

No. 84207-8

SUPREME COURT
OF THE STATE OF WASHINGTON

FLIGHT OPTIONS, LLC,

Petitioner

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent

SUPPLEMENTAL BRIEF OF PETITIONER

Scott M. Edwards, Esq.
WSBA No. 26455
LANE POWELL PC
Attorneys for Appellant

Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

RECEIVED
JAN 10 2013
E
b/h

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| INTRODUCTION..... | 1 |
| STATEMENT OF THE CASE..... | 1 |
| A. Flight Options' Business..... | 1 |
| B. Procedural History..... | 2 |
| SUMMARY OF ARGUMENT..... | 4 |
| ARGUMENT..... | 5 |
| A. Under Washington law, "all" personal property is assessed based on ownership, including operating property "of" (belonging to) inter-county public utilities..... | 5 |
| B. The temporary presence in Washington of fractionally- owned private jets on an irregular, unscheduled basis does not create a tax situs in this state. | 8 |
| 1. Under Washington law, the temporary presence of property in the state on an irregular, unscheduled basis does not create a tax situs here. | 9 |
| 2. Other states have held that a non-resident's personal property requires a permanent presence to establish a tax situs at a location other than the owner's domicile. | 11 |
| 3. Due Process limitations of the U.S. Constitution separately require that mobile property must operate on fixed routes and regular schedules to obtain a tax situs in a state through which it temporarily passes. | 12 |
| C. The Department's assessment of property tax against Flight Options for managing fractionally-owned private jets that enter the state only temporarily on an irregular, unscheduled basis is not authorized by RCW Ch. 84.12. | 15 |
| D. Any ambiguity regarding the Department's authority to impose property tax on Flight Options without regard to ownership or tax situs of the fractionally owned jets must be construed against the Department. | 19 |
| CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|---------------|
| CASES | |
| <i>Braniff Airways v. Nebraska Bd. of Equalization</i> , 347 U.S. 590, 74 S. Ct. 757, 98 L. Ed. 767 (1954) | 13, 14, 15 |
| <i>Canadian Pacific Railway Co. v. King County</i> , 90 Wash. 38, 144 P. 416 (1916)..... | passim |
| <i>Central Railroad Co. v. Pennsylvania</i> , 370 U.S. 607, 82 S. Ct. 1297, 9 L. Ed. 2d 720 (1962)..... | 13, 15 |
| <i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977)..... | 13 |
| <i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995)..... | 5 |
| <i>Fall Creek Constr. Co., Inc. v. Dir. Of Revenue</i> , 109 S.W.3d 165 (Mo. 2003)..... | 17 |
| <i>Flight Options, LLC v. Dep't of Revenue</i> , 154 Wn. App. 176, 225 P.3d 354 (2010)..... | 7, 12 |
| <i>Flying Tiger Line, Inc. v. Bd. of Assessors of Boston</i> , 404 Mass. 359, 535 N.E.2d 231 (1989)..... | 11, 12 |
| <i>Guinness v. King County</i> , 32 Wn.2d 503, 202 P.2d 737 (1949)..... | 9, 10, 11, 12 |
| <i>Humphrey Indus. Ltd. v. Clay Street Assoc. LLC</i> , Supreme Court Cause No. 82687-1 (Nov. 10, 2010)..... | 18 |
| <i>Lovell v. Spokane County</i> , 168 Wash. 683, 13 P.2d 59 (1932) | 8 |
| <i>Marye v. Balt. & Ohio R.R. Co.</i> , 127 U.S. 117, 8 S. Ct. 1037, 32 L. Ed. 94 (1888) | 13 |
| <i>Mesa Leasing Ltd. v. City of Burlington</i> , 169 Vt. 93, 730 A.2d 1102 (1999)..... | 9 |

