technicians are going to find them self out in the Gulf trying to help one of my clients' employees? The argument is that they are only entitled to tax him in proportion to the services and benefits that they offer. It's not very much. Frankly, my client had to pay 100% tax on his property down here in this state, he could not

compete with those operators that operate out of the State of Louisiana. He would have to move his company out of this state.

OWEN: Is there evidence in the record that he could be subjected to tax in Louisiana?

HOLLAND: Yes, there is. He maintains a maintenance facility and a refueling stop at Abbyville, Louisiana. Furthermore, he has to under his contract with some of these oil companies, he has to keep at least one helicopter on call in Louisiana 24 hours a day. He does rotate his equipment, but one is always on call. In addition to that, he does a considerable amount of flying back and forth from these platforms to and into the state of Louisiana hauling men and material.

In the record, you will see that he makes certain revenue departures from the State of Texas, but we classify a revenue departure as simply taking off. Because every time that helicopter lifts off it's considered a revenue departure. Now, it may fly over Louisiana and deposit men and materials or pick up men and materials, and then depart for offshore. When he does, that is another revenue departure. All in the period of 1 day. When these planes get out on these platforms, the oil company may say, "I want you to take these two men over to another platform, I want you to take this material back to New Orleans, or Morgan City, or I want you to pick this up." They depart, and they go back, that is also a revenue departure. So when you see all those revenue departures in the record there literally what they are are lift offs and landings. And they may make an enormous number of them everyday flying around the Gulf back and forth.

He could be taxed by Louisiana, but at this time he is not. But, I will remind the court that the *Central Railroad* case, now we have a late case here in Texas, *Harris County Appraisal v. TransAmerica Container*. Now that was decided by the First CA in 1995. That case went all the way to the US SC and back. But both *Central Railroad* and *Harris County v. TransAmerica* have stated and hold "It matters not whether the property is actually being taxed elsewhere. Under our federal scheme of things, all that matters is whether or not that property is subject to being taxed." Not necessarily taxed. And the King's purser wants 100% of my client's tax, because he's not being taxed some place else.

Now, let's assume that Galveston does get 100% of the tax, and then low and behold Louisiana comes along and says: Based on these same facts now, you guys fly in here, we're going to tax you. Well, we know there can't be double taxation, multiple taxation in interstate commerce. So now that \$100 that they're getting they've got to give the State of Louisiana some part of it. So I ask you, if the King is not entitled to it then, why is he entitled to it now? If he gets it now, he's taking money that he's really not entitled to. If you think about it in a round about way maybe that's where that formula really comes into play. He's not entitled to anymore than what the state says he's entitled to and the federal government.

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REBUTTAL

BOWER: We've been talking about whether there is anything apart from 21.05 that would keep Galveston from taxing these helicopters for their full value. If I understood counsel correctly, I think the answer was no. But I would like to nail that down and not just rely on his answer, because I do believe the answer is no, and the answer is found in the US SC case called *Central Railroad*.

According to that case, a taxpayer cannot avoid a domiciles property tax merely by showing the property is temporarily absent from the state. That case involved railroad cars that spent a great portion of the time outside Pennsylvania, but not on regular or fixed schedules. And the court held that Pennsylvania could fully tax those railroad cars even though they were used elsewhere. So the mere fact the property is absent from the state is never enough to limit a county's power to tax that property fully.

BAKER: Is the opposite then true, that a state can decide that it doesn't want to tax property that's not there all the time 100% and do as this statute does, and if so, what prohibits that?

BOWER: There's nothing that prohibits the state from not taxing. Texas does not have to have a property tax if it doesn't want to.

OWEN: Do you concede that these helicopters one or more of them could be taxed in Louisiana or some portion of them could be taxed?

BOWER: No, I don't.

OWEN: Why not?

BOWER: According to *Central Railroad*, it's the taxpayers burden to prove that property has acquired a tax situs elsewhere. And by tax situs, the SC equates this with a permanent location elsewhere. It's the taxpayers burden to prove that in order to get an allocation and in order to benefit from the commerce clause or due process clause as a justification for an allocation.

In this case, the taxpayer did not do that. The taxpayer never established a second tax situs. Even the CA said that. Of course it didn't matter to the CA because they didn't think they were dealing with an exemption.

BAKER: Well is the statute unconstitutional because it doesn't require that?

BOWER: Yes, because it does not require proof of a second tax situs. If there's no second tax situs, there is no requirement. There is no federal rule that would require that Galveston tax at less than full value. It's only when you have a second tax situs, it's only when you have a double taxation problem that some type of allocation can be federally required. But you have to establish the tax situs, the permanent location elsewhere not just the fact that it leaves the state

temporarily.

In this case, Tex-Air did not establish a tax situs elsewhere. More fundamentally, Tex-Air never even claimed to have a tax situs elsewhere. Never claimed it. Never claimed that they were taxable in Louisiana. The first I heard of it was today.

If you look at the trial record, and that's what counts, what was the case presented at trial? What were the arguments there? It was just that we are out in international water, no one's going to come help us, we shouldn't have to pay anything. Now if there is any evidence of a Louisiana tax situs it would have to be in the 2-page affidavit of Tex-Air President. That's the only evidence that could possibly be relevant to this matter. And that's in the transcript of the clerk's record at 60 and 61.

But according to that affidavit, the president of Tex-Air says: "All revenue departures are from Shoals field in Galveston County." That's what the affidavit says. It says, "90% of the time we spend in international water." There are some references to Louisiana. There is a reference in that affidavit about a plane that is stationed in Cameron. I'm not quite sure what I heard about Abbyville, Louisiana. But there's nothing in the record about Abbyville. I've never heard of Abbyville. That's not in the record.