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**SUPREME COURT OF THE STATE OF WASHINGTON**

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FLIGHT OPTIONS, LLC,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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**BRIEF OF RESPONDENT**

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**ORIGINAL**

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## I. INTRODUCTION

For many decades, the Department of Revenue has assessed property taxes on property used in providing interstate transportation and utility services under RCW 84.12. This case concerns the application of those statutes to a relatively new business model for providing air transportation—fractional ownership of the planes by their passengers. In Flight Options’s case, each plane in its fleet could have anywhere from one to sixteen owners. Flight Options enters into four different contracts with each participant in the program, and under these contracts, Flight Options not only sells an interest in the planes, but also provides management and flight services. The combination of these four contracts creates some interesting questions regarding the precise nature of the property interest program participants purchase and, correspondingly, the property interests Flight Options retains. However intriguing these questions may be, they need not be resolved.

The first issue in this case is whether Flight Options is an “airplane company” under RCW 84.12.200(3), which defines that term to include persons “owning, controlling, operating or managing” aircraft used to provide air transportation for compensation. The four contracts and other evidence in the record demonstrate that Flight Options controls, operates, and manages these aircraft, and that it uses them to provide air

transportation services for compensation. Under the plain language of the statute, Flight Options is an “airplane company,” regardless of its precise property interest in the fleet. Accordingly, the fleet is subject to a fairly apportioned property tax related to its use in Washington under RCW 84.12.270.

The second issue in this case is whether the aircraft had a tax situs in Washington, thus giving the state jurisdiction to impose property tax. This issue is governed by federal due process principles. Because Flight Options habitually operated aircraft in its fleet in Washington, with hundreds of takeoffs and landings in the state during each of the two tax years, the fleet was subject to a fairly apportioned property tax under current due process jurisprudence.

The trial court correctly concluded as a matter of law that the fleet Flight Options operated was subject to assessment under RCW 84.12.270, and the assessment was constitutionally valid. Accordingly, this Court should affirm the summary judgment order.

## **II. STATEMENT 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. STATEMENT OF THE CASE

Flight Options operates a fleet of 200 aircraft that it uses to run 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 (Interrogatory No. 36); CP 394.

#### **Fractional Ownership Program**

Flight Options typically sells fractional interests in planes it purchases from aircraft manufacturers. CP 437-38. Flight Options uniformly paints and customizes the planes. CP 438-40, 443. Program participants are not allowed to customize or modify the aircraft related to the fractional interest they purchase. CP 443, 491. When purchasing aircraft, Flight Options buys more planes than it plans to sell fractionally. CP 485-86. Flight Option owns approximately 20% of the total fleet. CP 230-34, 485-87.

Customers can 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 lasts 60 months, after which Flight Options has the right to repurchase the interest. CP 114; CP 134 ¶ 4.2(e). The fractional interest entitles program participants to a certain number of flight hours on aircraft of a similar make and model in Flight Options's fleet. CP 174 ¶ 5.1(b). Typically, Flight Options sells the fractional interest in 1/16 shares, which entitles the participants to 50 flight hours. CP 114; CP 251 (Interrogatory No. 25).

When purchasing a fractional interest, customers must execute four contracts. These include the Purchase Agreement, Management Agreement, Owner's Agreement, and Master Interchange Agreement. See CP 132 ¶ 3.2(a); CP 130 ¶ 1.3. These agreements govern the participants' use of the aircraft in the program; 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 services and their use of the aircraft. CP 120-197.

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 do have the right to sell their interests back to Flight Options, but the sale is subject to a "remarketing

fee,” deducted from the sale price. CP 133 ¶ 4.2. The remarketing fee varies from five to twelve percent, depending on how long the participant has held the interest. *Id.* If a customer trades in its interest for an equal or greater percentage interest in a larger or more expensive plane, the remarketing fee is waived. CP 135 ¶ 4.2(j). Flight Options has the right to repurchase the interest after 60 months or if the program participant defaults on the Management Agreement. CP 134 ¶ 4.2(d)-(e). Examples of default include failing to pay monthly management fees or hourly charges, allowing liens or encumbrances to attach to the fractional interest, or if the participant files for bankruptcy. CP 180 § 9. Likewise, program participants can require Flight Options to repurchase their interest if Flight Options defaults on the Management Agreement. CP 134 ¶ 4.2(f).

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 also arranges for insurance coverage, and in the event of a loss the proceeds will be paid to Flight Options. CP 170 ¶ 3.6; CP 179 ¶ 6.3.

With respect to the other contracts, the Owners Agreement details rights and responsibilities each fractional owner has with respect to other owners and the aircraft, including providing 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.

Customers also must sign a Management Agreement with Flight Options when they purchase a fractional interest from Flight Options.<sup>1</sup> CP 132 ¶ 3.2(a); CP 130 ¶ 1.3. The Management Agreement details the number of hours a program participant may use the aircraft in Flight Options's fleet, how those hours are calculated, and the fees charged for use and management of the aircraft. *See* CP 167-87.

Under the Management Agreement, Flight Options maintains possession of the aircraft and agrees to manage the aircraft for the program participant. CP 169 ¶ 1.1. The Management Agreement requires Flight Options to provide pilots, maintenance, hangar space, fueling, and administrative communications, and to make any takeoff, flight and landing arrangements necessary for use of the aircraft. CP 170 ¶¶ 3.4-3.5. Flight Options also retains the right to operate the aircraft for its own purposes when it is not being used to transport program participants, and to keep any compensation it receives from operating the aircraft. CP 152 ¶ 4.6.

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<sup>1</sup> Flight Options provides aircraft management services only to customers that purchase fractional interests. CP 253 (Interrogatory No. 32).

Program participants wishing to make a flight contact Flight Options and provide 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 can also 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 any takeoff, flight and landing arrangements necessary for the flight. CP 170 ¶¶ 3.4-3.5. After February 15, 2005, all of Flight Options's flights have been operated under Federal Aviation Regulation Part 135, which required Flight Options to maintain operational control of the aircraft. *See* CP 250 (Interrogatory 23); CP 169 ¶ 1.2.<sup>2</sup>

Program participants do not have the right to fly on their own plane. CP 174 ¶ 5.1(b). Flight Options is obligated only to supply an aircraft of a similar make and model or arrange for a charter aircraft at its own expense if one is not available from the fleet.<sup>3</sup> CP 174 ¶ 5.1(b); CP 272 (Interrogatory No. 47). When scheduling an aircraft for the

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<sup>2</sup> The 2004 version of the Management Agreement states that the program participant is in operational control of the aircraft when using it. CP 148 ¶ 1.2. However, this provision did not apply when Flight Options provided program participants with chartered aircraft. CP 272 (Interrogatory No. 47). Even though program participants may have had "operational control" for FAA purposes before February 2005, the Management Agreement obligated Flight Options to provide the pilots and aircrew for the flight. CP 148-49 ¶ 3.4. Those pilots could terminate a flight, refuse to commence flight or take other actions necessitated by safety considerations. CP 192 § 5.

<sup>3</sup> In two percent of flights in 2004 Flight Options used chartered aircraft. The figure for 2005 was six percent. CP 255 (Interrogatory No. 38).

participant's flight, Flight Options does not take into account the ownership of the airplane. CP 389. Program participants must give 48 hours notice before any domestic flights and 96 hours notice for international flights. CP 175 ¶ 5.2(b).

After the flight, Flight Options deducts the number of flight hours used from the participant's account. Flight Options also bills the participant an additional occupied hourly rate and fuel charge based on the amount of time the participant used the aircraft. CP 171 ¶ 4.1; 176 ¶ 5.4(a); CP 185. If program participants use more than their allotted hours they must pay a supplemental hourly fee three times higher than the typical occupied hourly rate for using the aircraft in Flight Options's fleet. CP 176 ¶ 5.3; CP 484:21-24. In 2004-05, Flight Options charged program participants \$413,000,000 in occupied and supplemental hourly charges. CP 120 ¶ 7.

### **JetPass Program**

The JetPass program is a charter program that allows members to fly on aircraft in the Flight Options fleet for a fee. Program members prepay a certain amount 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 for using the plane will vary depending on the type of plane. CP 199 ¶ (1)(c). Under the JetPass

program, 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 will contract 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).

### **Department's Property Tax Assessment**

Under RCW 84.12, the Department assesses the operating property of certain transportation and utilities companies. RCW 84.12.200. These companies must file annual reports with the Department, which are due by March 15th of each year. RCW 84.12.230. Using the information in these reports, the Department values the operating property of the companies and provides tentative assessments to the companies and the assessors by June 30th. WAC 458-50-070.

The Department became aware that Flight Options was operating flights in Washington and issued a property tax assessment based on Flight Options's average use of its fleet in Washington. 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 aircraft made in 2004. CP 6-7 ¶ 11; CP 119 ¶ 1; CP 120 ¶ 2.

In 2006, the Department issued another property tax assessment on an apportioned amount of Flight Options's property. The Department apportioned value to Washington 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.<sup>4</sup>

### **Case History**

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

Both the Department and Flight Options moved for summary judgment, relying in part on stipulated facts and exhibits. *See* CP 119-205. In August 2008, the Court granted the Department's motion for summary judgment and denied Flight Options's. CP 743. Flight Options

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<sup>4</sup> In its annual reports, Flight Options neglected to 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.

timely filed a notice of direct appeal to the Washington Supreme Court.  
CP 749. The Department filed an answer opposing direct review.

#### IV. ARGUMENT

The dispute in this case boils down to whether Flight Options and the aircraft it operates fall within the scope of RCW 84.12, which governs the assessment of property taxes related to property used by intercounty or interstate transportation and utility companies, and whether the State of Washington has jurisdiction to tax such aircraft, given the nature of its contacts with Washington. The first issue is resolved by the plain and unambiguous language of RCW 84.12.200(3) and related sections, as applied to the contracts governing Flight Options's relationship with fractional program participants and JetPass members, along with other undisputed evidence. Federal due process standards govern the second issue. Under those standards, Flight Options's habitual use of fleet aircraft in Washington renders the aircraft subject to a fairly apportioned property tax. The trial court properly granted summary judgment to the Department, and its order should be affirmed.

