PROPOSED REGULATION OF THE NEVADA TAX COMMISSION

Temporary Regulation XXX-16

1st Draft - October 21, 2016

EXPLANATION – Matter in ***italics*** is new; matter in brackets **[~~omitted material~~]** is material to be omitted.

AUTHORITY: §§1-, NRS 360.090, 360.250, 361.227, and 361.260;

Section 1. Chapter 361 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 34, inclusive, of this regulation.

Sec. 2. ***As used in sections 2 to 34, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3 to 22, inclusive, of this regulation have the meanings ascribed to them in those sections.***

Sec. 3. ***1. "Aircraft" means any contrivance used or designed for the navigation of or for flight in the air, other than a parachute or similar emergency safety device. Aircraft includes, but is not limited to:***

(a) General aircraft;

(b) Commercial aircraft;

(c) Unmanned aircraft systems, and small unmanned aircraft systems, commonly known as drones;

(d) Kit aircraft;

(e) Light-sport aircraft;

(f) Ultra-light aircraft;

(g) Hang gliders;

(h) Hot air balloons; and

(i) Fixed-wing aircraft with a weight of less than 12,500 pounds used by an unscheduled air transport company that would otherwise be subject to valuation by the Nevada Tax Commission, if the company elects, in the form and manner prescribed by the Department, to have the property of the company assessed by a county assessor pursuant to NRS 361.320(10).

2. "Aircraft" does not include any of the following:

(a) Rockets or missiles;

(b) Any property of an interstate or inter-county nature used directly in the operation of an scheduled or unscheduled air transport company subject to valuation by the Nevada Tax Commission pursuant to NRS 361.320(1), except fixed-wing aircraft meeting the conditions of NRS 361.320(10).

Sec. 4. *"Allocation" means the process of assigning a portion of a property value having taxable situs in multiple states to an individual state or county using a formula.*

Sec. 5. *"Apportionment" means the process of assigning or spreading a portion of the taxable property value that is allocated to an individual state or county to that state's or county's various tax levying districts.*

Sec. 6. *1. "Commercial aircraft" means civilian aircraft operated for compensation or hire and used in the carriage of persons or property.*

(a) The term includes aircraft used in an on-demand, scheduled, or supplemental operation, except aircraft operated by a scheduled or unscheduled air transport company subject to valuation by the Nevada Tax Commission.

(b) Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air is merely incidental to the operator's other business or is, in itself, a major enterprise for profit.

Sec. 7. *"Domicile" means:*

(a) The permanent, principal home to which a person returns or intends to return after an absence; or

(b) The principle place where a business has its headquarters or principle place of business located.

Sec. 8. *"FAA" means the Federal Aviation Administration, a regulatory agency within the U.S. Department of Transportation responsible for ensuring the safety of civil aviation.*

Sec. 9. *"Foreign air carrier" means any person other than a citizen of the United States, who undertakes directly, by lease or other arrangement, to engage in air transportation.*

Sec. 10. *"General aircraft" means civilian aircraft operated for purposes other than commercial passenger or cargo transport, registered with, and having an airworthiness certificate issued from, the FAA.*

Sec. 11. *"Habitually situated" means the location where an aircraft spends the most ground time.*

Sec. 12. *"Jurisdiction" means the taxing entity, state, or nation that has jurisdiction to tax a property because of the property's location or use, or because of the owner's domicile or principal place of business.*

Sec. 13. *1. "Kit aircraft" means an aircraft:*

(a) Assembled by a person from a kit manufactured by the holder of an FAA production certificate for that kit, without the supervision and quality control of the production certificate holder; and

(b) Issued a special airworthiness certificate by the FAA.

Sec. 14. ***"Light-sport aircraft" has the meaning ascribed to it in 14 CFR §1.1 .***

Sec. 15. ***"On-demand operation" has the meaning ascribed to it in 14 CFR §110.2 .***

Sec. 16. ***1. "Scheduled and unscheduled air transport company" means a commercial operator:***

(a) Engaged in the common carriage of persons or property for compensation or hire;

(b) Who holds a certificate from the FAA authorizing operations under parts 121, 125 or 135 of 14 CFR Chapter 1, Subchapter G;

(c) Who uses property of an interstate or inter-county nature directly in the operations of the company; and

(d) Whose property is subject to valuation by the Nevada Tax Commission pursuant to NRS 361.320(1).

Sec. 17. ***"Scheduled operation" has the meaning ascribed to it in 14 CFR §110.2 .***

Sec. 18. ***"Service member" means a member of the uniformed services, as that term is defined in 10 U.S.C. §101(a)(5), as used in 50 U.S.C. App. §511(1) of the Servicemembers Civil Relief Act.***

Sec. 19. ***"Small unmanned aircraft" means an unmanned aircraft weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft.***

Sec. 20. ***"Supplemental operation" has the meaning ascribed to it in 14 CFR §110.2 .***

Sec. 21. ***1. "Taxable situs" means the location or locations where an aircraft has received benefits and protection from the local government sufficient to confer jurisdiction to tax at that location or locations.***

Sec. 22. ***"Unmanned aircraft system (UAS)" means an unmanned aircraft and its associated elements (including communication links and the components that control the unmanned aircraft) that are required for the safe and efficient operation of the unmanned aircraft in the national airspace system.***

Sec. 23. ***1. A person claiming an aircraft is exempt from taxation as personal property held for sale by a merchant or manufacturer pursuant to NRS 361.068(1)(a) or (b) in the ordinary course of business, has the burden of establishing to the satisfaction of the county assessor that the aircraft qualifies for the claimed exemption. The initial claim for exemption must be accompanied by the following documents as requested by the county assessor:***

(a) FAA dealer's license;

(b) Seller's permit;

(c) Local business license;

(d) Proof of location on an airport or airfield;

(e) Flight log; or

(f) Listing or consignment agreements.

Sec. 24. ***1. An aircraft owned by a service member or the spouse of a service member shall not be deemed to be located or present in, or to have a taxable situs in, the tax jurisdiction in which the service member is serving in compliance with military order, unless the jurisdiction is the member's domicile or residence or if the aircraft is used in a trade or business, pursuant to 50 U.S.C. App. §571(d)(1-3).***

2. The county assessor may request documentation from the service member confirming current active duty status.

Sec. 25. *An aircraft owned by a foreign air carrier, based and registered abroad and used exclusively in international commerce is deemed to have not acquired taxable situs in Nevada.*

Sec. 26. *1. The written statement required by NRS 361.265 setting forth information about the aircraft that is necessary to ascertain the taxable value of the aircraft includes, but is not limited to, the serial number, the make, model, year of manufacture of the aircraft, and engine and maintenance information, including the total hours logged on the aircraft following the last major overhaul of the engine of the aircraft.*

Sec. 27. *Aircraft shall be valued and assessed pursuant to the requirements of NAC 361.1345 through NAC 361.139 prior to any allocation or apportionment of taxable value.*

Sec. 28. *1. Taxable situs of an aircraft is established in Nevada if:*

(a) The aircraft is physically present within the State of Nevada on July 1 for more than a temporary period;

(b) The aircraft is used continually in Nevada, whether regularly or irregularly, during the 12 months preceding July 1, regardless of its location on July 1; or

(c) The aircraft's owner resides or does business in Nevada and the property is outside Nevada for a temporary period on July 1.

2. Taxable situs of an aircraft is established in jurisdictions outside of Nevada if:

(a) The aircraft is physically present within that state or nation's boundaries on the state or nation's property tax lien date for more than a temporary period;

(b) The aircraft has been used continually in the state or nation during the 12 months preceding July 1, regardless of its location on July 1;

(c) The aircraft's owner resides or does business in that state or nation and the property is outside that state or nation for a temporary period on July 1; or

(d) The state or nation has in fact assessed a property tax against the property.

Sec. 29. ***1. If an aircraft has acquired taxable situs in Nevada, it must be assessed by the county assessor of the jurisdiction in which it is habitually situated when not in flight. For example, if tax situs is acquired in two or more Nevada counties, 100% of the taxable value allocated to Nevada is apportioned to the Nevada county in which the aircraft is habitually situated.***

2. The taxable value of an aircraft apportioned to the county must be assessed for the full fiscal year and may not be prorated if the aircraft is removed from the county prior to the end of the fiscal year.

Sec. 30. ***1. If an aircraft has acquired taxable situs in Nevada and outside Nevada, the property owner may claim the taxable value of an aircraft is subject to allocation. The property owner has the burden of proving taxable situs outside Nevada has been acquired. The burden is met by providing sufficient information measuring the use of the property within Nevada and within other states or nations. Such information includes, without limitation:***

(a) Records kept in the normal course of business, such as mileage, flight, or maintenance logs and hangar or tie-down receipts that indicate where the aircraft has traveled, how long it was located at each destination, and the purpose of its location at each destination;

(b) Actual tax bills or notices of appraisal or assessment from another jurisdiction; or

(c) Reports filed with state or national agencies that indicate where the aircraft has traveled, how long it was located at destination, and the purpose of its location at each destination.

2. The county assessor may also request documentation supporting the domicile of the aircraft owner. The documentation may include, without limitation, utility bills, vehicle registration, driver's license, income tax returns, or property ownership records.

Sec. 31. *1. The county assessor shall determine whether the aircraft has acquired tax situs in this state and in another jurisdiction from the evidence supplied by the property owner. If the county assessor determines that the aircraft has acquired taxable situs in multiple locations, he or she shall allocate the portion of the aircraft's taxable value that fairly reflects its use in this state.*

2. The calculation for the allocation of taxable value to the county where the aircraft is habitually situated must be made as follows:

(a) Determine the number of overnights the aircraft spent in each location outside Nevada where taxable situs has been acquired divided by the total number of days in the prior fiscal year beginning on July 1 and ending on June 30.

(b) The percentage so derived is subtracted from 100%.

(c) The total taxable value of the aircraft is multiplied by the percentage remaining after the subtraction in subparagraph (b). The resulting value is the amount of taxable value allocated to the county where the aircraft is habitually situated.

Sec. 32. *An aircraft must remain listed on a county's assessment roll until the taxpayer provides written notice and documentation to the assessor that the aircraft no longer has a taxable situs in the county.*

Sec. 33. ***1. A commercial or general aircraft which is titled or registered to fractional owners must be assessed as a single taxable unit. The fractional owners shall be treated as tenants in common for purposes of levying the taxes due.***

2. In the event the fractionally-owned aircraft is part of a fleet operated by a central manager that may be interstate or inter-county in nature, the county assessor shall consult with the Department of Taxation to determine responsibility for assessment.

Sec. 34. ***For purposes of application of NRS 361.4722, 361.4723, or 361.4724, property which is not eligible for abatement for the current year includes that portion of the total taxable value for which there was no allocation or apportionment within Nevada for the immediately preceding year***

Aircraft Regulation, NAC 361 ~ Draft

1. For purposes of this section:

(a) "Aircraft" is defined as any contrivance used or designed for the navigation of or for flight in the air, other than a parachute or similar emergency safety device. Aircraft includes, but is not limited to, general aircraft, commercial aircraft, unmanned aircraft systems, kit aircraft, ultra-lights, hang gliders, and hot air balloons.

(b) "FAA" is the Federal Aviation Administration, the national aviation authority of the United States with powers to regulate all the aspects of American civil aviation.

(c) "General aircraft" is defined as an aircraft operating under a general aviation certification issued by the FAA.

(d) "Commercial aircraft" is defined as an aircraft operating under an official commercial certification issued by the FAA, which is not centrally assessed pursuant to NRS 361.320.

(e) "Unmanned aircraft system" is defined as an aircraft without a human pilot onboard that is controlled by an operator on the ground and is also commonly called a drone, which is required to be registered with the FAA prior to being operated.

(f) "Kit aircraft" is defined as an amateur-built aircraft which has been completely assembled from a kit, which is required to be registered and is issued an airworthiness certificate by the FAA.

(g) "Taxable situs" is a determination by a jurisdiction to impose taxes on aircraft based on evidence of an adequate connection between the aircraft and the taxing jurisdiction pursuant to subsections 4 and 5.

(h) "Habitually situated" is a determination of taxable situs based on evidence of where an aircraft is customarily present or has recurring ground time when it is not in flight.

(i) "Jurisdiction" refers to any municipality, county, state, country or territory where an aircraft could establish situs, regardless of whether the governing body of the jurisdiction imposes taxes on the aircraft.

(j) "Domicile" refers to an individual's or corporation's permanent legal residence or place of business for purposes of determining proper jurisdictions for taxable situs.

(k) "Apportionment" means a distribution or allotment of taxes into proper shares based upon taxable situs having been acquired in more than one jurisdiction.

2. The following are exempt from taxation:

(a) Aircraft not based in the jurisdiction and solely within the jurisdiction to be repaired, overhauled, modified, or serviced.

(b) Kit aircraft not yet completely assembled or issued an airworthiness certificate.

(c) Aircraft owned and deemed to be inventory held for sale or lease by a dealer.

~ In determining whether or not the business claiming the exemption is selling or leasing aircraft as part of their ordinary course of business, the business shall make available to the assessor upon request any or all of the following: FAA dealer's license, seller's permit, local business license, proof of location on an airport or airfield, flight log, and listing or consignment agreements.

(d) Aircraft owned by the United States or foreign governments.

(e) Aircraft owned by military personnel which are entitled to be exempt under provisions of the Servicemembers Civil Relief Act (SCRA).

~In determining eligibility for exemption the assessor may request updated documentation from the aircraft owner each fiscal year the aircraft is on the county's tax roll and would otherwise be subject to tax based on the situs of the aircraft.

3. All aircraft other than aircraft described in subsection 2 shall be assessed by any county jurisdiction in which the aircraft has established taxable situs in accordance with the remaining provisions of this section.

4. Taxable situs of aircraft may be determined based upon the situs of the aircraft itself, the domicile of the aircraft owner, or a combination of both as of July 1 of the fiscal year for which it is being assessed.

(a) The assessor in determining aircraft situs may request certain documents from the taxpayer including, but not limited to, hangar or tie-down receipts, flight or maintenance logs, and paid tax bills from another jurisdiction.

(b) The assessor in determining the domicile of the aircraft owner, whether an individual or a corporation, may request from the taxpayer any or all of, but not limited to, the following types of documents as evidence: proof of a homeowner's exemption on their primary residence, utility bills, vehicle registration, copy of driver's license, income tax returns, or property ownership records.

(c) The assessor shall consider and weigh all evidence which is provided pursuant to this subsection to verify locations the aircraft is habitually situated and locations the aircraft owner is domiciled for purposes of determining situs in one or more jurisdictions.

5. An aircraft determined to have established taxable situs in a county is subject to assessment in the county for the full fiscal year and may not be prorated based on the aircraft having been removed from the county prior to the end of the fiscal year.

6. An aircraft listed on a county's assessment roll should remain so until written notice is provided to the assessor that the aircraft has established situs outside the county. The burden of notification falls upon the taxpayer and, unless otherwise given notice, the assessor should enroll and assess an aircraft at its last known situs.

7. A commercial or general aircraft which is titled or registered to fractional owners shall be assessed as a single taxable unit with taxes levied to all of the owners as tenants in common.

8. Commercial and general aircraft which have situs in more than one jurisdiction may be subject to apportionment.

- *(a) When the assessor determines an aircraft has established taxable situs in the county, and the aircraft has established situs in another jurisdiction, the county may apportion taxes reflecting the portion of the current fiscal year that the aircraft is present in the county.*

- *(b) An aircraft habitually situated in the county, regardless of the domicile of the aircraft owner, shall be assessed in the county for its full portion of taxes.*

- *(c) The assessor in determining the appropriate apportionment may request from the current or prior aircraft owner all applicable documentation including, but not limited to, flight log, maintenance log, aircraft sales agreement, or aircraft dealer statement.*

- *(d) Any applicable apportionment shall be calculated and applied by the assessor in the form and manner described in subsection 9.*

9. The formula for apportionment shall be to multiply the assessed value or the tax amount by a single factor expressed as a fraction.

- *(a) The numerator of the fraction shall be the number of overnights the aircraft spent in the State during the prior fiscal year.*

- *(b) The denominator shall be:*

  - *(1) the total number of days in the prior fiscal year counting forward from the date the aircraft first establishes taxable situs, or*

  - *(2) 90 days,*

  ~whichever is greater.

NRS and NAC Excerpts Related to Proposed Temporary Regulations on Aircraft Nexus and Allocation

NRS 361.032 "Property of an interstate or intercounty nature" defined. "Property of an interstate or intercounty nature" means tangible property that:

1. Physically crosses a county or state boundary; and
2. Is used directly in the operation of the business.

(Added to NRS by 1999, 1269; A 2001, 83)

NRS 361.320 Determination and allocation of valuation for property of interstate or intercounty nature; billing, collection and remittance of taxes on private car lines.

