

NO. 84207-8

SUPREME COURT OF THE STATE OF WASHINGTON

FLIGHT OPTIONS, LLC,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Since 1935, the Department of Revenue has assessed property taxes on the property used by interstate utility and transportation companies under RCW 84.12. To address the unique problems of assessing property taxes on property used by interstate utility and transportation companies, RCW 84.12 establishes a separate and distinct method for reporting, valuing and assessing property taxes on the property used by interstate utility and transportation companies in Washington.

The Department assessed Flight Options under RCW 84.12 because it operated a fleet of 200 aircraft, with an average of four takeoffs and landings a day in Washington, as part of its fractional aircraft ownership and air charter programs. Flight Options's challenges to the Department of Revenue's property tax assessment largely ignore the relevant statutory provisions in RCW 84.12 and instead rely on general property tax statutes and case law that do not apply. When the proper statutes and case law are applied to the undisputed facts, the Department correctly assessed Flight Options's operating property. Therefore, this Court should affirm the Court of Appeals decision.

II. QUESTIONS PRESENTED

1. Does Flight Options qualify as an "airplane company" under RCW 84.12.200(3), where it operated and partially owned a fleet of aircraft used in its fractional aircraft ownership and air charter programs?

2. Did Flight Options's habitual use of its fleet of aircraft in Washington, with an average of four takeoffs and landings a day, provide

sufficient contacts to allow Washington to impose an apportioned property tax on the fleet?

III. STATEMENT OF THE CASE

A. Programs Offered By Flight Options

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

Fractional Ownership Program. Customers participate in the fractional ownership program by buying or leasing an undivided interest of a particular aircraft in the fleet. CP 114, CP 483. Flight Options owns approximately 20% of the total fleet. CP 230-34, 485-87. The fractional interest entitles program participants to a certain number of flight hours on aircraft of a similar make and model in the fleet. CP 174 ¶5.1(b). Typically, Flight Options sells the interest in 1/16 shares, entitling participants to 50 flight hours. CP 114; CP 251. Flight Options sells fractional interests in planes it purchases from manufacturers. CP 437-38. Flight Options uniformly paints and customizes the planes; fractional owners may not customize or modify the aircraft. CP 438-40, 443, 491.

Program participants may not transfer their fractional interests to third parties without Flight Options's consent. CP 135-36. Flight Options retains the right to repurchase the fractional interest after 60 months or if

the program participant defaults on its contract obligations. CP 134 ¶4.2. If Flight Options proposes a substitute interest in another aircraft of the same make and model, program participants cannot unreasonably withhold their consent. CP 134 ¶4.2(i).

When purchasing a fractional interest, customers must execute four contracts. CP 132 ¶ 3.2(a). Under the contracts, Flight Options manages and controls the aircraft. Flight Options provides all services necessary to operate the aircraft, such as pilots, maintenance, hangar space, fueling, and administration, and it makes all the necessary takeoff, flight and landing arrangements. CP 170 ¶¶3.4-3.5. Flight Options maintains possession of the aircraft, and it has the right to operate the aircraft for its own purposes when not transporting program participants and to keep any compensation it receives from doing so.¹ CP 152 ¶4.6; CP 169 ¶1.1.

Program participants wishing to make a flight provide Flight Options the departure point, destination, and other details within the required notice periods. CP 175 ¶5.2(b); CP 176 ¶5.2(d). Customers may request a different type of aircraft than the one in which they own an interest. CP 115; CP 177 ¶5.4(b). Flight Options then arranges for the aircraft, pilot, aircrew, and fuel and makes the takeoff, flight, and landing arrangements. CP 170 ¶¶3.4-3.5. All of Flight Options's flights since February 15, 2005, fall under Federal Aviation Regulation Part 135, which

¹ In contrast, fractional owners cannot use their interest to provide air transportation. CP 192 ¶ 7(a). Nor can they sell or transfer their flight hours to a third party. CP 496.

requires Flight Options to maintain operational control of the aircraft. *See* CP 250; CP 169 ¶1.2.