In this appeal from a summary judgment, the standard of review is *de novo*, and this Court may affirm the summary judgment order on any basis supported by the record. *See Int'l Brotherhood of Elec. Workers, Local No. 46 v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622

(2000), *cert. denied*, 532 U.S. 1002 (2001); *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).<sup>5</sup>

**A. The Department Properly Assessed Flight Options Under RCW 84.12.**

Although most property subject to property tax in Washington is assessed at the local level, the property of interstate utility and transportation companies operating in Washington is subject to assessment by the Department under RCW 84.12. Flight Options offers a few arguments for why it believes it should not have been assessed under RCW 84.12, but it never grapples with the plain language of the statute, which demonstrates the Department's assessment was proper.

**1. Flight Options is an "airplane company."**

Property the Department assesses under RCW 84.12 includes the property of "airplane companies." RCW 84.12.200(3). 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.*

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<sup>5</sup> When considering whether to affirm summary judgment for the Department, the Court should draw all reasonable inferences from the evidence in a light favorable to Flight Options. When considering whether to reverse and direct the trial court to enter summary judgment for Flight Options, the Court should draw all reasonable inferences in a light favorable to the Department. *Burriss v. General Ins. Co. of America*, 16 Wn. App. 73, 75-76, 553 P.2d 125 (1976).

RCW 84.12.200(3) (emphasis added). Under this definition, this Court should affirm summary judgment for the Department if it finds that Flight Options owns *or* controls *or* operates *or* manages aircraft to provide air transportation for compensation as owner *or* lessee *or* otherwise. Under the undisputed facts, this is the correct conclusion.

Flight Options operates a fleet of approximately 200 aircraft. CP 120 ¶ 5-6; CP 114. It owns nearly 20% of this fleet overall<sup>6</sup> and uses the aircraft to support both its fractional ownership and JetPass programs. CP 254; CP 394. Besides the aircraft Flight Options owns, it also controls, operates and manages aircraft to provide transportation for participants in its fractional ownership program.

Under the JetPass program, Flight Options receives compensation for providing air transportation to JetPass program members. CP 199. These customers do not own fractional interests in the aircraft, and Flight Options maintains operational control of the aircraft. CP455-56; CP 201 ¶ (2)(e). Therefore, the compensation Flight Options receives under the JetPass program is solely for providing air transportation.

Under the fractional ownership program, Flight Options receives income from selling fractional interest in aircraft and collects management fees and hourly charges for the management and use of the aircraft. To

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<sup>6</sup> Flight Options has a partial ownership interest in the majority of the aircraft used in the fractional ownership program, representing unsold or repurchased fractional interests. In some of these aircraft all of the fractional interests have been sold. Flight Options also owns 100% of the interest in some aircraft in its fleet. CP 230-34. Overall, Flight Options owns just under 20% of the entire fleet. It uses the fractionally owned aircraft and its own aircraft interchangeably in both the fractional ownership and JetPass programs. CP 254 (Interrogatory No. 36); CP 394.

enter the program, every customer must agree to let Flight Options manage the aircraft, and the participant cannot sell or transfer the interest without Flight Options's approval. CP 132 ¶ 3.2(a); CP 135-36 § 5. Additionally, Flight Options has the right to repurchase the interest after 60 months or if the customer defaults under the Management Agreement. CP 134 ¶ 4.2(d)-(e).

Under the 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. CP 170 ¶¶ 3.4-3.5; CP 174 ¶ 5.1(b). Though program participants request the takeoff time and destination, it is Flight Options that determines what 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 ¶¶ 3.4-3.5; CP 174 ¶ 5.1(b). Moreover, Flight Options selects what aircraft will be used without regard to the ownership of an aircraft. 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 service under the JetPass program) and to retain any compensation it receives for use of the aircraft. CP 174 ¶ 4.6.

Additional facts support the conclusion that Flight Options provides air transportation services to program participants, in addition to selling fractional interests and management services. Program participants can earn additional hours if they schedule a trip in advance of the

scheduling deadline. CP 175 ¶ 5.2(b). Also, if Flight Options is more than 60 minutes late, program participants are entitled to additional flight hours. CP 178 ¶ 5.7. Then there is the question of pilots. The Master Interchange Agreement states program participants can use their own pilots with Flight Options's approval. CP 192 § 5. However, none of the Flight Options employees deposed had ever heard of program participants using their own pilots. CP 314; CP 382; CP 460. According to Flight Options's Director of Operations, Flight Options has had a policy that pilots and crews must be Flight Options employees since at least May 2005 when he joined the company. CP 382. The Chief Financial Officer, who joined the company in July 2006, stated that program participants are precluded from using their own pilots. CP 493.

In sum, when program participants purchase a fractional interest in a plane, they acquire little more than the right to a specific number of flight hours on a particular make and model of aircraft in Flight Options's fleet. Thus, the fractional ownership program is a method by which Flight Options provides air transportation for compensation.

Federal appellate decisions support this conclusion. In one, the Federal Circuit Court of Appeals held that a company operating a fractional airplane ownership program was subject to the federal air transportation tax because it was "in the business of transporting persons or property for hire by air." *Executive Jet Aviation, Inc. v. United States*, 125 F.3d 1463, 1468-69 (Fed. Cir. 1997).

The facts in *Executive Jet* are nearly identical to the facts in this case. See *Executive Jet*, 125 F.3d at 1465-66 (description of NetJets fractional ownership program). As the Federal Circuit noted, there are negligible differences between these fractional ownership programs and operation of a commercial air charter business. *Id.* at 1469. The agreements that control the fractional ownership program place significant limitations on the exercise of a participant's ownership interest. The agreements also grant the program manager extensive control over use of the aircraft and allow the manager to repurchase the interests after 60 months or in the event of a participant's default. Further, the program manager in each program reserves for itself the use of the aircraft when it is not being used to transport program participants, allowing the program managers to use the aircraft to provide charter service. On these facts, the court in *Executive Jet* concluded the ownership interest of the program participants was merely a vehicle for them to acquire air transportation services from the program manager. *Id.* at 1469.

Like the program manager in *Executive Jets*, Flight Options pays the federal air transportation tax. CP 253 (Interrogatory No. 31); CP 229 ¶ 10. If Flight Options were not providing air transportation for compensation, it would not owe the tax. Flight Options owns, controls, operates, and manages its aircraft fleet in order to engage "in the business of transporting persons and/or property for compensation, *as owner, lessee or otherwise.*" Accordingly, it is an "airplane company" under RCW 84.12.200(3).

In another persuasive case, the Fifth Circuit held that Executive Jet Aviation's sister corporation was a "common carrier by air" under the Railway Labor Act, which governs labor disputes between "common carriers by air" and their employees. *Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742 (5<sup>th</sup> Cir. 2003); *see* 45 U.S.C. §§ 151a, 181. Under the Railway Labor Act, a "common carrier by air" must not only provide transportation for hire, but also offer those services indiscriminately to any person willing to pay the price. *Thibodeaux*, 328 F.3d at 750. The court found that Executive Jet International did so through its NetJets program. *Id.* at 753.

Under the Fifth Circuit's analysis, Flight Options also qualifies as a "common carrier by air." In fact, the National Mediation Board, which governs disputes under the Railway Labor Act, has found that Flight Options is a "carrier" under the Act. *In the Matter of the Representation of Employees of Flight Options, LLC Pilots*, 33 NMB No. 22, 2006 WL 516054 (2006); CP 117-18.

Flight Options, like Executive Jet, sells highly circumscribed "ownership" rights to fractional ownership program participants and maintains for itself nearly unrestricted operational and management authority over the fleet. The courts in *Executive Jet* and *Thibodeaux*, and the National Mediation Board, correctly concluded that fractional program managers such as Flight Options and Executive Jet Aviation provide transportation for hire or compensation under these circumstances. Because Flight Options controls, operates, or manages property used to

provide air transportation for compensation as an owner, lessee, “or otherwise,” the Department properly classified Flight Options as an “airplane company” under RCW 84.12.200(3) and assessed its “operating property,” the aircraft fleet.

**2. RCW 84.12 expressly allows assessments to be issued to persons other than the title owner of the property.**

Flight Options argues that the Department’s assessments are invalid because a “basic tenant [sic] of Washington tax law” provides that property taxes may be assessed only against the owner of the taxed property. Appellant’s Brief at 7. Flight Options is incorrect. The plain language of applicable provisions in RCW 84.12 expressly states otherwise. Moreover, the authorities on which Flight Options relies neither support the broad proposition Flight Options advocates nor contradict the express language of the relevant statutes.

**a. Flight Options’s argument is contrary to the plain language of the applicable statutes.**

When the Department conducts central assessment under RCW 84.12, it is required to assess “the operating property of all companies . . . .” RCW 84.12.270. “Operating property” is defined to include all real or personal property “owned by any company, or held by it *as occupant, lessee or otherwise, . . .*” RCW 84.12.200(12) (emphasis added). A “company” includes any of the listed types of companies, including an “airplane company.” RCW 84.12.200(11). Finally, “airplane company” includes “any person *owning, controlling, operating or managing* real or

personal property” used for the air transportation purposes described. RCW 84.12.200(3) (emphasis added). Thus, the statutes require the Department to assess real or personal property owned “or held” by a person “owning, controlling, operating or managing” such property for the stated purposes. The plain language of these statutes demonstrates the absence of any general principle in Washington law precluding the assessment of property taxes against a person other than the property owner.<sup>7</sup>

Other provisions in RCW 84.12 also confirm that assessments can be directed to persons other than the “owner” of operating property. For instance, notice of the assessment may be provided by the Department to a company using operating property as owner or otherwise. RCW 84.12.320. In addition to stating that a company can be assessed even if it is not the owner of the operating property, RCW 84.12.320 indicates notice to the company constitutes notice to “all interests in the property” and that assessment in the name of the company is deemed an assessment and taxation “of all the title and interest in such property of every kind or nature.” In other words, the Legislature recognized that multiple property interests can exist in the same property, and it relieved the Department of

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<sup>7</sup> The definitions of “electric light and power company,” “telegraph company,” “telephone company,” “gas company,” “pipe line company,” and “logging railroad company” also apply to any person “owning, controlling, operating or managing” property for those purposes. RCW 84.12.200(4)-(9). In contrast, the definition of “railroad company” includes those persons “owning or operating” a railroad. RCW 84.12.200(2). This difference shows the Legislature knew exactly what it was doing when it allowed central assessment of operating property used in Washington by a person other than an “owner.”

the potential burden of assessing all the property interests separately or providing notice of a single assessment to all persons with interests in the property.<sup>8</sup>

These features of the central assessment statutory scheme are consistent with the general proposition that “[a]d 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 874 (1970). The provisions of RCW 84.12 also are consistent with the principle that “the whole property is taxed” when interests in property are affected by private contracts such as leases, “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. The parties to such contracts can allocate tax burdens between themselves in their contracts. *Clark-Kunzl*, 78 Wn.2d at 63 (citing *Trimble v. City of Seattle*, 64 Wash. 102, 116 P. 647 (1911)); *Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wn.2d 7, 24, 541 P.2d 699 (1975).

