

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ALOHA AIRLINES, INC.,	)	
Appellants	)	
v.	)	No. 82-585
DIRECTOR OF TAXATION OF HAWAII;	)	
and	)	
HAWAIIAN AIRLINES, INC.,	)	
Appellant	)	
v.	)	No. 82-586
DIRECTOR OF TAXATION OF HAWAII	)	

Washington, D. C.

October 4, 1983

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 ALOHA AIRLINES, INC.                   :

4                   Appellants                   :

5                   v.                   :   No. 82-585

6 DIRECTOR OF TAXATION OF HAWAII; and   :

7 HAWAIIAN AIRLINES, INC.,               :

8                   Appellant               :

9                   v.                   :   No. 82-586

10 DIRECTOR OF TAXATION OF HAWAII       :

11   - - - - -x

12                                   Washington, D.C.

13                                   Tuesday, October 4, 1983

14                   The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 2:06 p.m.

17 APPEARANCES:

18 RICHARD L. GRIFFITH, ESQ. Honolulu, Hawaii, on behalf of  
19   the Appellants

20 WILLIAM D. DEXTER, ESQ., Special Deputy Attorney General  
21 of Hawaii, Honolulu, Hawaii, on behalf of Appellee

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1                                P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: Mr. Griffith, I think  
3 you may proceed whenever you are ready.

4                    ORAL ARGUMENT OF RICHARD L. GRIFFITH, ESQ.,

5                    ON BEHALF OF APPELLANTS

6                    MR. GRIFFITH: Mr. Chief Justice, and may it  
7 please the Court:

8                    These consolidated cases are on appeal from  
9 the Supreme Court of Hawaii. They present a single  
10 issue, whether a Hawaii tax of 3 percent of the gross  
11 income of airlines from the airline business is exempt  
12 from the section of the Federal Aviation Act, 49 U.S.C.,  
13 Section 1513, which forbids a state from levying a tax  
14 on the gross receipts derived from the carriage of  
15 passengers or the sale of air transportation.

16                   The Hawaii Supreme Court upheld the Hawaii  
17 tax. Its decision thus conflicts with the holdings of  
18 the other state courts which have considered the same  
19 issue, namely, the highest court of the State of New  
20 York, the Court of Appeals of Arizona, and the Superior  
21 Court of Alaska, all of which have struck down similar  
22 state taxes because of this federal statute. Also, in  
23 the State of Ohio, the Attorney General rendered an  
24 opinion that the Ohio tax was invalid in view of the  
25 federal statute, and the Ohio legislature then repealed



1 the tax.

2 Appellants Aloha Airlines and Hawaiian  
3 Airlines are commercial airlines flying in federal  
4 airways between the six major islands of Hawaii.

5 I will make three points on oral argument, and  
6 only three. First, the plain language of the federal  
7 statute, 49 U.S.C. 1513, prohibits this tax. Second,  
8 the Hawaii tax can't be saved under subsection (b) of  
9 that federal statute because subsection (b) is  
10 consistent with subsection (a). And finally, the  
11 legislative history of this statute requires a decision  
12 in favor of the airlines in this case because Congress  
13 meant exactly what it said in Section 1513, and it meant  
14 to forbid precisely this kind of state tax.

15 With regard to my first point, that the  
16 federal statute expressly prohibits the Hawaii tax, we  
17 need examine only the gist of the Hawaii tax statute and  
18 the key sentence of the federal statute. First, the  
19 Hawaii statute says there shall be levied and assessed  
20 upon each airline a tax of 4 percent of its gross income  
21 each year from the airline business. That language  
22 conflicts directly with the federal statute which  
23 provides no state -- this is the federal statute -- no  
24 state shall levy or collect a tax, fee, head charge or  
25 other charge directly or indirectly on persons traveling

1 in air commerce or on the carriage of persons traveling  
2 in air commerce, or on the sale of air transportation,  
3 or on the gross receipts derived therefrom.

4           This federal statute thus expressly prohibits  
5 every conceivable method by which a state could tax the  
6 carriage of passengers by air or the sale of air  
7 transportation or the gross receipts derived therefrom.

8           QUESTION: How about a net income tax, Mr.  
9 Griffith?

10           MR. GRIFFITH: Subsection (b) expressly  
11 permits a net income tax, Your Honor.

12           QUESTION: Is there all that much difference  
13 between a gross income tax and a net income tax?

14           MR. GRIFFITH: I think there definitely is. A  
15 gross income tax is a tax at the immediate point of  
16 transaction between a passenger and the airline, or  
17 between a customer and the provider of a service, and  
18 that is a tax which can easily be passed on dollar for  
19 dollar to the customer.

20           QUESTION: Well, you say that a gross income  
21 tax is necessarily one on the passenger? I wouldn't  
22 have thought so, or perhaps I misunderstood you.

23           QUESTION: The statute is defined four  
24 different ways, to hit a tax directly on the passenger  
25 or a tax on the carriage of that passenger, or a tax on

1 the sale of air transportation, or a tax on the gross  
2 receipts realized by the airline.

3 QUESTION: Yes, but what I am try -- what I  
4 want to ask you is whether a gross income tax or gross  
5 receipts tax on the airline that is collected at the  
6 head office of the airline, it isn't imposed on  
7 passengers individually at all --

8 MR. GRIFFITH: Yes.

9 QUESTION: Is that appreciably different from  
10 a net income tax similarly reflected?

11 MR. GRIFFITH: Very definitely different in  
12 concept and theory, Your Honor.

13 QUESTION: How?

14 MR. GRIFFITH: Because a net income tax  
15 depends on many other factors besides the price of a  
16 ticket. It depends on administrative overhead, it  
17 depends on many other things, including other deductible  
18 state taxes. Many other deductions and concepts are  
19 woven in before you get to the net of a company.

