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NO. 84207-8

SUPREME COURT OF THE STATE OF WASHINGTON

FLIGHT OPTIONS, LLC,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent is the State of Washington, Department of Revenue.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Department properly assess property tax on aircraft Flight Options used in Washington on the basis that Flight Options was an "airplane company" under RCW 84.12.200(3), which includes persons owning, operating, controlling, or managing aircraft for the purpose of providing transportation for compensation?

2. Did Washington have jurisdiction to impose an apportioned property tax on the aircraft in Flight Options's fleet based on the number of takeoffs and landings Flight Options made in 2004 and 2005?

III. COUNTERSTATEMENT OF THE CASE

A. Programs Offered By Flight Options

Flight Options operates a fleet of 200 aircraft as part of a fractional aircraft ownership program and an aircraft charter program called JetPass. CP 120 ¶¶5-6; CP 394. These programs provide participants access to Flight Options's fleet of private aircraft. CP 114. The same aircraft are used to transport both fractional owners and JetPass program members. CP 254; CP 394.

Fractional Ownership Program. Flight Options typically sells fractional interests in planes it purchases from manufacturers. CP 437-38. Flight Options uniformly paints and customizes the planes. CP 438-40, 443. Fractional owners may not customize or modify the aircraft. CP 443, 491. Flight Options owns approximately 20% of the total fleet. CP

230-34, 485-87.

Customers participate in the fractional ownership program by buying or leasing an undivided interest of a particular aircraft in Flight Options's fleet. CP 114, CP 483. The fractional interest entitles program participants to a certain number of flight hours on aircraft of a similar make and model in the fleet. CP 174 ¶5.1(b). Typically, Flight Options sells the fractional interest in 1/16 shares, which entitles participants to 50 flight hours. CP 114; CP 251.

When purchasing a fractional interest, customers must execute four contracts. The contracts govern the participants' use of the aircraft; Flight Options's obligation to provide necessary certification, operation and maintenance services for the program aircraft; and the compensation participants pay to Flight Options for its management and transportation services and their use of the aircraft. CP 120-197.

Purchase Agreement. Under the Purchase Agreement, program participants may not transfer their fractional interests to third parties without Flight Options's consent. CP 135-36. Program participants may sell their interests back to Flight Options, but the sale is subject to a "remarketing fee" of five to twelve percent, deducted from the sale price. CP 133 ¶4.2. Flight Options has the right to repurchase the fractional interest after 60 months or if the program participant defaults on its other contract obligations. CP 134 ¶4.2(d)-(e).

Program participants cannot unreasonably withhold their consent if Flight Options proposes a substitute interest in another aircraft of the same

make and model. CP 134 ¶4.2(i). Flight Options procures insurance coverage, and in the event of a loss, receives the proceeds. CP 170 ¶3.6; CP 179 ¶6.3.

Owners Agreement and Master Interchange Agreement. The Owners Agreement details rights and responsibilities each fractional owner has with respect to other owners and the aircraft. It includes a provision that each owner's Management Agreement governs use of the aircraft. CP 122-26. The Master Interchange Agreement provides that all participants agree to let other program participants use the aircraft in which they have an interest. CP 190 § 2.

Management Agreement. Customers also must sign a Management Agreement with Flight Options when they purchase a fractional interest. CP 132 ¶3.2(a); CP 130 ¶1.3. The Management Agreement details the number of hours a program participant may use aircraft in the fleet, how those hours are calculated, and the fees Flight Options charges participants for management of the aircraft and transportation services. *See* CP 167-87.

The Management Agreement requires Flight Options to provide pilots, maintenance, hangar space, fueling, and administration, and to make any necessary takeoff, flight and landing arrangements. CP 170 ¶¶3.4-3.5. Flight Options maintains possession of the aircraft, and it has the right to operate the aircraft for its own purposes when not transporting program participants and to keep any compensation it receives from doing so. CP 152 ¶4.6; CP 169 ¶1.1.