In light of the plain language of the statutes at issue here and the foregoing cases, Flight Options’s argument that property taxes may be assessed only against the owner must be rejected as a general principle. Rather, the starting place for determining who may be assessed for any

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<sup>8</sup> See also RCW 84.12.330, regarding notice of valuation and the assessment roll (“No assessment shall be invalidated by reason of a mistake in the name of the company assessed, or the omission of the name of the owner or by the entry as owner of a name other than that of the true owner”).

property must be the applicable statute. Here, the central assessment requirement in RCW 84.12.270 and the applicable definitions of “operating property,” “company,” and “airplane company” in RCW 84.12.200 demonstrate that the Department may assess either the “owner” or other designated persons. Nothing in these statutes precludes the Department from assessing Flight Options, who controls, operates, and manages the aircraft, along with owning nearly a 20 percent interest in the fleet overall. CP 114; CP 230-34; CP 487:9.

**b. Flight Options’s legal authorities do not support the proposition that only “owners” of operating property may be assessed.**

The cases on which Flight Options relies do not compel a conclusion that only the “owner” of operating property may be assessed. In one, the court held that personal property was exempt from property tax where title to the property passed to a tax-exempt entity before the date on which the assessor valued and assessed the property. *Star Iron & Steel Co. v. Pierce County*, 5 Wn. App. 515, 523, 488 P.2d 776 (1971), *opinion adopted*, 81 Wn.2d 680, 504 P.2d 770 (1972), *overruled in part by Timber Traders, Inc. v. Johnston*, 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 court in *Star Iron* addressed whether a manufacturer could be assessed property tax on machinery it had manufactured where title had passed to the United States (a tax-exempt entity), but which was still in the manufacturer’s possession in order to

complete the necessary work under the custom contract. *See* 5 Wn. App. at 517, 521. The court held the manufacturer was exempt from the tax. 5 Wn. App. at 525.

The court based its holding in *Star Iron* first and foremost on the controlling statute, RCW 84.40.020, which provided in 1971 and still provides today: “All personal property in this state subject to taxation shall 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: . . .” (Emphasis added). As the court stated:

First, the words of RCW 84.40.020 support the contention that *ownership* and not *possession* is taxable. Personal property is to be listed and assessed each year with reference to both its “value” and its “ownership.” This statutory language should have some effect.

*Star Iron*, 5 Wn. App. at 525 (emphasis in original). The court noted the different statutory language associated with real property taxation, which requires the assessment to be with reference to “value,” but not “ownership.”

Just as in *Star Iron*, the language in the applicable statute should be given effect. But the applicable statute is RCW 84.12.270 (and the related statutory definitions), not RCW 84.40.040. Unlike RCW 84.40.040, RCW 84.12.270 requires assessments of the true and fair value of the “operating property” of “companies” on the first of January of each year. Because the definitions of “operating property,” “company,” and “airplane company” impose no ownership requirement and expressly allow

assessment of interests other than full ownership, to impose such a requirement would be contrary to the plain language of the statutes.

Flight Options also relies on cases discussing the distinction between property taxes and excise taxes. *See Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) (city ordinance imposing residential street utility charge held an unconstitutional property tax, rather than a regulatory fee); *High Tide Seafoods v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986) (tax on enhanced food fish held not a property tax subject to uniformity); Appellant's Brief at 6, 8. Since there is no dispute here that the tax at issue is a property tax, these cases are of only academic interest.

Even if it were relevant, *Covell* did not hold, as Flight Options implies, that property tax liability arises only from taxpayers' "status as property owners" or solely on the "ownership of property." Appellant's Brief at 6. *Covell* held 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). Because liability for the charge arose from the appellants' ownership of property, rather than their use of a city service, the charge was a property tax, not an excise tax. 127 Wn.2d at 890. Flight Options has confused the issue of what constitutes a property tax with that of who can be assessed a property tax under RCW 84.12.

Taking another tack, Flight Options argues in a footnote that it is unconstitutional to foreclose a tax lien against property owned by someone

other than the taxpayer. Appellant's Brief at 7, n.2. Flight Options cites a case in which this Court held an unemployment compensation statute unconstitutional to the extent it allowed a lien to be foreclosed on machinery and equipment owned by a person who leased it to an employer who defaulted in making contributions due the unemployment compensation fund. *State v. Lawton*, 25 Wn.2d 750, 172 P.2d 465 (1946). The equipment owner had no interest in the business of the employer, other than the lease of equipment, and the employer had no interest in the equipment or its owner's business, other than the lease. The Court held foreclosing on the equipment was unconstitutional. *Id.* at 764-65.

The holding in *Lawton* does not support the general conclusion Flight Options draws, that lien foreclosures against those other than the taxpayers are unconstitutional. *Lawton* did not concern a property tax. As indicated above, property taxes are primarily in rem in character and are imposed against the property itself. *Clark-Kunzl*, 78 Wn.2d at 63. Tax liability follows the property. In a case concerning the purchase of motors where title did not pass until the final installment payment, this Court held in 1910:

It is clear from this section that [the property tax] is a charge against the property assessed from and after the assessment. . . . It follows that the property, being taxable, is liable for the taxes levied against it. *It is immaterial to the state whether the title to the property is actually in the appellant or some other person. The collecting officer is authorized to pursue the property for the tax.*

*Lewis Const. Co. v. King County*, 60 Wash. 694, 697, 111 P. 892 (1910) (emphasis added).

Flight Options's final argument in relationship to ownership is that even if it qualifies as an "airplane company" under RCW 84.12, property operated but not owned by it must be assessed against the owner of the aircraft. Appellant's Brief at 8. Flight Options cites RCW 84.12.210,<sup>9</sup> which provides: "Property 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." By its terms, that statute applies only when there is both an "owning company" and an "operating company." Because "company" is defined in RCW 84.12.200(11) to include only companies subject to central assessment, the obvious intent of RCW 84.12.210 is to indicate that when two or more entities qualify as "companies," the operating property will be considered the property of the "owning company." 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). This sensible provision eliminates uncertainty for both taxpayers and the Department. But it has no application here, where there is no choice to be made between "companies."

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<sup>9</sup> Flight Options quotes from RCW 84.12.210, but mistakenly cites RCW 84.12.120, which does not exist.

**3. Even if an “owner” requirement existed, Flight Options would qualify and be taxable.**

Although RCW 84.12.200(3) plainly does not restrict entities other than the “owner” of operating property from being considered an “airplane company,” even if it did, Flight Options could properly be taxed as “owner” of the aircraft in its fleet.

Washington cases indicate the chief incidents of ownership include “the right to its possession, use and enjoyment, and to sell or otherwise dispose of it according to the will of its owner.” *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599, 528 P.2d 471 (1974). To be taxable, a person need not have a perfect unencumbered title, but should be vested either with apparent legal title “or with the possession coupled with such claims and evidence of ownership as will justify the assumption that he is the owner.” *Id.* (citing *Sloan Shipyards Corp. v. Thurston County*, 111 Wash. 361, 365, 190 P. 1015 (1920)). Other indicia of ownership include the right to invite others to use the property or to exclude them from doing so, the right to profit from the property, and bearing the risk of loss when property is destroyed. *Wasser*, 84 Wn.2d at 600; 73 C.J.S. *Property* §§ 44, 47 (2004). These indicia of ownership demonstrate Flight Options is properly considered a taxable “owner” of the aircraft in its fleet.

Flight Option is the only party with the right to profit from use of the aircraft. Flight Options has the right to use the plane to provide transportation for hire, including receiving compensation for transporting

JetPass members. CP 174 ¶ 4.6. Program participants, on the other hand, cannot use the aircraft to provide transportation for compensation. CP 124 ¶ 6(c); CP 192. Nor can program participants sell their hours to someone else. CP 496. Thus, Flight Options, not program participants, has the right to profit from use of the property.

Flight Options also may invite third parties to use the property and likewise exclude third parties. Under the Management Agreement, Flight Options has possession of the plane and retains operational control of the aircraft when program participants are using it. CP 169 ¶¶ 1.1-1.2. Flight Options even has the right to exclude program participants from the planes in which they have a fractional interest. CP 174 ¶ 5.1(b) (“Owner may be provided, at Manager’s option, the use of another aircraft”). Since Flight Options retains the right to use the plane when it is not being used to transport a program participant, it can invite others to use the plane, such as JetPass members, prospective buyers, or use it for training flights, without asking the program participant’s permission. CP 174 ¶ 4.6. Program participants have no corresponding right, which is consistent with Flight Options retaining possession and operational control of the plane.