Program participants have no right to fly on their own plane. CP 174 ¶5.1(b). Flight Options is obligated only to supply an aircraft of similar make and model from the fleet or arrange for a charter if one is not available.² CP 174 ¶5.1(b); CP 272. Flight Options does not take into account the ownership of the airplane when scheduling an aircraft for the participant's flight. CP 389.

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

JetPass Program. The JetPass program is a pure charter program allowing members to fly on aircraft in Flight Options's fleet for a fee. JetPass members prepay based on the type of aircraft they wish to use. CP 202 ¶(3)(d). The program entitles them to use most of the aircraft in the fleet, but the hourly rate depends on the type of plane. CP 199 ¶(1)(c). Flight Options maintains operational control of the aircraft during the

² Flight Options used chartered aircraft in two percent of flights in 2004 and in six percent of flights in 2005. CP 255.

flight. CP 201 ¶(2)(e). If a Flight Options plane is not available, Flight Options contracts with a third-party charter company to provide the flight. CP 200 ¶(2)(a). Once the funds in the member's account are used up, the membership is terminated. CP 202 ¶(4).

B. Department's Property Tax Assessment And Case History

Under RCW 84.12, the Department assesses the operating property of certain transportation and utilities companies, which must file annual reports for the Department's use in valuing and assessing the operating property. RCW 84.12.200; RCW 84.12.230; WAC 458-50-070. When the Department learned Flight Options was operating flights in Washington, it issued a property tax assessment in 2005 based on Flight Options's average use of its fleet in Washington during 2004. CP 73-74. The Department allocated the value of Flight Options's property to Washington based on 1,397 takeoffs or landings in Washington, versus 146,484 total takeoffs or landings the fleet made in 2004. CP 6-7 ¶11; CP 119 ¶1; CP 120 ¶2; *see* RCW 84.12.300 (Department apportions system value to state). In 2006, the Department issued a similar assessment, based on 700 landings in Washington, compared to 65,072 total landings Flight Options made in 2005. CP 7 ¶12; CP 120 ¶¶2-3.³

Flight Options filed an action for declaratory and injunctive relief against the Department's 2005 assessment, which it later amended to

³ The Department allocated all the landings to King County because Flight Options did not provide, in its annual reports, 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).

include the 2006 assessment. Flight Options alleged that it was not an “airplane company” under RCW 84.12.200(3) and that the Department lacked jurisdiction to assess its property because the property did not acquire a tax situs in Washington and imposing property tax would violate the Due Process Clause of the federal constitution. CP 8-9 ¶¶17, 25, 27.

The parties moved for summary judgment, relying in part on stipulated facts and exhibits. *See* CP 119-205. The trial court granted the Department’s motion and denied Flight Options’s motion. CP 743. The Court of Appeals affirmed, holding the Department had statutory authority to assess the aircraft and rejecting Flight Options’s argument that the aircraft lacked a tax situs in Washington. *Flight Options LLC v. Dep’t of Revenue*, 154 Wn. App. 176, 225 P.3d 354 (2010).

IV. ARGUMENT

Property taxes are imposed on property located or brought into the state based on its value as of January 1 each year. RCW 84.36.005. The statutes governing the listing and assessment of property taxes vary depending on the type of property and how it is used.⁴ In the case of property used by utility and transportation companies, the property tax is collected from the company operating the property in Washington. RCW 84.12.270. Under RCW 84.12.320, the operating company is deemed to be the representative of all interests in the operating property, and the

⁴ *See, e.g.*, RCW 84.40.020 (personal property assessed by county assessors with reference to owner, while real property is not); RCW 84.40.065 (vessels assessed by Department to owner *or* operator); RCW 84.12.270 (property used by utility and transportation companies assessed by Department with reference to operator).

assessment constitutes notice to all interests in the property for purposes of assessment and taxation.⁵ Unlike most property, property used by interstate utility and transportation companies is assessed by the Department as a unit and apportioned to Washington based on the use of the property in the state. RCW 84.12.300. Assessment of property used by interstate utilities and transportation companies is therefore different than the typical assessments of personal property, where the county assessor lists individual pieces of property and sends the assessment to the property owner. *See* RCW 84.40.040.