| | |
|---|--------|
| <i>Northwest Airlines, Inc. v. Minnesota</i> , 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944)..... | 13, 14 |
| <i>Northwest Imp. Co. v. Henneford</i> , 184 Wash. 502, 51 P.2d 1083 (1935) | 18 |
| <i>Peabody Coal v. State Tax Comm'n</i> , 731 S.W.2d 837 (Mo. 1987)..... | 11, 12 |
| <i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007) (<i>en banc</i>) | 19 |
| <i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)..... | 16 |
| <i>Timber Traders, Inc. v. Johnston</i> , 87 Wn.2d 42, 548 P.2d 1080 (1976)..... | 6, 7 |
| <i>TracFone Wireless, Inc. v. Dep't of Revenue</i> , 2010 WL 4244674, __ P.3d __ (2010) | 6 |
| <i>U.S. Whaling Co. v. King County</i> , 96 Wash. 434, 165 P. 70 (1917)..... | 8 |
| <i>Weyerhaeuser Co. v. State Dep't of Revenue</i> , 106 Wn.2d 557, 723 P.2d 1131 (1986)..... | 17 |
| <i>Weyerhaeuser Timber Co. v. Henneford</i> , 185 Wn. 46, 53 P.2d 38 (1936) | 16, 19 |

STATUTES

| | |
|-------------------------|------------|
| RCW 84.12.200(3) | 16, 17, 20 |
| RCW 84.12.200(12) | passim |
| RCW 84.12.210..... | passim |
| RCW 84.12.270..... | 16, 20 |
| RCW 84.12.350..... | 18 |
| RCW 84.40.020..... | passim |

RCW 84.40.040.....5

RCW 84.44.010..... 4, 9, 12, 20

RCW 84.56.070.....8

RCW 84.56.570.....8

RCW 84.60.020.....,7

RCW Ch. 84.12 passim

OTHER AUTHORITIES

American Heritage College Dictionary (3d Ed. 1997)8

INTRODUCTION

This is a case of first impression nationally. It involves property tax assessed against a manager of fractionally-owned private jets because of its management activities, without regard to ownership. Moreover, the jets, which are based outside the state and enter Washington only temporarily on an irregular, unscheduled basis at the direction of their various fractional owners, do not have a tax situs in Washington.

STATEMENT OF THE CASE

A. Flight Options' Business

Flight Options is a leading seller of fractional ownership interests in private corporate jets. CP 33. Flight Options is a Delaware limited liability company with its principal place of business in Richmond Heights, Ohio. *Id.* It does not maintain an office, place of business, or any operations in Washington. CP 35.

Flight Options buys corporate jets that it re-sells to private owners in fractional shares. CP 34; *see also* CP 129-44 (Purchase Agreement). Buyers acquire title and an undivided ownership interest in a specific aircraft that is registered with the Federal Aviation Administration. CP 34. Each jet has between two and sixteen owners. *Id.* Pursuant to a separate agreement, Flight Options also provides management services to the owners for a fee. CP 34-5; *see also* CP 146-65, 167-87 (2004 and 2005 Management Agreements). During the period at issue (2005 and

2006), Flight Options managed private jets on behalf of more than 1,100 fractional owners. CP 36.

The fractionally-owned jets managed by Flight Options do not fly on fixed routes or regular schedules. CP 35. Rather, the fractional owners use their aircraft to fly at-will between airfields throughout the United States and internationally. *Id.* When a private jet managed by Flight Options enters Washington, it does so only temporarily on an irregular and unscheduled basis at the direction of a fractional owner.¹ *Id.* Fractional owners select the aircraft's origin and destination, and determine the number, location and duration of any stops. CP 153-54.

B. Procedural History

On June 8, 2005, the Department of Revenue ("Department") emailed Flight Options an "Airplane Company Annual Report" and instructed Flight Options to file it before June 30, 2005, "to avoid a default assessment and 25% penalty." CP 715. When demanding that Flight Options submit the report, the Department instructed Flight Options to list "all aircraft in the fractional program . . . under the 'owned' category." *Id.* To avoid the threatened penalty, Flight Options provided the Department a list of the 202 private jets it was managing as of January 1, 2005. CP 36. On December 9, 2005, the Department issued a 2005 property tax

¹ A small percentage of flights are made by members of Jet Pass, a private membership program that provides access to private jets without ownership. *Id.*

assessment to Flight Options “for property taxes that will be billed and payable in 2006.” CP 73. 2005 was the first year the Department assessed property taxes against any manager of fractional ownership interests in private jets.