Regarding risk of loss, Flight Options arranges for insurance coverage and pays the premium. In the event of a loss, proceeds are paid to Flight Options. CP 170 ¶ 3.6; CP 179 ¶ 6.1; CP 347. Flight Options also decides whether or not to file a claim if there is a loss. CP 349. If it decides not to file a claim, Flight Options pays the repair costs out of pocket. CP 349-50. In the event of a total loss, Flight Options has the

option to substitute another aircraft of the same make and model and keep the proceeds. CP 179 ¶ 6.3. If the proceeds are insufficient to purchase a similar aircraft, Flight Options can fund the difference. *Id.* Thus, Flight Options primarily bears the risk of loss or damage to the aircraft in the fractional program, consistent with ownership.<sup>10</sup>

Flight Options also primarily controls transfers of interests in the aircraft. Program participants cannot sell their interest to third parties without Flight Options's permission. CP 135-36. Flight Options has the right to repurchase the fractional interest after 60 months or if a program participant defaults on the Management Agreement. CP 134 ¶ 4.2(d)-(e). Further, 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). Accordingly, Flight Options is the party that ultimately decides when, how, and to whom interests in a particular plane are sold.

Under the common-law standards in *Wasser*, Flight Options is an "owner" of the fleet it operates. It is a person controlling, operating, and managing this operating property under RCW 84.12.200(3), but also a person "owning" it.

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<sup>10</sup> Other evidence that Flight Options bears the risk of loss relates to repurchase terms. When a program participant wishes to resell its interest to Flight Options, valuation of the aircraft is subject to certain assumptions. For instance, engines are assumed to be mid-life (50%) and assumed airframe hours do not exceed 1300 hours a year. CP 133 ¶ 4.1. Thus, Flight Options bears the risk of the loss in value from any excessive use of the aircraft.

**4. Application of RCW 84.12 does not turn on whether an airplane company is a “public service company” or public utility.**

Contrary to Flight Options’s arguments, RCW 84.12 does not require that the taxpayer be a “public service company” or public utility. *See* Appellant’s Brief at 19-25. Nothing in the plain language of the statute limits its application to public utilities or public service companies. The statute applies to both public utilities and specified transportation companies. *See* RCW 84.12.200; Laws of 1935, ch. 123 (including motor vehicle companies, steamboat companies, and airplane companies within scope of act, titled “Taxation of Properties of Transportation Companies”).

Flight Options labels the Department’s basis for assessing property taxes in this case a “substance over form theory” that imputes activity to Flight Options contrary to the terms of its contracts. Appellant’s Brief at 19.<sup>11</sup> The Department does not disagree with Flight Options that fractional ownership program participants purchase “an interest” in a plane and that Flight Options is not a “public airline.” *See* Appellant’s Brief at 20-21. But these two facts do not preclude Flight Options from qualifying as a person that owns, controls, operates, or manages its aircraft fleet in order to engage “in the business of transporting persons and/or property for compensation.”

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<sup>11</sup> If, by criticizing the Department for allegedly elevating substance over form, Flight Options is implicitly arguing the Department should instead elevate form over substance, that approach to taxation has been repeatedly rejected. *See Chicago Bridge & Iron Co. v. State*, 98 Wn.2d 814, 822-23, 834, 659 P.2d 463 (1983); *Time Oil Co. v. State*, 79 Wn.2d 143, 147, 483 P.2d 628 (1971); *Fidelity Title Co. v. State*, 49 Wn. App. 662, 666-67, 745 P.2d 530 (1987).

Flight Options never identifies the contract provisions that allegedly preclude the Department from assessing the aircraft under RCW 84.12. In fact, the contracts provide the basis for the assessment because they demonstrate that program participants pay Flight Options both for an ownership interest in an airplane *and* for the right to obtain air transportation services on demand, which are provided by Flight Options.<sup>12</sup> Under the four contracts, Flight Options controls, operates, and manages the aircraft, and it transports program participants from their chosen departure locations to their chosen destinations at their chosen times. If demand for flight services at any given time is so great that the regular Flight Options fleet is insufficient, Flight Options charters aircraft from other companies at its own expense in order to provide the requested flight services. CP 174 ¶ 5.1(b); CP 272 (Interrogatory No. 47).

The assessment here was not based on a “substance *over* form theory.” The “substance” of Flight Options’s relationship with fractional participants and JetPass members is entirely consistent with the “form” of the governing contracts. The Department applied the “substance” of applicable sections in RCW 84.12 to the “substance” of the services Flight Options provides under the express terms of its contracts with its customers.

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<sup>12</sup> In addition to charging program participants for their ownership interest and general management fees, Flight Options imposes hourly charges for the flight time. CP 171 ¶ 4.1(a); CP 185. During the tax periods, occupied and supplementary hourly charges totaled \$413,000,000. CP 120 ¶ 7. If Flight Options did not sell transportation services for hire, it would not have any basis to make the hourly charges.

Flight Options cites several cases, none of which demonstrate that RCW 84.12 is inapplicable to use of its fleet in Washington. In the first, *Weyerhaeuser Co. v. State Dep't of Revenue*, 106 Wn.2d 557, 723 P.2d 1141 (1986), the Court held the Department had no authority to impose business and occupation taxes on imputed interest on contracts that the taxpayer recorded for internal accounting purposes, but never actually received under the contracts. The Court also held that the taxpayer was a "private carrier" entitled to an exemption from retail sales taxes on its purchases of bunker fuel for shipping timber overseas. 106 Wn.2d at 560-64. The case does not concern RCW 84.12 in any manner nor discuss public utilities or public service companies.

Next, Flight Options cites *Northwestern Imprv. Co. v. Henneford*, 184 Wash. 502, 51 P.2d 1083 (1935). The Court in that case held that the 1935 version of RCW 84.12 did not allow the State Tax Commission to assess solely intracounty utilities, but only intercounty utilities. 184 Wash. at 512. The Court referred to the companies subject to centralized assessment as "public service companies" and "utilities," but it did not hold that the only companies assessable under the statute were required to be "public service companies" or "public utilities." That was not an issue in the case. Equally important, nothing in *Northwestern Improvement* suggests the standard for determining what companies are assessable under RCW 84.12 (or its predecessor) is dictated by anything other than the statutory definitions of the companies falling within the statute. *See id.* at 504 (noting the statute provides for of assessment various public service

companies “therein enumerated” and quoting definition of “electric light and power company”).

By its own admission, Flight Options operates in multiple counties in Washington. CP 36-38. Because it falls within the definition of “airplane company” in RCW 84.12.200(3), it is properly taxed as such.

The case Flight Options discusses concerning logging railroad companies provides no different result. *See Weyerhaeuser Timber Co. v. Henneford*, 185 Wash. 46, 53 P.2d 308 (1936); Appellant’s Brief at 22. The definition of “logging railroad company” provided then, as it does today, that the company be engaged in the business of transporting forest products “either as private carrier or carrier for hire.” *Weyerhaeuser Timber*, 185 Wash. at 48; RCW 84.12.200(9). The Court reviewed multiple definitions of “private carrier” and “common carrier” and concluded that “logging railroad company” included only “quasi-public carriers” transporting the logs of “others than their own.” 185 Wash. at 51. Since the taxpayer transported only its own logs, it was not a “logging railroad company” and could not be assessed under that statute.

Unlike the “logging railroad company” definition, the definition of “airplane company” does not require that the company act as a “private carrier or carrier for hire.” Instead, the standard is whether the company uses aircraft “in the business of transporting persons and/or property for compensation, as owner, lessee or otherwise.” RCW 84.12.200(3). Under the undisputed facts, Flight Options does.

Finally, Flight Options relies on a Missouri case, in which the court held that a company's fractional interest in two aircraft in a fractional ownership program was subject to use tax in that state as a purchase of tangible personal property. *Fall Creek Constr. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 169-70 (Mo. 2003). The court reviewed some of the contract provisions and rejected the taxpayer's argument that the true nature of the transaction was for transportation services. *Id.* at 170. It held that because the taxpayer unambiguously purchased an ownership interest in the aircraft, the mere fact that it entered into additional management agreements did not change the fact of its ownership interest. *Id.* Thus, use tax was properly imposed when the aircraft were delivered to the state for the taxpayer's use. *Id.* at 173.

This case does not concern liability for use tax by Flight Options's customers, but *Fall Creek* demonstrates an important point: the contracts executed between Flight Options and its customers are multi-faceted, and the different facets may have different tax consequences. As the court in *Fall Creek* noted: "Clearly this was a complex transaction between sophisticated parties designed to maximize regulatory and tax advantages." *Id.* at 170. Just as the mere existence of contracts detailing the services the fleet operator provided to the taxpayer in *Fall Creek* did not change the fact that the taxpayer had purchased a property interest in two aircraft, giving rise to use tax liability, the fact that Flight Options has sold property interests in its fleet to customers does not change the fact that under the Management Agreement, Flight Options provides

transportation services to those customers for compensation. CP 169-71. In other words, the existence of a program participant's ownership interest in an aircraft does not preclude the Department from assessing Flight Options as an "airplane company" if other facets of the multi-contract transaction demonstrate Flight Options qualifies under the statute, as they do here.

So long as Flight Options controls, operates, or manages the aircraft in its fleet, the precise ownership status of each plane is irrelevant. When Flight Options is paid for transporting passengers from one location to another, it acts as an "airplane company," whether the passengers are JetPass members or fractional program participants. The contracts demonstrate Flight Options does control, operate, and manage the aircraft assessed and that it does provide air transportation for compensation. No more is required under RCW 84.12.

**B. Because Flight Options Habitually Used And Employed Planes In Its Fleet In Washington, The State Had The Right To Impose A Fairly Apportioned Property Tax On That Property As Provided In RCW 84.12.**

Flight Options argues the State of Washington had no jurisdiction to impose a fairly apportioned tax on the aircraft in its fleet because the planes lacked a tax situs in Washington. Appellant's Brief at 9-19. Flight Options argues this is an issue arising under the Due Process Clause of the Fourteenth Amendment, but also argues that Washington law imposes situs requirements entirely separate from federal law. The Washington state cases demonstrate otherwise. When Washington courts face

questions regarding the State's ability to impose property taxes on transportation property used in interstate commerce, they rely on federal law. Federal cases, applying due process standards, confirm that a state may tax any property habitually used or employed in the state, so long as the tax is fairly apportioned to use in the state.

Flight Options made hundreds of takeoffs and landings in Washington in 2004 and 2005, averaging four each day. CP 119-20. Because Flight Options habitually used the aircraft in Washington, the "operating property" had a tax situs in Washington. The State had jurisdiction to tax it, and the Department had statutory authority to do so. The trial court correctly ruled that the assessment was proper.