20 QUESTION: Now, the act does not prohibit, I  
21 gather, a property tax or a franchise tax to be levied  
22 by the state.

23 MR. GRIFFITH: That is correct.

24 QUESTION: And what reason would Congress have  
25 to forbid the use of gross receipts as a measure for

1 imposing a property tax or a franchise tax?

2 MR. GRIFFITH: Because Congress --

3 QUESTION: If the amount is the same?

4 MR. GRIFFITH: Congress was very much  
5 concerned about the price of air fares, and the fact is  
6 that Congress as part of an overall federal program  
7 levied an 8 percent federal excise tax on air fares. It  
8 did not want the states competing with that tax. It did  
9 not want the states adding an additional tax up on top  
10 of the federal tax because that federal tax was the  
11 prime revenue raiser to fund the Congress' airport aid  
12 program, a program which funneled vast sums out to the  
13 states for the development of airports.

14 QUESTION: Well, I know that is what you have  
15 argued on the purpose, but if the state can get the same  
16 revenue and just label it something else, it is little  
17 hard to understand the position.

18 MR. GRIFFITH: I am saying, Your Honor, that  
19 the states cannot reach the same revenue through another  
20 label.

21 QUESTION: Well, now, Congress has amended the  
22 law in a way that doesn't apply to the tax years in  
23 question here.

24 MR. GRIFFITH: Yes.

25 QUESTION: But they have since amended it, and



1 they have created a new exemption for in lieu taxes.

2 Now, if that were applicable today, does that  
3 have any implication on this?

4 MR. GRIFFITH: No, it would not, Your Honor,  
5 because Congress left the two key sections we are  
6 talking about, (a) and (b) of Section 1513,  
7 undisturbed. It then added an in lieu tax, but that  
8 would be taxes not prohibited by subsection (a), but  
9 certain in lieu taxes in other areas providing that the  
10 funds received from such in lieu tax go into airport  
11 development and improvement. The Hawaii tax does not do  
12 that. The Hawaii tax goes into the general state  
13 treasury.

14 QUESTION: Mr. Griffith, if you should prevail  
15 here, is there anything to prevent the state from  
16 turning around and levying even a higher income tax on  
17 your clients?

18 MR. GRIFFITH: Nothing whatsoever except the  
19 usual constitutional guarantees against unequal  
20 treatment, but otherwise nothing whatsoever.

21 QUESTION: But you might win a Pyrrhic victory  
22 then here.

23 MR. GRIFFITH: We are willing to take that  
24 chance, Your Honor.

25 QUESTION: That isn't the only kind of tax

1 they could levy either, is it?

2 MR. GRIFFITH: That is correct, Mr. Chief  
3 Justice. The subsection (b) lists a whole litany of  
4 state taxes that are still permitted so long as they do  
5 not reach head taxes, gross receipts taxes, taxes on air  
6 carriage, taxes on the sale of transportation. So long  
7 as the states will stay away from the area of  
8 prohibition, they have freedom to tax the airlines like  
9 any other business or citizen.

10 QUESTION: If you were entirely an intrastate  
11 airline, didn't fly over international waters, you would  
12 have no case here, would you?

13 MR. GRIFFITH: We would have a case, Your  
14 Honor. I'll tell you why. And the Arizona case was  
15 exactly on this point.

16 Section 1513 speaks of persons traveling in  
17 air commerce, and it also speaks in terms of carriage of  
18 persons traveling in air commerce. Air commerce is a  
19 defined term in the Federal Aviation Act. It has  
20 several definitions, but one key definition is flights  
21 within the federal air space. The flights of the two  
22 airlines before you today are entirely within the  
23 federal air space, so even if we were totally  
24 intrastate, we would be covered by this statute, and in  
25 fact, I would remind you, in the Arizona case, Cochise

1 Airlines was flying between points in the State of  
2 Arizona; it was stipulated that that was intrastate, but  
3 because of that definition of air commerce, that  
4 airline's flights clearly came within the scope of the  
5 statute.

6           In subsection (a) Congress precluded all  
7 traditional forms of tax by specifically prohibiting any  
8 tax or any fee or any head charge, and it then went on  
9 to try and preclude preventive minds by prohibiting  
10 other charges to ensure that this prohibition would  
11 encompass any prohibited tax, however labeled.

12           Second, Congress broadly defined the subjects  
13 and measures of tax to be prohibited: namely, taxes,  
14 first, on persons traveling in air commerce; second, on  
15 the carriage of persons traveling in air commerce;  
16 third, on the sale of air transportation; and fourth, on  
17 the gross receipts derived therefrom.

18           And then finally, Congress extended this  
19 absolute prohibition to all taxes that are directly or  
20 indirectly levied or collected on any of these  
21 prohibited areas.

22           Congress thus meant to sweep the field clean  
23 of state taxes on air carriage, on gross receipts  
24 therefrom, and on head taxes. The plain language, I  
25 submit, of Section 1513(a) thus prohibits the Hawaii

1 tax.