The property Flight Options operated falls squarely within RCW 84.12. Flight Options owns, controls, operates, and manages aircraft used to provide transportation for compensation. Its operating property was properly assessed as a unit and apportioned to Washington based on the number of takeoffs and landings its aircraft made in Washington. Furthermore, Flight Options's habitual use of the property in Washington exceeded the minimum contacts needed to issue an apportioned property tax assessment under the Due Process and Commerce Clauses.

In challenging the Department's assessment, Flight Options primarily relies on statutes and case law governing general property tax assessments by county assessors, and not the specific provisions governing

⁵ "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." RCW 84.12.320.

the valuation and assessment of the operating property of interstate utilities and transportation companies. Flight Options also misreads the Supreme Court cases addressing the constitutional standards for state tax jurisdiction. When properly applied, the relevant statutes and case law demonstrate that the Court of Appeals decision should be affirmed.

A. Flight Options Is An “Airplane Company” Under RCW 84.12.200(3).

RCW 84.12 requires the Department to assess the “operating property” of “airplane companies” in the business of transporting persons or property for compensation. The statute defines “airplane company” as:

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

RCW 84.12.200(3) (emphasis added). Accordingly, Flight Options is an “airplane company” if it owned *or* controlled *or* operated *or* managed aircraft during the tax periods to provide air transportation for compensation as owner *or* lessee *or* otherwise. *Id.* The undisputed facts demonstrate that Flight Options is an “airplane company.”

Flight Options owns, controls, operates, and manages aircraft used to provide air transportation. It owns 20% of the fractional interests in its fleet. CP 230-34, 485-87. It has possession and operational control of all the planes in the fleet. CP 169 ¶¶ 1.1-1.2. It operates and manages the aircraft, scheduling the flights and providing the aircraft, pilot, and crew

without regard to the fractional interests participants have in a particular plane. CP 170 ¶¶ 3.4-3.5, 389. Thus, Flight Options falls squarely within the statutory definition of an “aircraft company” under RCW 84.12.200(3).

Flight Options argues that it is not in the business of transporting persons or property for compensation, as owner, lessee, or otherwise. Petition at 18. This argument is contrary to the undisputed facts. Flight Options uses its fleet of aircraft to operate the JetPass air charter program, which is a classic sale of transportation services, giving members the right to on-demand air charter transportation for a specified number of hours. CP 199-205. Moreover, the fractional ownership program also includes the sale of transportation services for compensation. In addition to purchasing a fractional interest in a plane and aircraft management services, fractional owners purchase the right to obtain air transportation services from Flight Options on demand. Flight Options is responsible for operating the plane and must make a plane available for a participant’s scheduled flight or charter an aircraft at its own expense if one is not available. CP 174 ¶5.1(b), 272.

The compensation Flight Options receives under the contracts also confirms that Flight Options provides air transportation services. When program participants use their allotted annual flight hours, Flight Options charges fees for the transportation services, including the occupied hourly fee and other fuel fees. CP 171 ¶4.1, 176 ¶5.3, 185-86. If program participants exceed their allotted hours they must pay a supplemental

hourly fee three times higher than the typical hourly rate paid for using the aircraft in Flight Options's fleet. CP 176 ¶5.5, 484. During the tax periods, Flight Options earned \$413 million in occupied and supplemental hourly fees for providing air transportation. CP 120.

Flight Options also collects and pays the federal air transportation tax, which it would not owe if it were not providing air transportation for compensation. CP 229 ¶10; CP 253; *see* 26 U.S.C. § 4261.⁶ Moreover, Flight Options, like other fractional program managers, is classified as a "carrier" by the National Mediation Board under the Railway Labor Act, which only applies to "common carriers by air."⁷ CP 117-18. Thus, the record amply demonstrates that Flight Options is in the business of providing transportation for compensation, as owner, lessee, or otherwise. Accordingly, Flight Options falls squarely within the definition of an "airplane company" whose operating property is subject to assessment under RCW 84.12.