Flight Options challenged the Department’s authority to assess property tax against Flight Options for its management of fractionally-owned private jets that enter Washington only temporarily on an irregular, unscheduled basis by filing this suit for declaratory and injunctive relief on January 6, 2006.² On cross-motions for summary judgment, the Superior Court dismissed Flight Options’ claims, ruling that a “commercial utilities tax” was not barred by the Commerce Clause (CP 743), even though the lawsuit involves property tax and Flight Options did not assert any Commerce Clause arguments. On appeal, Division II affirmed dismissal of Flight Options’ suit on the theory that a perceived conflict between RCW 84.12.210 and RCW 84.12.200(12) authorizes the imposition of property tax on the use of “operating property” owned by another. Division II’s opinion does not acknowledge the situs issue.

² After the Department issued an assessment for 2006, Flight Options amended the complaint to include that assessment as well. CP 4. As of January 1, 2006, the lien date for the 2006 assessment, the number of fractionally-owned private jets under management had decreased to 189. CP 120.

SUMMARY OF ARGUMENT

The Department's assessment against Flight Options for managing fractionally-owned private jets violates two fundamental principles of Washington property tax law. First, the defining characteristic of property tax is that it is imposed on the taxpayer's ownership of property. Thus, RCW 84.40.020 requires that "*all* personal property" subject to property tax in this state "*shall be*" assessed "with reference to its ... *ownership*." (Emphasis added.) Yet, Flight Options was assessed property tax based on its *management* of property owned by others as if the property tax were instead an excise tax.

Second, property tax is only imposed on property that has a tax situs in the taxing jurisdiction. RCW 84.44.010. The temporary presence of mobile property on an irregular, unscheduled basis does not create a tax situs in locations the property happens to pass through.

Both of these principles apply regardless of whether or not Flight Options' management of fractionally owned private jets would cause it to be deemed an inter-county public utility. RCW Ch. 84.12, the chapter that authorizes the Department to centrally assess the operating property "of" specified inter-county public utilities, limits that authority to property (a) owned by the assessed company that (b) has a tax situs in the taxing jurisdiction. RCW 84.12.210 and RCW 84.12.200(12). The only relevance of Flight Options' potential status as an inter-county public

utility is that such status impacts whether the Department of Revenue or County Tax Assessors are the proper taxing authority to assess property tax on owners of property that has a tax situs in Washington.

Under basic principles of Washington property tax law, each fractional owner owes property tax on that owner's plane in the county of the owner's domicile. Personal property taxes owed by fractional owners domiciled in Washington are to be assessed by the County Assessor of the County in which the fractional owner is domiciled. RCW 84.40.040.

ARGUMENT

- A. **Under Washington law, “all” personal property is assessed based on ownership, including operating property “of” (belonging to) inter-county public utilities.**

This Court has identified defining characteristic of property taxes as its imposition on “the ownership of property,” explaining that liability for property tax arises from the taxpayers’ “status as property owners.” *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995). That defining characteristic is codified in RCW 84.40.020, which requires that “**All** personal property in this state subject to taxation *shall be* ... assessed ... with reference to its ... *ownership* on the first day of January of the year in which it is assessed.” (Emphasis added.) As this Court has recently held, the “use of the word ‘all’ shows legislative intent” for universal application of the statute “without implied exceptions.”

TracFone Wireless, Inc. v. Dep't of Revenue, 2010 WL 4244674, at *8, ___ P.3d __ (2010).