2           Now, the Director of Taxation of Hawaii  
3 attempts to avoid the effect of this language with  
4 several theories, mostly looking to subsection (b) of  
5 the federal statute, and our second major point is that  
6 these arguments should not prevail because subsection  
7 (b) is clearly consistent with subsection (a) which I  
8 have quoted with you. After sweeping the field clean of  
9 gross receipts and head taxes, Congress added subsection  
10 (b) simply to clarify which state taxes are still  
11 permitted. This section provides that states may levy  
12 taxes other than those enumerated in (a), and then it  
13 lists property taxes, net income taxes, franchise taxes,  
14 and sales or use taxes.

15           But the key clause in the subsection (b) is  
16 taxes other than those enumerated in subsection (a).  
17 This clause clearly means that a state will be permitted  
18 to levy a tax if but only if that tax is not based on  
19 the carriage of passengers or the sale of air  
20 transportation or the gross receipts derived therefrom.

21           The Director argues that the Hawaii tax is a  
22 property tax and thus is permitted under subsection (b)  
23 because that is one of the listed taxes there, and he  
24 relies on a phrase in the Hawaii statute which says  
25 "this tax is a means of taxing the personal property of



1 airlines and other carriers."

2           There are several flaws in this argument.

3 First, the Hawaii tax is actually based solely on gross  
4 receipts. It therefore violates subsection (a) and is  
5 not permitted under (b) because the Hawaii tax is not  
6 one of those taxes other than those enumerated in  
7 subsection (a). The Director, it seems to us, is  
8 therefore asking this Court to rewrite subsection (b)  
9 and to ignore that clause, taxes other than those  
10 enumerated in subsection (a). But this clause cannot be  
11 ignored.

12           Secondly, the Hawaii tax is in no sense truly  
13 a property tax. The tax return used requires  
14 information only as to the airline's gross receipts. It  
15 requires no information as to the airline's personal  
16 property. The tax is only labeled as a means of taxing  
17 the personal property, and Justice Marumoto in his  
18 dissent below pointed out that Hawaii has no personal  
19 property tax as such, and there was none at the time  
20 this tax was enacted.

21           Federal standards are controlling here, and  
22 for federal purposes, I submit this is not a personal  
23 property tax.

24           The Director also argues that Section 1513(a)  
25 prohibits only taxes on gross receipts and not property

1 taxes measured by gross receipts. But I submit this  
2 argument exalts form over substance and asks this Court  
3 to disregard the broad sweep of subsection (a) which  
4 forbids the use of gross receipts as the measure of a  
5 tax as well as the subject of a tax.

6 Finally, the Director argues that the Hawaii  
7 tax --

8 QUESTION: Mr. Griffith --

9 MR. GRIFFITH: Yes.

10 QUESTION: The airlines over a number of years  
11 accepted this tax, didn't they?

12 MR. GRIFFITH: Your Honor, we did not.

13 QUESTION: Your client didn't. That is --

14 MR. GRIFFITH: Our client did not, yes.

15 QUESTION: You represent Aloha?

16 MR. GRIFFITH: Aloha Airlines.

17 QUESTION: Well, did you file protests every  
18 year or something? Did you --

19 MR. GRIFFITH: We have protested and contested  
20 the tax back to the first effective year.

21 The Director argues the tax is a general  
22 business tax which does not discriminate against  
23 airlines because other businesses in Hawaii bear a  
24 similar state tax on their gross receipts. The flaw in  
25 this argument is that unlike other businesses in Hawaii

1 in general, the airline passenger fares are already  
2 burdened with an 8 percent federal excise tax. In its  
3 wisdom, Congress determined that this federal tax is  
4 steep enough and that the states cannot tax air fares or  
5 tax the gross receipts of airlines from air  
6 transportation. Congress believed that any state taxes  
7 on top of the already steep federal tax would discourage  
8 air traffic and would reduce the yield of the federal  
9 tax, thereby depriving the airport and airway  
10 development program of the funds to carry out its  
11 purpose.

12               Finally, my last argument, and I will be  
13 brief, although resort to legislative history is not  
14 required because I believe we have a very clear federal  
15 statute here, I believe this legislative history clearly  
16 tells us that Congress meant to say exactly what it said  
17 in Section 1513, and meant to bar precisely the kind of  
18 tax here in issue.

19               In 1970 Congress found that the nation's  
20 airports and air control system were outmoded and  
21 inadequate to handle the massive growth in air traffic.  
22 Congress responded with a two-part program. First, it  
23 vastly increased grants of federal funds to the states  
24 for airport improvement. And second, to pay for this  
25 program, it adopted a comprehensive and uniform program

1 of federal taxes on passengers and on airlines. That  
2 comprehensive program has been considered and described  
3 by this Court in Massachusetts v. the United States in  
4 1978 in a very able opinion written by Justice Brennan.  
5 The most significant tax in this federal program, and  
6 the largest revenue raiser by far is the 8 percent  
7 federal tax on all domestic air fares.

8           After this program took effect, Congress  
9 learned of efforts by states and localities to impose  
10 head taxes and gross receipts taxes of their own.  
11 Congress regarded the state and local taxes as a threat  
12 to the revenue base underlying the 1970 airport  
13 development program, and in 1973 it enacted the Airport  
14 Development Acceleration Act which included this federal  
15 statute that I have been describing today, and it also  
16 included an additional increase in grants to the states  
17 for airport development.

18           In fact, in the years in issue, this fine  
19 program has yielded \$55 million to the State of Hawaii  
20 for airport and airway grants. That is the six years  
21 after 1973.