B. Under RCW 84.12, The Department Lists And Assesses Property Based On The Identity Of The Operator, Not The Owner.

RCW 84.12 requires the Department to list and assess the operating property of each company next to the company's name. RCW 84.12.270; RCW 84.12.330. RCW 84.12.200(11) defines "operating

⁶ *See Executive Jet Aviation, Inc. v. United States*, 125 F.3d 1463, 1468-69 (Fed. Cir. 1997) (company operating fractional ownership program was "in the business of transporting persons or property for hire").

⁷ *Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742 (5th Cir. 2003) (NetJets fractional ownership program held a "common carrier by air" providing transportation for hire under Railway Labor Act, 45 U.S.C. §§ 151a, 181).

property” to include “all property... owned by any company, *or held by it as occupant, lessee or otherwise*, ... used by the company in the conduct of its operations.” Because the definition includes property that is not owned by the company, RCW 84.12 specifically requires the assessments to be made with respect to the operator of the property, not the owner.

Relying on RCW 84.40.020, Flight Options claims the Department’s assessment is invalid because Flight Options does not own the property. Petition at 9. However, RCW 84.40 primarily addresses the listing and assessment of property by county assessors.⁸ See RCW 84.40.040; RCW 84.40.060. Thus, RCW 84.40.020 applies to property listed and assessed by county assessors, not the Department.⁹

This result is further supported by RCW 84.12.320, which states that the operating company:

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.

⁸ An interesting exception is RCW 84.40.065, which requires anyone owning, controlling or possessing a taxable vessel to list it with the Department. The statute also requires *the Department* to assess the vessel and mail the tax statement to the “owner of a ship or vessel, *or to the person listing the ship or vessel if different from the owner.*” RCW 84.40.065(3) (emphasis added). Thus, RCW 84.40.020 does not apply to all property, but rather property listed and assessed by county assessors.

⁹ Even if the statutes were in conflict, the specific statutes in RCW 84.12 would govern over the general statute. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008).

(Emphasis added). If the Legislature intended only the property *owned* by the company to be listed and assessed, this provision would not be necessary.¹⁰ Giving effect to the plain language of RCW 84.12.320 disposes of Flight Options's argument.

Flight Options also maintains that RCW 84.12.210 requires the Department to assess the owner of the property instead of the operator. Under RCW 84.12.210, “[p]roperty used but not owned by an *operating company* shall, whether such use be exclusive or jointly with others, be deemed the sole operating property of the *owning company*.” (Emphasis added). Because “company” is defined in RCW 84.12.200(11) to include only companies subject to central assessment, RCW 84.12.210 applies only when two or more entities are “companies” assessed under RCW 84.12, one as the owner and the other as the operator. In *Canadian Pacific Ry. Co. v. King County*, 90 Wash. 38, 44-46, 155 P. 416 (1916), cited by Flight Options, both the owner and the operator were “companies” under the statutory predecessor to RCW 84.12.200.¹¹ Here, Flight Options is the only “company” assessed under RCW 84.12, so there is no choice to make between an “owning company” and an “operating company.” As such, RCW 84.12.210 does not apply.

¹⁰ Given the rights Flight Options has in the planes and its 20% ownership of the fleet, it could also be considered the “owner” of the planes for property tax purposes. See Respondent's Brief at 26-28.

¹¹ Flight Options misstates the holding in *Canadian Pacific*. Petition at 17. The Court's holding was that the “true owner” *could* be assessed where it was a joint operator of the property, not that it had to be assessed. *Canadian Pacific*, 90 Wash. at 44-46. The taxpayer admitted that the property could be assessed against the operator, but claimed it was not liable because it did not operate a railroad in Washington. *Id.* at 41-42.

Moreover, RCW 84.12.330 specifically states: “No assessment shall be invalidated by ... entry as owner of a name other than that of the true owner.” RCW 84.12.330. Even if the Department were required to assess the owner of the property under RCW 84.40.020 or RCW 84.12.210, the assessment would still be valid and enforceable. In sum, when the relevant statutes are read together, the Department is required to assess the operating property with reference to the operator of the property, not the owner, and the Department correctly did so here.