In *Timber Traders, Inc. v. Johnston*, 87 Wn.2d 42, 49, 548 P.2d 1080 (1976), this Court explained that property “taxes are assessed against the owners of property,” recognizing “the clearly expressed intent of RCW 84.40.020 to be that owners shall be liable.” The Department’s assessment of property taxes against Flight Options in this case violates that basic tenant of Washington property tax law. The record shows that Flight Options had *no ownership* interest whatsoever in at least 60 of the aircraft for which it was assessed property tax. CP 230-34.³

Even if Flight Options operated the privately-owned jets as an inter-county public utility (which, as discussed in point C below, it did not), the Department was still required to assess property tax based on ownership. While RCW Chapter 84.12 governs the Department’s central assessment of the operating property of specified inter-county public utilities, nothing in that Chapter imposes property tax on a person based on its use rather than its ownership of property. To the contrary, consistent with and reaffirming the mandate in RCW 84.40.020 that “*all* personal property” be assessed “with reference to its ... *ownership*,” RCW 84.12.210 provides that “property used but not owned by an operating

³ Moreover, the Department concedes that Flight Options’ residual ownership interest in the planes it had not yet fully sold was in the aggregate only “about 20%.” RP (5/16/08) at 54:14-15.

company ... shall be deemed the sole operating property of the owning company.” RCW 84.12.210.

Division II’s opinion ignores RCW 84.40.020, and, therefore, failed to address either (a) the statute’s universal requirement that “all personal property” be assessed according to its ownership, or (b) this Court’s holding that the statute means “owners shall be liable” for personal property taxes. *Timber Traders*, 87 Wn.2d at 49.

While acknowledging that RCW 84.12.210 “appears to support Flight Options’ argument,” Division II treats the statute as a nullity on the theory that it “conflicts with the statutory definition of ‘operating property.’” *Flight Options, LLC v. Dep’t of Revenue*, 154 Wn. App. 176, 181, 225 P.3d 354 (2010). The imagined “conflict” is non-existent. RCW 84.12.210 simply provides that when property meeting the definition of operating property is used by a person other than its owner, the property shall be assessed “to the owning company.” Thus, in *Canadian Pacific Railway Co. v. King County*, 90 Wash. 38, 144 P. 416 (1916), this Court held that property tax on railroad cars operated by one company, while meeting the definition of operating property, was nevertheless required to be assessed to the “true owner thereof,” not the operator. *Id.* at 45-46.

The statutory method for enforcing payment of property tax assessments also confirms that taxes are imposed on property owners. RCW 84.60.020 provides “The taxes assessed upon personal property

shall be a lien upon each item of personal *property of the person assessed*, distrained by the treasurer as provided in RCW 84.56.570.” (Emphasis added.) The distraint statute provides that if property taxes on personal property are not paid, the “treasurer shall ...distrain sufficient goods and chattels *belonging to the person charged with such taxes* to pay the same.” RCW 84.56.570.⁴ Applying these provisions in *Lovell v. Spokane County*, 168 Wash. 683, 13 P.2d 59 (1932), this Court held that the tax collector could not distrain property owned by one person to enforce payment of property taxes assessed against another explaining:

[Because] the property against which the taxes which the county was seeking to collect were levied was not the property of respondent ... we hold that respondent was not liable ... for these taxes, and that his property was not subject to distraint therefor.

Id. at 686. The Department’s assessment of Flight Options thus violates the controlling statute, RCW 84.40.020, as well as numerous supporting statutes (RCW 84.12.210, 84.60.020 and 84.56.070) and the Washington case law applying those statutes.

B. The temporary presence in Washington of fractionally-owned private jets on an irregular, unscheduled basis does not create a tax situs in this state.

In Washington, “[t]he law is well settled that tangible personal property is subject to taxation in the jurisdiction in which it has its actual situs.” *U.S. Whaling Co. v. King County*, 96 Wash. 434, 436, 165 P. 70

⁴ These provisions harmonize with each other since “of” means “belonging to.” *American Heritage College Dictionary* (3d Ed. 1997).

(1917). This principle has been codified by statute. RCW 84.44.010 (personal property shall be assessed “in the county where it is situated”);⁵ and RCW 84.12.200(12) (limiting operating property, in relevant part, to property “that is situate in Washington.”).