**1. Personal property habitually used in a state is subject to property tax in that state, and fair apportionment satisfies the Due Process Clause.**

According to the United States Supreme Court, "the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax 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 has been for nearly a century 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. Co. v. King County*, 90 Wash. 38, 43, 155 P. 416 (1916). 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).

An older common-law rule, *mobilia sequuntur personam* (movables follow the person), arose in the Middle Ages when movable personal property consisted primarily of gold and jewels easily carried from place to place. *Pullmans Palace*, 141 U.S. at 22. That rule resulted in personal property being fully taxable at the owner's domicile. *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 442, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979). By the end of the nineteenth century, the medieval rule largely had been replaced by the current rule.

In 1888, the United States Supreme Court 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). The Court explained that 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 Court also indicated that 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*, 441 U.S. at 445.

The habitual use or employment standard meets the “minimum contacts” threshold for due process purposes in the context of property taxes. In addition, 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 address the requirement that state taxes be related to state-provided services, states are limited to imposing apportioned taxes tied to use of the property in the particular taxing state:

So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. [citation omitted] Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.

*Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

In 1891, the Supreme Court approved an apportioned property tax on specialized rail cars used in Pennsylvania by an Illinois corporation based on the number of miles of railroad track in Pennsylvania over which

the cars were run, compared to the total in all states. *Pullmans Palace*, 141 U.S. at 26. It has approved similar apportionment schemes ever since. See, e.g., *Braniff*, 347 U.S. at 593 n.4 (Nebraska apportionment formula for aircraft carrier based on average ratios of state-based arrivals and departures, tons carried, and income, relative to whole). In *Ott*, the Court noted that the benefit of requiring an apportioned tax, in which each state taxes the portion of the value of property used in that state, is the absence of any “cumulative effect” caused by the interstate character of the business. In short, “there is no risk of multiple taxation.” *Ott*, 336 U.S. at 174.

Fair apportionment ensures that a state tax is constitutional under the Due Process Clause, but also is required for 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.<sup>13</sup> 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.<sup>14</sup>

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<sup>13</sup> The Supreme Court set forth a four-part test to determine whether any state tax violated the Commerce Clause in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). 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. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

<sup>14</sup> Flight Options indicates it is not challenging the Department’s assessment based on the Commerce Clause and faults the trial court for concluding the assessment was valid under the Commerce Clause instead of addressing Due Process Clause standards. Appellant’s Brief at 9. The Supreme Court has noted that 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

Under the foregoing standards, the State's assessment of Flight Options's aircraft met the requirements of the Due Process Clause.

**2. Flight Options habitually used aircraft in Washington, on which the Department imposed a fairly apportioned tax.**

In 2004 and 2005, Flight Options habitually operated aircraft in Washington. 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. This is an average of almost four takeoffs or landings each day. Under any reasonable interpretation of the due process "minimum contacts" standard, Flight Options's operations in Washington constituted habitual use during the tax periods. 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 Fall Creek Constr. Co. v. Director of Revenue*, 109 S.W.3d 165 (Mo. 2003) (fractionally owned aircraft had "substantial nexus" with state, although hangared and maintained outside the state, where aircraft arrived in or departed from Missouri forty-two times during thirteen-month period and planes remained overnight twenty-four times during period); *Auerbach v. Assessment Appeals Board*, 167 Cal. App. 4<sup>th</sup> 1415, 1422, 85 Cal. Rptr. 3d 118 (Cal. App. 2008) (in determining proper

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(1991); *Quill*, 504 U.S. at 313 n.7. Thus, a state tax meeting the requirements of the Commerce Clause also will satisfy due process requirements. Given the Court's comment in *Ott* that there is "no practical difference" between the standards for purposes of property taxes on interstate transportation property, 336 U.S. at 174, the trial court's lack of precision is both understandable and defensible.

proportion of air taxi fleet taxable in California, parties acknowledged aircraft had taxable situs in Nevada based on one plane being in Nevada eight days and another for two days during tax year).

The Department apportions the property of "airplane companies" based primarily on the ratio of takeoffs and landings in Washington compared to the company's total takeoffs and landings. WAC 458-50-100(7). Takeoffs and landings is a fair measure of the use of aircraft in Washington compared to the use in other states. When an aircraft lands in Washington, the aircraft uses the landing facilities present in the state. It also has the benefit and protection of local emergency services and has opportunities to obtain services from local vendors. Even planes in the airspace over Washington enjoy some benefits from the state below. State and local authorities deal with problems of noise, air crashes, and regulation of lands under takeoff and approach patterns. *See Zantop Air Transport, Inc. v. San Bernardino County*, 246 Cal. App. 2d 433, 440-41, 54 Cal. Rptr. 823 (Cal. App. 1966) (Michigan-based air transport company properly assessed property tax in California county using flight time as apportionment method).<sup>15</sup>

In sum, due process principles allow Washington to impose a fairly apportioned property tax on the aircraft Flight Options habitually operated

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<sup>15</sup> *Zantop* demonstrates that fair apportionment can be accomplished in different ways. In that case, the assessor used flight time. Very recently, California approved use of the location of planes in a fleet on a particular day. *Auerbach v. Assessment Appeals Board*, 167 Cal. App. 4<sup>th</sup> 1415, 1422, 85 Cal. Rptr. 3d 118 (Cal. App. 2008). Oregon has held due process allows use of overflight time in a formula to allocate the state's portion of value of aircraft. *Alaska Airlines, Inc. v. Dep't of Revenue*, 769 P.2d 193 (Or. 1989).

in Washington in 2004 and 2005 as part of its fractional ownership and JetPass programs.

**3. Flight Options relies on outdated case law regarding state taxing jurisdiction.**

Flight Options argues that in order for the aircraft it operates to have situs in Washington for property tax purposes, the planes must have a permanent presence here or operate here on fixed schedules and regular routes. Appellant's Brief at 9-19. Flight Options also argues that Washington common law regarding situs "does not rely on federal due process principles" and provides a separate basis for concluding the Department had no ability to issue the assessment, despite the Department's express statutory authority provided in RCW 84.12. Appellant's Brief at 19. These arguments should be rejected. Washington cases relating to interstate property rely on federal law, but the case law has not been updated to reflect current federal due process doctrines. The vessel cases Flight Options discusses apply a principle known as the "home port" doctrine, which the United States Supreme Court abandoned several decades ago. With regard to fixed schedules and regular routes, Flight Options misunderstands the difference between a sufficient and a necessary condition. Fixed routes and regular schedules are sufficient to establish habitual employment of property for due process purposes, but they are not necessary.

a. **Washington cases follow federal law in determining state tax jurisdiction regarding personal property used in interstate commerce.**

Flight Options incorrectly argues that Washington common law regarding tax situs is independent from federal due process case law on the same subject. It is true that the Washington cases Flight Options cites do not mention the Due Process Clause. However, the Washington cases concerning movable property used in interstate commerce, such as vessels or railroad cars, do rely on the same general body of federal law as is described in the preceding sections. *See Guinness v. King County*, 32 Wn.2d 503, 202 P.2d 737 (1949); *United States Whaling Co. v. King County*, 96 Wash. 434, 165 P. 70 (1917); *Canadian Pac. Ry. Co. v. King County*, 90 Wash. 38, 155 P. 416 (1916).

In 1954, as noted above, the United States Supreme Court stated: “[T]he bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process.” *Braniff*, 347 U.S. at 599. Because the question of “tax situs” is a jurisdictional inquiry, the tie to the Due Process Clause is logical. The fact that older Washington cases do not specifically mention due process is not surprising because they tend to rely on even older federal cases, some of which were decided before adoption of the Fourteenth Amendment in 1868. Apparently, the first Supreme Court case to strike down a state tax under the Due Process Clause was in 1903. *See Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U.S. 385, 398, 23 S. Ct. 463, 47 L. Ed. 513 (1903) (Kentucky’s taxation of value of ferry franchise

granted by Indiana violated the Fourteenth Amendment), *cited in Central Railroad*, 370 U.S. at 620 & n.6 (Black, J., concurring). *Pullmans Palace*, decided in 1891, is an example of a case applying tax situs principles now recognized as due process principles, but without mention of the Due Process Clause. The evolution of the federal jurisprudence may have been fuzzy in the first half of the last century, but it is clear today that the question of tax situs is a federal constitutional question.

Flight Options has offered no authority based on Washington law (constitutional, statutory, or otherwise) to support its argument that tax situs in Washington is governed by some law “separate” from federal constitutional law.<sup>16</sup> In a case where the property in question is used to provide interstate transportation, it would be odd for Washington law to be “separate” from federal law, much less controlling. Accordingly, any state cases should be viewed in light of current federal constitutional standards.

**b. Because the Supreme Court has abandoned the “home port” doctrine, cases relying on the doctrine are not persuasive.**

Flight Options places great emphasis on *Guinness*, which concerned a British-owned pleasure yacht located in Seattle during World War II, the necessities of which precluded the owner from removing it from Washington. The Court held the yacht was exempt from property

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<sup>16</sup> Flight Options quotes from RCW 84.44.010 for the proposition that personal property is taxable “in the county where it is situated.” Appellant’s Brief at 9-10. Flight Options fails to note the exception in the statute, “except such as is required in this title to be listed and assessed otherwise.” The general rule in RCW 84.44.010 does not apply in this case because the property is assessed under RCW 84.12.

tax in Washington until after the war. *Guinness*, 32 Wn.2d at 508-09. The Court relied upon the following reasoning:

The general rule is that a ship or vessel can be taxed only at her legal situs – her home port and the domicile of her owner – and is not taxable by a state other than that in which her owner resides, to which she plies and at which she is temporarily staying while loading or unloading her cargo. However, when a vessel is kept and used wholly within the limits of a state other than that in which the owner resides, she acquires a situs in such state for purpose of taxation, even though she is engaged in interstate commerce.

*Id.* at 506; *see also Alaska Freight Lines, Inc. v. King County*, 66 Wn.2d 360, 363, 402 P.2d 670 (1965); *United States Whaling*, 96 Wash. at 436-38.