Flight Options also alleges that it is unconstitutional to assess the property tax with respect to the operating company instead of the owner. Petition at 8 n.3. This claim is based on a case involving unemployment contributions, not property taxes. *State v. Lawton*, 25 Wn.2d 750, 751-52, 172 P.2d 465 (1946). Moreover, the holding in *Lawton* relied heavily on the unique facts of the case, where the statute imposed a lien on the property of a third party totally unconnected with the tax liability. *Id.*

This Court acknowledged:

the legislature is vested with a wide discretion, not only to determine what objects are subject to taxation, but the persons against whom the exaction is imposed; that its determination, when expressed in statutory enactment, cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable and unjust that it will cause an imposition of burdens upon one class to the exclusion of another, without reasonable distinction.

Lawton, 25 Wn.2d at 757. The Court concluded that the statute was unconstitutional because it “arbitrarily impose[d] a lien on property of one not liable for a tax, from which to satisfy the tax of a liable employer. It in

effect requires a third party to pay the tax of a liable employer, without any provision for reimbursement.” *Id.* at 764.

Here, the statute imposes the tax on the property itself. RCW 84.12.270 (assessment of the operating property of all companies). The assessment constitutes a lien on the property, regardless of ownership. RCW 84.60.020. Given the integrated and complex nature of many utility and transportation companies, the property is assessed as a unit to ensure accurate valuation and apportionment of the property. *Northwestern Imp. Co. v. Henneford*, 184 Wash. 502, 511, 51 P.2d 1083 (1935). Tracking down and individually notifying the owner of each interest in the operating property of an interstate utility or transportation company would be virtually impossible and present significant collection problems. Thus, the Legislature chose to collect the tax from the operator using the property in Washington. This is a reasonable and just method for collecting the property tax and does not infringe on the rights of uninterested third parties, unlike the statute in *Lawton*.¹² The operator of the property receives the benefit of using the property in Washington and has the best information regarding its use in the state.

C. Flight Options’s Habitual Use And Employment Of Aircraft In Washington Created A Constitutional Basis For Imposing A Fairly Apportioned Property Tax On The Fleet.

The question whether property used in interstate commerce has tax situs in a state for purposes of property taxes “is one of due process.”

¹² Under its contracts with fractional program participants, Flight Options can and does pass the tax onto the owners of the property. CP 151 ¶ 4.5.

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

The United States Supreme Court long ago set standards for state taxation of personal property used to provide transportation services in interstate commerce. *Marye v. Baltimore & Ohio R.R. Co.*, 127 U.S. 117, 8 S. Ct. 1037, 32 L. Ed. 94 (1888). Where an out-of-state railroad company brought rolling stock (cars and engines) into Virginia “there habitually to use and employ,” Virginia could tax that property and impose on it a “fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens.” *Id.* at 123. The tax was proper even if the specific items of property used and employed in the state were not continuously the same. *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); *see also Central R.R. Co. of*

Pennsylvania v. Commonwealth of Pennsylvania, 370 U.S. 607, 613, 615, 82 S. Ct. 1297, 8 L. Ed. 2d 720 (1962); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 445, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979).

The habitual use or employment standard meets the “minimum contacts” threshold for due process purposes in the property tax context, and the nature of those contacts sets practical limits on the extent to which a state can tax the property under the Due Process Clause. To satisfy due process, the tax must be apportioned to bear a relationship to the “opportunities, benefits, or protection” provided by the state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 69 S. Ct. 432, 93 L. Ed. 585 (1949). The Supreme Court has approved various apportionment schemes since before the turn of the last century. *See, e.g., Pullmans Palace*, 141 U.S. at 26 (for specialized rail cars, apportionment based on miles of railroad track in state compared to total in all states); *Braniff*, 347 U.S. at 593 n.4 (apportionment based on ratios of state-based arrivals and departures, tons carried, and income, relative to the whole).