Yet neither the Superior Court nor the Court of Appeals addressed the tax situs of mobile property that temporarily enters the state on an irregular, unscheduled basis. Washington state law and the Due Process Clause of the U.S. Constitution each separately require property to be permanently present in the state to obtain a tax situs apart from its owner’s domicile. For mobile property, the permanence necessary to establish a tax situs requires that the property be used in the state on fixed routes and regular schedules.

- 1. Under Washington law, the temporary presence of property in the state on an irregular, unscheduled basis does not create a tax situs here.**

This Court has consistently held that a tax situs for tangible personal property requires a permanent presence in the taxing jurisdiction. *Guinness v. King County*, 32 Wn.2d 503, 507, 202 P.2d 737 (1949) and *Canadian Pacific*, 90 Wash. at 40.

⁵ “There is nearly universal agreement that personal property is ‘situated’ for tax purposes at its tax situs, which requires a sufficient nexus between the property and the taxing jurisdiction.” *Mesa Leasing Ltd. v. City of Burlington*, 169 Vt. 93, 96, 730 A.2d 1102 (1999).

In *Guinness*, this Court held, as a matter of *Washington* law, that tax situs over a nonresident's moveable tangible personal property requires "permanent presence" within the State, *id.* at 507. The Court explained that:

[C]hattels merely temporarily or transiently within the limits of a state are not subject to its property taxes. Tangible personal property passing through or in the state for temporary purposes only, *if it belongs to a nonresident*, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed.

Id. (quoting 51 Am. Jur. 468, Taxation § 453) (emphasis added).

This Court also considered the distinction between temporary presence and permanent presence sufficient to establish a tax situs in *Canadian Pacific*. That case involved property tax assessed against the owner of railroad cars used by another company to provide daily scheduled service between British Columbia and Seattle. *Canadian Pacific*, 90 Wash. at 39-40. The parties' contract required the owner to provide three passenger cars for daily use by the operator on a fixed route and schedule within Washington State. *Id.* at 40-41. While the owner's domicile was in Canada, this Court held that three railway cars had established a tax situs in Washington. *Id.* at 45. In so holding, the Court emphasized that (1) the taxpayer owned cars that followed "certain routes of travel," (2) the cars were "regularly used and employed in railroad business within this State," and (3) "the same number of cars [we]re used daily." *Id.* at 44. Thus, in Washington, transitory mobile property obtains

a “permanent presence” sufficient to establish tax situs through use on fixed routes at regular schedules.

Under Washington law, as reflected in *Guinness* and *Canadian Pacific*, the temporary, irregular, and unscheduled presence of some fractionally-owned jets within the state at the direction of their individual fractional owners is not sufficient to create a tax situs in Washington separate from the owner’s domicile. Consequently, *fractional owners who are Washington residents are subject to assessment of property tax by the County Assessor of the county where that owner is domiciled.*

2. Other states also hold that a non-resident’s personal property requires a permanent presence to establish a tax situs at a location other than the owner’s domicile.

Other state supreme courts have considered the specific issue of the property tax situs of aircraft and have applied the same analysis as this Court. *Flying Tiger Line, Inc. v. Bd. of Assessors of Boston*, 404 Mass. 359, 535 N.E.2d 231 (1989); *Peabody Coal v. State Tax Comm’n*, 731 S.W.2d 837 (Mo. 1987).

In *Peabody*, a Missouri business that owned two private jets and used them to fly between “its several installations” argued that the aircraft had “acquired a taxable situs in Indiana[] by reason of their frequent landings there.” 731 S.W.2d at 838.⁶ The court held that the jets had not

⁶ Respectively, the two aircraft made 32 percent and 20 percent of their landings in Indiana. *Id.*

acquired a tax situs in Indiana because the unscheduled and irregular landings there, while frequent, did not exhibit the “continuous presence” necessary to establish a tax situs. *Id.* at 839. In arriving at its decision, the court contrasted the case with a factual situation involving “fixed routes and regular schedules.” *Id.* at 838.