The principle enunciated in these cases is known as the “home port doctrine.” It arose out of *Hays v. Pacific Mail S.S. Co.*, 58 U.S. 596, 17 How. 596, 15 L. Ed. 254 (1854). The Supreme Court has characterized the doctrine as a corollary to the medieval maxim, *mobilia sequuntur personam*. *Japan Line*, 441 U.S. at 442. Though the home port doctrine applied for many years to oceangoing vessels even after adoption of the Due Process Clause, its relevance waned during evolution of the fair apportionment approach to situs analysis. *See Alaska Freight Lines*, 66 Wn.2d at 363-64 (recognizing developing law regarding apportionment, but applying home port doctrine to oceangoing barges). By 1979, the Court in *Japan Line* indicated the home port doctrine had yielded to the rule of fair apportionment among the states. *Id.* The Court declined to recognize any continuing vitality in the doctrine, stating: “Given its

origins, the doctrine could be said to be 'anachronistic'; given its underpinnings, it may indeed be said to have been 'abandoned.'" *Id.* at 443 (quoting Chief Justice Stone's dissent in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 320, 64 S. Ct. 950, 88 L. Ed. 1283 (1944)).

Even before *Japan Line*, the home port doctrine had been eroded. In 1949, the Supreme Court in *Ott* held the doctrine should not apply to vessels operating only on inland waters. Instead, the due process standards applicable to railroad cars applied, based on fair apportionment. *Ott*, 336 U.S. at 173-74. A few years later, in 1954, the Supreme Court declined to apply the home port doctrine to airplanes flying interstate, preferring instead to determine the situs question for aircraft based on the habitual employment of the planes in the state and fair apportionment. *Braniff*, 347 U.S. at 599-601.

Flight Options cites a case from Missouri in which the court relied on home port analysis, but applied it to aircraft, as Flight Options urges should be done here. *Peabody Coal Co. v. State Tax Comm'n*, 731 S.W.2d 837 (Mo. 1987). The court relied on *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944). The dissent correctly noted the principles enunciated later in *Braniff* should have applied instead. *Peabody*, 731 S.W.2d at 840 (Welliver, J., dissenting). Flight Options also discusses a Massachusetts case in which the court held aircraft used in interstate commerce were not "situated" in Boston such that they could be taxed under a local statute. *Flying Tiger Line, Inc. v. Board of Assessors*, 535 N.E.2d 231, 234 (Mass. 1989). That

state, however, interpreted the word “situated” in its own statute to require a more permanent presence than the minimal contacts required for due process purposes. The court assumed a “properly focused” local tax would meet the requirements of due process. *Id.* at 233 (citing *Braniff*, 347 U.S. at 600-01). In addition, the court noted that the home port analysis had been “superseded” in later Supreme Court opinions. *Id.* at 233 (again citing *Braniff*, 347 U.S. at 600-01).

This Court should reject Flight Options’s suggestion that it apply a tax situs doctrine that the Supreme Court rejected 55 years ago in the context of this case – aircraft flying in interstate commerce.

**c. Habitual use or employment in a state may be satisfied in the absence of fixed routes and regular schedules.**

Flight Options also argues that Washington cannot have tax jurisdiction over its planes because the aircraft have no fixed schedules and regular routes that would create a “permanent presence.” Appellant’s Brief at 15-19. Flight Options is incorrect. Although the cases are clear that transportation property operating on fixed routes and regular schedules in a state creates a taxable situs in that state, they do not *require* fixed routes and regular schedules:

[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 permitting taxation of the average number of cars so engaged.

*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 refrigerator rail cars owned by Illinois corporation although cars were not run in state in fixed numbers, on regular schedules, or on fixed routes). In other words, fixed routes and regular schedules are a sufficient, but not a necessary condition, for state taxing jurisdiction.

In *Central Railroad*, the record demonstrated railroad freight cars were used on fixed routes and regular schedules in New Jersey and in Pennsylvania, which was the domicile of the owner. 370 U.S. at 609. The cars also were used in other states, but the record was silent regarding the details of use in any particular state. *Id.* The Court held that New Jersey was entitled to impose an apportioned property tax on the value of freight cars used in that state. *Id.* at 613. It also held that because the facts in the record did not disclose an actual tax situs in any state other than Pennsylvania, either through fixed routes and regular schedules or habitual employment on irregular routes, Pennsylvania could impose property tax on the remaining portion of the freight car fleet. *Id.* at 614-16.

The aircraft fleet Flight Options used to provide air transportation services in Washington had a taxable situs in Washington, and the Department's exercise of its authority under RCW 84.12 to assess property tax based on an apportioned value of the fleet was consistent with its constitutional jurisdiction to tax.

**V. CONCLUSION**

For the foregoing reasons, the Court should affirm the trial court's order granting summary judgment to the Department and denying Flight Options's summary judgment motion.

RESPECTFULLY SUBMITTED this 1st day of May, 2009.

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# APPENDIX

**Chapter 84.12 RCW**  
**ASSESSMENT AND TAXATION OF PUBLIC**  
**UTILITIES**

Sections

84.12.200	Definitions.
84.12.210	Property used but not owned deemed sole operating property of owning company.
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84.12.360	Basis of apportionment.
84.12.370	Certification to county assessor -- Entry upon tax rolls.
84.12.380	Assessment of nonoperating property.
84.12.390	Rules and regulations.

**84.12.200 Definitions.** For the purposes of this chapter and unless otherwise required by the context:

(1) "Department" without other designation means the department of revenue of the state of Washington.

(2) "Railroad company" means and includes any person owning or operating a railroad, street railway, suburban railroad or interurban railroad in this state, whether its line of railroad be maintained at the surface, or above or below the surface of the earth, or by whatever power its vehicles are transported; or owning any station, depot, terminal or bridge for railroad purposes, as owner, lessee or otherwise.

(3) "Airplane company" means and includes 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.

(4) "Electric light and power company" means and includes 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 generation, transmission or distribution of electricity in this state, and engaged in the business of furnishing, transmitting, distributing or generating electrical energy for light, heat or power for compensation as owner, lessee or otherwise.

(5) "Telegraph company" means and includes any person owning, controlling, operating or managing any telegraph or cable line in this state, with appliances for the transmission of messages, and engaged in the business of furnishing telegraph service for compensation, as owner, lessee or otherwise.

(6) "Telephone company" means and includes 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 transmission of communication by telephone in this state \*through owned or controlled exchanges and/or switchboards, and engaged in the business of furnishing telephonic communication for compensation as owner, lessee or otherwise.

(7) "Gas company" means and includes 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 manufacture, transportation, or distribution of natural or manufactured gas in this state, and engaged for compensation in the business of furnishing gas for light, heat, power or other use, as owner, lessee or otherwise.

(8) "Pipe line company" means and includes 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 or transportation of oils, natural or manufactured gas and/or other substances, except water, by pipe line in this state, and engaged in such business for compensation, as owner, lessee or otherwise.

(9) "Logging railroad company" means and includes 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 forest products by rail in this state, and engaged in the business of transporting forest products either as private carrier or carrier for hire.

(10) "Person" means and includes any individual, firm, copartnership, joint venture, association, corporation, trust, or any other group acting as a unit, whether mutual, cooperative or otherwise, and/or trustees or receivers appointed by any court.

(11) "Company" means and includes any railroad company, airplane company, electric light and power company, telegraph company, telephone company, gas

company, pipe line company, or logging railroad company; and the term "companies" means and includes all of such companies.

(12) "Operating property" means and includes all property, real and personal, owned by any company, or held by it as occupant, lessee or otherwise, including all franchises and lands, buildings, rights-of-way, water powers, motor vehicles, wagons, horses, aircraft, aerodromes, hangars, office furniture, water mains, gas mains, pipe lines, pumping stations, tanks, tank farms, holders, reservoirs, telephone lines, telegraph lines, transmission and distribution lines, dams, generating plants, poles, wires, cables, conduits, switch boards, devices, appliances, instruments, equipment, machinery, landing slips, docks, roadbeds, tracks, terminals, rolling stock equipment, appurtenances and all other property of a like or different kind, situate within the state of Washington, used by the company in the conduct of its operations; and, in case of personal property used partly within and partly without the state, it means and includes a proportion of such personal property to be determined as in this chapter provided.

(13) "Nonoperating property" means all physical property owned by any company, other than that used during the preceding calendar year in the conduct of its operations. It includes all lands and/or buildings wholly used by any person other than the owning company. In cases where lands and/or buildings are used partially by the owning company in the conduct of its operations and partially by any other person not assessable under this chapter under lease, sublease, or other form of tenancy, the operating and nonoperating property of the company whose property is assessed hereunder shall be determined by the department of revenue in such manner as will, in its judgment, secure the separate valuation of such operating and nonoperating property upon a fair and equitable basis. The amount of operating revenue received from tenants or occupants of property of the owning company shall not be considered material in determining the classification of such property. [1998 c 335 § 1; 1994 c 124 § 13; 1987 c 153 § 1; 1975 1st ex.s. c 278 § 159; 1961 c 15 § 84.12.200. Prior: 1935 c 123 § 1; 1925 ex.s. c 130 § 36; 1907 c 131 § 2; 1907 c 78 § 2; RRS § 11156-1. Formerly RCW 84.12.010 and 84.12.020, part.]

\*Reviser's note: Language was apparently modified during the publication process and has been restored.

Effective date -- 1998 c 335: "This act takes effect January 1, 1999." [1998 c 335 § 7.]

Construction -- Severability -- 1975 1st ex.s. c 278: See notes following RCW 11.08.160.

**84.12.210 Property used but not owned deemed sole operating property of owning company.** Property 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. [1961 c 15 § 84.12.210. Prior: 1935 c 123 § 1, subdivision (19); RRS § 11156-1(19). Formerly RCW 84.12.020, part.]

**84.12.220 Jurisdiction to determine operating, nonoperating property.** In all matters relating to assessment and taxation the department of revenue shall have jurisdiction to determine what is operating property and what is nonoperating property. [1975 1st ex.s. c 278 § 160; 1961 c 15 § 84.12.220. Prior: 1935 c 123 § 2; RRS § 11156-2. Formerly RCW 84.12.020, part.]