1. At the regular session of the Nevada Tax Commission commencing on the first Monday in October of each year, the Nevada Tax Commission shall examine the reports filed pursuant to NRS 361.318 and establish the valuation for assessment purposes of any property of an interstate or intercounty nature used directly in the operation of all interstate or intercounty railroad, sleeping car, private car, natural gas transmission and distribution, water, telephone, scheduled and unscheduled air transport, electric light and power companies, and the property of all railway express companies operating on any common or contract carrier in this State. This valuation must not include the value of vehicles as defined in NRS 371.020.

2. Except as otherwise provided in subsections 3, 4 and 7 and NRS 361.323, the Nevada Tax Commission shall establish and fix the valuation of all physical property used directly in the operation of any such business of any such company in this State, as a collective unit. If the company is operating in more than one county, on establishing the unit valuation for the collective property, the Nevada Tax Commission shall then determine the total aggregate mileage operated within the State and within its several counties and apportion the mileage upon a mile-unit valuation basis. The number of miles apportioned to any county are subject to assessment in that county according to the mile-unit valuation established by the Nevada Tax Commission.

10. For the purposes of this section, an unscheduled air transport company does not include a company that only uses three or fewer fixed-wing aircraft with a weight of less than 12,500 pounds to provide transportation services, if the company elects, in the form and manner prescribed by the Department, to have the property of the company assessed by a county assessor.

NRS 361.4722 Partial abatement of taxes levied on property for which assessed valuation has been established or on remainder parcel of real property.

1. Except as otherwise provided in or required to carry out the provisions of subsection 3 and NRS 361.4725 to 361.4729, inclusive, the owner of any parcel or other taxable unit of property, including property entered on the central assessment roll, for which an assessed valuation was separately established for the immediately preceding fiscal year is entitled to a partial abatement of the ad valorem taxes levied in a county on that property each fiscal year equal to the amount by which the product of the combined rate of all ad valorem taxes levied in that county on the property for that fiscal year and the amount of the assessed valuation of the property which is taxable in that county for that fiscal year, excluding any increase in the assessed valuation of the property from the immediately preceding fiscal year as a result of any improvement to or change in the actual or authorized use of the property, exceeds the sum obtained by adding:

(a) The amount of all the ad valorem taxes:

(1) Levied in that county on the property for the immediately preceding fiscal year; or

(2) Which would have been levied in that county on the property for the immediately preceding fiscal year if not for any exemptions from taxation that applied to the property for that prior fiscal year but do not apply to the property for the current fiscal year,

➥ whichever is greater; and

(b) A percentage of the amount determined pursuant to paragraph (a) which is equal to:

(1) The greater of:

(I) The average percentage of change in the assessed valuation of all the taxable property in the county, as determined by the Department, over the fiscal year in which the levy is made and the 9 immediately preceding fiscal years;

(II) Twice the percentage of increase in the Consumer Price Index for all Urban Consumers, U.S. City Average (All Items) for the immediately preceding calendar year; or

(III) Zero; or

(2) Eight percent,

➥ whichever is less.

NAC 361.1345 Definitions. (NRS 360.090, 360.250, 361.227) As used in NAC 361.1345 to 361.139, inclusive, unless the context otherwise requires, the words and terms defined in NAC 361.1351, 361.1355 and 361.1361 have the meanings ascribed to them in those sections.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.1351 "Acquisition cost" and "original cost" defined. (NRS 360.090, 360.250, 361.227) "Acquisition cost" or "original cost" means the actual cost of property to its present owner, including, without limitation, the costs of transportation and the costs of installation.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.1355 "Costs of installation" defined. (NRS 360.090, 360.250, 361.227) "Costs of installation" means the costs of direct labor, direct overhead and the capitalized expense of interest or imputed charges for interest which are necessary to make the property operational.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.1361 *"Personal Property Manual"* defined. (NRS 360.090, 360.250, 361.227) *"Personal Property Manual"* means a manual for the valuation of personal property that is published by the Department annually pursuant to NAC 361.1365.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.1365 *Personal Property Manual*: Publication; contents; approval; use. (NRS 360.090, 360.250, 361.227)

1. The Department will annually publish a *Personal Property Manual* which describes the methods and standards that must be used for the valuation of personal property. The manual must include, without limitation, annually updated:

(a) Cost-index factors that must be used in the conversion of acquisition cost into an estimate of replacement cost new;

(b) Expected-life schedules that indicate the category of expected life for each type of property or type of industry in which the property is used; and

(c) Percent-good tables which indicate the rate of depreciation that must be applied.

2. The *Personal Property Manual* must be approved by the Commission before publication. The Department, at least 1 month before presenting the manual to the Commission for approval, must disclose all proposed modifications to the manual and hold a public workshop on the modifications.

3. Each county assessor shall use the *Personal Property Manual* in determining the taxable value of personal property.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.1371 Procedure for determination of taxable value. (NRS 360.090, 360.250, 361.227)

1. The taxable value of personal property must be determined by adjusting the acquisition cost of the property by a cost-index factor and reducing the adjusted acquisition cost by an estimate of applicable depreciation. The taxable value so determined shall be deemed to be the indicator of value of replacement cost new less depreciation.

2. In determining taxable value, a county assessor shall use the schedules in the *Personal Property Manual* that show the cost-index factors, the rates of depreciation and the percent good by year. The assessor shall use the schedules by:

(a) Selecting the appropriate expected useful life of the personal property; and

(b) Selecting the appropriate cost-index factor, based on the year of acquisition of the property, and applying it to the acquisition cost of the property.

➥ The result shall be deemed to be the replacement cost new of the property.

3. The assessor shall select the method of applying depreciation to the personal property by either:

(a) Multiplying the adjusted acquisition cost of the property by the rate of depreciation and subtracting the result from the adjusted acquisition cost; or

(b) Multiplying the adjusted acquisition cost of the property by the percent-good factor.

➥ The result from either approach shall be deemed to be the taxable value of the property.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.1375 Determination of expected life, cost-index factors and depreciation. (NRS 360.090, 360.250, 361.227)

1. Personal property must be categorized by the specific type of property that it is or by the type of industry in which it is used. Each category must be assigned to a schedule of expected life which is based on commonly available sources of information, including, without limitation, the life expectancy guidelines published by the Marshall and Swift Valuation Service and any other sources published in the *Personal Property Manual*.

2. The cost-index factors published in the *Personal Property Manual* must be determined by calculating the average change in costs over time. The Department shall identify the sources used to calculate the average change.

3. For purposes of calculating the amount of applicable depreciation, personal property must be assigned to one of the following expected lives:

(a) Three-year life;

(b) Five-year life;

(c) Seven-year life;

(d) Ten-year life;

(e) Fifteen-year life;

(f) Twenty-year life; or

(g) Thirty-year life.

4. Depreciation must be calculated over the expected life of the personal property by using the declining balance method, except that tables which provide a method other than the declining balance

method for calculating depreciation may be used if the tables have been approved by the Commission and included in the *Personal Property Manual*.

5. For purposes of calculating the rate of depreciation, a residual amount of 5 percent must be used. Percent-good tables using a residual amount other than 5 percent may be adopted by the Commission if the Department has conducted a market study or has otherwise obtained information which indicates that a different residual amount is appropriate for the category in which the personal property is placed pursuant to subsection 1.

(Added to NAC by Tax Comm'n by R034-03, eff. 12-4-2003)

NAC 361.138 Reported acquisition cost for leased equipment. (NRS 360.090, 360.250, 361.227) For leased equipment, the reported acquisition cost is the cost which the user of the property would incur if the equipment were purchased, less any discount customarily allowed by a seller.

(Added to NAC by Tax Comm'n, eff. 10-10-83; A by R034-03, 12-4-2003)

NAC 361.139 Personal property acquired with real property for lump sum; use of other valuation techniques. (NRS 360.090, 360.250, 361.227)

1. In determining the taxable value of personal property which was acquired with real property for a lump sum, the assessor may refer to appropriate guides which list the cost of equipment to determine the value of the personal property in relation to the value of the real property. In addition, the assessor may estimate the age of the equipment by inspecting it or discussing the approximate value of the equipment with manufacturers, dealers or other persons in the business who have knowledge of the value of the equipment. The serial number, if it exists, may enable a manufacturer to determine the date of manufacture and the original cost.

2. If sufficient data is not otherwise available to establish acquisition cost, or if the assessor determines that a reported acquisition cost is not equal to the fair market value of the property at the time of acquisition plus any costs of transportation and costs of installation, the assessor may use any nationally recognized valuation technique to determine the acquisition cost, including, without limitation:

(a) Establishing the current cost of replacement of the property with new property by reference to current manufacturing costs. If the current cost of replacement is known, the assessor shall apply depreciation to that cost to determine the taxable value.

(b) Using a guide which lists the cost or a procedure recognized by businesses which use such equipment to determine the taxable value. Before such a guide or procedure may be used, an assessor must receive approval from the Executive Director.

(c) Using information based on current market data.

3. Upon request, the Division of Local Government Services of the Department will provide information on various guides which may be used to determine original cost.

(Added to NAC by Tax Comm'n, eff. 10-10-83; A 6-29-84; R034-03, 12-4-2003; R068-12, 9-14-2012)

NAC 361.6075 General abatement: Taxable unit of centrally assessed property; ineligible property of interstate or intercounty company. (NRS 360.090, 361.4722)

1. For the purposes of NRS 361.4722, the value of any centrally assessed property which is allocated and apportioned to a taxing district shall be deemed to constitute a taxable unit of real or personal property in that taxing district.

2. Property of an interstate or intercounty company valued pursuant to NRS 361.320 which is not eligible for a general abatement for the current year includes, without limitation:

(a) That portion of the unit valuation of such property for which there was no allocation or apportionment within Nevada for the immediately preceding year;

(b) New property placed on the unsecured tax roll and classified as construction work in progress; and

(c) That portion of the unit valuation of such property for which there is an increase in the cost indicator of value from the immediately preceding year, unless it has already been reported to the Department as construction work in progress and the taxpayer certifies that the pertinent capital expenditures will be reported as part of construction work in progress before being transferred to the accounting records of the company for plant in service.

3. For the purposes of this section, "construction work in progress" has the meaning ascribed to it in NAC 361.258.

(Added to NAC by Tax Comm'n by R011-06, eff. 5-4-2006)

ASSESSORS' HANDBOOK
SECTION 577

ASSESSMENT OF GENERAL AIRCRAFT

NOVEMBER 2003

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CALIFORNIA STATE BOARD OF EQUALIZATION

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CHAPTER 1: INTRODUCTION

This handbook section pertains to the assessment and taxation of general aircraft as described in sections 5301 through 5456 of the Revenue and Taxation Code.[2] For purposes of property taxation, general aircraft are classified as personal property. The appraisal and assessment of general aircraft present challenges unique to this special type of property. These challenges arise because of the transitory nature of general aircraft, their various configurations and applications of use, the diversity of manufacturers, the varying condition of aircraft, and the specific types of avionics installed on the aircraft.

DEFINITIONS

PERSONAL PROPERTY

Personal property is defined by exception; *personal property* is all property except real estate.[3] Section 104 defines real property, or real estate, as:

> (a) The possession of, claim to, ownership of, or right to the possession of land.
>
> (b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.
>
> (c) Improvements.

AIRCRAFT

Revenue and Taxation Code section 5303 defines *aircraft* as:

> … any contrivance used or designed for the navigation of or for flight in the air which has been flown at least once, other than a parachute or similar emergency safety device.

Aircraft does not include any of the following:

1. Air taxis, as defined in section 1154.
2. Aircraft operated exclusively by certified air carriers
3. Rockets or missiles

Ultra-lights, hang gliders, and hot air balloons are examples of less conventional flying contrivances which, once flown, are aircraft within the meaning of section 5303.

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[2] All statutory references in this handbook refer to the Revenue and Taxation Code unless otherwise indicated.
[3] Section 106.

AIR TAXI

Air taxi is defined in section 1154 as:

> …aircraft used by an air carrier which does not utilize aircraft having a maximum passenger capacity of more than 30 seats or a maximum payload capacity of more than 7,500 pounds in air transportation and which does not hold a certificate of public convenience and necessity or other economic authority issued by the Civil Aeronautics Board of the United States, or its successor, or by the California Public Utilities Commission, or its successor.

This definition can be further broken down into scheduled and nonscheduled air taxis. Scheduled air taxis are treated for property taxation purposes as certificated aircraft, and nonscheduled air taxis are treated as general aircraft.

CERTIFICATED AIRCRAFT

Section 1150 defines *certificated aircraft* to mean:

> … aircraft operated by an air carrier or foreign air carrier engaged in air transportation … while there is in force a certificate or permit issued by the Civil Aeronautics Board of the United States, or its successor, or a certificate or permit issued by the California Public Utilities Commission, or its successor, authorizing such air carrier to engage in such transportation.[4]

For a complete discussion of this topics, see Assessors' Handbook Section 570, *Assessment of Commercial Aircraft*.

SITUS

Situs is the place where property is legally situated; the more or less permanent location of the property. A complete discussion of aircraft situs is included in Chapter 4.

HABITUALLY SITUATED

Rule 205, subsection (b), provides that general aircraft are assessable in the county where they are *habitually situated*.[5] The location where an aircraft is habitually situated is the airport at which the aircraft is usually present when not in flight, i.e., the location where the aircraft spends most of its ground time. Thus, if an aircraft spends a substantial amount of time at multiple airports, it is *habitually situated* at the airport where it spends the most ground time.

[4] The Federal Aviation Agency is the successor of the Civil Aeronautics Board of the United States.
[5] All references to "rules" refer to sections in Title 18, Public Revenues, California Code of Regulations, commonly known as Property Tax Rules.

LIEN DATE

Sections 2192 (local roll) and 722 (Board roll) specify that the annual lien date is January 1. Personal property is assessable only if taxable on this date.[6]

CLASSIFICATION

Aircraft are included on the local unsecured roll as personal property and are assessable to the owner, whether the owner is an individual, a business, or otherwise. The tax rate for property on the unsecured roll is levied at the rate for the preceding year's secured roll within the same taxing jurisdiction.[7] Since aircraft are classified as personal property, they are not subject to special assessments.

Unlike most types of personal property, there is no requirement that aircraft be used for business purposes to be assessable. However, not all aircraft are taxable. Some aircraft may be fully or partially exempt from property taxation due to the nature of their ownership or use. Preferential assessments and exemptions are discussed in Chapter 5.

ENTRY ON ASSESSMENT ROLL

An *assessment roll*, as defined in section 109, is the entire listing of taxable property within the county.[8] The assessment roll consists of two parts: the secured roll and the unsecured roll. Aircraft should be included on the regular assessment roll and enrolled as unsecured property. Aircraft assessments should be placed in a separate section of the unsecured roll, rather than intermingling them with other unsecured assessments. Rule 252, subsection (a), provides that each local assessment roll shall contain:

> … (14) In a separate section of the roll, the assessed value of any personal property for which tax revenues are subject to allocation in a manner different from that provided for general property tax revenues (e.g., general aircraft).[9]

Advantages of enrolling aircraft in a separate section on the unsecured roll include:

- Simplifying roll-searching for the assessor, tax collector, and others when a permanently assigned block of assessment numbers serves to identify aircraft.
- Making statistical data more readily available.
- Eliminating taxpayer confusion that often occurs when the value of an aircraft is included in the total personal property value of other types of taxable personal property.

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[6] Exceptions are manufactured homes and floating homes, although classified as personal property, are assessed in the same manner as real property. See section 229 and sections 5802 et seq.
[7] California Constitution, article XIII, section 12.
[8] The assessor prepares two separate rolls each year: the regular assessment roll and the supplemental assessment roll.
[9] See sections 5451, et seq.

- Avoiding the necessity of adding the tax on the aircraft to an impound account when a lending institution pays the tax on the real property and secured personal property.

OVERVIEW OF THE FACTORS IN MAKING AN ASSESSMENT

The making of an assessment requires the determination of seven factors for that assessment to be proper and complete. These seven factors are especially important for personal property assessments because they can be difficult to determine and they often tend to change from lien date to lien date. The seven factors are *assessability, assessee, situs, description, classification, security,* and *value*.

Of the seven factors involved in making an assessment, the appraiser only needs to consider five of the factors with respect to aircraft. Two of the factors—*classification* and *security*—are already determined due to the nature of aircraft. That is, all aircraft are classified as personal property, and they should be listed on the unsecured regular assessment roll. A brief description of each of the other five factors is included below. A more thorough discussion of *description, value,* and *situs* are included in later chapters of this manual.[10]

ASSESSABILITY OF PROPERTY

Article XIII, section 1, of the California Constitution provides that all property is taxable unless otherwise exempt by the state constitution or the laws of the United States. The Legislature has the power to exempt personal property from taxation or to allow for differential taxation.[11] For example, section 224 provides:

> The personal effects, household furnishings, and pets of any person shall be exempt from taxation. The phrase "personal effects, household furnishings, and pets" does not include boats, aircraft, vehicles, or personalty held or used in connection with a trade profession or business or pets so held or used.

An aircraft can be exempt from property taxation by reason of its ownership, use, and/or type. For example, an aircraft dealer's inventory is exempt by type (a discussion of business inventories and other exemptions is included in Chapter 5).