In *Flying Tiger*, the Massachusetts Supreme Court held that aircraft owned by two Delaware corporations had not acquired a taxable situs in Boston simply because they frequently landed at Logan Airport. *Flying Tiger*, 404 Mass. at 360. Construing a statute that, like Washington’s, imposes tax on property “situated” in the taxing jurisdiction, the court stated that “[t]o be situated in a municipality[,] the property must have ‘some degree of permanence of location’ and ‘temporary lodgment or migratory presence’ is not enough,” *id.* at 364. The court held that the “brief but regular presence” of the planes in Boston “lack[ed] sufficient permanence” to establish a taxable situs there. *Id.*

3. Due Process limitations of the U.S. Constitution separately require that mobile property must operate on fixed routes and regular schedules to obtain a tax situs in a state through which it temporarily passes.

The Court of Appeals did not address Washington situs under RCW 84.44.010, RCW 84.12.200(12), *Guinness* and/or *Canadian Pacific*. Instead, Division II conclusorily asserted that the Department’s assessments are “constitutional” because the tax was “fairly apportioned.” *Flight Options*, 154 Wn. App. at 182. Like the Superior

Court, Division II misidentified the relevant constitutional principle. The requirement that taxes be “fairly apportioned” is a Commerce Clause requirement. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). As the U.S. Supreme Court has explained, whether property “has tax situs in a state for the purpose of subjection to a property tax is one of due process,” not the Commerce Clause. *Braniff Airways v. Nebraska Bd. of Equalization*, 347 U.S. 590, 598-99, 74 S. Ct. 757, 98 L. Ed. 767 (1954).⁷ Properly applied, the separate requirements of the Due Process Clause further support the determination under Washington law that the Department lacked authority to assess property taxes against Flight Options for private jets owned by others that enter Washington only temporarily on an irregular, unscheduled basis at the direction of a planes’ fractional owners.

In three critical decisions, the U.S. Supreme Court has outlined the Due Process limitations on the tax situs of mobile personal property. *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607, 82 S. Ct. 1297, 9 L. Ed. 2d 720 (1962); *Braniff, supra*; and *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944). First, in *Northwest Airlines*, the Court affirmed that the domiciliary state has the

⁷ Moreover, Washington state law and the Due Process Clause provide separate restrictions on the assessment of property taxes. Thus, the U.S. Supreme court has affirmed injunctions against property tax assessments that are not authorized by state law, without regard to whether the assessment might be within limitations imposed by the Due Process Clause. *Marye v. Balt. & Ohio R.R. Co.*, 127 U.S. 117, 124, 8 S. Ct. 1037, 32 L. Ed. 94 (1888).

power to fully tax an owner's interest in personal property unless and until the property has become "permanently situated" in another state. *Northwest*, 322 U.S. at 297-98. Northwest Airlines had challenged Minnesota's assessment of property tax on all of the company's airplanes. *Id.* at 293. While all of Northwest's planes routinely left Minnesota (Northwest's domicile state), the Court found that "it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere." *Id.* at 295. The Court held that the domiciliary state, Minnesota, retained the exclusive authority to impose property taxes on all planes *owned* by Northwest. *Id.*

In *Braniff*, the Court permitted a non-domiciliary state (Nebraska) to tax airplanes owned by a commercial airline when it permanently employed some of its planes and part of its ground operations in that state, creating a tax situs there. The planes established a tax situs in Nebraska by "operating over fixed routes and landing on and departing from airports within Nebraska on regular schedules." *Braniff*, 347 U.S. at 591. While the Court permitted non-domiciliary property taxation in *Braniff* and not *Northwest*, the Court stressed that *Northwest* remained valid and distinguished the two cases, emphasizing that the evidence in the latter (as in this case) had not shown a permanent presence outside the property owner's domiciliary state. *Id.* at 601-02.