Construction -- Severability -- 1975 1st ex.s. c 278: See notes following RCW 11.08.160.

**84.12.230 Annual reports to be filed.** Each company doing business in this state shall annually on or before the 15th day of March, make and file with the department of revenue an annual report, in such manner, upon such form, and giving such information as the department may direct: PROVIDED, That the department, upon written request filed on or before such date and for good cause shown therein, may allow an extension of time for filing not to exceed sixty days. At the time of making such report each company shall also be required to furnish to the department the annual reports of the board of directors, or other officers to the stockholders of the company, duplicate copies of the annual reports made to the interstate commerce commission or its successor agency and to the utilities and transportation commission of this state and duplicate copies of such other reports as the department may direct: PROVIDED, That the duplicate copies of these annual reports shall not be due until such time as they are due to the stockholders or commissioners. [1998 c 311 § 12; 1984 c 132 § 1; 1975 1st ex.s. c 278 § 161; 1961 c 15 § 84.12.230. Prior: 1935 c 123 § 3; 1925 ex.s. c 130 § 39; 1907 c 131 § 5; 1907 c 78 § 5; 1897 c 71 § 40; 1893 c 124 § 40; 1891 c 140 § 27; 1890 p 541 § 27; RRS § 11156-3. Formerly RCW 84.12.030.]

Construction -- Severability -- 1975 1st ex.s. c 278: See notes following RCW 11.08.160.

**84.12.240 Access to books and records.** The department of revenue shall have access to all books, papers, documents, statements and accounts on file or of record in any of the departments of the state; and it shall have the power to issue subpoenas, signed by the director of the department or any duly authorized employee and served in a like manner as a subpoena issued from courts of record, to compel witnesses to

appear and give evidence and to produce books and papers. The director of the department or any employee officially designated by the department is authorized to administer oaths to witnesses. The attendance of any witness may be compelled by attachment issued out of any superior court upon application to said court by the director or any duly authorized employee of the department, upon a proper showing that such witness has been duly served with a subpoena and has refused to appear before the said department. In case of the refusal of a witness to produce books, papers, documents, or accounts, or to give evidence on matters material to the hearing, the department may institute proceedings in the proper superior court to compel such witness to testify or to produce such books or papers, and to punish him for such failure or refusal. All process issued by the department shall be served by the sheriff of the proper county or by a duly authorized agent of the department and such service, if made by the sheriff, shall be certified by him to the department of revenue without any compensation therefor. Persons appearing before the department in obedience to a subpoena shall receive the same compensation as witnesses in the superior court. The records, books, accounts and papers of each company shall be subject to visitation, investigation or examination by the department, or any employee thereof officially designated by the department. All real and/or personal property of any company shall be subject to visitation, investigation, examination and/or listing at any and all times by the department, or any person officially designated by the director. [1975 1st ex.s. c 278 § 162; 1973 c 95 § 9; 1961 c 15 § 84.12.240. Prior: 1935 c 123 § 4; 1925 ex.s. c 130 § 37; 1907 c 131 § 3; 1907 c 78 § 3; RRS § 11156-4. Formerly RCW 84.12.080.]

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.250 Depositions may be taken.** The department of revenue, in any matter material to the valuation, assessment or taxation of the operating property of any company, may cause the deposition of witnesses residing without the state or absent therefrom, to be taken upon notice to the company interested in like manner as the depositions of witnesses are taken in civil actions in the superior court. [1975 1st ex.s. c 278 § 163; 1961 c 15 § 84.12.250. Prior: 1935 c 123 § 5; 1925 ex.s. c 130 § 38; 1907 c 131 § 4; 1907 c 78 § 4; RRS § 11156-5. Formerly RCW 84.12.090.]

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.260 Default valuation by department of revenue — Penalty — Estoppel.** (1) If any company

shall fail to materially comply with the provisions of RCW 84.12.230, the department shall add to the value of such company, as a penalty for such failure, five percent for every thirty days or fraction thereof, not to exceed ten percent, that the company fails to comply.

(2) If any company, or any of its officers or agents shall refuse or neglect to make any report required by this chapter, or by the department of revenue, or shall refuse to permit an inspection and examination of its records, books, accounts, papers or property requested by the department of revenue, or shall refuse or neglect to appear before the department of revenue in obedience to a subpoena, the department of revenue shall inform itself to the best of its ability of the matters required to be known, in order to discharge its duties with respect to valuation and assessment of the property of such company, and the department shall add to the value so ascertained twenty-five percent as a penalty for such failure or refusal and such company shall be estopped to question or impeach the assessment of the department in any hearing or proceeding thereafter. Such penalty shall be in lieu of the penalty provided for in subsection (1) of this section.

(3) The department shall waive or cancel the penalty imposed under subsection (1) of this section for good cause shown.

(4) The department shall waive or cancel the penalty imposed under subsection (1) of this section when the circumstances under which the failure to materially comply with the provisions of RCW 84.12.230 do not qualify for waiver or cancellation under subsection (3) of this section if:

(a) The company fully complies with the reporting provisions of RCW 84.12.230 within thirty days of the due date or any extension granted by the department; and

(b) The company has timely complied with the provisions of RCW 84.12.230 for the previous two calendar years. The requirement that a company has timely complied with the provisions of RCW 84.12.230 for the previous two calendar years is waived for any calendar year in which the company was not required to comply with the provisions of RCW 84.12.230. [2007 c 111 § 201; 1984 c 132 § 2; 1975 1st ex.s. c 278 § 164; 1961 c 15 § 84.12.260. Prior: 1935 c 123 § 6; 1925 ex.s. c 130 § 41; 1907 c 131 § 7; 1907 c 78 § 6; 1891 c 140 § 37; 1890 p 544 § 36; RRS § 11156-6. Formerly RCW 84.12.100.]

**Application -- 2007 c 111 §§ 201 and 202:** "Sections 201 and 202 of this act apply with respect to annual reports and annual statements originally due on or after July 22, 2007." [2007 c 111 § 203.]

**Part headings not law -- 2007 c 111:** See note following RCW 82.16.120.

**Construction -- Severability -- 1975 1st ex.s. c 278:** See

notes following RCW 11.08.160.

**84.12.270 Annual assessment — Sources of information.** The department of revenue shall annually make an assessment of the operating property of all companies; and between the fifteenth day of March and the first day of July of each year shall prepare an assessment roll upon which it shall enter and assess the true and fair value of all the operating property of each of such companies as of the first day of January of the year in which the assessment is made. For the purpose of determining the true and fair value of such property the department of revenue may inspect the property belonging to said companies and may take into consideration any information or knowledge obtained by it from such examination and inspection of such property, or of the books, records, and accounts of such companies, the statements filed as required by this chapter, the reports, statements, or returns of such companies filed in the office of any board, office, or commission of this state or any county thereof, the earnings and earning power of such companies, the franchises owned or used by such companies, the true and fair valuation of any and all property of such companies, whether operating or nonoperating property, and whether situated within or outside the state, and any other facts, evidence, or information that may be obtainable bearing upon the value of the operating property: PROVIDED, That in no event shall any statement or report required from any company by this chapter be conclusive upon the department of revenue in determining the amount, character, and true and fair value of the operating property of such company. [2001 c 187 § 3; 1997 c 3 § 113 (Referendum Bill No. 47, approved November 4, 1997); 1994 c 301 § 20; 1975 1st ex.s. c 278 § 165; 1961 c 15 § 84.12.270. Prior: 1939 c 206 § 19; 1935 c 123 § 7; 1925 ex.s. c 130 § 43; 1907 c 131 § 8; 1907 c 78 § 7; 1891 c 140 §§ 28-31; 1890 p 541 §§ 26-33; RRS § 11156-7. Formerly RCW 84.12.040.]

**Contingent effective date -- 2001 c 187:** See note following RCW 84.70.010.

**Application -- 2001 c 187:** See note following RCW 84.40.020.

**Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3:** See notes following RCW 84.40.030.

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.280 Classification of real and personal property.** In making the assessment of the operating property of any railroad or logging railroad company and in the apportionment of the values and the taxation thereof, all land occupied and claimed exclusively as the

right-of-way for railroads, with all the tracks and substructures and superstructures which support the same, together with all side tracks, second tracks, turn-outs, station houses, depots, round houses, machine shops, or other buildings belonging to the company, used in the operation thereof, without separating the same into land and improvements, shall be assessed as real property. And the rolling stock and other movable property belonging to any railroad or logging railroad company shall be considered as personal property and taxed as such: PROVIDED, That all of the operating property of street railway companies shall be assessed and taxed as personal property.

All of the operating property of airplane companies, telegraph companies, pipe line companies, and all of the operating property other than lands and buildings of electric light and power companies, telephone companies, and gas companies shall be assessed and taxed as personal property. [2001 c 187 § 4; 1998 c 335 § 2; 1997 c 3 § 114 (Referendum Bill No. 47, approved November 4, 1997); 1987 c 153 § 2; 1961 c 15 § 84.12.280. Prior: 1935 c 123 § 8; 1925 ex.s. c 130 § 44; 1907 c 78 § 8; 1891 c 140 §§ 28-31; 1890 p 541 §§ 26-33; RRS § 11156-8. Formerly RCW 84.12.050.]

**Contingent effective date -- 2001 c 187:** See note following RCW 84.70.010.

**Application -- 2001 c 187:** See note following RCW 84.40.020.

**Effective date -- 1998 c 335:** See note following RCW 84.12.200.

**Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3:** See notes following RCW 84.40.030.

**84.12.300 Valuation of interstate utility — Apportionment of system value to state.** In determining the value of the operating property within this state of any company, the properties of which lie partly within and partly without this state, the department of revenue may, among other things, take into consideration the value of the whole system as a unit, and for such purpose may determine, insofar as the same is reasonably ascertainable, the salvage value, the actual cost new, the cost of reproduction new less depreciation and plus appreciation, the par value, actual value and market value of the company's outstanding stocks and bonds during one or more preceding years, the past, present and prospective gross and net earnings of the whole system as a unit.