Program participants wishing to make a flight provide Flight Options the departure point, destination, date and time of flight, number of passengers, amount of luggage, and date and time of return flight. CP 176 ¶5.2(d). Customers may request a different type of aircraft than the one in which they own an interest. CP 115; CP 177 ¶5.4(b). Flight Options then arranges for the aircraft, pilot, aircrew, and fuel and makes takeoff, flight, and landing arrangements for the flight. CP 170 ¶¶3.4-3.5. Program participants must give 48 hours notice before domestic flights and 96 hours notice for international flights. CP 175 ¶5.2(b). All of Flight Options's flights since February 15, 2005, fall under Federal Aviation Regulation Part 135, which requires Flight Options to maintain operational control of the aircraft. *See* CP 250; CP 169 ¶1.2.

Interestingly, program participants have no right to fly on their own plane. CP 174 ¶5.1(b). Flight Options is obligated only to supply an aircraft of similar make and model from the fleet or arrange for a charter if one is not available.¹ CP 174 ¶5.1(b); CP 272. Flight Options does not take into account the ownership of the airplane when scheduling an aircraft for the participant's flight. CP 389.

After the flight, Flight Options deducts the number of flight hours used from the participant's account and bills the participant an additional occupied hourly rate and fuel charge based on the time the participant used the aircraft. CP 171 ¶4.1; 176 ¶5.4(a); CP 185. Participants using more

¹ Flight Options used chartered aircraft in two percent of flights in 2004 and in six percent of flights in 2005. CP 255.

than their allotted hours must pay a supplemental hourly fee three times the standard rate for using the aircraft in Flight Options's fleet. CP 176 ¶5.3; CP 484:21-24. In 2004-05, Flight Options charged participants \$413,000,000 in occupied and supplemental hourly charges. CP 120 ¶7.

JetPass Program. The JetPass program is a pure charter program allowing members to fly on Flight Options aircraft for a fee. JetPass members prepay based on the type of aircraft they wish to use. CP 202 ¶(3)(d). The program entitles them to use most of the aircraft in the Flight Options fleet, but the hourly rate depends on the type of plane. CP 199 ¶(1)(c). Flight Options maintains operational control of the aircraft during the flight. CP 201 ¶(2)(e). If a Flight Options plane is not available, Flight Options contracts with a third-party charter company to provide the flight. CP 200 ¶(2)(a). Once the funds in the member's account are used up, the membership is terminated. CP 202 ¶(4).

B. Department's Property Tax Assessment And Case History

Under RCW 84.12, the Department assesses the operating property of certain transportation and utilities companies, which must file annual reports for the Department's use in valuing and assessing the operating property. RCW 84.12.200; RCW 84.12.230; WAC 458-50-070. The Department learned Flight Options was operating flights in Washington, and in 2005 it issued a property tax assessment based on Flight Options's average use of its fleet in Washington during 2004. CP 73-74. The Department allocated the value of Flight Options's property to Washington based on 1,397 takeoffs or landings in Washington, versus

146,484 total takeoffs or landings the fleet made in 2004. CP 6-7 ¶¶11; CP 119 ¶1; CP 120 ¶2; *see* RCW 84.12.300 (Department apportions system value to state). In 2006, the Department issued another apportioned property tax assessment, based on 700 landings in Washington, compared to 65,072 total landings Flight Options's aircraft made in 2005. CP 7 ¶12; CP 120 ¶¶2-3.²

Flight Options filed a declaratory judgment action and sought an injunction against the Department's 2005 assessment. Flight Options alleged that it was not an "airplane company" under RCW 84.12.200(3) and that the Department lacked jurisdiction to assess its property because the property did not acquire a tax situs in Washington and imposing property tax would violate the Due Process Clause of the federal constitution. CP 8-9 ¶¶17, 25, 27. Flight Options amended its complaint in 2007 to enjoin the Department's 2006 assessment on the same grounds.

The parties moved for summary judgment, relying in part on stipulated facts and exhibits. *See* CP 119-205. The trial court granted the Department's motion and denied Flight Options's motion. CP 743. Flight Options timely filed a notice of direct appeal to this Court, CP 749, which remanded the case to the Court of Appeals after receiving briefing.