The assessor must first determine whether an aircraft is taxable (assessable) or exempt.[12] It is important for the appraiser to be aware of all possible aircraft exemptions in order to determine the assessability of the aircraft being appraised.

In determining assessability, an aircraft is not assessable until it has been flown once.[13] An aircraft that is not presently in flyable condition but that still has an active registration with the FAA would be assessable. The maintenance of an active FAA registration would be evidence of

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[10] For a complete discussion of this topic, see Assessors' Handbook Section 504, *Assessment of Personal Property and Fixtures*, Chapter 1.
[11] Article XIII, section 2, California Constitution.
[12] For purposes of property tax assessment and this text, *taxable* and *assessable* are used synonymously.
[13] Section 5303.

an intent to make the aircraft flyable at some future point in time. If the registration has been cancelled by registering the aircraft as scrapped or dismantled with the FAA, then the parts which were formerly an aircraft would be treated in the same manner as other personal property owned by the assessee.

Aircraft are assessable if they have situs in a particular county on the lien date, and the assessment must be made timely to be valid. Section 532 establishes a statute of limitations that affects the assessability of all taxable property, including aircraft. Unless the assessee intentionally evades taxation, an assessment must normally be made within four years of the assessment period in which the property escaped assessment or was underassessed.[14]

The assessor is required to assess all aircraft as of the lien date.[15] For example, an assessee filing a statement with the assessor that declares ownership of an aircraft as of 12:01 a.m., January 1, 2003, will receive a tax bill for the fiscal year July 1, 2003 through June 30, 2004.

The following is an example of how the lien date affects the assessment of an aircraft.

EXAMPLE 1.1

LIEN DATE

On lien date January 1, 2003, an aircraft owned by "A" is located in Sacramento. The assessee (owner "A") sells the aircraft to an airplane dealer (owner "B") on January 15, 2003. It becomes business inventory to owner "B" on that date.

Owner "A" receives a tax bill for the fiscal year July 1, 2003 through June 30, 2004 for the assessment of the aircraft. Although owner "A" does not own the aircraft during the fiscal year that the bill covers, the bill is valid based on ownership on the lien date. Taxes on unsecured property are due on the lien date.

If the facts were changed so that the dealer was the owner on the lien date and sold the aircraft to "A" on January 15, the aircraft would be exempt from property taxation as business inventory of owner "B," even through owner "A" owned the aircraft from January 15 through June 30, 2004.

Generally, ownership on the lien date determines the taxability, situs, and assessee of an aircraft.

Property taxes on the unsecured roll as of July 31 are payable in one installment, due no later than the August 31 following the lien date.[16]

[14] Section 532.
[15] Section 401.3.
[16] Section 2922.

ASSESSEE

An aircraft is assessed to the person owning, claiming, possessing, or controlling it on the lien date—the *assessee*.[17] Assessments are usually made in the name of the person listed as the owner of record on the lien date, based on the official documentation or registration for the aircraft.

Owners who sell their aircraft after the lien date and prior to the fiscal year that the tax bill covers are still liable for the taxes imposed.[18] Although the assessment is based on the value of the aircraft on the preceding lien date, the tax bill received is for the ensuing fiscal year. Thus, in the sale of an aircraft, any proration of taxes is left to the parties involved.

SITUS

Situs is the place where property is situated for tax purposes. Since aircraft are taxed where they are situated on the lien date, situs is an essential factor in making an assessment of an aircraft. Situs is seldom a problem for property that remains in one location, as in the case of real property, but many problems are encountered by the appraiser when determining the proper situs of movable property, such as an aircraft.

A complete discussion of *situs* is included in Chapter 4.[19]

DESCRIPTION OF PROPERTY

An accurate assessment requires a *description* of the property. The primary source of descriptive information for the appraiser is on annual forms filed by aircraft owners. The forms request information needed by the appraiser to make an annual review and accurate assessment of the aircraft.

A more detailed discussion regarding *description* of the property and aircraft forms are included in Chapter 2.

VALUE OF PROPERTY

For purposes of California property taxation, aircraft are valued at their fair market value every year as of the lien date. An appraiser's most important function is to determine the value of the aircraft. The terms "fair market value" and "full cash value" have the same meaning in property tax law and in the context of this manual.[20]

A more detailed discussion of *value* is presented in Chapter 3.

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[17] Section 405.
[18] *Estate of Backesto* (1923) 63 Cal.App. 265.
[19] For a complete discussion of this topic, see Assessors' Handbook Section 504, *Assessment of Personal Property and Fixtures*, Chapter 3.
[20] Section 110.

CHAPTER 2: DISCOVERY AND DESCRIPTION

DISCOVERY

Developing a program for the discovery of information regarding taxable aircraft and the verification of new and existing information is important to ensure accurate and valid assessments. Although the means of discovery may differ from county to county, the primary sources of information for aircraft are:

- Airport owners' and operators' reports
- Field canvassing
- Field appraisers
- Federal Aviation Agency (FAA) registration lists
- Referrals from other counties

AIRPORT OWNERS' AND OPERATORS' REPORTS

Section 5366 requires owners and operators of public and private airports to annually supply the assessor with lists of aircraft based at their airports. This information is provided on Form BOE-577-B, *List of Aircraft.*

The airport owners are required to provide to the assessor (1) the owner's name and address and (2) the FAA number, make, model, and year of manufacture for each aircraft. This information is extremely useful to the assessor in locating all aircraft situated in the county.

FIELD-CANVASSING

Field-canvassing is a technique that involves physically viewing aircraft where they are located. Information obtained by the appraiser should be entered into the aircraft file to ensure that an accurate assessment is made without incurring any duplication. The FAA number should always be obtained, along with all other available information about the aircraft, e.g., situs, make, model, year of manufacture, general condition, flight hours since last overhaul, and ownership. The appraiser should conduct field-canvassing near the lien date.

Since ultralights, hang gliders, and power hang gliders do not have an FAA number, they pose a significant discovery problem for assessors. Staff should be made aware of this problem and discovery programs should be established, such as field-canvassing airports, landing strips, and other areas where these aircraft are known to be situated.

FIELD APPRAISERS

General aircraft may also be discovered by field appraisers while conducting appraisals of other properties. Any aircraft located that are not listed in the assessors' files should be investigated to determine their taxable status.

FEDERAL AVIATION AGENCY

County assessors can obtain registration information from the FAA master registration program through the FAA Web site (www.FAA.gov). Once on the FAA Web site, the registry information can be accessed by:

- Clicking on *General Aviation*
- Under the column *Services,* click on *Query Aircraft Database*
- Click on *Link to Perform Query*
- Click on *State and County*
- Select *California*
- Select appropriate *County*

The FAA updates the registration list on a monthly basis to show any changes in ownership of aircraft based in California. The information provided includes a coded description of each aircraft, and the zip code number and the name of the registered owner.

REFERRAL FROM OTHER COUNTIES

Often county assessors receive information from a taxpayer indicating that an aircraft has been relocated to another county. This information can be useful in determining accurate situs. Cooperation between county assessors is essential for the proper assessment of all aircraft within the state. Without it, many aircraft would escape assessment and accurate information regarding the description, ownership, and situs of such aircraft could be lost (see Change in Situs section in Chapter 4 for a further discussion).

An assessor frequently receives information indicating that an aircraft has been taken to another county or was actually in a different county than was initially reported. This information should be forwarded to the assessor gaining jurisdiction, along with all other information that may be available, such as aircraft description and previous assessed values.

It is important that the county receiving the information follow through to the point of making an assessment. If neither the aircraft nor the aircraft owner can be located, the county originating the information should be notified so that further action can be taken to prevent an escape assessment. The originating county should send a notice to the aircraft owner's last known address to attempt to establish the exact location of the aircraft.

DESCRIPTION

In order for an appraiser to make a comprehensive review and assessment of an aircraft, a detailed and accurate description of the aircraft is essential. Aircraft statements and other aircraft forms used by the assessor provide vital information.

COUNTY AIRCRAFT STATEMENT

Assessors send aircraft statements to owners requesting information on their aircraft. Section 5365 provides that:

> Upon request of the assessor of the county in which an aircraft is habitually based, the owner shall file with him a statement setting forth the make, model, and year of manufacture of the aircraft.

Assessors use these statements to gather information and to ultimately determine an assessable value for aircraft. Furthermore, if the assessor requires that these forms be completed by aircraft owners annually, they are often very useful in a timely determination of when owners have installed new avionics on an aircraft or when an aircraft has undergone an overhaul. The aircraft statement should be mailed to the taxpayer for completion as close to the lien date as possible.

If any person who is requested by the assessor to file a statement pursuant to section 5365 fails to file such statement by the time specified by the assessor, a penalty of 10 percent of the market value of the unreported aircraft shall be added to the value of the aircraft on the current roll.[21] While the statute does not specify the length of time the assessor should allow to file the aircraft statement before imposition of the penalty, it is recommended that the deadline for filing without a penalty be 30 days after the mailing date or April 1 (as for other property statements), whichever is later.

While section 5365 only mandates that the assessee provide the assessor with the make, model, and year of manufacture of the aircraft, it is good policy for the assessor to request all pertinent information from an aircraft owner annually, since usually assessees will provide the information requested by the assessor. However, the assessor should remember that the section 5367 penalty cannot be imposed on an aircraft owner for not supplying information requested by the assessor beyond the requirements of section 5365.

A sample of an aircraft statement is included in Appendix A.[22]

OTHER AIRCRAFT FORMS

Many county assessors use the *Vessel or Aircraft Form* (BOE-576-A) to enhance their aircraft assessment program. The form can be used for the following purposes:

1. To notify the owner of record of the assessor's proposed assessed value of an aircraft for the forthcoming year.
2. To obtain information on transfers of aircraft.
3. To locate an aircraft.

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[21] Section 5367.
[22] The Board does not prescribe a property statement for general aircraft.

The *Vessel or Aircraft Form* should be mailed to all owners of aircraft as shown on the assessor's records prior to the lien date each year.

In addition, the *Aircraft Form* (BOE-577-AHH) is a double postcard inquiry form that is folded and mailed to known or probable aircraft owners at any time of the year. Upon receipt of the card, the aircraft owner should detach the half containing his or her name and address, and return the preaddressed remaining half with the information requested by the assessor. This form can be used to obtain the following information:

1. Verification of the registered owner's name and address.
2. Specific description of the aircraft, e.g., FAA number, make, model, and equipment installed.
3. Detailed description of the engine, e.g., make, model, year built, and air hours.
4. Sales information, e.g., purchase price and date of purchase.

CHAPTER 4: SITUS

Situs, the place where property is legally situated, is one of the essential factors of a valid assessment. Section 404 governs the assessment jurisdiction for property and provides that:

> All taxable property, except State assessed property, shall be assessed by the assessing agency of the taxing agency where the property is situated.

Aircraft are classified as personal property, are mobile, and frequently have no single fixed location. One of the most important duties of the appraiser is to determine an aircraft's tax situs. For property tax purposes, an aircraft's situs is established on the lien date. On the lien date, aircraft with situs in California are assessable by the taxing agency of the jurisdiction in which they are habitually situated.

Permanent versus temporary situs must be considered when determining taxable situs for property taxation purposes. Article XIII, section 14, provides that:

> All property taxed by local government shall be assessed in the county, city, and district in which it is situated.

This constitutional provision does not refer to the temporary location of aircraft but to its permanent situs. *Situated* means that property has acquired tax situs and, thus, the taxation of an aircraft must be based on the fact that it is to some extent kept or maintained in California, rather than here casually or in transit.

The guidelines for situs of aircraft depend on aircraft type. For assessment purposes, aircraft are typed or classified as general aircraft, certificated aircraft, or air taxis. This handbook focuses on the issues affecting situs of general aircraft.

GENERAL AIRCRAFT

The rules of situs apply to general aircraft as they do to other personal property. General aircraft are assessable at the location where the aircraft is *habitually* situated. When an aircraft has tax situs in California and divides its time between two or more airports in California, situs becomes determinable based on a "time test," but no apportionment is necessary. Rule 205, subsection (b), states in pertinent part:

> … An aircraft that spends a substantial amount of ground time at each of two or more airports has its tax situs at the airport where it spends the greatest amount of ground time.

Thus, where an aircraft does not remain in one location in California, it is assessable in the place where it spends the greatest amount of ground time.[33]

[33] *GeoMetrics* v. *County of Santa Clara* (1982) 127 Cal.App.3d 940.

If an aircraft establishes tax situs both in California and outside California, apportionment is necessary between California and other jurisdictions under the rulings established in *Ice Capades, Inc.* v. *County of Los Angeles* and *GeoMetrics* v. *County of Santa Clara*.[34]

The interpretation of tax situs is that property must have "such contacts as confer jurisdiction to tax."[35] Due process requires that the nature of the contacts sufficient to support a state's power to tax must provide the opportunities, benefits, or protection afforded by the state.[36] For movable personal property such as aircraft,[37] the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination.[38]

In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. The court held that these were the determinative factors in *Ice Capades*

AIRCRAFT OPERATED SOLELY IN CALIFORNIA

For aircraft maintained and operated solely within California, such aircraft have an established tax situs in California, regardless of the domicile of the aircraft owner, and the appropriate county in which the aircraft is habitually situated has assessment jurisdiction without apportionment.[39] Aircraft having mere transitory contact in California do not have an established tax situs in this state and, therefore, are not subject to taxation.

Example 1

An aircraft owner has domicile in Nevada, and the aircraft owned has established a tax situs in California for 100 percent of the year. Regardless of where the owner of the aircraft is domiciled, the California county where the aircraft is habitually situated would enroll 100 percent of the value of the aircraft.

OWNER DOMICILED IN CALIFORNIA

When an aircraft owner is domiciled in California and the aircraft (1) has established a tax situs in California, (2) has established a tax situs in another state, states, or foreign country, (3) operates in other states or foreign countries but does not establish tax situs in those states or foreign countries, and (4) is predominantly located in California during the year, the county may assess portions of value reflecting the portion of the year that the aircraft is present in California and the portion of the year that the aircraft operates in the states or foreign countries where the aircraft has not established tax situs.

[34] *Ice Capades, Inc*. v. *County of Los Angeles* (1976) 56 Cal.App.3d 745; *GeoMetrics* v. *County of Santa Clara* (1982) 127 Cal.App.3d 940.
[35] *Zantop Air Transport, Inc*. v. *County of San Bernardino* (1966) 246 Cal.App. 2d 433, 437.
[36] *Ice Capades, Inc., supra* at 752.
[37] Rule 205, subsection (a).
[38] *Ice Capades, Inc., supra* at 753.
[39] *Ice Capades, Inc., supra* at 755.

Example 2

An aircraft owner has domicile in California, and the aircraft owned has established a tax situs in California for 60 percent of the year. The aircraft has also established a tax situs in another state or a foreign country for 20 percent of the year. The other 20 percent of the time, the aircraft is flown in an out of five other states, but does not establish tax situs in any of the five states. Because the aircraft is predominantly located in California and/or because the aircraft owner has domicile in California during the year, the California county where the aircraft is habitually situated would enroll 80 percent of the value of the aircraft.

OWNER DOMICILED IN ANOTHER STATE

When an aircraft owner is domiciled in a state *other than* California and the aircraft (1) has established a tax situs in the owner's domiciliary state, (2) has established a tax situs in California, and (3) operates in another state, states, or foreign country, the county may assess portions of value reflecting only the portion of the year that the aircraft is present in California. In other words, the value is apportioned for only the time spent in California.

Example 3

An aircraft owner has domicile in Arizona, and the aircraft owned has established a tax situs in California for 60 percent of the year. The aircraft has also established a tax situs in Arizona for 20 percent of the year. The other 20 percent of the time, the aircraft is flown in an out of five other states or foreign countries, but does not establish tax situs in any of the five states or foreign countries. Because the owner of the aircraft is domiciled outside of California, the California county where the aircraft is habitually situated would enroll 60 percent of the value of the aircraft.

To assist the appraiser in determining situs for allocation purposes, the appraiser may request certain documents from the taxpayer. Documents that may be useful include, but are not limited to, hangar or tie-down receipts, flight or maintenance logs, and paid tax bills from another county, state, or country.

To assist the appraiser in determining the domicile of the aircraft owner (whether an individual or a corporation), the appraiser may request from the taxpayer any or all of (but not limited to) the following types of documents as evidence: proof of a homeowner's exemption on property, utility bills, vehicle registration, income tax returns, or property ownership records.

CERTIFICATED AIRCRAFT

Certificated aircraft owned by a commercial air carrier are assessable as general aircraft if:

- The aircraft is taken out of scheduled service and grounded in the county prior to the lien date,[40] and
- The aircraft is not flown during the representative period,[41] and
- The aircraft has an established tax situs in California and is solely situated in or habitually situated in the county on the lien date.[42]

CHANGE OF SITUS

All aircraft currently on a county's assessment roll should remain so until written notice is provided to the assessor that the aircraft has established situs outside of the county. The burden of notification falls upon the taxpayer and, unless otherwise given notice, the assessor should enroll and assess an aircraft at its last known situs.

