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STATE OF WASHINGTON
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NO. 84207-8

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SUPREME COURT OF THE STATE OF WASHINGTON

FLIGHT OPTIONS, LLC,

Petitioner,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF
BOMBARDIER AEROSPACE CORPORATION**

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I. INTRODUCTION

Bombardier states that its amicus brief addresses a single issue—“the effect of Federal Aviation Administration (‘FAA’) regulations applicable to aircraft purchased through fractional ownership programs.” Bombardier Br. at 1. Better than half of Bombardier’s arguments in its brief, however, are directed not at the application of FAA regulations to the fractional ownership programs operated by Flight Options and Flexjet, but at the statutory definition of “airplane company” in RCW 84.12.200(3). *See* Bombardier Br. at 5-9. Bombardier’s aim in filing this amicus brief seems primarily to be about convincing the Court that even if the Department properly assessed property taxes on the Flight Options aircraft fleet, the fleet operated by Flexjet should remain untaxed merely because it operates its fractional ownership program under a different chapter of the FAA regulations. *See* Bombardier Br. at 2, 4-5, 7.

This outcome of this case does not turn on which set of federal safety regulations the FAA applies to Flight Options or Flexjet. Contrary to Bombardier’s assertion, the Department has not placed any “great emphasis” on the fact that Flight Options operates under Part 135 of the FAA regulations. *See* Bombardier Br. at 2. The Department has mentioned this fact, but has never suggested that it is controlling or even of great significance compared to other facts in the record. To the extent

other fractional programs share the basic features of the Flight Options program, they too should be assessed under chapter 84.12 RCW, regardless of the set of FAA regulations under which they operate.

II. ARGUMENT

A. **Contrary To Bombardier's Argument, Participants In Flight Options' Fractional Ownership Program Do Not Control Their Aircraft.**

Bombardier admits that Flight Options has operational control "in a regulatory sense" over all aircraft Flight Options flies under its Part 135 certificate, which includes all the aircraft in its fleet. Bombardier argues, however, that as "a practical matter," all fractional owners in "any fractional ownership program" decide "when and where their aircraft fly," and that is "the essence of control." Bombardier Br. at 4, 7.

Bombardier is mistaken, at least with respect to the undisputed facts of this case. For contrary to Bombardier's assertion about fractional owners "in any fractional ownership program," the record demonstrates that Flight Options, not the fractional owners, decides "when and where" all of the aircraft in its fleet fly.

Under the Flight Options fractional ownership Management and Master Interchange Agreements, fractional owners give up the right to fly on the plane in which they own an interest and allow Flight Options to exercise total control over the maintenance, operation, and use of the

aircraft. Though program participants request the takeoff times and destinations, Flight Options determines which aircraft will be used, supplies the pilots, aircrew, and fuel, and makes any takeoff, flight, or landing arrangements necessary for use of the aircraft. CP 170, 175-76. Flight Options selects which plane will be used without regard to the ownership of the plane. CP 389. Under the Management Agreement, when aircraft are not being used by program participants, Flight Options has the right to use the planes for its own purposes (such as providing aircraft charter services under its JetPass program) and to retain any compensation it receives for use of the aircraft. CP 152, 169. *See* Br. of Respondent at 14; Answer to Petition for Review at 3-4; Respondent's Supp. Br. at 3-4. In sum, Flight Options is a "person . . . controlling . . . personal property, used . . . to facilitate the conveyance and transportation of persons and/or property by aircraft" under RCW 84.12.200(3).

B. Operators Of Fractional Ownership Programs Fall Squarely Within The Statutory Definition Of "Airplane Company" In RCW 84.12.200(3).

Bombardier admits that to assess apportioned property taxes against Flight Options and Flexjet under chapter 82.14 RCW, the Department need only show under RCW 84.12.200(3) that these companies (1) are persons either owning or controlling or operating or managing the aircraft and (2) are persons engaged in the business of

transporting persons or property for compensation. Bombardier Br. at 5. Although Bombardier argues unpersuasively that fractional program managers neither own, nor control, nor operate their aircraft fleets,¹ it concedes (as it must) that they at least manage the fleets and therefore satisfy the first disjunctive requirement in the statute. Bombardier Br. at 8. Bombardier's statutory argument thus reduces to an assertion that its Flexjet division cannot satisfy the second requirement in RCW 84.12.200(3) because Bombardier is a wholly owned subsidiary of a Canadian parent corporation and, unlike Flight Options, is not subject to the federal safety requirements in Part 135 of the FAA regulations. Bombardier Br. at 2, 4-5, 8.

There is no reason to believe that the Washington Legislature, in enacting the statutory definitions in RCW 84.12.200, intended to incorporate federal regulatory distinctions based on corporate owners' citizenship or any of the other "technical niceties" of the FAA safety regulations. *See* Bombardier Br. at 3. Bombardier has offered no evidence of any such intent, and there would be no sound tax policy

¹ In its previous briefs, the Department has shown that Flight Options not only is a person controlling, operating, and managing its aircraft fleet, but also is a person owning it. *See* Br. of Respondent at 3-9, 12-18, 26-28; Answer to Petition for Review at 1-5, 8-9; Respondent's Supp. Br. at 2-5, 8-9. The Department will not repeat those arguments once more in this brief. Under the plain language of RCW 84.12.200(3) and in light of the undisputed facts in the record, Flight Options plainly is an "airplane company."

reason for the Legislature to do so. *Cf.* Rev. Rul. 78-75, 1978-1 C.B. 340 (status of an operator under FAA regulations is not determinative in applying federal aviation fuel taxes and transportation taxes). As Bombardier notes, the statutory definitions in RCW 84.12.200 were enacted long before the appearance of fractional ownership programs and thus long before the FAA adopted its current regulations in Part 91K. *See* Bombardier Br. at 8. Contrary to Bombardier's apparent purpose in so noting, this is a compelling reason to reject Bombardier's central argument, not to embrace it.