The Court of Appeals affirmed, holding the Department had statutory authority to assess the aircraft and rejecting Flight Options's

² In its annual reports, Flight Options did not provide the information requested regarding the various airports at which the company's planes landed during the prior year. CP 541; CP 562-609 (2006 Annual Report missing Airport Statistics page). As a result, the Department allocated all the landings to King County.

argument that the aircraft lacked a tax situs in Washington. *Flight Options LLC v. Dep't of Revenue*, 2010 WL 94107 at *2-3 (Wn. App., Jan. 12, 2010). Flight Options timely petitioned for review in this Court.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Contrary to what Flight Options implies, this is a case of first impression only in the sense that it concerns the application of property taxes to a relatively new form of business in the aircraft industry, a company that sells property interests in the aircraft, as well as management and charter services. By contrast, the legal principles involved here are well established. This case presents no novel issues. The Department (or its predecessor) has been assessing the operating property of "airplane companies" since 1935. *See* Laws of 1935, ch. 123. The United States Supreme Court has recognized since the early 1900s that the question of property "situs" for purposes of determining a state's tax jurisdiction is governed by due process principles, and that habitual use and enjoyment of property in a state satisfies the requirements of the Due Process Clause. Nothing about the decision conflicts with any decision of this Court or the Court of Appeals or otherwise meets the standards of RAP 13.4(b).

A. Division II's Decision That The Department Properly Assessed The Flight Options Aircraft Fleet Does Not Conflict With Any Decision Of This Court.

Most property subject to property tax in Washington is assessed at the local level. Many decades ago, the Legislature made an exception for the property of inter-county and interstate transportation and utility

companies, which is subject to assessment by the Department under RCW 84.12. RCW 84.12.270. This centralized approach to assessment avoids inconsistent local valuations and allows the value of interstate property to be apportioned.

1. Under the plain language of RCW 84.12.200, Flight Options is an “airplane company.”

As a starting point, it is helpful to understand why the Department issued an assessment to Flight Options as an “airplane company” under RCW 84.12. RCW 84.12 requires the Department to assess the “operating property” of “airplane companies” who provide air transportation for hire.

The statute defines “airplane company” as:

any person owning, controlling, operating or managing real or personal property, used or to be used for or in connection with or to facilitate the conveyance and transportation of persons and/or property by aircraft, and engaged in the business of transporting persons and/or property for compensation, as owner, lessee or otherwise.

RCW 84.12.200(3) (emphasis added); *see also* RCW 84.12.200(10), (11), (12) (definitions of “person,” “company,” and “operating property,” respectively). Under RCW 84.12.200(3), the assessment was valid if Flight Options owned *or* controlled *or* operated *or* managed aircraft during the tax periods to provide air transportation for compensation as owner *or* lessee *or* otherwise. The undisputed facts demonstrate as a matter of law that Flight Options is an “airplane company.”

The Flight Options contracts for the fractional ownership and JetPass programs leave no doubt that Flight Options controlled or operated or managed the aircraft as owner or lessee “or otherwise.” CP 120-205.

The Management Agreement alone proves this point, since it gives Flight Options possession and sole control over each aircraft, including operational control when any program participant is using it (starting in 2005). CP 167-187. *See supra*, at 3-5 (relevant facts demonstrating Flight Options's control, operation, and management of the fleet).

Because of the disjunctive phrasing in the "airline company" definition, the Department is not limited to assessing "owners" of operating property. It may assess the operating property of companies that control, operate, or manage the property as a lessee "or otherwise." Here, however, Flight Options is properly considered an "owner" as well. It has a 20% ownership interest in the overall fleet. CP 485-87. It also has almost every other common indicia of ownership in the aircraft fleet, including the right to possession, the sole right to profit from its use, the right to exclude others, including program participants, from its use, and the right to control transfers of interest in the aircraft. CP 124 ¶6(c), 134-136, 152 ¶4.6, 161 ¶1.1, 174 ¶5.1(b). *See Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599-600, 528 P.2d 471 (1974); Br. of Resp. at 26-27.

The undisputed evidence also shows the company is "engaged in the business of transporting persons and/or property for compensation."³

³ This undisputed evidence distinguishes this case from *Weyerhaeuser Timber Co. v. Henneford*, 185 Wash. 46, 51, 53 P.2d 38 (1936), where this Court held that a company that transported its own logs, but did not transport logs for others, did not qualify as a "logging railroad company" under RCW 84.12.200(9). The Court of Appeals recognized that Flight Options receives compensation for providing transportation services, 2010 WL 94107 at *1. Nothing in its decision is in conflict with *Weyerhaeuser*.