If proper documentation for a new situs is provided, the aircraft assessment should then be cancelled via an assessment roll change. If a tax bill from another county is offered as evidence of a situs change, the assessor should request that the owner provide evidence that the bill has been paid, so as to ensure that the tax bill from the other county has not been cancelled. If an aircraft will be or has been moved to another county within California and the owner makes a written declaration of the fact, a copy of the declaration should be sent to the other county where the aircraft will gain its situs.

If an aircraft is present in the county on the lien date and had tax situs in the county for one or more of the preceding assessment years, then it will have current taxable situs in the county even if removed prior to the start of the new fiscal year.

[40] Section 1150 provides that while aircraft are in service and being operated by an air carrier, they are considered certificated aircraft. However, once they are taken out of service and grounded, they become general aircraft.
[41] Section 1153.
[42] Section 220 and Rule 138 provide an exception for aircraft solely in California to be repaired, overhauled, modified, or serviced.

CHAPTER 5: EXEMPTIONS

Certain provisions of the California Constitution allow for aircraft exemptions, either on a partial or full basis. The Constitution provides that the Legislature may classify any personal property for differential taxation or for exemption.[43] Personal property may be exempt from taxation by reason of its ownership, use, and/or type. Full exemptions include:

- Aircraft considered inventory
- Aircraft of historical significance
- Aircraft in California for the sole purpose of being repaired, overhauled, modified, or serviced
- Aircraft that have been made available for display in a publicly owned aerospace museum
- Aircraft owned by the United States or foreign governments
- Aircraft owned by the State of California or a political subdivision

It is important for the appraiser to be aware of these exemptions in order to determine the assessability of the aircraft being appraised. It is also important to note that not all exemptions are automatic. In these cases, a taxpayer has the burden of demonstrating that an aircraft qualifies for the exemption being sought. Some exemptions are allowed only if appropriate forms are filed in a timely manner. In such cases, an aircraft remains assessable until an exemption claim is filed by the taxpayer and approved by the county assessor.

BUSINESS INVENTORIES

Virtually all aircraft held as dealers' inventory in California are flown directly from the factory to airports located in California. Having been flown at least once, the aircraft qualify under section 5305 as general aircraft. The guidelines for exemption of aircraft as business inventory are the same as for other properties, e.g., to be eligible for the business inventory exemption the aircraft must be either held for sale or lease in the ordinary course of business on the lien date.[44]

The following are some suggestions for verifying whether an aircraft is being held for purposes other than for sale or lease:

1. A dealer who operates an air taxi service must file Department of Transportation (DOT) Form OST-4507 with the department. The form is a listing of all aircraft by tail number used in the air taxi service. Whenever there is a change in the dealer's listing of aircraft that are used in the service, an updated form must be filed. A review of an operator's DOT forms will indicate any aircraft committed to air taxi service. Inclusion of an aircraft on the DOT list would be an indication that the aircraft is not being held for sale or lease.

[43] Article XIII, section 2.
[44] Section 129; Rule 133.

2. Review the aircraft's flight log. If an aircraft is being used in a charter or other commercial service, the operator must maintain a flight log of each commercial flight.

3. Review the aircraft's engine hours. A new aircraft will typically have about 30 hours of flight time from the factory to the dealer, plus approximately 4 hours of required engine operation per month. Thus, allowing for a few hours of flight demonstration to prospective customers, an aircraft that has been in a dealer's hands for three months would typically have 45 to 55 hours of total engine time. Conversely, aircraft being operated in, for example, student training or charter service will usually be flown in excess of 50 hours per month.

4. The typical turnover time period a dealer requires to sell an aircraft is three months. Therefore, if a dealer has an aircraft for a year or more, it is likely the dealer is using it for purposes not directly associated with the sale of that aircraft.

There will be occasions when a combination dealer/air taxi operator has used an aircraft in air taxi operations, but on the lien date the dealer has legitimately offered it for sale or lease. In this instance, the aircraft would qualify for the inventory exemption. However, the assessor should follow up to determine if the operator resumed air taxi activity with the aircraft after the lien date.

In determining whether or not the business claiming the exemption is selling or leasing aircraft as part of their *ordinary course of business*, the business should have, but not limited to, the following:

- FAA dealer's license
- State of California seller's permit
- Local business license
- Location on an airport or airfield
- Listing or consignment agreements
- Statement that they have total care, custody, and control of consignment aircraft

If an aircraft qualifies as business inventory within the meaning of section 129 and Rule 133, the aircraft is exempt from property taxation.

EXEMPTION FOR AIRCRAFT OF HISTORICAL SIGNIFICANCE

Aircraft of historical significance is defined by section 220.5 as:

> … any aircraft which is an original, restored, or replica of a heavier than air powered aircraft which is 35 years or older or any aircraft of a type or model of which there are fewer than five in number known to exist worldwide.

General Transportation

General transportation means conveyance of or travel from one place to another. Use of an aircraft for general transportation means flight of the aircraft from one place to another, for the primary purpose of transporting passengers or goods from one location to another.

To constitute general transportation there must be flight from one place to another, not flights that originate and end in the same place with no intervening stop. Recreational flying, maintenance-related flying, and flights necessary to maintain the owner's pilot's certificate would not constitute general transportation unless the flights are primarily for the purpose of transporting goods or persons to another location. Flights to and from historical aircraft shows or displays do not constitute general transportation.

The exemption for aircraft of historical significance does not apply if an aircraft is used for general transportation.

Commercial Use

Conveyance of passengers or goods for any business reason or use of the aircraft for any revenue-producing activity would constitute a *commercial purpose*.

If an aircraft is depreciated as business property, or expenses are written off as business expenses, then this is factual documentation that the aircraft is used for commercial purposes.

The exemption for aircraft of historical significance does not apply if an aircraft is used for commercial use.

Administration of the Exemption for Aircraft of Historical Significance

The following are some of the procedural requirements that the assessor should be aware of for the administration of the exemption for aircraft of historical aircraft.

- If an owner removes an aircraft from the taxing jurisdiction of a county and then returns the aircraft at a subsequent lien date, an additional fee is not required for any subsequent application filed for the same aircraft.
- A separate application and fee is required for each aircraft. If an individual owns multiple potentially qualifying aircraft, then separate applications are required for each of the aircraft, with a fee charged for each application.
- If an aircraft is moved to another county, and an exemption application is filed in the second county, it would be considered the initial application in that county and the $35 fee is required.
- After the initial application tax year, the applicant shall sign a "continuing qualification affidavit" each year. The assessor should ensure compliance with the exemption requirements by random audit.

SERVICEMEMBERS CIVIL RELIEF ACT ("SCRA")
50 U.S.C. App. §§501-597b[1]

[Note: The section numbers shown herein are citations to 50 U.S.C. App. §___. The section numbers from the current Act, as amended, are shown after the section titles in bracketed *italics*.]

INDEX TO SCRA
(section numbers refer to 50 U.S.C. App. §___)

TITLE I – GENERAL PROVISIONS

TITLE II – GENERAL RELIEF

[1] Current as of the end of the 111th Congress in 2010. The Servicemembers Civil Relief Act was enacted as P.L. 108-189, effective December 19, 2003. It has been amended by P.L. 108-454 (adding 50 U.S.C. §511 (9) and amending §517), P.L. 109-163 (adding §515a), P.L. 110-181 (amending 50 U.S.C. App. §§521 and 522), P.L. 110-289 (amending 50 U.S.C. §§527 and 533), P.L. 109-233 (amending 50 U.S.C. App. §594); P.L. 110-389 (amending §§527 and 535 and adding §535a), P.L. 111-97 (amending 50 U.S.C. App. §§568, 571), P.L. 111-275 (amending §§535 and 535a, and adding §§597, 597a and 597b), effective October 13, 2010, and S.4508, which amended P.L. 111-289 by extending the "sunset" provision of 50 U.S.C. App. §533(b) to December 31, 2012.

TITLE III – RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS, ASSIGNMENT, LEASES

TITLE IV – LIFE INSURANCE

TITLE V – TAXES AND PUBLIC LANDS

TITLE VI – ADMINISTRATIVE REMEDIES

TITLE VII – FURTHER RELIEF

TITLE VIII – CIVIL LIABILITY

§ 501. Short title ***[Sec. 1]***

This Act [50 U.S.C. App. §§ 501 *et seq.*] may be cited as the Servicemembers Civil Relief Act.

§ 502. Purpose ***[Sec. 2]***

The purposes of this Act are—

(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

TITLE I -- GENERAL PROVISIONS

§ 511. Definitions ***[Sec. 101]***

For the purposes of this Act:

(1) Servicemember

The term "servicemember" means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code.

(2) Military service. The term "military service" means—

(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—

(i) active duty, as defined in section 101(d)(1) of title 10, United States Code, and

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds;

(B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and

(C) any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(3) Period of military service. The term "period of military service" means the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service.

(4) Dependent. The term "dependent", with respect to a servicemember, means—

(A) the servicemember's spouse;

(B) the servicemember's child (as defined in section 101(4) of title 38, United States Code); or

(C) an individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under this Act [sections 501 to 596 of this Appendix].

(5) Court. The term "court" means a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record.

(6) State. The term "State" includes—

(A) a commonwealth, territory, or possession of the United States; and

(B) the District of Columbia.

(7) Secretary concerned. The term "Secretary concerned"—

(A) with respect to a member of the armed forces, has the meaning given that term in section 101(a)(9) of title 10, United States Code;

(B) with respect to a commissioned officer of the Public Health Service, means the Secretary of Health and Human Services; and

(C) with respect to a commissioned officer of the National Oceanic and Atmospheric Administration, means the Secretary of Commerce.

(8) Motor vehicle. The term "motor vehicle" has the meaning given that term in section 30102(a)(6) of title 49, United States Code.

(9) Judgment. The term 'judgment' means any judgment, decree, order, or ruling, final or temporary.[2]

[2] Subsection (9) was added by P.L. 108-454, effective December 10, 2004.

§ 512. Jurisdiction and applicability of Act ***[Sec. 102]***

(a) Jurisdiction

This Act applies to—

(1) the United States;

(2) each of the States, including the political subdivisions thereof; and

(3) all territory subject to the jurisdiction of the United States.

(b) Applicability to proceedings

This Act applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act. This Act does not apply to criminal proceedings.

(c) Court in which application may be made

When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court which would otherwise have jurisdiction over the matter.

§ 513. Protection of persons secondarily liable ***[Sec. 103]***

(a) Extension of protection when actions stayed, postponed, or suspended. Whenever pursuant to this Act a court stays, postpones, or suspends (1) the enforcement of an obligation or liability, (2) the prosecution of a suit or proceeding, (3) the entry or enforcement of an order, writ, judgment, or decree, or (4) the performance of any other act, the court may likewise grant such a stay, postponement, or suspension to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability the performance or enforcement of which is stayed, postponed, or suspended.

(b) Vacation or set-aside of judgments. When a judgment or decree is vacated or set aside, in whole or in part, pursuant to this Act, the court may also set aside or vacate, as the case may be, the judgment or decree as to a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily liable on the contract or liability for the enforcement of the judgment or decree.

(c) Bail bond not to be enforced during period of military service. A court may not enforce a bail bond during the period of military service of the principal on the bond when military service prevents the surety from obtaining the attendance of the principal. The court may discharge the surety and exonerate the bail, in accordance with principles of equity and justice, during or after the period of military service of the principal.

§ 548. Regulations *[Sec. 408]*

The Secretary of Veterans Affairs shall prescribe regulations for the implementation of this title [50 U.S.C. App. §§541 – 549].

§ 549. Review of findings of fact and conclusions of law *[Sec. 409]*

The findings of fact and conclusions of law made by the Secretary of Veterans *Affairs* in administering this title [50 U.S.C. App. §§541 – 549] are subject to review on appeal to the Board of Veterans' Appeals pursuant to chapter 71 of title 38, United States Code [38 U.S.C. §§7101 *et seq.*], and to judicial review only as provided in chapter 72 of such title [38 U.S.C. §§7251 *et seq.*.].

TITLE V – TAXES AND PUBLIC LANDS

§ 561. Taxes respecting personal property, money, credits, and real property *[Sec. 501]*

(a) Application. This section applies in any case in which a tax or assessment, whether general or special (other than a tax on personal income), falls due and remains unpaid before or during a period of military service with respect to a servicemember's —

(1) personal property (including motor vehicles); or

(2) real property occupied for dwelling, professional, business, or agricultural purposes by a servicemember or the servicemember's dependents or employees—

(A) before the servicemember's entry into military service; and

(B) during the time the tax or assessment remains unpaid.

(b) Sale of property.

(1) Limitation on sale of property to enforce tax assessment. Property described in subsection (a) may not be sold to enforce the collection of such tax or assessment except by court order and upon the determination by the court that military service does not materially affect the servicemember's ability to pay the unpaid tax or assessment.

(2) Stay of court proceedings. A court may stay a proceeding to enforce the collection of such tax or assessment, or sale of such property, during a period of military service of the servicemember and for a period not more than 180 days after the termination of, or release of the servicemember from, military service.

(c) Redemption. When property described in subsection (a) is sold or forfeited to enforce the collection of a tax or assessment, a servicemember shall have the right to redeem or

§ 568. Land rights of servicemembers *[Sec. 508]*

(a) No age limitations. Any servicemember under the age of 21 in military service shall be entitled to the same rights under the laws relating to lands owned or controlled by the United States, including mining and mineral leasing laws, as those servicemembers who are 21 years of age.

(b) Residency requirement. Any requirement related to the establishment of a residence within a limited time shall be suspended as to entry by a servicemember or the spouse of such servicemember[12] in military service until 180 days after termination of or release from military service.

(c) Entry applications. Applications for entry may be verified before a person authorized to administer oaths under section 1044a of title 10, United States Code, or under the laws of the State where the land is situated.

§ 569. Regulations *[Sec. 509]*

The Secretary of the Interior may issue regulations necessary to carry out this title [50 U.S.C. §§561 – 571] (other than sections 501, 510, and 511 [50 U.S.C. App. §§561, 570 and 571]).

§ 570. Income taxes *[Sec. 510]*

(a) Deferral of tax. Upon notice to the Internal Revenue Service or the tax authority of a State or a political subdivision of a State, the collection of income tax on the income of a servicemember falling due before or during military service shall be deferred for a period not more than 180 days after termination of or release from military service, if a servicemember's ability to pay such income tax is materially affected by military service.

(b) Accrual of interest or penalty. No interest or penalty shall accrue for the period of deferment by reason of nonpayment on any amount of tax deferred under this section.

(c) Statute of limitations. The running of a statute of limitations against the collection of tax deferred under this section, by seizure or otherwise, shall be suspended for the period of military service of the servicemember and for an additional period of 270 days thereafter.

(d) Application limitation. This section shall not apply to the tax imposed on employees by section 3101 of the Internal Revenue Code of 1986 [26 U.S.C. §3101].

§ 571. Residence for tax purposes[13]

(a) Residence or domicile.

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[12] P.L. 111-97 added the phrase "or the spouse of such servicemember".

[13] This section was amended by P.L. 111-97, effective November 11, 2009, by adding subsections (a)(2), (c) and (d), which result in the inclusion of the spouses of servicemembers within the protection of this section.

(1) In general. A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.

(2) Spouses. A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the cse may be, is the same for the servicemember and the spouse.

(b) Military service compensation. Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.

(c) Income of a military spouse. Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.

(d) Personal property.

(1) Relief from personal property taxes. The personal property of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.

(2) Exception for property within member's domicile or residence. This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's or the spouse's domicile or residence.

(3) Exception for property used in trade or business. This section does not prevent taxation by a tax jurisdiction with respect to personal property used in or arising from a trade or business, if it has jurisdiction.

(4) Relationship to law of State of domicile. Eligibility for relief from personal property taxes under this subsection is not contingent on whether or not such taxes are paid to the State of domicile.

(e) Increase of tax liability. A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.

(f) Federal Indian reservations. An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservations and not the State where the reservation is located.

(g) Definitions. For purposes of this section:

(1) Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).

(2) Taxation. The term "taxation" includes licenses, fees, or excises imposed with respect to motor vehicles and their use, if the license, fee, or excise is paid by the servicemember in the servicemember's State of domicile or residence.

(3) Tax jurisdiction. The term "tax jurisdiction" means a State or a political subdivision of a State.

TITLE VI – ADMINISTRATIVE REMEDIES

§ 581. Inappropriate use of Act *[Sec. 601]*

If a court determines, in any proceeding to enforce a civil right, that any interest, property, or contract has been transferred or acquired with the intent to delay the just enforcement of such right by taking advantage of this Act [50 U.S.C. App. §§501 *et seq.*], the court shall enter such judgment or make such order as might lawfully be entered or made concerning such transfer or acquisition.

§ 582. Certificates of service; persons reported missing *[Sec. 602]*

(a) Prima facie evidence. In any proceeding under this Act [50 U.S.C. App. §§501 *et seq.*], a certificate signed by the Secretary concerned is prima facie evidence as to any of the following facts stated in the certificate:

(1) That a person named is, is not, has been, or has not been in military service.