In *Central Railroad*, the Court affirmed the distinction established by these cases, noting that “[i]n *Braniff*, the airplanes held subject to non-domiciliary taxation were shown by the record to have flown on *fixed and regular routes*.” *Central Railroad*, 370 U.S. at 617 (emphasis added). Following *Braniff*, the Court held that 158 railroad cars owned by a Pennsylvania company but operated on “fixed routes and regular schedules” in New Jersey had acquired a tax situs in New Jersey. *Id.* at 613. However, the Court also held that the company’s 1,507 other railroad cars that were “regularly, habitually and/or continuously employed” outside Pennsylvania nevertheless retained their tax situs in that state because “they did not run ‘on fixed routes and regular schedules.’” *Id.*

C. The Department’s assessment of property tax against Flight Options for managing fractionally-owned private jets that enter the state only temporarily on an irregular, unscheduled basis is not authorized by RCW Ch. 84.12.

The basic tenets of Washington property tax law discussed in Sections A and B above apply regardless of whether Flight Options is an inter-county public utility. Contrary to the unstated premise implicit in Division II’s opinion, the procedures established in Ch. 84.12 RCW for valuing operating property owned by inter-county public utilities do not impose liability for property tax on persons who do not own property with a tax situs in Washington. Not only does RCW 84.12.210 provide that taxes on operating property are assessed to “the owning company” even

when the property is used by a different company,⁸ RCW 84.12.270 only authorizes the Department to assess the operating property “*of*” specified utilities, which as noted above means “belonging to.” Likewise, RCW 84.12.200(12) limits the definition of “operating property,” in relevant part, to property “situate in Washington,” requiring that operating property central assessed under RCW Ch. 84.12 have a Washington tax situs.

The Department contends that it is authorized to assess property taxes against Flight Options without reference to the ownership or tax situs of fractional private jets because of the presence of the word “managing” in the definition of public utility “airplane companies.” RCW 84.12.200(3). CP 103. This emphasis on a single word, taken out of context, is contrary to fundamental principles of statutory construction. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (“[A] single word in a statute should not be read in isolation.”). It is also contrary to this Court’s holding in *Weyerhaeuser Timber Co. v. Henneford*, 185 Wash. 46, 51, 53 P.2d 38 (1936) that RCW Ch. 84.12 only applies to “quasi public carriers ... holding themselves out as such.” In contrast to public air carriers like those in *Northwest* or *Braniff*, rides on the fractionally owned private jets managed by Flight Options are not available to the public. Rather, the private jets are used by their owners at

⁸ A result confirmed by in *Canadian Pacific*, 90 Wash. at 46 (operating property must be assessed “to the true owner thereof” not the company using it).

the owner's expense to fly owners between airfields of the owner's choosing at times of the owner's choosing. CP 153-54.

The statutory definition of an "airplane company" utility also requires that it be "engaged in the business of transporting persons." RCW 84.12.200(3). Consequently, the Department attempts to re-characterize Flight Options' purchase and management agreements – by which Flight Options sells interests in specific private jets to persons who register their ownership with the FAA, and the owner hires Flight Options to manage the jet on the owner's behalf – as "really a method of selling air transportation." CP 104, 619. But as this Court held in *Weyerhaeuser Co. v. State Dep't of Revenue*, 106 Wn.2d 557, 565-66, 723 P.2d 1131 (1986), the Department has "no authority" under Washington law to "impute" activity to a taxpayer contrary to the actual terms of the taxpayer's contracts. The Missouri Supreme Court rejected the Department's theory in a case involving the sale of a fractional ownership interest in one of the very same jets that the Department has assessed for property tax in this case. *Fall Creek Constr. Co., Inc. v. Dir. Of Revenue*, 109 S.W.3d 165, 170 (Mo. 2003) (contract language "clearly and unambiguously demonstrate[d]" that the fractional owner was "purchasing an interest in tangible personal property – the aircraft," not transportation services).