The JetPass program is a pure sale of transportation services, giving members the right to on-demand air charter transportation for a specified number of hours. CP 199-205. The fractional ownership program also includes the sale of transportation services for compensation. In addition to purchasing a fractional interest in a plane and aircraft management services, fractional owners purchase the right to obtain air transportation services from Flight Options on demand. Flight Options is obligated to make a plane available for their scheduled flight or charter one, if necessary. CP 174 ¶5.1(b), 272.

When a program participant uses some of its allotted annual flight hours, Flight Options charges fees for the transportation services it provides, including the occupied hourly fee and other fuel fees. CP 171 ¶4.1, 176 ¶5.3, 185-86. Flight Options earned \$413 million in fees from transportation services during the tax periods. CP 120. Flight Options collects and pays the federal air transportation tax, which it would not owe if it were not providing air transportation for compensation. CP 229 ¶10; CP 253; *see* 26 U.S.C. § 4261.⁴

The Department's assessment of Flight Options as an "airplane company" was a straightforward application of RCW 84.12 to the

⁴ Federal cases support the conclusion that Flight Options provides air transportation for compensation. *See Executive Jet Aviation, Inc. v. United States*, 125 F.3d 1463, 1468-69 (Fed. Cir. 1997) (company operating fractional ownership program was "in the business of transporting persons or property for hire"); *Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742 (5th Cir. 2003) (NetJets fractional ownership program held a "common carrier by air" providing transportation for hire under Railway Labor Act, 45 U.S.C. §§ 151a, 181); *see also* CP 117-18 (National Mediation Board ruling concluding Flight Options is a "carrier" under Railway Labor Act).

undisputed facts concerning Flight Options's business.

2. Division II's application of RCW 84.12 is not in conflict with this Court's decisions.

Flight Options argues it is a "basic tenet" that property taxes may be imposed only on owners of property and that the Court of Appeals decision is in conflict with cases so holding. Petition at 1, 8-11. The Legislature has decided otherwise. As discussed above, RCW 84.12 does not limit assessments to the operating property of owners. In addition, Flight Options incorrectly reads the cases, and no such conflict exists.

This Court did not hold that property tax liability arises only from taxpayers' "status as property owners" or solely on the "ownership of property" in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) (city ordinance imposing street utility charge was an unconstitutional property tax, rather than a regulatory fee). What this Court held was that a street utility charge best fit the definition of a property tax, which the Court defined as "an absolute and unavoidable demand against property or the ownership of property." 127 Wn.2d at 890 (citing *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965)) (emphasis added).

Likewise, the Court of Appeals decision is not in conflict with cases addressing RCW 84.40.020, which requires that personal property subject to taxation "be listed and assessed every year, with reference to its value and ownership on the first day of January of the year in which it is assessed" See *Star Iron & Steel Co. v. Pierce County*, 5 Wn. App. 515, 523, 488 P.2d 776 (1971) (personal property exempt from property

tax where title passed to tax-exempt entity before date on which assessor valued and assessed the property), *opinion adopted*, 81 Wn.2d 680, 504 P.2d 770 (1972), *overruled in part by Timber Traders, Inc. v. Johnson*, 87 Wn.2d 42, 548 P.2d 1080 (1976) (requiring exempt status to be determined as of January 1 rather than the date the valuation occurs).

The applicable statute here is RCW 84.12.270, not RCW 84.40.020. For centrally assessed utility and transportation companies, the Legislature directed the Department to “annually make an assessment of the *operating property* of all *companies*; and . . . prepare an assessment roll upon which it shall enter and assess the true and fair value of all the *operating property* of each such *companies*” as of January 1 of that year. RCW 84.12.270 (emphasis added). Read with the statutory definitions of “operating property” and “company” (which includes “airplane companies”), RCW 84.12.270 requires “operating property” to be assessed by reference to “companies,” as owner, lessee, or otherwise. *See* RCW 84.12.200(11) & (12). In addition, RCW 84.12.320 provides that assessment of a company in the name of the owner, lessee, or operating company is notice to, and an assessment of, all interests in the property.⁵