(2) The time and the place the person entered military service.

(3) The person's residence at the time the person entered military service.

(4) The rank, branch, and unit of military service of the person upon entry.

(5) The inclusive dates of the person's military service.

(6) The monthly pay received by the person at the date of the certificate's issuance.

(7) The time and place of the person's termination of or release from military service, or the person's death during military service.

Zantop Air Transport, Inc. v. County of San Bernardino

[Civ. No. 8001. Fourth Dist., Div. Two. Nov. 14, 1966.]

ZANTOP AIR TRANSPORT, INC., Plaintiff and Appellant, v. COUNTY OF SAN BERNARDINO, Defendant and Respondent.

[246 Cal. App. 2d 435]

COUNSEL

Finch, Bell, Duitsman & Margulis and Roger G. Duitsman for Plaintiff and Appellant.

Stanford D. Herlick, County Counsel, and Robert R. Walker, Deputy County Counsel, for Defendant and Respondent.

OPINION

TAMURA, J.

Plaintiff, a nondomiciliary corporation engaged in interstate air transportation of cargo and passengers under government contracts, appeals from an adverse judgment in its action against the County of San Bernardino to recover ad valorem taxes levied on an apportioned value of plaintiff's flight equipment.

The case was submitted to the trial court on the following stipulated facts:

Plaintiff is a Michigan corporation with its principal office in Detroit. Its sole business is the fulfillment of two contracts with the United States Air Force for air transportation of cargo and, occasionally, upon approval of the air force, passengers between air bases in the United States both in and out of California, including Norton Air Force Base in San Bernardino County and bases in Santa Barbara, Solano and Sacramento Counties. In the performance of the contracts, plaintiff owned a fleet of 20 C-46s and 4 DC- 6As which it operated on regularly-scheduled flights, either daily or on alternate days. A specific plane was not regularly assigned to the same scheduled run, the planes being substituted from time to time. No corporate officers were stationed in San Bernardino County. All matters relating to its contracts and the administration thereof were handled from the plaintiff's home office in Detroit. It did maintain in San Bernardino County a facility for the repair and maintenance of its equipment but the tax thereon was separately assessed and paid and is not involved in this action.

For the tax year 1962-63, defendant's assessor assessed the planes on the basis of their average physical presence during the year using the following method: He determined the average daily plane hours of physical presence in the county for each type of aircraft by taking the ground time at Norton Air Force Base and adding thereto, for direct flights to and from Norton and out- of-state bases, "flight time" within California or, for flights to and from bases within the state, one-half of the air time. For flights occurring on alternate **[246 Cal. App. 2d 436]** days, he divided the total by two. By multiplying the market value of the aircraft by the ratio which the total average plane hours thus derived bore to 24, he arrived at an apportioned value continuously present during the tax year for each type of aircraft making regularly- scheduled stopovers at Norton. There was no dispute concerning the market value which the assessor assigned to the aircraft.

It was stipulated that the counties of Santa Barbara, Solano, and Sacramento levied a similar tax on plaintiff's aircraft.

Plaintiff paid the tax under protest and brought this action. The complaint alleged nine causes of action, each stating a separate ground of attack on the assessment, but by stipulation of the parties all but three were dismissed. fn. 1 It was stipulated that the remaining causes of action presented only two legal issues for determination: (1) Whether, under the Constitution and statutes of California, defendant was empowered to levy an ad valorem tax on migratory flight equipment, and (2) whether the inclusion of "flight time" in the apportionment formula was proper.

The trial court made findings in accordance with the stipulation, concluded that the assessment was valid, and entered judgment for defendant.

Plaintiff concedes that under the rule enunciated in Braniff Airways, Inc. v. Nebraska State Board of Equalization, 347 U.S. 590 [98 L. Ed. 967, 74 S. Ct. 757], California has jurisdiction to levy an ad valorem tax on plaintiff's aircraft on a properly apportioned basis, but contends that it has not exercised that power. To support that contention, plaintiff relies upon the language of section 10, article XIII of the California Constitution and section 404 of the Revenue and Taxation Code implementing it, providing for the assessment of property "... in the county in which it is situated." The argument is that the taxation of migratory flight equipment could not have been contemplated because by its nature such property is not "permanently situated" in a particular county. If plaintiff's contention is sound it would be in the enviable position of enjoying tax exemption on the value attributable to use in California both in this state and in the **[246 Cal. App. 2d 437]** domiciliary State of Michigan. Michigan would be precluded from taxing values having a taxable situs in this state whether or not California elected to tax. (Central R.R. Co. v. Pennsylvania, 370 U.S. 607 [8 L. Ed. 2d 720, 82 S. Ct. 1297].)

[1] The word "situated", however, as used in section 10, article XIII of the Constitution and section 404 of the Revenue and Taxation Code is synonymous with "situs"; it means having such contacts as confer jurisdiction to tax. (Brock & Co. v. Board of Supervisors, 8 Cal. 2d 286 [65 P.2d 791, 110 A.L.R. 700]; Town of Cady v. Alexander Constr. Co., 12 Wis.2d 236 [107 N.W.2d 267, 108 N.W.2d 145]; City of Dallas v. Texas Prudential Ins. Co., 156 Tex. 36 [291 S.W.2d 693].) Plaintiff admits that under Braniff

Airways, Inc. v. Nebraska State Board of Equalization, supra, 347 U.S. 590 [98 L. Ed. 967, 74 S. Ct. 757], a properly apportioned value of its aircraft has a taxable situs in this state. [2] Past decisions have implicitly, if not expressly, determined that the situs of such property within the state is in the county in which it is present on a regular and ascertainable portion of its life. (Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal. 2d 314 [333 P.2d 323]; Slick Airways, Inc. v. County of Los Angeles, 140 Cal. App. 2d 311 [295 P.2d 46].) [3] The fact that section 14, article XIII of the Constitution providing for the centralized assessment of railroad, utility, and certain other types of property fails to include aircraft cannot be taken as an intention to exempt such property from taxation. It is a constitutional mandate (§ 1, art. XIII), implemented by legislation (Rev. & Tax. Code, §§ 201, 401, 404), that all property, not otherwise exempt, shall bear its fair and equal burden of taxation. (Feather River Power Co. v. State Board of Equalization, 206 Cal. 486 [274 P. 962].) There are no constitutional or statutory provisions exempting interstate migratory flight equipment.

The cases of People v. Niles, 35 Cal. 282; Rosasco v. County of Tuolumne, 143 Cal. 430 [77 P. 148]; Church v. City of Los Angeles, 96 Cal. App. 2d 89 [214 P.2d 550], and Brock & Co. v. Board of Supervisors, supra, 8 Cal. 2d 286, cited by plaintiff do not support its narrow definition of the word "situated." They merely hold that temporary presence of property on lien date does not confer jurisdiction to tax (People v. Niles, supra; Rosasco v. County of Tuolumne, supra; Church v. City of Los Angeles, supra), and, conversely, that temporary absence on tax day does not terminate taxable situs. (Brock & **[246 Cal. App. 2d 438]** Co. v. Board of Supervisors, supra.) They do not deal with the situs of migratory property habitually employed in a county.

[4] We conclude that a portion of the value of plaintiff's flight equipment was "situated" in and subject to taxation by defendant-county.

Turning to the propriety of including "flight time" (air time in the state) in the apportionment formula, both parties agree that the question has never been squarely decided. But plaintiff contends that the decision in Flying Tiger Lines, Inc. v. County of Los Angeles, supra, 51 Cal. 2d 314, by implication, prohibits such inclusion. We find no basis for so construing that case. The issue there was whether California (the airline's commercial domicile) through Los Angeles County (the home base of the aircraft), could tax the full value of the airline's planes flown in foreign and interstate commerce where they habitually spent a portion of their time outside the state. The court held that Los Angeles County could not tax the full value and affirmed a judgment of the trial court awarding the taxpayer the amount it sought to recover; namely, the difference between the tax paid and the amount which would have been levied on an apportioned value based upon average physical presence in the county. Justice (now Chief Justice) Traynor dissented on the ground that the commercial domicile may tax the full value where the property has not acquired a taxable situs elsewhere. fn. 2 Plaintiff argues that Justice Traynor's observation, that the "physical presence test compelled by the majority" would result in inequities because values represented by "bridge time" would escape taxation, requires the majority opinion to be read as implying that "flight time" may not be considered in determining average physical presence. fn. 3 It is apparent, however, that the "bridge time" which was of concern to Justice **[246 Cal. App. 2d 439]** Traynor was air time over the high seas or over states with which the aircraft did not have sufficient contacts to confer jurisdiction to tax. He was of the view that a multi-factored apportionment formula, such as arrivals and departures, revenue tons, and originating revenues as used by Nebraska in Braniff Airways, Inc. v. Nebraska State Board of Equalization, supra, 347 U.S. 590 [98 L. Ed. 967, 74 S. Ct. 757], would provide for a more equitable apportionment of value among the states. If physical presence was to be a factor, he suggested that "bridge time" be excluded from the calculations completely. This would allow each state to tax that proportion of the value which time spent within the state bears to total time spent within all jurisdictions in which a taxable situs had been established.

We cannot derive any implication from Flying Tiger Lines, Inc. v. County of Los Angeles, supra, which would preclude the inclusion of "flight time" in the apportionment formula.

Plaintiff argues that the opinions in Slick Airways, Inc. v. County of Los Angeles, 140 Cal. App. 2d 311 [295 P.2d 46], and Flying Tiger Lines, Inc. v. County of Los Angeles, supra, 51 Cal. 2d 314, indicate that the apportionment formula used by Los Angeles County taxed only the value represented by actual time spent in the county. The precise calculation used by Los Angeles County in determining the duration of physical presence in the county is not disclosed in the opinions nor was it an issue in either of the cases. fn. 4

[5] The validity of a particular apportionment formula for the taxation of instrumentalities used in interstate commerce so far as the United States Constitution is concerned turns upon the commerce and due process clauses. "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' (Nashville C. & St. L. Ry. Co. v. Browning, 310 U.S. 362, 365 [84 L. Ed. 1254, 1255, 60 S. Ct. 968, 970]; Central R.R. Co. v. Pennsylvania, supra, 370 U.S. 607, 623 [8 L. Ed. 2d 720, 731, 82 S. Ct. 1297].) 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 **[246 Cal. App. 2d 440]** State. (See Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 [85 L. Ed. 267, 270, 61 S. Ct. 246, 249, 130 A.L.R. 1229, 1232-1233].) 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 [93 L. Ed. 585, 69 S. Ct. 432]; Braniff Airways, Inc. v. Nebraska State Board of Equalization, supra, 347 U.S. 590 [98 L. Ed. 967, 74 S. Ct. 757].) [6] A reasonable attempt must be made to tax only so much of the value as is fairly related to use within the taxing jurisdiction. (Union Tank Line Co. v. Wright, 249 U.S. 275, 282 [63 L. Ed. 602, 39 S. Ct. 276, 278].) Mathematical exactitude, however, is neither attainable nor constitutionally required. (Nashville C. & St. Louis Ry. Co. v. Browning, supra; see People v. Keith Ry. Equipment Co., 70 Cal. App. 2d 339, 348 [161 P.2d 244].)

In the instant case, so far as the commerce clause is concerned, plaintiff does not contend that the tax is discriminatory. In fact, it abandoned that ground of attack in the trial court. There is no contention that the inclusion of "flight time" in the apportionment formula will result in the imposition of cumulative taxes by other states. Nor does plaintiff contend that the tax is excessive in relation to the commerce carried on within the state. In sum, there is no showing that the inclusion of "flight time" will cause an undue burden on interstate commerce.

[7] Plaintiff argues that a tax on values represented by "flight time" has no relation to the opportunities, benefits, or protection afforded the owner by the state or county and, hence, violates due process. The contention is without merit. Although the United States through federal statutes regulating air commerce has exercised jurisdiction over the navigable air space, sovereignty in air space, including the power to tax, otherwise remains with the states. (Braniff Airways, Inc. v. Nebraska State Board of Equalization, supra, 347 U.S. 590 [98 L. Ed. 967, 74 S. Ct. 757].) The protection of state laws extends to air space. (See Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 593 [39 Cal. Rptr. 708, 394 P.2d 548].) In addition, states and local agencies must contend with numerous problems stemming from the use of air space for interstate air commerce, particularly as such use affects the use of subjacent lands. For example, they must deal with problems of noise, air crashes, and use regulations of lands under take- off and approach patterns. It is thus unrealistic to suggest that the owner of aircraft does not begin to enjoy the benefits, **[246 Cal. App. 2d 441]** opportunities, and protection afforded by the state until the moment the plane touches down and ceases to enjoy them the instant the plane is again airborne.

The use of "flight time" as a factor in determining average physical presence of migratory flight equipment used in interstate commerce is not unusual. For example, the State of Missouri employs an apportionment formula based on the average of two factors: (1) The ratio which the certificated route miles within the state bears to the total certificated route miles of the airline; (2) the ratio which the miles flown in the state bears to the total miles flown. (Rev. Stats. Mo. § 155.040.) fn. 5 In United Airlines, Inc. v. State Tax Com. (Mo.) 377 S.W.2d 444, and Delta Airlines, Inc. v. Missouri State Tax Com. (Mo.) 378 S.W.2d 515, assessments made under the statute were challenged by nondomiciliary airlines, but not on the ground that the statutory formula improperly included "flight time." In both cases, the principal issue was whether, under the statute, the total valuation to which the ratios were to be applied should be the value of the taxpayer's airline system as a whole--its unitary value--or only the total value of aircraft actually used within the state. The court held that the Missouri statute permitted the use of only the value of the aircraft operated within the state rather than the aggregate value of all aircraft owned and used by the taxpayer in its business. In Delta Airlines v. Missouri State Tax Com., supra, an additional issue was considered. The airline contended that the use of the certificated route-mile ratio was arbitrary and unreasonable and that, as expressed by the court, "... the only fair test of the reasonableness of an assessment is the ratio of time spent in Missouri to time spent elsewhere by the Missouri planes." The court held that since the statute provided for the average of two ratios, scheduled route miles and miles actually flown, the formula was neither arbitrary nor unreasonable. In the instant case, there has been no attempt either to include in the total valuation any aircraft not used within the state or to use route miles as a factor.

[8] We conclude that the inclusion of "flight time" in the allocation formula used by defendant was proper. To exclude "flight time" would compound the inequities referred to by Justice Traynor in his dissent in Flying Tiger Lines, Inc. v. County of Los Angeles, supra, 51 Cal. 2d 314. It would **[246 Cal. App. 2d 442]** permit values represented by "flight time" to escape taxation. (Central R.R. Co. v. Pennsylvania, supra, 370 U.S. 607 [8 L. Ed. 2d 720, 82 S. Ct. 1297].)

[9] The remaining question is the propriety of including time in the air over counties other than San Bernardino. With respect to direct flights to and from out-of-state bases and Norton Air Force Base, the assessor included all "flight time" within the State of California which, although the record is silent in this respect, might have included some air time over counties other than the defendant. Since values represented by such "flight time" have no other taxable situs in the state, they were properly treated as having situs in the defendant. For the purpose of intrastate assessment, the county in which regular stopovers are made is the only one with which such values have substantial contacts. With respect to flights to and from San Bernardino and bases in other counties in the state, the assessor took one-half of the "flight time." Although the record does not disclose whether the same method of apportionment was used, it was stipulated that the other counties imposed a "similar" tax. Plaintiff does not contend that the taxes imposed on its aircraft by the various counties in the state are cumulative or that the total value assessed by the counties exceeds the value properly apportionable to the state as a whole based on average physical presence in the state.

We conclude that the apportionment method here employed was proper and the assessment levied by defendant was valid.

This case does point up the desirability of centralizing the assessment of aircraft as in the case of railroads, utilities and certain other classes of property. fn. 6 (Cal. Const., art. XIII, § 14.) That, however, is a matter of legislative policy.

Judgment affirmed.

McCabe, P. J., and Kerrigan, J., concurred.

FN 1. Among the grounds of asserted invalidity of the assessment abandoned by plaintiff in the trial court, were the allegations that the state did not reserve jurisdiction to tax property on Norton Air Force Base and that plaintiff's property was exempt as an instrumentality of the United States.

FN 2. The view expressed by Justice Traynor that the domicile may assess the full value unless the taxpayer shows that taxable situs has been acquired elsewhere was the one adopted by the U.S. Supreme Court in Central R.R. Co. v. Pennsylvania, 370 U.S. 607 [8 L. Ed. 2d 720, 82 S. Ct. 1297].

FN 3. The question whether a state over which aircraft is regularly flown but in which no scheduled stops are made has jurisdiction to tax has never been squarely decided. (Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev., 953, 992; Multiple Taxation of Air Commerce, H. R. Document No. 141, 79th Cong. 1st Sess. 53-54.) See concurring opinion of Justice Jackson in Northwest Airlines v. Minnesota, 322 U.S. 292, 304 [88 L. Ed. 1283, 64 S. Ct. 950, 956, 153 A.L.R. 245], for the view that the subjacent state does not have jurisdiction to tax.