22           Also, we note that Congress recently acted to  
23 continue this program of grants and taxes until the year  
24 1987. So this decision is important.

25           The Solicitor General has filed an amicus



1 brief in support of the airlines in this case. He has  
2 called the Hawaii tax a threat to the fiscal integrity  
3 of the federal airport development program. In the  
4 Solicitor General's brief he points out that if this  
5 Court is to sanction the Hawaii tax, other states would  
6 regard the decision as an invitation to evade the  
7 federal prohibition by labeling their gross receipts  
8 taxes as a means of taxing personal property. Surely,  
9 Congress did not intend that its mandate be so easily  
10 evaded or that its national fiscal program be so easily  
11 undermined.

12 Congress in its wisdom has determined that the  
13 steep federal tax on passenger air fares is all the  
14 taxation that air carriage of persons should bear. At  
15 the same time, the federal government has distributed  
16 subsetantial grants to the state, fueling a great  
17 improvement in the nation's airports.

18 The plain words of the federal statute forbid  
19 this Hawaii tax. The Court should not embark on an  
20 invitation to rewrite that plain language, and the  
21 Hawaii tax should be stricken and the decision below  
22 reversed.

23 Thank you.

24 CHIEF JUSTICE BURGER: Mr. Dexter?

25 ORAL ARGUMENT OF WILLIAM D. DEXTER, ESQ.

1 ON BEHALF OF APPELLEES

2 MR. DEXTER: Mr. Chief Justice, and may it  
3 please the Court:

4 I believe that Aloha Airlines and Hawaiian  
5 Airlines in the argument here have said nothing that has  
6 not been substantially covered in the briefs. So I  
7 would like to focus this Court's attention on what I  
8 believe to be some of the underlying practical  
9 considerations that need to be considered and  
10 undoubtedly are controlling in the disposition of this  
11 case.

12 QUESTION: Mr. Dexter, you will speak about  
13 the language of the statute, won't you, because I have  
14 gone through your brief and I do not find it quoted  
15 anywhere.

16 MR. DEXTER: Yes. Well, let me just answer  
17 that question right now. The statute has to do with the  
18 same user taxes that were preempted by Congress under  
19 the Airport and Airways Development Act. Congress had  
20 imposed an 8 percent ticket tax on domestic flights, a 3  
21 percent emplaning tax on international flights, and a 5  
22 percent tax on air transportation of goods.

23 Now, 1513(a) simply prohibits a tax on the air  
24 transportation of persons. Also, it prohibits a tax on  
25 the air carriage of persons in interstate commerce. It

1 also prohibits a tax on the sale of air transportation.  
2 Those are the three taxes that are prohibited. Those  
3 parallel, if you will, the federal taxes that have been  
4 preempted by Congress, and as we have indicated in our  
5 brief, those deal with specific subjects of taxation.

6 Subsection (b) says except for the taxes  
7 enumerated in subsection (a) --

8 QUESTION: Mr. Dexter, you didn't mention in  
9 responding to Justice Blackmun, or at least I didn't  
10 hear you --

11 MR. DEXTER: What?

12 QUESTION: That the prohibition is not just on  
13 taxing the sale of air transportation but goes as they  
14 are on the gross receipts derived therefrom.

15 MR. DEXTER: But on the gross receipts derived  
16 therefrom, Your Honor, as far as the legislative history  
17 history is concerned, is traceable to a discriminatory  
18 Ohio tax on singling out airlines.

19 One of the basic positions that we have that  
20 there's much -- that there's a lot of difference between  
21 Congress taxing me and not taxing anyone else and  
22 Congress saying that I am singled out for an exemption.  
23 What subsection (a) is designed to do is to prevent  
24 directly or indirectly imposition of those kinds of head  
25 taxes preempted by Congress, and the pro -- the quid pro

1 quo there was increased congressional involvement in  
2 airport development and financing. The legislative  
3 history clearly indicates that this was the balancing,  
4 and it had nothing to do with general business taxes.

5 QUESTION: Well, is this a gross receipts  
6 tax?

7 MR. DEXTER: No, it is not, Your Honor. This  
8 tax is a tax, a utilities tax --

9 QUESTION: It's a tax on gross receipts.

10 MR. DEXTER: Well, it's a general utilities  
11 tax imposed --

12 QUESTION: On what, gross receipts?

13 MR. DEXTER: It's on the franchises, the  
14 business, the going concern's values of the property the  
15 same as the old utility taxes on railroads or other  
16 utilities.

17 QUESTION: It's not on gross receipts.

18 MR. DEXTER: No. The property -- the  
19 property -- the going concern value of the property is  
20 the thing that this statute focuses on, and in order to  
21 determine the going concern value of utility property,  
22 this Court for 100 years has realized that you look at  
23 the income that is being produced by that property that  
24 has to be used solely for utility purposes. Ad valorem  
25 valuations of it or looking at it in different ways



1 doesn't work. So all that the Hawaii legislature has  
2 done is imposed a franchise privilege tax on the  
3 utilization of tangible property in the State of Hawaii,  
4 including going concern value.