The Department has limited authority to assess property taxes against inter-county public utility companies specified in RCW 84.12 that

own operating property with a tax situs in multiple Washington counties. *Northwest Imp. Co. v. Henneford*, 184 Wash. 502, 512, 51 P.2d 1083 (1935) (taxpayer owning property with a situs in only one Washington county not subject to assessment under RCW Ch. 84.12). Thus, RCW 84.12.350 requires that the Department “*shall* apportion such value to the respective counties entitled thereto.” (Emphasis added.) The Department’s assessments also violate that express statutory mandate by apportioning the assessments entirely to one county, King County, without even asking where in Washington the jets landed.⁹ CP 715. Regardless of whether Flight Options falls within the definition of an “airplane company” utility, the Department’s assessments violate not only the fundamental ownership and tax situs requirements of property tax law but also the purpose of central assessment – to apportion the tax among the multiple Washington counties in which the taxpayer’s property has a situs. *See Humphrey Indus. Ltd. v. Clay Street Assoc. LLC*, Supreme Court Cause No. 82687-1 (Nov. 10, 2010) (“the party attempting to comply with the statute must make a bona fide attempt to comply with the law and ... must actually accomplish its purpose.”) (citations and internal quotations omitted).

⁹ The record is undisputed that fractional owners landed at, or took off from, airfields in at least fifteen Washington counties during those assessment years. CP at 36-38.

D. Any ambiguity regarding the Department's authority to impose property tax on Flight Options without regard to ownership or tax situs of the fractionally owned jets must be construed against the Department.

As discussed above, Flight Options contends that the applicable Washington statutes require that all personal property be assessed according to its ownership and impose tax only on property that has a tax situs in the state, which for mobile property requires fixed routes and regular schedules. The Department's arguments that it has statutory authority to assess tax without regard to ownership or the tax situs of the fractionally-owned planes, at most creates an ambiguity in the applicable statute. This Court has repeatedly held that "[a]mbiguities in taxing statutes are construed most strongly against the government and in favor of the taxpayer." *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P.3d 667 (2007) (*en banc*) (citation omitted); *Weyerhaeuser Timber*, 185 Wash. at 51 (applying rule to RCW Ch 84.12). This rule applies "no less when interpreting facts in a tax case and concluding therefrom the applicability of a taxing statute." *Foremost Dairies, Inc. Tax Comm'n*, 75 Wn.2d 758, 763, 453 P.2d 870 (1969).

Thus, any ambiguity as to the following should be construed in favor of Flight Options and against the Department: (1) whether RCW 84.40.020's command that "**all** personal property" shall be assessed "with reference to its ownership" really means "all"; (2) whether the command in RCW 84.12.210 that utility "operating property" be assessed to "the

owning company” is consistent with (rather than in conflict with) RCW 84.40.020; (3) whether the word “of” in RCW 84.12.270 means “belonging to”; (4) whether RCW 84.44.010 requires that mobile personal property be permanently present by operation on fixed routes and regular schedules to acquire a tax situs in Washington; (5) whether RCW 84.12.200(12) confirms the tax situs requirement for public utility “operating property”; (6) whether Flight Options contracts to manage fractionally owned airplanes on behalf of their owners can be recharacterized as “providing transportation services” under RCW 84.12.200(3); and/or (7) whether Ch. 84.12 RCW authorizes the Department to assess property tax against an inter-county public utility without regard to ownership or tax situs of the assessed property.

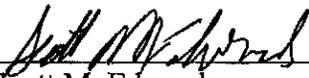
II. CONCLUSION

For the foregoing reasons, Petitioner Flight Options respectfully requests that the Court reverse and direct that summary judgment instead be awarded in favor of Flight Options.

RESPECTFULLY SUBMITTED this 10th day of November, 2010.

LANE POWELL PC

By


Scott M. Edwards

WSBA No. 26455

Attorneys for Appellant

CERTIFICATE OF SERVICE

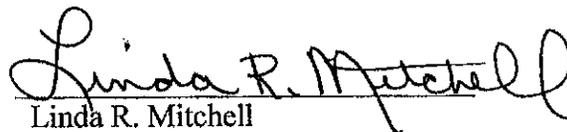
I hereby certify that on November 10, 2010, I caused to be served a copy of the foregoing Supplemental Brief of Petitioner on the following person(s) in the manner indicated below at the following address(es):

Heidi Irvin
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
heidii@atg.wa.gov

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

Brett Durbin
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123
brettd@atg.wa.gov

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**


Linda R. Mitchell