FN 4. The opinion in Scandinavian Airline System, Inc v. County of Los Angeles, 56 Cal. 2d 11 at p. 17 [14 Cal. Rptr. 25, 363 P.2d 25] reveals that the method then used by Los Angeles County in determining average physical presence in the county consisted of determining ground time in Los Angeles and adding thereto one hour flying time per trip.

FN 5. Compare: Nevada Rev. Stats., § 361.320.

FN 6. In 1961 the Legislature enacted section 5301 et seq., of the Revenue and Taxation Code providing for a uniform method of levying, assessing and collecting taxes on aircraft based in California, but the statute expressly excludes aircraft operated exclusively by an air carrier or foreign air carrier as defined in the "Federal Aviation Act of 1958," engaged in air transportation as defined in the act under a certificate or permit issued by the Civil Aeronautics Board of the United States authorizing the carrier to engage in such air transportation. (Rev. & Tax. Code, § 5303.)

FOR EDUCATIONAL USE ONLY

99 S.Ct. 1813

60 L.Ed.2d 336, 1 ITRD 1708, 1979 A.M.C. 881

(Cite as: 441 U.S. 434, 99 S.Ct. 1813)

JAPAN LINE, LTD., et al., Appellants,

v.

COUNTY OF LOS ANGELES et al.

No. 77-1378.

Supreme Court of the United States

Argued Jan. 8, 1979.

Decided April 30, 1979.

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Commerce Clause of the Constitution, may ***436** impose a nondiscriminatory ad valorem property tax on foreign-owned instrumentalities (cargo containers) of international commerce.

I

The facts were "stipulated on appeal," App. 29, and were found by the trial court, id., at 33-36, as follows:

Appellants are six Japanese shipping companies; they are incorporated under the laws of Japan, and they have their principal places of business and commercial domiciles in that country. Id., at 34. Appellants operate vessels used exclusively in foreign commerce; these vessels are registered in Japan and have their home ports there. Ibid. The vessels are specifically designed and constructed to accommodate large cargo shipping containers. [FN1] The containers, like the ships, are owned by appellants, have their home ports in Japan, and are used exclusively for hire in the transportation of cargo in foreign commerce. Id., at 35. Each container is in constant transit save for time spent undergoing repair or awaiting loading and unloading of cargo. All appellants' containers are subject to property tax in Japan and, in fact, are taxed there.

FN1. "A container is a permanent reusable article of transport equipment . . . durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package." Simon, The Law of Shipping Containers, 5 J. Mar. L. & Com. 507, 513 (1974).

See Customs Convention on Containers, Art. I(b), may 18, 1956, [1969] 20 U.S.T. 301, 304, T. I. A. S. No. 6634. Although containers may be as small as 1 cubic meter (35.3 cubic feet), 49 CFR ' 420.3 (c)(5) (1977), they are typically 8 feet high, 8 feet wide, and between 8 and 40 feet long. Simon, 5 J. Mar. L. & Com., at 510.

Appellees are political subdivisions of the State of California. Appellants' containers, in the course of their international ***437** journeys, pass through appellees' jurisdictions intermittently. Although none of appellants' containers stays permanently in California, some are there at any given time; a container's average stay in the State is less than three weeks. Ibid. The containers engage in no intrastate or interstate transportation of cargo except as continuations of international voyages. Id., at 30. Any movements or periods of nonmovement of containers in appellees' jurisdictions are essential to, and inseparable from, the containers' efficient use as instrumentalities of foreign commerce. Id., at 35-36.

Property present in California on March 1 (the "lien date" under California law) of any year is subject to ad valorem property tax. Cal.Rev. & Tax.Code Ann. " 117, 405, 2192 (West 1970 and Supp.1979). A number of appellants' containers were physically present in appellees' jurisdictions on the lien dates in 1970, 1971, and 1972; this number was fairly representative of the containers' "average presence" during each year. App. 35. Appellees levied property taxes in excess of $550,000 on the assessed value of the containers present on March 1 of the three years in question. Id., at 36. During the same period, similar containers ****1816** owned or controlled by steamship companies domiciled in the United States, that appeared from time to time in Japan during the course of international commerce, were not subject to property taxation in Japan, and therefore were not, in fact, taxed in that country. Id., at 35.

Appellants paid the taxes, so levied, under protest and sued for their refund in the Superior Court for the County of Los Angeles. That court awarded judgment in appellants' favor. [FN2] Id., at 39-40. The court found that appellants' containers were instrumentalities of foreign commerce that had their home ports in Japan where they were taxed. The federal courts, however, in the trial court's view, had "consistently held that vessels which are instrumentalities of foreign commerce ***438** and engaged in foreign commerce can be taxed in their home port only." Id., at 24. This rule, said the court, was necessary to avoid multiple taxation, id., at 23; whereas apportionment of taxes can be used to prevent duplicative taxation in interstate commerce, apportionment is "not practical" when one of the taxing entities is a foreign sovereign. In such cases, "[t]here is no tribunal that can adjudicate [competing] rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties." Id., at 24. The application of appellees' taxes in derogation of the "home port doctrine," the court concluded, subjected international commerce to multiple taxation and thus was unconstitutional under the Commerce Clause. In so holding, the court followed Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25, cert. denied, 368 U.S. 899, 82 S.Ct. 175, 7 L.Ed.2d 94 (1961) (hereinafter SAS) (ruling that ad valorem property tax levied by California upon aircraft owned, based, and registered abroad and used exclusively in international commerce, was unconstitutional under the Commerce Clause).

FN2. The opinion of the Superior Court is not officially reported.

The Court of Appeal reversed. 132 Cal.Rptr. 531 (1976). The court appeared to conclude that SAS had been effectively overruled by Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 117 Cal.Rptr. 448, 528 P.2d 56 (1974). In Sea-Land, the Supreme Court of California had criticized the home port doctrine and labeled it "anachronistic," and had upheld apportioned property taxation of containers owned by a domestic corporation and used in both intercoastal and foreign commerce. Id., at 787, 117 Cal.Rptr., at 458, 528 P.2d, at 66. The Court of Appeal rejected appellants' arguments that a different result was required here in view of their containers' foreign ownership and exclusively international use. The court likewise dismissed any argument as to multiple taxation. "[T]he possibility of international double taxation of instrumentalities of foreign commerce," it concluded, is "no reason to limit the local power to ***439** tax them upon a nondiscriminatory apportioned basis." 132 Cal.Rptr., at 533. [FN3]

FN3. The Court of Appeal also rejected, 132 Cal.Rptr., at 534, appellants' argument that California's tax was prohibited by Art. XI, " 1 and 4, and by Art. XXII, ' 2, of the Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, Apr. 2, 1953, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (providing that Japanese nationals residing in the United States may not be subjected to payment of taxes "more burdensome than those borne by" United States nationals, and according Japan "most favored nation" status). Appellants repeat this argument here, and we reject it. The provisions appellants cite interdict discrimination against Japanese nationals; there is no evidence that California has treated Japanese containers differently from domestic containers for purposes of applying its property tax.

The Court of Appeal likewise rejected, 132 Cal.Rptr., at 533, appellants' argument that California's tax constituted an indirect "Duty of Tonnage" proscribed by U.S.Const., Art. I, ' 10, cl. 3. Appellants repeat this argument here; in view of our disposition, we do not reach it. The Court of Appeal noted that appellants did not challenge California's tax on due process grounds. See 132 Cal.Rptr., at 532 n. 2. Although appellants proffer a due process challenge here, we need not reach it either.

****1817** The California Supreme Court granted a hearing of the case and it, too, reversed the judgment of the Superior Court, essentially adopting the opinion of the Court of Appeal. 20 Cal.3d 180, 141 Cal.Rptr. 905, 571 P.2d 254 (1977). It concluded that "the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement." Id., at 185, 141 Cal.Rptr., at 908, 571 P.2d, at 257. Deeming the containers' foreign ownership and use irrelevant for purposes of constitutional analysis, id., at 186, 141 Cal.Rptr., at 908, 571 P.2d, at 257-258, the court rejected appellants' Commerce Clause challenge and sustained the validity of the tax as applied. [FN4]

FN4. The California Supreme Court also rejected appellants' argument that California's tax constituted "Imposts or Duties" proscribed by U.S.Const., Art. I, ' 10, cl. 2. 20 Cal.3d, at 186-188, 141 Cal.Rptr., at 908-910, 571 P.2d, at 258-259. Appellants reiterate this argument here; in view of our disposition, we do not consider it. In their petition for rehearing, appellants argued that the tax contravened Art. III, " 1 and 2 of the General Agreement on Tariffs and Trade (GATT), 61 Stat. A18 (providing that "imported products" may not be subjected to heavier taxes, or to less favorable treatment, than like products of domestic origin). Pet. for Rehearing 35-40. The court rejected this latter argument sub silentio. 20 Cal.3d, at 190, 141 Cal.Rptr. 905, 571 P.2d 254. Appellants repeat this argument here, and we deem it frivolous. Assuming, arguendo, that appellants' containers, as instrumentalities of commerce entering this country subject to re-exportation, could be labeled "imported products" within the meaning of GATT, the provisions on which appellants rely prohibit only discriminatory treatment. As noted in n. 3, supra, there is no evidence that California has treated Japanese containers differently from domestic containers for purposes of applying its property tax.

***440** Appellants appealed. We postponed consideration of our jurisdiction to the hearing on the merits. 436 U.S. 955, 98 S.Ct. 3067, 57 L.Ed.2d 1120 (1978).

II

This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. ' 1257(2). In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest.

[1] Appellees suggest that the California courts did not in reality uphold the tax statute against constitutional attack, but simply refused to extend to appellants a constitutional immunity from taxation. Motion to Dismiss or Affirm 2. Appellees' suggested recharacterization is unpersuasive. Appellants squarely challenged the constitutionality of the tax ***441** statute, as applied and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of ' 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. E. g., Cohen v. California, 403 U.S. 15, 17-18, 91 S.Ct. 1780, 1784, 29 L.Ed.2d 284 (1971); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686, and n. 1, 85 S.Ct. 1242, 1243, 14 L.Ed.2d 165 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n. 3, 83 S.Ct. 631, 634, 9 L.Ed.2d 584 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-290, 42 S.Ct. 106, 107-108, 66 L.Ed. 239 (1921). We conclude that we have appellate jurisdiction of this case.

III

A

The "home port doctrine" was first alluded to in Hays v. Pacific Mail S. S. Co., 17 ****1818** How. 596, 58 U.S. 596, 15 L.Ed. 254 (1855). In Hays, California sought to impose property taxes on oceangoing vessels intermittently touching its ports. The vessels' home port was New York City, where they were owned, registered, and based; they engaged in intercoastal commerce by way of the Isthmus of Panama, and remained in California briefly to unload cargo and undergo repairs. This Court held that the ships had established no tax situs in California:

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." Id., at 599-600.

Because the vessels were properly taxable in their home port, ***442** this Court concluded, they could not be taxed in California at all. [FN5]

FN5. The "home port doctrine" was reaffirmed, as to oceangoing vessels, in Morgan v. Parham, 16 Wall. 471, 476-477, 83 U.S. 471, 476-477, 21 L.Ed. 302 (1873), and in Southern Pacific Co. v. Kentucky, 222 U.S. 63, 69, 32 S.Ct. 13, 15, 56 L.Ed. 96 (1911). It was applied to vessels moving in inland waters in St. Louis v. Ferry Co., 11 Wall. 423, 20 L.Ed. 423 (1871), and in Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 421- 423, 26 S.Ct. 679, 682-683, 50 L.Ed. 1082 (1906).

The "home port doctrine" enunciated in Hays was a corollary of the medieval maxim mobilia sequuntur personam ("movables follow the person," see Black's Law Dictionary 1154 (rev. 4th ed. 1968)) and resulted in personal property being taxable in full at the domicile of the owner. This theory of taxation, of course, has fallen into desuetude, and the "home port doctrine," as a rule for taxation of moving equipment, has yielded to a rule of fair apportionment among the States. This Court, accordingly, has held that various instrumentalities of commerce may be taxed, on a properly apportioned basis, by the nondomiciliary States through which they travel. E. g., Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1891); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949); Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954). In discarding the "home port" theory for the theory of apportionment, however, the Court consistently has distinguished the case of oceangoing vessels. E. g., Pullman's Palace, 141 U.S., at 23-24, 11 S.Ct. at 878 (approving apportioned tax on railroad rolling stock, but distinguishing vessels "engaged in interstate or foreign commerce upon the high seas"); Ott, 336 U.S., at 173- 174, 69 S.Ct., at 434 (approving apportioned tax on barges navigating inland waterways, but "not reach[ing] the question of taxability of ocean carriage"); Braniff, 347 U.S., at 600, 74 S.Ct., at 763 (approving apportioned tax on domestic aircraft, but distinguishing vessels "used to plow the open seas"). Relying on these cases, appellants argue that the "home port doctrine," yet vital, continues to prescribe the proper rule for state taxation of oceangoing ships. Since ***443** containers are "functionally a part of the ship," Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800, 815 (CA2 1971), appellants conclude, the containers, like the ships, may be taxed only at their home ports in Japan, and thus are immune from tax in California.

Although appellants' argument, as will be seen below, has an inner logic, we decline to cast our analysis of the present case in this mold. The "home port doctrine" can claim no unequivocal constitutional source; in assessing the legitimacy of California's tax, the Hays Court did not rely on the Commerce Clause, nor could it, in 1854, have relied on the Due Process Clause of the Fourteenth Amendment. The basis of the "home port doctrine," rather, was common-****1819** law jurisdiction to tax. [FN6] Given its origins, the doctrine could be said to be "anachronistic"; given its underpinnings, it may indeed be said to have been "abandoned." Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 320, 64 S.Ct. 950, 964, 88 L.Ed. 1283 (1944) (Stone, C. J., dissenting). As a theoretical matter, then, to rehabilitate the "home port doctrine" as a tool of Commerce Clause analysis would be somewhat odd. More importantly, to hold in this case that the "home port doctrine" survives would be to prove too much. If an oceangoing vessel could indeed be taxed only at its home port, taxation by a nondomiciliary State logically would be barred, regardless of whether the vessel were domestically or foreign owned, and regardless of whether it were engaged in domestic or foreign commerce. In Hays itself, the vessel was owned in New York and was engaged in interstate commerce through international waters. There is no need in this case to decide currently the broad proposition whether mere use of international routes is enough, under the "home port doctrine," to render an instrumentality immune ***444** from tax in a nondomiciliary State. The question here is a much more narrow one, that is, whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State. [FN7]

FN6. See, e. g., Note, 49 Calif.L.Rev. 968, 970-971 (1961); Note, State Taxation of International Air Transportation, 11 Stan.L.Rev. 518, 522, and n. 19 (1959); Page, Jurisdiction to Tax Tangible Movables, 1945 Wis.L.Rev. 125, 143-144.

FN7. Accordingly, we do not reach questions as to the taxability of foreign-owned instrumentalities engaged in interstate commerce, or of domestically owned instrumentalities engaged in foreign commerce. Cf. Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 117 Cal.Rptr. 448, 528 P.2d 56 (1974) (domestically owned containers used in intercoastal and foreign commerce held subject to apportioned property tax); Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal.2d 314, 333 P.2d 323 (1958) (domestically owned aircraft used in foreign commerce held subject to apportioned property tax).

B

The Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, ' 8, cl. 3. In construing Congress' power to "regulate Commerce . . . among the several States," the Court recently has affirmed that the Constitution confers no immunity from state taxation, and that "interstate commerce must bear its fair share of the state tax burden." Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 750, 98 S.Ct. 1388, 1399, 55 L.Ed.2d 682 (1978). Instrumentalities of interstate commerce are no exception to this rule, and the Court regularly has sustained property taxes as applied to various forms of transportation equipment. See Pullman's Palace, supra (railroad rolling stock); Ott, supra (barges on inland waterways); Braniff, supra (domestic aircraft). Cf. Central Greyhound Lines v. Mealey, 334 U.S. 653, 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633 (1948) (motor vehicles). If the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the ***445** services provided by the State," no impermissible burden on interstate commerce will be found. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977); Washington Revenue Dept., 435 U.S., at 750, 98 S.Ct. at 1399.

Appellees contend that cargo shipping containers, like other vehicles of commercial transport, are subject to property taxation, and that the taxes imposed here meet Complete Auto 's fourfold requirements. The containers, they argue, have a "substantial nexus" with California because some of them are present in that State at all times; jurisdiction to tax is based on "the habitual employment of the property within the ****1820** State," Braniff, 347 U.S., at 601, 74 S.Ct. at 764, and appellants' containers habitually are so employed. The tax, moreover, is "fairly apportioned," since it is levied only on the containers' "average presence" in California. [FN8] The tax "does not discriminate," thirdly, since it falls evenhandedly on all personal property in the State; indeed, as an ad valorem tax of general application, it is of necessity nondiscriminatory. The tax, finally, is "fairly related to the services provided by" California, services that include not only police and fire protection, but also the benefits of a trained work force and the advantages of a civilized society.