5 QUESTION: Then how is that measured? How is  
6 it measured?

7 MR. DEXTER: It is measured by the gross  
8 income --

9 QUESTION: Receipts.

10 MR. DEXTER: -- of the utility.

11 QUESTION: Oh, so this is a gross income tax.

12 MR. DEXTER: But it is measured by the  
13 gross --

14 QUESTION: And it is different from gross  
15 receipts.

16 MR. DEXTER: Well, it's -- we don't quibble  
17 with --

18 QUESTION: Well, don't you require them to  
19 report their gross, "their gross receipts?"

20 MR. DEXTER: Yes, they are required --

21 QUESTION: And then you say that is not a  
22 gross receipts tax.

23 MR. DEXTER: It is not a tax on gross  
24 receipts.

25 QUESTION: I have problems.

1           MR. DEXTER: Okay, but if you look -- if you  
2 look at what they are trying to measure, Your Honor,  
3 they are trying to measure the value of the franchises.  
4 They are trying to measure the value of the doing  
5 business privileges in the state. They are trying to  
6 measure the value attributable to how they are able to  
7 use the property, and --

8           QUESTION: Well, Mr. Dexter, they don't say  
9 anything about the value of the franchise in the statute  
10 itself, do they?

11          MR. DEXTER: Well, the -- it says doing  
12 business, but if you look at the definition of  
13 public --

14          QUESTION: And it says there shall be leveled  
15 and assessed upon each airline a tax of 4 percent of its  
16 gross income each year from the airline business.

17          MR. DEXTER: But as -- but it is a  
18 franchise -- if you look at --

19          QUESTION: It is really something else.

20          MR. DEXTER: If you look at a utility, a  
21 definition of a public utility --

22          QUESTION: Well, what definition of public  
23 utility?

24          MR. DEXTER: It is in Section 269-1 of the  
25 Hawaiian statutes, you can see how they are talking

1 about trying to get at measuring the going concern value  
2 of utility property in the State of Hawaii, and it is  
3 not what we consider a traditional tax on gross  
4 receipts. It is measured.

5 QUESTION: Is that statute quoted in the  
6 briefs?

7 MR. DEXTER: What?

8 QUESTION: Is that statute quoted?

9 MR. DEXTER: No, it is not, and we would --  
10 there are some supplemental statutes we want to refer to  
11 here in the argument, if I get to it -- and we would be  
12 glad to furnish a supplemental appendix to the court.

13 Let's turn back to these practical  
14 considerations that I wanted to talk about.

15 The Hawaiian tax here applies to all of the  
16 income from the business activities of these airlines.  
17 That is the public service company tax. The airlines  
18 are here contending that only the tax as applied to  
19 their receipts from air transportation of persons is  
20 invalid, so they have asked for a specific deduction  
21 from the tax. They are not claiming the tax is  
22 invalid.

23 In addition, the airlines' pay on their  
24 nonoperating utility property a general business  
25 privilege tax measured by 4 percent of gross receipts.

1 So they have paid into the state of Hawaii for the  
2 purpose of conducting substantial business activities in  
3 Hawaii as a public utility and otherwise of 3 or 4  
4 percent of a tax -- a tax on 3 or 4 percent of their  
5 total gross income from that business.

6 Now, the Hawaii tax, indicating again the  
7 nature of its franchise, the Hawaii tax is due January  
8 1, measured by the receipts of the prior year for the  
9 next ensuing calendar year, very much like a franchise  
10 tax for the privilege of doing business for the next  
11 year, very much like an ad valorem property tax where  
12 the tax is due on a specific date.

13 In contrast, the 1513(a) tax is on a  
14 transactional type of tax for the furnishing  
15 specifically of air transportation services.

16 So the tax computation under 1513(a) and the  
17 actual tax computation under the Hawaiian public service  
18 tax are entirely different.

19 Now, the Hawaiian tax applies only to  
20 intrastate business in Hawaii, considering the  
21 interisland transportation as intrastate. For instance,  
22 United Air Lines, Northwest Orient, other airlines that  
23 fly in and out of Hawaii that do not do intrastate  
24 business pay no public service commission tax. It is  
25 only on those utilities conducting a substantial



1 intrastate business with employees, substantial  
2 properties, substantial business activities there.

3           Now, the Hawaii tax also applies to all other  
4 utilities doing business in the State of Hawaii. The  
5 public service commission tax applies to all utilities.  
6 Therefore, steamship companies, gas companies, electric  
7 companies, motor carrier companies, telephone companies  
8 and so forth all pay the same tax at the same or higher  
9 rate than the tax impose on the airlines in question.

10           In addition, comparable taxes are paid by  
11 every business in the State of Hawaii measured by gross  
12 receipts with the exception of life insurance companies  
13 and financial institutions.

14           QUESTION: But none of them pay the federal 8  
15 percent transportation tax, do they?

16           MR. DEXTER: Well, Your Honors, neither do the  
17 airlines here. Those taxes are imposed on me or you  
18 when we go to buy a ticket.

19           QUESTION: Well, I just, nevertheless, none of  
20 them have to charge their customers the 8 percent.

21           MR. DEXTER: Well, this is true, Your Honor.

22           QUESTION: Okay.

23           MR. DEXTER: This is true. There is that  
24 difference.

25           But all of them, whether it is an attorneys,

1 doctors, barbers, whatever, taxi cab drivers, every  
2 business in Hawaii is required to pay this 4 percent  
3 general excise tax.

4 QUESTION: Mr. Dexter, that argument would  
5 carry considerable weight if the claim here were that  
6 the tax on your -- the levy by Hawaii violated equal  
7 protection, but it is that it violates a specific  
8 prohibition in an act of Congress.

9 MR. DEXTER: Well, we think -- well, let -- we  
10 think that (a) is talking about specific excise taxes  
11 where airlines have been singled out for discriminatory  
12 treatment such as the Ohio excise tax.