Fair apportionment also ensures constitutionality under the Commerce Clause. *Braniff*, 347 U.S. at 600-01; *Johnson Oil*, 290 U.S. at 161-62. 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 174.¹³

¹³ 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

Under the due process standard, Flight Options's operations in Washington constituted habitual use during the tax periods. CP 119 ¶1 (1,397 takeoffs or landings in 2004); CP 120 ¶3 (700 landings in 2005). Accordingly, the operating property was subject to an apportioned property tax. *Braniff*, 347 U.S. at 601; *Central R.R. Co.*, 370 U.S. at 615; *Johnson Oil Refining*, 290 U.S. at 162; *see also Fall Creek Constr. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165 (Mo. 2003) (fractionally owned aircraft had "substantial nexus" with state where aircraft arrived in or departed from state 42 times during 13-month period and planes remained overnight 24 times during period); *Auerbach v. Assessment Appeals Bd.*, 167 Cal. App. 4th 1415, 1422, 85 Cal. Rptr. 3d 118 (Cal. App. 2008) (aircraft had taxable situs in Nevada where one plane in Nevada eight days and another for two days during tax year).

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

apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977); *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992). The Commerce Clause test in *Complete Auto* "encompasses" due process requirements. *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373, 111 S. Ct. 818, 112 L. Ed. 2d 884 (1991).

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

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

Flight Options's insistence on requiring a "permanent" location or fixed routes and regular schedules to establish situs runs counter to cases addressing the issue.¹⁴ *Central R.R. Co.*, 370 U.S. at 615; *Braniff*, 347 U.S. at 600-01. Moreover, it ignores the fundamental question: whether the tax bears a reasonable relationship to the benefits and protections provided by the state. *Ott*, 336 U.S. at 174.

Because the aircraft in Flight Options' fleet made an average of four takeoffs or landings per day in Washington during the two tax years, the Court of Appeals properly concluded under federal law that the assessment of an apportioned property tax was constitutional.

¹⁴ Flight Options's reliance on *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944) is misplaced. *Northwest Airlines* was a plurality opinion that was limited to its facts under *Braniff*. *Braniff*, 347 U.S. at 601-02.

D. Washington Law Does Not Impose Higher Situs Requirements Than The Federal Constitutional Requirements.

Flight Options incorrectly suggests that Washington law imposes a higher situs standard than federal constitutional situs requirements. The cases Flight Options cites do not establish a higher Washington situs requirement as they are based on federal law, not Washington statutes or constitutional provisions.¹⁵ See *U.S. Whaling Co. v. King County*, 96 Wash. 434, 436, 165 P. 70 (1917); *Guinness v. King County*, 32 Wn.2d 503, 506-07, 202 P.2d 737 (1949); *Canadian Pacific*, 90 Wash. at 44.

Most of these cases deal with unapportioned property taxes on ocean-going vessels and cite to federal case law dealing with these types of assessments. *U.S. Whaling*, 96 Wash. at 438; *Guinness*, 32 Wn.2d at 506. As explained above, federal law requires taxes to be fairly apportioned. As such, the amount and nature of the contact with a state needed to tax the full value of the property will be much higher than the amount needed to tax a small fraction of the property. See *Braniff*, 347 U.S. at 599-600 (distinguishing cases where states attempted to impose unapportioned property taxes on ocean-going vessels).

In *Alaska Freight Lines, Inc. v. King County*, 66 Wn.2d 360, 364, 402 P.2d 670 (1965), the Court even discussed the federal apportionment doctrine, but held that federal law still applied the “home port” doctrine to

¹⁵ To the extent Flight Options argues for a common law situs standard, RCW 84.12 expressly requires an apportioned tax be applied to any operating property used both inside and outside the state. RCW 84.12.200(11) (“operating property ... in case of personal property used partly within and partly without the state, . . . means and includes a proportion of such personal property to be determined as in this chapter provided.”).

ocean-going vessels, taxing the vessel at the domicile of the owner.¹⁶ Therefore, these cases are consistent with federal case law, and the courts properly required the property to acquire a permanent presence in Washington before the county could impose an *unapportioned* property tax. Because the assessment here satisfies the federal constitutional requirements, the assessment is valid under Washington law.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals affirming summary judgment for the Department.

RESPECTFULLY SUBMITTED this 10th day of November, 2010.

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¹⁶ The Supreme Court later abandoned the “home port” doctrine in favor of fair apportionment among the states. *Japan Line*, 441 U.S. at 442-43.