FN8. By taxing property present on the "lien date," California roughly apportions its property tax for mobile goods like containers. For example, if each of appellants' containers is in California for three weeks a year, the number present on any arbitrarily selected date would be roughly 3/52 of the total entering the State that year. Taxing 3/52 of the containers at full value, however, is the same as taxing all the containers at 3/52 value. Thus, California effectively apportions its tax to reflect the containers' "average presence," i. e., the time each container spends in the State per year.

[2] These observations are not without force. We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, Complete Auto would apply and be satisfied, and our Commerce Clause inquiry would be at an end. Appellants' containers, however, are instrumentalities of ***446** foreign commerce, both as a matter of fact [FN9] and as a matter of law. [FN10] The premise of appellees' argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. When construing Congress' power to "regulate Commerce with foreign Nations," a more extensive constitutional inquiry is required.

FN9. As noted above, the trial court found that appellants' containers are "instrumentalities of foreign commerce" that are "used constantly and exclusively for the transportation of cargo for hire in foreign commerce." App. 35, 36.

FN10. Appellants' containers entered the United States pursuant to the Customs Convention on Containers, see n. 1, supra, which grants containers "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions," provided they are used solely in foreign commerce and are subject to re-exportation. 20 U.S.T., at 304. Similarly, 19 CFR ' 10.41a(a)(3) (1978) designates containers "instruments of international traffic," with the result that they "may be released without entry or the payment of duty" under 19 U.S.C. ' 1322(a). See 19 CFR ' 10.41a(a)(1) (1978). A bilateral tax Convention between Japan and the United States associates containers with the vehicles that carry them, and provides that income "derived by a resident of a Contracting State . . . from the use, maintenance, and lease of containers and related equipment . . . in connection with the operation in international traffic of ships or aircraft . . . is exempt from tax in the other Contracting State." Convention Between the United States of America and Japan for the Avoidance of Double Taxation, Mar. 8, 1971, [1972] 23 U.S.T. 967, 1084-1085, T.I.A.S. No. 7365.

When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in Complete Auto, come into play. The first is the enhanced risk of multiple taxation. It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. E. g., Evco v. Jones, 409 U.S. 91, 94, 93 S.Ct. 349, 351, 34 L.Ed.2d 325 (1972); Central R. Co. v. Pennsylvania, 370 U.S. 607, 612, 82 S.Ct. 1297, 1301, 8 L.Ed.2d 720 (1962); Standard Oil Co. v. Peck, 342 U.S. 382, 384-385, 72 S.Ct. 309, 310, 96 L.Ed. 427 (1952); Ott, 336 U.S., at 174, 69 S.Ct., at 434; J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311, 58 S.Ct. 913, 915, 82 L.Ed. 1365 (1938). In order to prevent ***447** multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. . . . Otherwise there would be multiple taxation ****1821** of interstate operations." Standard Oil Co. v. Peck, 342 U.S., at 384-385, 72 S.Ct. at 310; Braniff, 347 U.S., at 601, 74 S.Ct. at 764. The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies.

Yet neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value. [FN11] If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. Hence, whereas the fact of apportionment in interstate commerce means that "multiple burdens logically cannot occur," Washington Revenue Dept., 435 U.S., at 746-747, 98 S.Ct. at 1397-98, the same conclusion, as to foreign commerce, logically cannot be drawn. Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed ***448** on no more than one full value, a state tax, even though "fairly apportioned" to reflect an instrumentality's presence within the State, may subject foreign commerce " 'to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.' " Evco v. Jones, 409 U.S., at 94, 93 S.Ct. at 351, quoting J. D. Adams Mfg. Co., 304 U.S., at 311, 58 S.Ct. at 915.

FN11. Oceangoing vessels, for example, are generally taxed only in their nation of registry; this fact in part explains the phenomenon of "flags of convenience" (a term deemed derogatory in some quarters), whereby vessels are registered under the flags of countries that permit the operation of ships "at a nominal level of taxation." See B. Boczek, Flags of Convenience 5, 56-57 (1962). Aircraft engaged in international traffic, apparently, are likewise "subject to taxation on an unapportioned basis by their country of origin." Note, 11 Stan.L.Rev., supra, n. 6, at 519, and n. 11. See, e. g., SAS, 56 Cal.3d, at 17, and n. 3, 14 Cal.Rptr., at 28, 363 P.2d, at 28, and n. 3.

Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." Board of Trustees v. United States, 289 U.S. 48, 59, 53 S.Ct. 509, 510, 77 L.Ed. 1025 (1933). Although the Constitution, Art. I, ' 8, cl. 3, grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. [FN12] Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction. [FN13] In approving state taxes ****1822** on the instrumentalities ***449** of interstate commerce, the Court consistently has distinguished oceangoing traffic, supra, at 1818; these cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule. Indeed, in Pullman's Palace, the Court wrote that the " 'vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature.' " 141 U.S., at 24, 11 S.Ct. at 878, quoting Railroad Co. v. Maryland, 21 Wall. 456, 470, 22 L.Ed. 678 (1875). Finally, in discussing the Import-Export Clause, this Court, in Michelin Tire Corp. v. Wages, 423 U.S. 276, 285, 96 S.Ct. 535, 540, 46 L.Ed.2d 495 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause. [FN14]

FN12. E. g., The Federalist No. 42, pp. 279-283 (J. Cooke ed. 1961) (Madison); 3 M. Farrand, The Records of the Federal Convention of 1787, p. 478 (1911) (Madison). See Note, State Taxation of International Air Carriers, 57 Nw.U.L.Rev. 92, 101, and n. 42 (1962); Note, 11 Stan.L.Rev., supra, n. 6, at 525-526, and n. 29; Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn.L.Rev. 432, 465-475 (1941) (concluding, after an exhaustive survey of contemporary materials: "Despite the formal parallelism of the grants, there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce 'among the several states' as over that 'with foreign nations.' " Id., at 475).

FN13. E. g., Buttfield v. Stranahan, 192 U.S. 470, 492-493, 24 S.Ct. 349, 354, 48 L.Ed. 525 (1904) ("exclusive and absolute" power of Congress over foreign commerce); Bowman v. Chicago & N. R. Co., 125 U.S. 465, 482, 8 S.Ct. 689, 697, 31 L.Ed. 700 (1888) ("It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation"); Henderson v. Mayor of New York, 92 U.S. 259, 273, 23 L.Ed. 543 (1876) (regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected"); Gibbons v. Ogden, 9 Wheat. 1, 228-229, 22 U.S. 1, 6 L.Ed. 23 (1824) (Johnson, J., concurring). See also Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932). In National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could be so limited.

FN14. The policies animating the Import-Export Clause and the Commerce Clause are much the same. In Michelin, the Court noted that the Import- Export Clause met three main concerns: "[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . ; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States . . . were prohibited from levying taxes on [goods in transit]." 423 U.S., at 285-286, 96 S.Ct. at 540-541 (footnotes omitted). Abel, see n. 12, supra, observed that the Commerce Clause was directed to similar concerns. See 25 Minn.L.Rev., at 448, and n. 67, 452, and n. 81, 456- 457, and n. 110 (need to deal in unified manner with foreign nations); id., at 446-451 (need to preserve federal revenue); id., at 448-449, and nn. 69-70, 470-471, 472-473 (need to prevent disharmony among States on account of import duties). In Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), we noted that the third Michelin factor--preserving harmony among the States--mandated the same inquiry as to the effect of a state tax as the Interstate Commerce Clause. See id., at 754-755, 98 S.Ct., at 1401-1402. In this case, similarly, the first Michelin factor--the need to speak with one voice when regulating commercial relations with foreign governments--mandates the same inquiry as to the effect of a state tax as the Foreign Commerce Clause. In Washington Revenue Dept., the Court, holding that the state tax at issue did not prevent "speaking with one voice," noted: "No foreign business or vessel is taxed." 435 U.S., at 754, 98 S.Ct., at 1401.

***450** A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. [FN15] If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. [FN16] ****1823** If other States followed the taxing State's ***451** example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.

FN15. See Note, Developments in the Law--Federal Limitations on State Taxation of Interstate Business, 75 Harv.L.Rev. 953, 986 (1962) (noting the difficulty of allocating "international bridge time" for aircraft engaged in international commerce, with consequent risk of multiple taxation from overlapping apportionment formulae, and concluding that apportioned state taxation of foreign-owned aircraft should be forbidden).

FN16. Cf. Chy Lung v. Freeman, 92 U.S. 275, 279, 23 L.Ed. 550 (1876) (invalidating California's bond requirement for Chinese immigrants):

"[I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"

[3] For these reasons, we believe that an inquiry more elaborate than that mandated by Complete Auto is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in Complete Auto, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

C

Analysis of California's tax under these principles dictates that the tax, as applied to appellants' containers is impermissible. Assuming, arguendo, that the tax passes muster under Complete Auto, it cannot withstand scrutiny under either of the additional tests that a tax on foreign commerce must satisfy.

First, California's tax results in multiple taxation of the instrumentalities of foreign commerce. By stipulation, appellants' containers are owned, based, and registered in Japan; they are used exclusively in international commerce; and they ***452** remain outside Japan only so long as needed to complete their international missions. Under these circumstances, Japan has the right and the power to tax the containers in full. California's tax, however, creates more than the risk of multiple taxation; it produces multiple taxation in fact. Appellants' containers not only "are subject to property tax . . . in Japan," App. 32, but, as the trial court found, "are, in fact, taxed in Japan." Id., at 35. Thus, if appellees' levies were sustained, appellants "would be paying a double tax." Id., at 23. [FN17]

FN17. The stipulation of facts, App. 32, like the trial court's finding, id., at 35, states that "[a]ll containers of [appellants] are subject to property tax and are, in fact, taxed in Japan." The record does not further elaborate on the nature of Japan's property tax. Appellants have uniformly insisted, Brief 9; Tr. of Oral Arg. 3, that Japan's property tax is unapportioned, i. e., that it is imposed on the containers' full value, and we so understand the trial court's finding. Although appellees do not seriously challenge this understanding, Brief 10-11, and n. 2, amicus curiae Multistate Tax Commission suggests that the record is inadequate to establish double taxation in fact: Japan, amicus says, may offer "credits . . . for taxes paid elsewhere." Brief 8. Amicus provides no evidence to support this theory. Both the Solicitor General, Brief for United States as Amicus Curiae 19 n. 9, and the Department of State, id., at 17a, assure us that Japan taxes appellants' containers at their "full value," and we accept this interpretation of the trial court's factual finding.

Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere risk of multiple taxation would invalidate a state tax, or whether this risk would be evaluated differently in foreign, as opposed to interstate, commerce. Compare Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276-277, 98 S.Ct. 2340, 2346, 57 L.Ed.2d 197 (1978), and Washington Revenue Dept., 435 U.S., at 746, 98 S.Ct. at 1397, with, e. g., Central R. Co. v. Pennsylvania, 370 U.S. 607, 615, 82 S.Ct. 1297, 1303, 8 L.Ed.2d 720 (1962); Ott v. Mississippi Barge Line Co., 336 U.S. 169, 175, 69 S.Ct. 432, 435, 93 L.Ed. 585 (1949); and Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 326, 64 S.Ct. 950, 967, 88 L.Ed. 1283 (1944) (Stone, C. J., dissenting).

Second, California's tax prevents this Nation from "speaking with one voice" in regulating **1824 foreign trade. The desirability of uniform treatment of containers used exclusively in foreign commerce is evidenced by the Customs Convention on Containers, which the United States and Japan have signed. See *453 n. 10, supra. Under this Convention, containers temporarily imported are admitted free of "all duties and taxes whatsoever chargeable by reason of importation." 20 U.S.T., at 304. The Convention reflects a national policy to remove impediments to the use of containers as "instruments of international traffic." 19 U.S.C. ' 1322(a). California's tax, however, will frustrate attainment of federal uniformity. It is stipulated that American-owned containers are not taxed in Japan. App. 35. California's tax thus creates an asymmetry in international maritime taxation operating to Japan's disadvantage. The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole. [FN18] If other States follow California's example (Oregon already has done so [FN19]), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make "speaking with one voice" impossible. California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade.

FN18. Retaliation by some nations could be automatic. West Germany's wealth tax statute, for example, provides an exemption for foreign-owned instrumentalities of commerce, but only if the owner's country grants a reciprocal exemption for German-owned instrumentalities. Vermogensteuergesetz (VStG), Art. 1, ' 2(3), reprinted in I Bundesgesetzblatt (BGB1) 950 (Apr. 23, 1974). The European Economic Community (EEC), when apprised of California's tax on foreign-owned containers, apparently determined to consider "suitable counter-measures." Press Release, Council of the European Communities 521st Council Meeting-- Transport (Luxenbourg, June 12, 1978), p. 21.

FN19. Ore.Op.Atty.Gen.No.7709 (Jan. 31, 1979) (citing decision below).

[4] Because California's ad valorem tax, as applied to appellants' containers, results in multiple taxation of the instrumentalities of foreign commerce, and because it prevents the Federal Government from "speaking with one voice" in international trade, the tax is inconsistent with Congress' power to "regulate *454 Commerce with foreign Nations." We hold the tax, as applied, unconstitutional under the Commerce Clause.

D

Appellees proffer several objections to this holding. They contend, first, that any multiple taxation in this case is attributable, not to California, but to Japan. California, they say, is just trying to take its share; it should not be foreclosed by Japan's election to tax the containers in full. California's tax, however, must be evaluated in the realistic framework of the custom of nations. Japan has the right and the power to tax appellants' containers at their full value; nothing could prevent it from doing so. Appellees' argument may have force in the interstate commerce context. Cf. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277, and n. 12, 98 S.Ct. 2340, 2346, 57 L.Ed.2d 197 (1978). In interstate commerce, if the domiciliary State is "to blame" for exacting an excessive tax, this Court is able to insist upon rationalization of the apportionment. As noted above, however, this Court is powerless to correct malapportionment of taxes imposed from abroad in foreign commerce.

Appellees contend, secondly, that any multiple taxation created by California's tax can be cured by congressional action or by international agreement. We find no merit in this contention. The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not pre-empted the field by affirmative regulation. But it long has been "accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national **1825 commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). Accord, Hughes v. Oklahoma, 441 U.S. 322, *455 326 and n. 2, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977). Appellees' argument, moreover, defeats, rather than supports, the cause it aims to promote. For to say that California has created a problem susceptible only of congressional--indeed, only of international--solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies.

Third, appellees argue that, even if California's tax results in multiple taxation, that fact, after Moorman is insufficient to condemn a state tax under the Commerce Clause. In Moorman, the Court refused to invalidate Iowa's single-factor income tax apportionment formula, even though it posed a credible threat of overlapping taxation because of the use of three-factor formulae by other States. See also the several opinions in Moorman in dissent. 437 U.S., at 281, 282, and 283, 98 S.Ct. at 2348-2349. That case, however, is quite different from this one. In Moorman, the existence of multiple taxation, on the record then before the Court, was "speculative," id., at 276, 98 S.Ct. at 2346; on the record of the present case, multiple taxation is a fact. In Moorman, the problem arose, not from lack of apportionment, but from mathematical imprecision in apportionment formulae. Yet, this Court consistently had held that the Commerce Clause "does not call for mathematical exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside." Northwest Airlines, Inc. v. Minnesota, 322 U.S., at 325, 64 S.Ct. at 967 (Stone, C. J., dissenting). Accord, Moorman, 437 U.S., at 274, 98 S.Ct. at 2345 (citing cases). See Hellerstein, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand.L.Rev. 335, 347 (1976). This case, by contrast, involves no mere mathematical imprecision in apportionment; it involves a situation where true apportionment does not exist and cannot be policed by this Court at all. Moorman, finally, concerned *456 interstate commerce. This case concerns foreign commerce. Even a slight overlapping of tax--a problem that might be deemed de minimis in a domestic context--assumes importance when sensitive matters of foreign relations and national sovereignty are concerned. [FN20]

FN20. Appellees' reliance on Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed.

455 (1948), is also misplaced. In that case, the appellant, a Michigan corporation, transported passengers from Detroit to an amusement park on an island in the Province of Ontario; the appellant refused to accept Negro passengers and was prosecuted under a Michigan civil rights statute. In sustaining the statute's application against Commerce Clause attack, the Court emphasized that the appellant conducted "foreign commerce" in name only. The sole business on the island was the amusement park, and it catered solely to American patrons. There were "no established means of access from the Canadian shore to the island," id., at 36, 68 S.Ct. at 362, and the island was "economically and socially . . . an amusement adjunct of the city of Detroit." Id., at 35, 68 S.Ct. at 362. The "highly closed and localized manner" in which the business was run insulated it "from all commercial or social intercourse and traffic with the people of another country usually characteristic of foreign commerce." Id., at 36, 68 S.Ct. at 362. The Court noted that the possibility of conflicting Canadian regulation was "so remote that it [was] hardly more than conceivable," id., at 37, 68 S.Ct. at 363, and concluded that, on the facts of the case, it was "difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce, affecting relations with foreign nations, or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so." Id., at 40, 68 S.Ct. at 364.