⁵ Flight Options cites *State v. Lawton*, 25 Wn.2d 750, 172 P.2d 465 (1946), as compelling its interpretation. *Lawton* did not concern a property tax, and Flight Options misunderstands the nature of property taxes. “Ad valorem property taxes are primarily in rem in character. The tax is imposed against the property itself, not against the owners of the various interests” in the property. *Clark-Kunzl Co. v. Williams*, 78 Wn.2d 59, 63, 469 P.2d 784 (1970). Property can be subject to multiple interests, “and which party shall bear the burden is not a matter of public concern.” *Trimble v. City of Seattle*, 231 U.S. 683, 689, 34 S. Ct. 218, 58 L. Ed. 435 (1914), *quoted in Clark-Kunzl*, 78 Wn.2d at 63. Interested parties can allocate tax burdens between themselves in their contracts. *Id.* Property tax liability follows the property, and the property is liable for the levy against it, regardless of who holds title. *Lewis Constr. Co. v. King County*, 60 Wash. 694, 697,

Flight Options looks for support for its “owner only” argument in RCW 84.12.210, which instructs the Department how to assess the operating property when there is both an “owning company” and an “operating company.” Under RCW 84.12.210, “[p]roperty used but not owned by an *operating company* shall, whether such use be exclusive or jointly with others, be deemed the sole operating property of the *owning company*.” (Emphasis added). Because “company” is defined in RCW 84.12.200(11) to include only companies subject to central assessment, the plain words of RCW 84.12.210 only apply when two or more entities qualify as “companies” assessed under RCW 84.12, one as the owner and the other as the operator. *See Canadian Pac. Ry. Co. v. King County*, 90 Wash. 38, 44-46, 155 P. 416 (1916) (rail passenger cars operated in Washington by Washington railroad company properly assessed to Canadian railroad company that owned them). Here, Flight Options is the only “company” assessed under RCW 84.12, so there is no choice to make between an “owning company” and an “operating company.” RCW 84.12.210 does not apply.

The Department agrees with Flight Options on one point, that the Court of Appeals incorrectly found a conflict between RCW 84.12.210 and the definition of “operating property” in RCW 84.12.200(12).⁶ Petition at 5, 10. But this is not a basis on which to grant review, and the

111 P. 892 (1910). *See* RCW 84.12.320 (assessment of operating property deemed an assessment of “all the title and interest in such property of every kind and nature”).

⁶ Had the Court of Appeals considered both the definitions of “company” and “operating property” and applied them in the context of RCW 84.12.210, it might not have gotten confused on this point.

Court of Appeals correctly concluded, based on the entire statutory scheme, that operating property may be assessed to a person other than the property owner. *Flight Options*, 2010 WL 94107 at *2.

B. Division II's Decision That Washington Had Jurisdiction To Impose An Apportioned Property Tax On Flight Options's Fleet Is Not In Conflict With Federal Constitutional Standards Or This Court's Decisions Regarding "Situs."

The Court of Appeals properly concluded that the Flight Options aircraft fleet had a tax "situs" in Washington. *Flight Options*, 2010 WL 94107 at *3. The decision is consistent with federal constitutional standards, and it does not conflict with any decision of this Court.

The question whether property used in interstate commerce has tax situs in a state for purposes of property taxes "is one of due process." *Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 599, 74 S. Ct. 757, 98 L. Ed. 967 (1954). In Washington, the general rule for nearly a century has been that tangible personal property is "subject to taxation by the state in which it is, no matter where the domicile of the owner may be." *Canadian Pac. Ry.*, 90 Wash. at 43. This rule is consistent with federal law. *See Pullmans Palace Car Co. v. Commonwealth of Pennsylvania*, 141 U.S. 18, 22, 11 S. Ct. 876, 35 L. Ed. 613 (1891) (citing earlier cases).

The United States Supreme Court long ago set standards for taxation by a state other than the owner's domicile of personal property used to provide transportation services in interstate commerce. *Marye v. Baltimore & Ohio Railroad Co.*, 127 U.S. 117, 8 S. Ct. 1037, 32 L. Ed. 94

(1888). Where an out-of-state railroad company brought rolling stock (cars and engines) into Virginia “there habitually to use and employ,” the State of Virginia could tax that property and impose on it a “fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens.” *Id.* at 123. The tax was proper even if the specific items of property used and employed in the state were not continuously the same, but constantly changing. *Id.* at 123-24.