In any event, the validity of the Department's property tax assessment of Bombardier is not before the Court. The only fractional program operator with a record before the Court is Flight Options. Bombardier will have an opportunity to litigate its property tax dispute with the Department in due course.

C. Bombardier's Attempt To Undermine The Authority Of *Executive Jet Aviation, Inc. v. United States* Is Unpersuasive.

In *Executive Jet Aviation, Inc. v. United States*, 125 F.3d 1463 (Fed. Cir. 1997), the court affirmed a summary judgment dismissing the tax refund claim brought by the operator of the NetJets fractional ownership program. The issue before the appellate court was whether the Internal Revenue Service had properly assessed federal air transportation

taxes under 26 U.S.C. § 4261 against the program operator for failing to collect the taxes from its program participants. 125 F.3d at 1467. Under the federal excise tax scheme, noncommercial flights were subject only to fuel taxes under 26 U.S.C. § 4041(c), while commercial flights were subject only to air transportation taxes under 26 U.S.C. § 4261, calculated as a percentage of the fees charged for the transportation. 125 F.3d at 1465. Which taxes applied to a particular flight turned on former section 4041(c)(4), which defined “noncommercial aviation” as “any use of an aircraft, other than use in a business of transporting persons or property for compensation or hire by air.” *Id.*²

The court reasoned that the “central question” was whether the program operator was in the “business of transporting persons or property for hire by air.” *Id.* at 1469. After carefully considering the four governing contracts every program participant was required to enter into as a condition for purchasing a fractional interest in an aircraft, the court held that as far as the NetJets program was concerned, the program operator was in the “business of transporting persons or property for hire

² Several years after the decision in *Executive Jet Aviation*, Congress repealed subsection (c)(4), but replaced it with a similar definition of “commercial aviation” in 26 U.S.C. § 4083(b). That statute currently provides that “commercial aviation” means “any use of an aircraft in a business of transporting persons or property for compensation or hire by air, unless properly allocable to any transportation exempt from the taxes imposed by sections 4261 and 4271 by reason of section 4281 or 4282 or by reason of subsection (h) or (i) of section 4261.”

by air.” *Id.* at 1465-66, 1469. It agreed with the lower court that there were only “negligible differences between the Netjets aircraft interchange program and the operation of a commercial air charter business.” *Id.* at 1469. Consequently, it held that the federal air transportation tax was properly imposed.

Bombardier describes *Executive Jet Aviation* as “a pre-Subpart 91K case” that was decided “when the fractional industry was still in its infancy.” It argues that the FAA’s “subsequent regulations” in Subpart 91K “greatly clarified the legal relationship” between the fractional owners and the program manager. Therefore, it argues, this Court should ignore “the less informed analysis” of fractional ownership in *Executive Jet Aviation*, which “would not likely be decided the same way today.” Bombardier Br. at 4.

Bombardier’s arguments before this Court are contrary to its own actions. If Bombardier actually believes *Executive Jet Aviation* would be decided differently today, then Flexjet should not be currently collecting that tax from its Flexjet fractional owners. But its own website indicates that it does.³ So does Flight Options. CP 229, CP 253; *see* Br. of

³ Bombardier states that basic facts of Flexjet’s operations can be found at www.flexjet.com. Bombardier Br. at 2. According to that website, Flexjet fractional owners are charged an “hourly rate” for “each hour the owner is in-flight,” with a “fuel component adjustment” added to “the base hourly rate” to account for “fluctuations in the cost of fuel.” The website then discloses that a “Federal Excise Tax will be assessed on

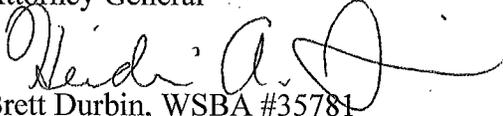
Respondent at 16. If Flight Options and Flexjet were not providing air transportation services to their customers, there would be no reason for them to collect this federal tax. Because they do, they must be “in a business of transporting persons or property for compensation or hire” under 26 U.S.C. §§ 4041(c) and 4261. Likewise, they are similarly “engaged in the business of transporting persons and/or property for compensation, as owner, lessee, or otherwise” under RCW 84.12.200(3). Thus, they both are “airplane companies” subject to an apportioned property tax under chapter 84.12 RCW.

III. CONCLUSION

The Court should affirm the decision of the Court of Appeals holding that the aircraft in the Flight Options fleet are subject to the apportioned property tax in chapter 84.12 RCW.

RESPECTFULLY SUBMITTED this 4th day of May, 2011.

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the non-fixed operational costs (hourly rate and fuel component adjustment).”
http://www.flexjet.com/pdf/Book_2_Navigating_Flexjet.pdf.

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DECLARATION OF
SERVICE

I, Candy Zilinskas, state and declare as follows:

I am a citizen of the United States of America and over 18 years of age and not a party to this action. On May 4, 2011, I provided a true and correct copy of Respondent's Answer to Amicus Curiae Brief of Bombardier Aerospace Corporation and this Declaration of Service to be served electronically by email and via U.S. mail through Consolidated Mail Service with proper postage affixed to:

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed this 4th day of May, 2011, in Tumwater, Washington.


Candy Zilinskas, Legal Assistant