13 QUESTION: But it just certainly, its language  
14 just doesn't bear that construction, do you think?

15 MR. DEXTER: Well, if you look at (b), I mean,  
16 just step back from the language, what was Congress  
17 trying to get at in (a)? Look at the legislative  
18 history, and then look at (b). (b) is talking about,  
19 except for the taxes enumerated in (a), (a) are specific  
20 excise taxes on air transportation, directly or  
21 indirectly. That is what all the legislative history is  
22 about.

23 What does (b) say? (b) talks about taxes of  
24 general applicability. For instance, compare --

25 QUESTION: No, gross receipts tax on air

1 transportation is a tax of general applicability, don't  
2 you think? I don't see why a gross receipts tax on air  
3 transportation or receipts is any less a tax of general  
4 applicability than a net income tax on the revenue from  
5 air transportation.

6 MR. DEXTER: Well, but what I am saying is  
7 that if you had -- for instance, take the problem of the  
8 net income tax you raised. This Court said, I think, in  
9 the Oakcoke Blue Company case that any deduction from  
10 gross receipts that was not proportionate to the  
11 receipts resulted in an income tax, so that when you are  
12 talking about the differences between the taxes in terms  
13 of labeled used in (b), it seems to me that that is  
14 subsidiary to what was the general pattern of (a) versus  
15 (b), and (a) was singling out airlines for  
16 discriminatory treatment by indirect means -- by  
17 directly or indirectly imposing head taxes or comparable  
18 taxes. (b) assured everyone that it did not include any  
19 general applicable business taxes. In my judgment, that  
20 is -- if you want to get a large framework to look at  
21 the statutory language.

22 QUESTION: Am I wrong that the purpose of this  
23 tax was to build the airports?

24 MR. DEXTER: Yes, this is true.

25 QUESTION: And if they didn't build them,

1 you'd have to build them, wouldn't you?

2 MR. DEXTER: The local governmental units  
3 would have had to try to -- or states would have to try  
4 to do it.

5 QUESTION: Sure.

6 MR. DEXTER: But you see, what we have  
7 here --

8 QUESTION: Your real problem here is that  
9 gross receipts doesn't mean gross receipts.

10 MR. DEXTER: Well, my real -- no, my --

11 QUESTION: Isn't that your problem?

12 MR. DEXTER: That is not my problem because I  
13 can distinguish very much between a public utility tax,  
14 you know, a general utility tax --

15 QUESTION: Well, so far as I am concerned, I  
16 will take on the problem if what a gross receipts is or  
17 happens to be.

18 MR. DEXTER: Well, even if this were a gross  
19 receipts tax, the question is, is it the type of gross  
20 receipts tax Congress was directing its attention to in  
21 1513(a)? Was it talking about specific types of excises  
22 for airport development, or was it trying to immunize  
23 the airlines from the general business taxes of selected  
24 states that historically happen to have measured their  
25 general business taxes by gross receipts?



1                   Or let me put it this way. The issue, the way  
2 that it is framed by the airlines, is by Congress  
3 imposing a head -- user taxes on you and me for the  
4 purpose of airport development and improvement, it  
5 intended to exempt airlines from their obligation to pay  
6 their fair share of general business taxes on the  
7 happenstance that those taxes historically were measured  
8 in some states by gross receipts. That in my judgment  
9 is the basic issue here, and we don't think there is  
10 anything in the Congressional record or history to  
11 support that idea.

12                   QUESTION: Mr. Dexter, supporting that you had  
13 a -- say you win this case, and there is another state  
14 that doesn't have the same history of taxing in the way  
15 you say Hawaii always has, but just decides, well, since  
16 Hawaii can impose this tax, I think it's a pretty good  
17 idea, let's impose a gross income tax in the language of  
18 the Hawaii statute.

19                   Would that statute be valid?

20                   MR. DEXTER: Your Honor, we have said in our  
21 brief two things. One, we think that the Congress  
22 intended by the legislative history to prevent head  
23 taxes or that type of taxes, directly or indirectly; and  
24 secondly, that Congress was concerned with the airlines  
25 being singled out for discriminatory treatment.

1           So I would say if somebody wanted to impose a  
2 gross receipts tax on airlines and single them out for  
3 discriminatory treatment, I think that this would very  
4 well be prohibited by this statute. But I do not think  
5 Congress --

6           QUESTION: Even if their new statute I  
7 described is in exactly the same language as the Hawaii  
8 statute?

9           MR. DEXTER: If it were -- no, but if it were,  
10 if it were, included everything --

11          QUESTION: Concerned about airlines, certain  
12 carriers: there shall be levied and assessed upon each  
13 airline a tax of 4 percent of its gross income. Say I  
14 am in Ohio or Iowa or someplace like that, would I have  
15 to look at the history of Iowa and Ohio taxes to decide  
16 whether that was constitutional, I mean, consistent with  
17 the federal statute, not constitutional.

18          MR. DEXTER: Well, I think you have to look to  
19 see whether airlines have been singled out for  
20 discriminatory treatment. That was the problem with the  
21 Ohio --

22          QUESTION: How do you tell that other than by  
23 the fact the statute applies only to airlines? This  
24 statute only applies to airlines.

25          MR. DEXTER: No, but that is part, that is

1 part of the public service company tax. It applies to  
2 all utilities. That was singled out there because of  
3 airlines traveling in interisland transportation under  
4 the old decisions of this Court, whether you could use a  
5 direct measure of gross receipts. So they used a  
6 property tax -- imposed a property tax measured by gross  
7 receipts for utility purposes.