Since *Marye*, the Supreme Court has repeatedly reaffirmed the habitual use or employment standard for determining whether movable property has a tax situs in a particular state. “The basis of the jurisdiction is the habitual employment of the property within the state.” *Johnson Oil Refining Co. v. State of Oklahoma ex rel. Mitchell*, 290 U.S. 158, 162, 54 S. Ct. 152, 78 L. Ed. 238 (1933), *quoted in Braniff Airways*, 347 U.S. at 601; *see also Central Railroad Co. of Pennsylvania v. Commonwealth of Pennsylvania*, 370 U.S. 607, 613, 615, 82 S. Ct. 1297, 8 L. Ed. 2d 720 (1962); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 445, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979).

The habitual use or employment standard meets the “minimum contacts” threshold for due process purposes in the context of property taxes, and the nature of those contacts sets practical limits on the extent to which a state can tax the property under the Due Process Clause. To satisfy due process, states are limited to imposing apportioned taxes tied to use of the property in the particular taxing state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

The Supreme Court has approved various apportionment schemes since before the turn of the last century. *See, e.g., Pullmans Palace*, 141 U.S. at 26 (for specialized rail cars, apportionment based on miles of railroad track in state compared to total in all states); *Braniff*, 347 U.S. at 593 n.4 (apportionment based on ratios of state-based arrivals and departures, tons carried, and income, relative to the whole).

Fair apportionment ensures constitutionality under the Commerce Clause. *Braniff*, 347 U.S. at 600-01; *Johnson Oil*, 290 U.S. at 161-62; United States Constitution, art. I, § 8, cl. 3. For purposes of property taxes on interstate transportation property, fair apportionment of the value of property used in the state renders the tax constitutional under both the Due Process and Commerce Clauses. *Ott*, 336 U.S. at 174.⁷

Under the due process “minimum contacts” standard, Flight Options’s operations in Washington constituted habitual use during the tax periods. In 2004, Flight Options made 1,397 takeoffs or landings in Washington. CP 119 ¶1. In 2005, Flight Options made 700 landings in Washington. CP 120 ¶3. Accordingly, the operating property was subject to an apportioned property tax. *Braniff*, 347 U.S. at 601; *Central Railroad*, 370 U.S. at 615; *Johnson Oil Refining*, 290 U.S. at 162; *see also*

⁷ A state tax will be sustained against a Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977); *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). The Commerce Clause test in *Complete Auto* “encompasses” due process requirements. *Trinova Corp. v. Michigan Dep’t of Treasury*, 498 U.S. 358, 373, 111 S. Ct. 818, 112 L. Ed. 2d 884 (1991).

Fall Creek Constr. Co. v. Director of Revenue, 109 S.W.3d 165 (Mo. 2003) (fractionally owned aircraft had “substantial nexus” with state where aircraft arrived in or departed from state 42 times during 13-month period and planes remained overnight 24 times during period); *Auerbach v. Assessment Appeals Board*, 167 Cal. App. 4th 1415, 1422, 85 Cal. Rptr. 3d 118 (Cal. App. 2008) (aircraft had taxable situs in Nevada where one plane in Nevada eight days and another for two days during tax year).

Flight Options argues that the Supreme Court decisions require mobile property to have fixed routes and regular schedules in a state to establish situs. Petition at 14. Flight Options confuses what is constitutionally necessary with what is constitutionally sufficient. There is no doubt that operating property on fixed routes and regular schedules in a state will establish situs in that state. *Central Railroad*, 370 U.S. at 614. However, habitual use of property in a state *also* creates situs:

[A] nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. . . . Habitual employment within the State of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs

Central Railroad, 370 U.S. at 615; *see also American Refrigerator Transit Co. v. Hall*, 174 U.S. 70, 72, 81-82, 19 S. Ct. 599, 43 L. Ed. 899 (1899) (approving Colorado tax on rail cars owned by Illinois corporation although cars were not run in fixed numbers, on regular schedules, or on fixed routes).