In apportioning such system value to the state, the department of revenue shall consider relative costs, relative reproduction cost, relative future prospects and relative track mileage and the distribution of terminal properties within and without the state and such other matters and things as the department may deem

pertinent.

The department may also take into consideration the actual cost, cost of reproduction new, and cost of reproduction new less depreciation, earning capacity and future prospects of the property, located within the state and all other matters and things deemed pertinent by the department of revenue. [1975 1st ex.s. c 278 § 166; 1961 c 15 § 84.12.300. Prior: 1935 c 123 § 9; 1925 ex.s. c 130 § 44; 1907 c 78 § 8; RRS § 11156-9. Formerly RCW 84.12.060.]

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.310 Deduction of nonoperating property.** For the purpose of determining the system value of the operating property of any such company, the department of revenue shall deduct from the true and fair value of the total assets of such company, the actual cash value of all nonoperating property owned by such company. For such purpose the department of revenue may require of the assessors of the various counties within this state a detailed list of such company's properties assessed by them, together with the assessable or assessed value thereof: PROVIDED, That such assessed or assessable value shall be advisory only and not conclusive on the department of revenue as to the value thereof. [2001 c 187 § 5; 1997 c 3 § 115 (Referendum Bill No. 47, approved November 4, 1997); 1994 c 301 § 21; 1975 1st ex.s. c 278 § 167; 1961 c 15 § 84.12.310. Prior: 1935 c 123 § 10; RRS § 11156-10. Formerly RCW 84.12.070.]

**Contingent effective date -- 2001 c 187:** See note following RCW 84.70.010.

**Application -- 2001 c 187:** See note following RCW 84.40.020.

**Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3:** See notes following RCW 84.40.030.

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.320 Persons bound by notice.** Every person, company or companies operating any property in this state as defined in this chapter shall be the representative of every title and interest in the property as owner, lessee or otherwise, and notice to such person shall be notice to all interests in the property for the purpose of assessment and taxation. The assessment and taxation of the property of the company in the name of the owner, lessee or operating company shall be deemed and held an assessment and taxation of all the title and interest in such property of every kind and nature. [1961 c 15 § 84.12.320. Prior: 1935 c 123 § 11; RRS § 11156-11. Formerly RCW 84.12.120.]

**84.12.330 Assessment roll -- Notice of valuation.**

Upon the assessment roll shall be placed after the name of each company a general description of the operating property of the company, which shall be considered sufficient if described in the language of RCW 84.12.200(12), as applied to the company, following which shall be entered the true and fair value of the operating property as determined by the department of revenue. No assessment shall be invalidated by reason of a mistake in the name of the company assessed, or the omission of the name of the owner or by the entry as owner of a name other than that of the true owner. When the department of revenue shall have prepared the assessment roll and entered thereon the true and fair value of the operating property of the company, as herein required, it shall notify the company by mail of the valuation determined by it and entered upon the roll. [2001 c 187 § 6; 1998 c 335 § 3; 1997 c 3 § 116 (Referendum Bill No. 47, approved November 4, 1997); 1994 c 301 § 22; 1975 1st ex.s. c 278 § 168; 1961 c 15 § 84.12.330. Prior: 1935 c 123 § 12; 1925 ex.s. c 130 § 44; 1907 c 78 § 8; 1891 c 140 § 35; 1890 p 543 § 35; RRS § 11156-12. Formerly RCW 84.12.110.]

**Contingent effective date -- 2001 c 187:** See note following RCW 84.70.010.

**Application -- 2001 c 187:** See note following RCW 84.40.020.

**Effective date -- 1998 c 335:** See note following RCW 84.12.200.

**Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3:** See notes following RCW 84.40.030.

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.340 Hearings on assessment, time and place of.**

Following the making of an assessment, every company may present a motion for a hearing on the assessment with the department of revenue within the first ten working days of July. The hearing on this motion shall be held within ten working days following the hearing request period. During this hearing, the company may present evidence relating to the value of its operating property and to the value of other taxable property in the counties in which its operating property is situate. Upon request in writing for such hearing, the department shall appoint a time and place therefor, within the period aforesaid, the hearing to be conducted in such manner as the department shall direct. Hearings provided for in this section may be held at such times and in such places throughout the state as the department may deem proper or necessary, may be adjourned from time to time and from place to place and may be conducted by the department of revenue or by such member or members thereof as may be duly delegated to act for it. Testimony

taken at this hearing shall be recorded. [1994 c 124 § 14; 1975 1st ex.s. c 278 § 169; 1961 c 15 § 84.12.340. Prior: 1953 c 162 § 1; 1939 c 206 § 20; 1935 c 123 § 13; RRS § 11156-13. Formerly RCW 84.12.130.]

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.350 Apportionment of value by department of revenue.** Upon determination by the department of revenue of the true and fair value of the property appearing on such rolls it shall apportion such value to the respective counties entitled thereto, as hereinafter provided, and shall determine the equalized assessed valuation of such property in each such county and in the several taxing districts therein, by applying to such actual apportioned value the same ratio as the ratio of assessed to actual value of the general property in such county: PROVIDED, That, whenever the amount of the true and fair value of the operating property of any company otherwise apportionable to any county or other taxing district shall be less than two hundred fifty dollars, such amount need not be apportioned to such county or taxing district but may be added to the amount apportioned to an adjacent county or taxing district. [2001 c 187 § 7; 1997 c 3 § 117 (Referendum Bill No. 47, approved November 4, 1997); 1994 c 301 § 23; 1967 ex.s. c 26 § 17; 1961 c 15 § 84.12.350. Prior: 1939 c 206 § 21; 1935 c 123 § 14; RRS § 11156-14. Formerly RCW 84.12.140.]

**Contingent effective date -- 2001 c 187:** See note following RCW 84.70.010.

**Application -- 2001 c 187:** See note following RCW 84.40.020.

**Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3:** See notes following RCW 84.40.030.

**Effective date -- 1967 ex.s. c 26:** See note following RCW 82.01.050.

**84.12.360 Basis of apportionment.** The true and fair value of the operating property assessed to a company, as fixed and determined by the department of revenue, shall be apportioned by the department of revenue to the respective counties and to the taxing districts thereof wherein such property is located in the following manner:

(1) Property of all railroad companies other than street railroad companies, telegraph companies and pipe line companies -- upon the basis of that proportion of the value of the total operating property within the state which the mileage of track, as classified by the department of revenue (in case of railroads), mileage of wire (in the case of telegraph companies), and mileage of pipe line (in the case of pipe line companies) within

each county or taxing district bears to the total mileage thereof within the state, at the end of the calendar year last past. For the purpose of such apportionment the department may classify railroad track.

(2) Property of street railroad companies, telephone companies, electric light and power companies, and gas companies -- upon the basis of relative value of the operating property within each county and taxing district to the value of the total operating property within the state to be determined by such factors as the department of revenue shall deem proper. (3) Planes or other aircraft of airplane companies -- upon the basis of such factor or factors of allocation, to be determined by the department of revenue, as will secure a substantially fair and equitable division between counties and other taxing districts.

All other property of airplane companies -- upon the basis set forth in subsection (2) of this section.

The basis of apportionment with reference to all public utility companies above prescribed shall not be deemed exclusive and the department of revenue in apportioning values of such companies may also take into consideration such other information, facts, circumstances, or allocation factors as will enable it to make a substantially just and correct valuation of the operating property of such companies within the state and within each county thereof. [2001 c 187 § 8; 1998 c 335 § 4; 1997 c 3 § 118 (Referendum Bill No. 47, approved November 4, 1997); 1994 c 301 § 24; 1987 c 153 § 3; 1975 1st ex.s. c 278 § 170; 1961 c 15 § 84.12.360. Prior: 1955 c 120 § 1; 1935 c 123 § 15; 1925 ex.s. c 130 § 47; 1917 c 25 § 1; 1907 c 78 § 11; 1891 c 140 § 33; 1890 p 541 § 30; RRS § 11156-15. Formerly RCW 84.12.150.]

**Contingent effective date -- 2001 c 187:** See note following RCW 84.70.010.

**Application -- 2001 c 187:** See note following RCW 84.40.020.

**Effective date -- 1998 c 335:** See note following RCW 84.12.200.

**Application -- Severability -- Part headings not law -- Referral to electorate -- 1997 c 3:** See notes following RCW 84.40.030.

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.

**84.12.370 Certification to county assessor -- Entry upon tax rolls.** When the department of revenue shall have determined the equalized assessed value of the operating property of each company in each of the respective counties and in the taxing districts thereof, as hereinabove provided, the department of revenue shall certify such equalized assessed value to the county assessor of the proper county. The county assessor shall enter the company's real operating property upon the

real property tax rolls and the company's personal operating property upon the personal property tax rolls of the county, together with the values so apportioned, and the same shall be and constitute the assessed valuation of the operating property of the company in such county and the taxing districts therein for that year, upon which taxes shall be levied and collected in the same manner as on the general property of such county. [1994 c 301 § 25; 1975 1st ex.s. c 278 § 171; 1961 c 15 § 84.12.370. Prior: 1935 c 123 § 16; RRS § 11156-16. Formerly RCW 84.12.160.]

**Construction -- Severability -- 1975 1st ex.s. c 278:**  
See notes following RCW 11.08.160.

**84.12.380 Assessment of nonoperating property.** All property of any company not assessed as operating property under the provisions of this chapter shall be

assessed by the assessor of the county wherein the same may be located or situate the same as the general property of the county. [1961 c 15 § 84.12.380. Prior: 1935 c 123 § 17; 1891 c 140 § 34; 1890 p 542 § 33; RRS § 11156-17. Formerly RCW 84.12.180.]

**84.12.390 Rules and regulations.** The department of revenue shall have the power to make such rules and regulations, not inconsistent herewith, as may be convenient and necessary to enforce and carry out the provisions of this chapter. [1975 1st ex.s. c 278 § 172; 1961 c 15 § 84.12.390. Prior: 1935 c 123 § 18; RRS § 11156-18. Formerly RCW 84.08.070, part.]

**Construction -- Severability -- 1975 1st ex.s. c 278:** See notes following RCW 11.08.160.