8 QUESTION: What if they imposed a property tax  
9 measured by \$10 per passenger flying on the aircraft?

10 MR. DEXTER: Well, I think that that would --  
11 that would obviously be, in my judgment, an indirect  
12 head tax.

13 QUESTION: Well, why isn't this an indirect  
14 gross receipts tax?

15 MR. DEXTER: That's been in effect since 1933,  
16 or companion bills to that. It has nothing to do with  
17 this current legislation. I think, you know, it's not,  
18 it's simply not in our judgment that kind of tax. It  
19 certainly has not been a -- no general business taxes  
20 were discussed in the legislative history. Two prime  
21 sponsors of the legislation were Senator Magnuson from  
22 the State of Washington and Representative Brock Adams,  
23 and Washington has a business and occupation tax  
24 measured by gross receipts. It includes the intrastate  
25 receipts of airlines, and no -- and they were -- Senator

1 Magnuson and Adams, Representative Adams were prime  
2 sponsors of this kind of legislation, made no mention in  
3 the legislative history of this act about the Washington  
4 tax or any other general business taxes.

5 In fact, the reason that we have published and  
6 printed this 187 page volume is simply to demonstrate to  
7 the Court that there is not one word in that volume  
8 having to do with general business taxes except one  
9 statement, and that was the statement of the  
10 representative of the airline industry, Mr. Tipton, and  
11 in reference to the Ohio discriminatory tax he said we  
12 oppose this tax because it singles out and discriminates  
13 against the airlines. But he very definitely said that  
14 the airlines had no objection in Ohio or elsewhere of  
15 paying their fair share of general business taxes along  
16 with other members of the business community.

17 And what I think is the real differentiation  
18 here is there is a vast difference between being singled  
19 out, Congress singling out an industry from general  
20 business taxes for preferential purposes on the  
21 happenstance that they might -- on the happenstance that  
22 those taxes are measured by gross receipts. There is a  
23 vast difference between that and singling out the  
24 airlines for discriminatory tax treatment by duplicating  
25 federal head taxes directly or indirectly. And I think



1 that is really the underlying question here.

2 I would like to emphasize, although I know  
3 that I have had some problems with it with this Court at  
4 the moment, but there is, there is a substantial  
5 difference between the public service company tax, a  
6 utility tax, and a tax directly on gross receipts.

7 Now, I know there's much argument in the briefs  
8 of the airlines that there is no difference between a  
9 measure and a subject matter of the tax, but I believe  
10 if you do some real reflecting, you will have to realize  
11 you have got to have a subject of a tax because you  
12 can't measure nothing. There is in every taxing statute  
13 that I have ever seen two things, a subject and a  
14 measure. Now, if the measure, the Court might say the  
15 measure is the same as the subject and substitute, then,  
16 the measure for the subject, but you always have to have  
17 in place these two things. And we think this --

18 QUESTION: Well, the trouble is the statute  
19 says the tax will be on gross income, and that sounds  
20 like the subject to me.

21 MR. DEXTER: Well, but then it turns around,  
22 Your Honor, and says it is a means of taxing the  
23 personal property of the airlines, including the  
24 tangible and intangible and going concern values. It  
25 is --

1                   QUESTION: Well, it doesn't in the taxing part  
2 of it.

3                   MR. DEXTER: Yes, it does, yes, that's the  
4 last part of -- that's the last part of 239-6. So it  
5 was a means of taxing, and then if you look at the  
6 definition of public utility in 269-1 of the Hawaiian  
7 statute, you see that in the definition of the public  
8 utilities they were trying to arrive at the growing  
9 concern value of these franchises and properties used by  
10 the utilities, and the easiest and most direct way to do  
11 it was to measure that by capitalizing net income, which  
12 we do many times in the utility field today, or taking  
13 the gross receipts. And those really are the same as  
14 property taxes because as was indicated, the 1982  
15 amendment to 1513, by adding subsection (d) clearly  
16 indicates that in lieu of property taxes were covered by  
17 (d), and (d) had to do with the property taxes permitted  
18 under (b), so that in lieu of taxes are within the scope  
19 of property taxes under 1513.

20                   And I would suggest if othey were not, then  
21 the Four R legislation under the Railroad Revitalization  
22 Act of 1975 and the same language in the Motor Carrier  
23 Act of 1980 would not become effective because on those  
24 utilities they talk about ad valorem property taxes, but  
25 obviously those statutes have been construed by the

1 lower courts to include in lieu of taxes measured by  
2 gross receipts.

3           So we think that traditionally in this  
4 country, for over a century, property taxes on utilities  
5 have been measured by gross receipts, and there's many  
6 decisions of this Court that uphold it. So if the  
7 question became whether this is indeed a property tax  
8 under (b), we submit that it really is.

9           QUESTION: Tell me, have some of the airlines  
10 paid the tax and without any objection for some time?

11           MR. DEXTER: Well, as -- the airlines in  
12 question here, Your Honor, and all the airlines, paid  
13 the tax for a number of years without question. We  
14 believe that there is nothing, there is nothing in this  
15 legislative history that ever indicated that Congress  
16 was talking about invalidating any state's general  
17 business taxes.

18           QUESTION: Could I ask you, what has been --  
19 what's the airlines' practice under this tax? Do they  
20 add it to the fare?

21           MR. DEXTER: No. They -- it's absorbed.  
22 There's no, in fact, it's not separately stated in  
23 Hawaii at all. It's just part of their general cost of  
24 doing business.