Flight Options’s insistence on requiring a “permanent” location or

fixed routes and regular schedules to establish situs runs counter to modern cases addressing the issue, other than perhaps *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944), where the Court held that the aircraft had tax situs only in Minnesota. The Supreme Court distanced itself from the *Northwest Airlines* decision in *Braniff*, holding that a nondomiciliary state could impose an apportioned property tax on an aircraft fleet that made 18 stops per day in the state. *Braniff*, 347 U.S. at 601-02.

Because the aircraft in Flight Options's fleet made an average of four takeoffs or landings a day in Washington during the two tax years, the Court of Appeals properly concluded under federal law that the assessment of an apportioned property tax was constitutional. Flight Options also argues that the Court of Appeals decision is in conflict with state law, but it fails to establish that conflict.

The Department does not dispute that the statutes governing centrally assessed property incorporate the concept of situs. RCW 84.12.200(12) (defining "operating property" in part as being "situate" in Washington); *see* Petition at 11-12. No conflict exists, however, between the Court of Appeals decision and the cases Flight Options cites.

In two cases concerning vessels, this Court addressed whether Washington had situs for purposes of an *unapportioned* property tax assessed by county assessors, rather than an apportioned tax under RCW 84.12. *U.S. Whaling Co. v. King County*, 96 Wash. 434, 436-38, 165 P. 70 (1917) (whaling vessel taxable in home port of Washington, although

registration and owner's domicile in another state); *Guinness v. King County*, 32 Wn.2d 503, 202 P.2d 737 (1949) (yacht with British owner not subject to tax in Washington where it was temporarily in the state for period extended by war).⁸ But in a later case concerning a barge company, this Court recognized the importance of apportionment. *Alaska Freight Lines, Inc. v. King County*, 66 Wn.2d 360, 364, 402 P.2d 670 (1965) (because apportionment did not apply to oceangoing vessels under federal cases cited, unapportioned tax assessed in nondomiciliary state required blending of vessel into commerce and property of that state). Here, the property tax *is* apportioned, so the risk that multiple states will tax the same property is eliminated.⁹ RCW 84.12.300. Correspondingly, there is no need to limit "situs" to a single state.

Likewise, nothing in the Court of Appeals decision is in conflict with the other state case *Flight Options* cites, *Canadian Pac. Ry. Co. v. King County*, 90 Wash. 38, 155 P. 416 (1916); Petition at 13. That case concerned an apportioned assessment of a "railroad company" under the predecessor statute to RCW 84.12.¹⁰ The taxpayer's rail cars were used on regular routes and schedules in Washington, but this Court did not indicate

⁸ *Guinness* and *U.S. Whaling* applied the "home port" doctrine, which the Supreme Court has abandoned in favor of fair apportionment among the states. *Japan Line*, 441 U.S. at 442-43.

⁹ The benefit of an apportioned property tax, in which each state taxes the portion of the value used in that state, is the absence of any cumulative effect. In short, "there is no risk of multiple taxation." *Ott*, 336 U.S. at 174.

¹⁰ *Flight Options* incorrectly argues that RCW 84.12 does not provide an independent basis for taxing property. Petition at 17. "The legislature has broad plenary powers in its capacity to levy taxes." *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 96, 558 P.2d 211 (1977); see also *Northern Pac. Ry. Co. v. State*, 84 Wash. 510, 529, 147 P. 45 (1915) (rejecting challenges to predecessor of RCW 84.12).

fixed routes and regular schedules were required. Instead, it applied the more flexible approach, finding tax situs because the cars were “regularly used and employed in railroad business within this state,” even though the same cars were not used continuously. *Id.* at 44 (citing *Pullmans Palace*).

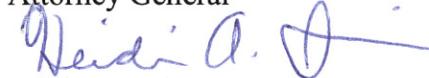
Flight Options has not demonstrated that the Court of Appeals decision is in conflict with any decision of this Court or with United States Supreme Court cases applying due process standards to determine a state’s jurisdiction to impose an ad valorem tax on property used by interstate transportation companies.

V. CONCLUSION

For the foregoing reasons, the Court of Appeals decision does not merit review under RAP 13.4(b), and the petition should be denied.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.

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