25           QUESTION: But they don't say on their -- they

1 don't have a separate item they add to the bill for  
2 taxes for each passenger.

3 MR. DEXTER: No, no, no. This is just --  
4 well, we think it is a general problem --

5 QUESTION: Does any of them, does any of them  
6 do that?

7 MR. DEXTER: What?

8 QUESTION: Does any of them do that, just  
9 automatically add the gross income tax to the fare?

10 MR. DEXTER: Not that I know of. Most gross  
11 income taxes are considered general business taxes and  
12 are absorbed.

13 Now, there's some taxes are passed on under  
14 the Hawaii general privilege, business and privilege 4  
15 percent tax in order to get the federal tax deduction  
16 for income tax purposes.

17 QUESTION: Are there other airlines than these  
18 two involved in this controversy directly or  
19 indirectly?

20 MR. DEXTER: Well, it involves -- it involves,  
21 as far as Hawaii, no, there's -- I guess -- well, there  
22 may be some smaller airlines there, but this is the --  
23 these are -- the tax here is confined to the intrastate  
24 flights in Hawaii, and I think most of the states that  
25 apply their gross receipts don't tax -- that have gross



1 receipts privilege taxes don't include any interstate  
2 flight receipts. We are talking about a local business  
3 basically.

4           I would like to point out what I think is an  
5 important example of legislative history, and it is set  
6 forth in pages 22 and 25 of the brief of the State of  
7 Washington and other states. In those pages, this  
8 was -- Senator Cotton of New Hampshire wanted to  
9 grandfather in the New Hampshire head tax, so he  
10 proposed to Senator Cannon, who was the sponsor of the  
11 legislation, an amendment to grandfather in the head tax  
12 of New Hampshire until the end of 1973. In that -- and  
13 Senator Cannon agreed to it. And in agreeing to it, he  
14 said that this covers only the head tax now in effect in  
15 the State of New Hampshire.

16           Now, the language submitted by Senator Cannon  
17 I believe is set forth on page 79 of the legislative  
18 history appendix is identical to the language of Section  
19 1513(a). In other words, that shows specifically a  
20 legislative intent that they were talking about the  
21 subject matter generally of head taxes, the direct or  
22 direct imposition of them. In fact, the language "or  
23 the gross receipts derived therefrom" is admitted by the  
24 Air Transport Association, the Solicitor General, the  
25 airlines in question, to have -- to find its place in

1 the statutory language only to take care of the specific  
2 excise tax imposed by the State of Ohio. Ohio had  
3 imposed on airlines alone an excise tax on air  
4 transportation measured by the emplaning or deplaning of  
5 passengers, and the airline association and others were  
6 disturbed about that kind of specific discriminatory tax  
7 against airlines, and everybody agrees, to the extent  
8 there is any legislative history known about this, that  
9 the phrase "or gross receipts derived therefrom" had to  
10 do with that legislation.

11           And I would like to close by saying you can go  
12 through this 187 pages of legislative history, you will  
13 hear the words discriminatory taxes, head taxes, or  
14 equivalent taxes and abuses. You will never hear one  
15 word about any nondiscriminatory general business taxes  
16 of any state in these United States mentioned.

17           And I want to also tell you that if you decide  
18 that Congress -- that the airlines' position is right in  
19 this case, you will have decided that Congress for the  
20 first time in the history of this nation had singled out  
21 one industry from discharging their general obligations  
22 to state governments.

23           Thank you.

24           CHIEF JUSTICE BURGER: Thank you.

25           Do you have anything further?

1 ORAL ARGUMENT OF RICHARD L. GRIFFITH, ESQ.

2 ON BEHALF OF APPELLANTS -- REBUTTAL

3 MR. GRIFFITH: Thank you.

4 Just a couple of quick points.

5 My learned friend has described at length the  
6 Ohio tax as a discriminatory one, but I would point out  
7 to the Court that the Tax Commissioner of Ohio appeared  
8 before the House Commerce Committee and went to great  
9 lengths to list the various Ohio taxes and to show that  
10 in fact the Ohio tax was not discriminatory as compared  
11 to the railroads, the truckers, or other businesses, and  
12 he then submitted language to the Congress to permit a  
13 nondiscriminatory gross excise tax. The Congress  
14 declined his invitation. They did not accept his  
15 language, and I think that tells us that Congress was  
16 concerned about much more than discriminatory taxes.

17 Finally, I would just point out that the  
18 Hawaii statute says that it is levied and assessed upon  
19 each airline a tax of 4 percent of its gross income each  
20 year from the airline business, and then it goes on  
21 later on to say that that tax is in lieu of the Hawaii  
22 general excise tax which is also a gross income, gross  
23 receipts tax.

24 I have no further points.

25 Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
2 The case is submitted.  
3 (Whereupon, at 3:00 p.m. the case in the  
4 above-entitled matter was submitted.)  
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# CERTIFICATION

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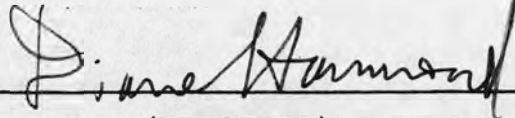
#82-585-ALOHA AIRLINES, INC., APPELLANTS v. DIRECTOR OF TAXATION OF HAWAII; and

#82-586-HAWAII AIRLINES, INC., Appellant v. DIRECTOR OF TAXATION OF HAWAII

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