Bob-Lo is consistent with both the analysis and the result in the present case. Whereas in Bob-Lo the risk that foreign commerce would be burdened by inconsistent international regulation was "remote," the risk that foreign commerce will be burdened by international multiple taxation here has been realized in fact. And whereas the Michigan statute posed no threat at all to the Federal Government's ability to "speak with one voice" in regulating foreign trade, the impairment of federal uniformity worked by California's statute is substantial.

****1826** Finally, appellees present policy arguments. If California cannot tax appellants' containers, they complain, the State will lose revenue, even though the containers plainly have a nexus with California; the State will go uncompensated for the services it undeniably renders the containers; and, by ***457** exempting appellants' containers from tax, the State in effect will be forced to discriminate against domestic, in favor of foreign, commerce. These arguments are not without weight, and, to the extent appellees cannot recoup the value of their services through user fees, they may indeed be disadvantaged by our decision today. These arguments, however, are directed to the wrong forum. "Whatever subjects of this [the commercial] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." Cooley v. Board of Wardens, 12 How. 299, 319, 53 U.S. 299, 13 L.Ed. 996 (1852). The problems to which appellees refer are problems that admit only of a federal remedy. They do not admit of a unilateral solution by a State.

The judgment of the Supreme Court of California is reversed.

It is so ordered.

Substantially for the reasons set forth by Justice Manuel in his opinion for the unanimous Supreme Court of California, 20 Cal.3d 180, 141 Cal.Rptr. 905, 571 P.2d 254, Mr. Justice REHNQUIST is of the opinion that the judgment of that court should be affirmed.

Filed 6/21/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NETJETS AVIATION, INC., et al. Plaintiffs and Respondents, v. WEBSTER J. GUILLORY, as County Assessor, etc., Defendant and Appellant.	G044970 (Super. Ct. No. 30-2008-00107805) O P I N I O N
FLIGHT OPTIONS, LLC, Plaintiff and Respondent, v. WEBSTER J. GUILLORY, as County Assessor, etc., Defendant and Appellant.	(Super. Ct. No. 30-2008-00110932)

CITATIONSHARES MANAGEMENT, LLC, Plaintiff and Respondent, v. JOSEPH E. HOLLAND, as County Assessor, etc., Defendant and Appellant.	G044980 (Super. Ct. No. 30-2009-00288116)
BOMBARDIER AEROSPACE CORPORATION, Plaintiff and Respondent, v. JOSEPH E. HOLLAND, as County Assessor, etc., Defendant and Appellant.	(Super. Ct. No. 30-2009-00303518)

Appeals from judgments of the Superior Court of Orange County, William M. Monroe, Judge. Reversed.

Nicholas S. Chrisos, County Counsel, James C. Harman and Aurelio Torre, Deputy County Counsel, for Defendant and Appellant Webster J. Guillory.

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Randy Ferris, Robert W. Lambert and Kiren Kaur Chohan for the California State Board of Equalization as Amicus Curiae on behalf of Defendants and Appellants.

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Cahill, Davis & O‟Neall, John D. Cahill, Cris K. O‟Neall and Andrew W. Bodeau for Plaintiff and Respondent CitationShares Management, LLC.

Bewley, Lassleben & Miller, Jeffrey S. Baird and Joseph A. Vinatieri for Plaintiff and Respondent Bombardier Aerospace Corporation.

Wm. Gregory Turner for the Council on State Taxation as Amicus Curiae on behalf of Plaintiffs and Respondents.

*   *   *

INTRODUCTION

Respondents sell fractional interests in private jets, and manage those jets for the fractional owners. In 2007, the California Legislature enacted new legislation to assess a personal property tax against the managers of fractionally owned aircraft. The legislation added sections 1160, 1161, 1162, and 5368 to the Revenue and Taxation Code, and amended Revenue and Taxation Code sections 441 and 452 (the Legislation). (All further statutory references are to the Revenue and Taxation Code, unless otherwise specified.) Respondents challenged the Legislation, and the trial court concluded it was unconstitutional or otherwise unlawful.

We hold the tax on the fractionally owned aircraft assessed by the Legislation is constitutional and lawful, as against the substantive challenges raised by respondents. We agree with the trial court‟s ruling, however, that the new assessment cannot be applied retroactively. Accordingly, we hold retroactive application of the new tax assessment is unconstitutional.

We reverse and direct the trial court to enter judgments providing that the retroactivity provisions of the Legislation are unconstitutional, but that the Legislation is lawful and constitutional in all other respects challenged by respondents.

STATEMENT OF FACTS

I.

BACKGROUND FACTS

NetJets Aviation, Inc., NetJets International, Inc., and NetJets Large Aircraft, Inc. (collectively, NetJets), are Delaware corporations, with their principal places of business in Ohio, South Carolina, and Connecticut, respectively. Flight Options, LLC (Flights Options), is a Delaware limited liability company, with its principal place of business in Ohio. CitationShares Management, LLC (CitationShares), is a limited liability company organized under the laws of Delaware, with its principal place of business in Connecticut. Bombardier Aerospace Corporation (Bombardier) is a Texas corporation, with its principal place of business in Texas.[1]

[1] In its brief, and again in a separate motion entitled "Motion of Respondent Bombardier Aerospace Corporation for Separate Consideration in Consolidated Appeals" (which we deemed to be a motion for leave to file a supplemental respondent‟s brief, and therefore denied), Bombardier asked this court to separately consider its case against appellant Joseph E. Holland. In reaching our conclusions, we have given separate consideration to the facts applicable to each appellant and each respondent. To make the opinion more comprehensible, we will refer to NetJets, Flight Options, Bombardier, and CitationShares, collectively, as Respondents, and describe their businesses, and the effect of Senate Bill No. 87 (2007-2008 Reg. Sess.) (Senate Bill No. 87) on their businesses, collectively. In doing so, we have given fair and full consideration to all parties. We

In November 2003, the Federal Aviation Administration (FAA) enacted regulations pertaining to fractional ownership of aircraft and program management services for such fractionally owned aircraft. (14 C.F.R. § 91.1001 et seq. (2012).) Fractional owners purchase fractional interests in a specific aircraft, and are allotted a specified number of hours of access to the aircraft, depending on the size of their ownership interests.

A fractional owner enters into a number of operating agreements regarding the ownership interest: (1) a purchase agreement, by which the owner acquires an undivided share in one aircraft, agrees not to transfer its interest without the respective Respondent‟s consent, agrees to use the aircraft exclusively in the fractional ownership program, transfers possession of the aircraft back to Respondent, and grants Respondent the right to sell additional fractional interests in the aircraft and the right to repurchase the fractional interests under specific conditions; (2) a management agreement, by which the fractional owner gives Respondent the exclusive right to manage the aircraft, and agrees to pay a monthly management fee and an hourly fee for the time the aircraft is used, and by which Respondent agrees to staff, provide pilots for, and maintain the aircraft, and retains the right to use the aircraft when not being used by a fractional owner; (3) an owner‟s agreement, by which each fractional owner agrees that the aircraft will be used exclusively in the fractional ownership program; and (4) a master interchange agreement or dry lease exchange agreement,[2] by which all fractional owners agree that they will

have carefully considered the briefs filed by the parties and by amici curiae, and the voluminous record supporting all parties‟ arguments.

[2] “A „dry lease‟ is a lease of the aircraft without the flight crew, while a „wet lease‟ is a lease of the aircraft with a flight crew.” (Crowther, *Taxation of Fractional Programs: “Flying Over Uncharted Waters”* (2002) 67 J. Air L. & Com. 241, 245; see U.S. Dept. of Transportation, FAA, Truth in Leasing, Advisory Circular No. 91-37A, Jan. 16, 1978, ¶ 5 <http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%2091-37A.pdf> [as of June 21, 2012].)

participate in the fractional ownership program under the relevant operating agreements, and that the aircraft for which the owner is on title will be used in the program.

Respondents are managers for fractionally owned aircraft in their respective fleets. Respondents make fractional shares of aircraft available for purchase. They also provide central management of the aircraft including furnishing pilots, obtaining insurance, maintaining the aircraft, and administering a reciprocal leasing arrangement by which fractional owners may use another aircraft if the aircraft in which they own a fractional share is unavailable.

Each of the Respondents also offers access to the aircraft to nonfractional owners. (Bombardier does not operate its own program, but leases unused fractional shares to an independent charter air carrier.) The same aircraft that make up the fractional ownership program are used for these programs.

II.

THE LEGISLATION

In California, general aviation aircraft are taxed as personal property in the county in which they are hangared. (Cal. Code Regs., tit. 18, § 204; 1 Ehrman & Flavin, Taxing Cal. Property (4th ed. 2011) § 7.6; Bd. of Equalization, Assessors‟ Handbook (Oct. 2002) § 504, Assessment of Personal Property and Fixtures, p. 36 <http:// www.boe.ca.gov/proptaxes/pdf/ah504.pdf> [as of June 21, 2012].) Commercial aircraft are taxed based on an allocation formula that considers the time the aircraft spends in California (whether on the ground or in flight) and the number of arrivals and departures the aircraft makes within California. Both of those factors are then compared proportionally to the overall time and the overall number of arrivals and departures during the time period. (§ 1150 et seq.; Cal. Code Regs., tit. 18, § 202; 1 Ehrman & Flavin, Taxing Cal. Property, *supra*, § 7.7; Bd. of Equalization, Assessors‟ Handbook, *supra*, § 504, pp. 40-41.) Because of the hybrid nature of fractionally owned aircraft, before 2007 they had not been taxed by any taxing authority in California, despite the constitutional and statutory requirement that all nonexempt property be taxed. (Cal. Const., art. XIII, § 1; § 405, subd. (a).)

In April 2006, the Los Angeles County Assessor inquired of the State Board of Equalization (the Board) whether fractionally owned aircraft were subject to property taxation in California. The Board responded the aircraft could be taxable in California, but did not determine whether any individual aircraft had acquired a taxable situs in California. The Board also determined that Respondents could be taxed directly if they maintained possession and control over the aircraft.

In 2007, the California Legislature proposed Senate Bill No. 87 to capture tax revenue on fractionally owned aircraft. "The Legislature finds and declares the following: [¶] (a) A substantial portion of business aviation aircraft is now owned and operated under fractional ownership programs. [¶] (b) Aircraft in fractional ownership programs have a significant presence in California. [¶] (c) The size of some fractional ownership program fleets is quite large and the mix of ownership interests and unscheduled usage imposes a significant burden on both taxpayers and county assessors to assess and tax these fleets on an aircraft-by-aircraft basis; in order to reduce this burden, a simplified assessment approach is warranted. [¶] (d) Section 1 of Article XIII of the California Constitution specifies that all nonexempt property is taxable. Therefore, fractionally owned aircraft are constitutionally required to be assessed. [¶] (e) The purpose of Sections 2 and 4 of this act is to establish a simplified procedure for assessing fractionally owned aircraft that is appropriate and fair, that allocates assessed value among counties in a reasonable manner, and that reduces the administrative burden on taxpayers and county assessors." (Stats. 2007, ch. 180, § 1.)

Senate Bill No. 87, which was enacted as the Legislation, amended and added certain sections of the Revenue and Taxation Code. Of particular importance is the addition of sections 1160 and 1161, which creates a means for calculating the tax due on fractionally owned aircraft, using an allocation system. Section 1160 sets out the definitions applicable to the Legislation: "For purposes of this article, all of the following apply: [¶] (a) The following terms have the following meanings: [¶] (1) „Aircraft" has the same meaning as specified in Section 5303. [¶] (2) „Fleet" means all aircraft operated by a manager of a fractional ownership program. [¶] (3) „Fleet type" means aircraft classified by make, model, and series operated by a manager of a fractional ownership program. [¶] (4) „Fractionally owned aircraft" or „aircraft operated in fractional ownership programs" means those aircraft registered with the Federal Aviation Administration as fractionally owned aircraft. [¶] (5) „Landing" means physical contact involving the embarking or disembarking of crew, passengers, or freight, and that physical contact did not arise unintentionally as the result of an emergency. [¶] (b) Revenues derived from the taxation of fractionally owned aircraft under this article shall be distributed in accordance with Chapter 6 (commencing with Section 5451) of Part 10 of this division. [¶] (c) Fractionally owned aircraft shall be assessed under this article only if a lead county assessor accepts a designation as lead county assessor under Section 1162."

Section 1161 specifies the entities that may be assessed the tax on fractionally owned aircraft, and the assessment period: "(a) Notwithstanding any other law, *fractionally owned aircraft that has situs in this state shall be assessed on a fleetwide basis to the manager in control of the fleet* and a notice of that assessment shall be issued to that manager. [¶] (1) Any fractionally owned aircraft that has been annually assessed for the fiscal years preceding the 2007-08 fiscal year shall be assessed under this article commencing with the 2007-08 fiscal year. [¶] (2) For fractionally owned aircraft that have not been annually assessed for the fiscal years preceding the 2007-08 fiscal year, assessment under this article applies for the 2007-08 fiscal year and for each fiscal year thereafter, and for preceding fiscal years for which an assessment was not made, and for which a statute of limitations either does not apply or has been waived. [¶] (b) A fleet of fractionally owned aircraft establishes situs in this state if an aircraft within the fleet makes a landing in the state. [¶] (c) A fleet of fractionally owned aircraft shall be assessed on an allocated basis. An allocation factor shall be established in each county for each fleet type of fractionally owned aircraft for which situs in this state has been established as described in subdivision (b). *This allocation factor is a fraction, the numerator of which is the total number of landings and departures made by the fleet type in the county during the previous calendar year and the denominator of which is the total number of landings and departures made by the fleet type worldwide during the previous calendar year*." (Italics added.)

The Legislative Counsel"s Digest of Senate Bill No. 87 describes the purpose of the Legislation as follows: "Existing property tax law requires that aircraft, other than certificated aircraft, be valued and assessed only in the county in which it is habitually situated. Existing property tax law requires owners, as well as operators, of private and public airports, to provide the assessor of the county in which the airport is situated, with specified information regarding aircraft using the airport as a base, to be used by the assessor in the assessment of aircraft at market value. [¶] This bill would instead provide a formula, based upon the number of landings in and departures from a county in proportion to landings and departures worldwide, to assess a fleet of fractionally owned aircraft, as defined, that would be taxed by the counties where the fleet lands. This bill would require that the fleet be assessed to the manager in control of the fleet, as specified. This bill would specify that this fleetwide assessment applies for the 2007-08 fiscal year and each fiscal year thereafter, and also to specified prior fiscal years. . . . [¶] . . . [¶] This bill would declare that it is to take effect immediately as an urgency statute."

III.

PROCEDURAL HISTORY

After the enactment of the Legislation, local tax assessors began assessing Respondents as managers "in control of the fleet[s]" (§ 1161, subd. (a)), not as representatives of the fractional owners. The assessments extended back to January 1, 2002.

NetJets and Flight Options filed separate lawsuits in Orange County Superior Court, against Webster J. Guillory, in his capacity as the Orange County Tax Assessor, challenging the legality and constitutionality of the Legislation and the assessments made thereunder. Bombardier and CitationShares filed similar lawsuits in Santa Barbara County Superior Court, against Joseph E. Holland, in his capacity as the Santa Barbara County Tax Assessor. The Santa Barbara cases were transferred to Orange County Superior Court, and the four cases were consolidated for purposes of trial. Guillory and Holland will be referred to in this opinion as the Assessors.

Each of the Respondents filed a dispositive motion for declaratory relief. The parties presented their cases by means of written briefs and declarations; no live witness testimony was offered. Following oral argument, the trial court issued a minute order reading, in relevant part, as follows:

"First, [Respondents] argue that assessments and collections for the [period] before 1/1/07 are unconstitutionally retroactive.

"Applicable law.

"The U.S. Supreme Court has explained that a „wholly new" tax may not be imposed retroactively. [Citations.] For purposes of substantive Due Process, the court must ask whether such taxes are „harsh and oppressive" [citation]. Both Federal and California courts seem to agree, however, that taxes may be imposed retroactively during the preceding year (i.e., the year of the legislative session in which it was enacted, or the current tax year). [Citations.] Longer periods of retroactivity are regarded with suspicion. [Citation.]

"It seems undisputed that [Respondents] have been assessed for taxes, supposedly owed under SB 87, going all the way back to 1/1/02. . . .

"SB 87 appears to be a „wholly new‟ tax, rather than a mere clarification of existing tax law.

"[The Assessors] argue that SB 87 did not impose a „wholly new‟ tax, but merely „clarified‟ existing law regarding aircraft taxation.

"The legislative history of SB 87 suggests that it is far more than a mere clarification of existing tax law. [Citation.] The State Board of Equalization, in their internal correspondence, likewise seems to have regarded SB 87 as entirely new law . . . .

"SB 87 imposes a „harsh‟ and „oppressive‟ burden on [Respondents] in violation of Due Process.

"[The Assessors] argue that even if SB 87 is a retroactive tax, it is still not „harsh‟ or „oppressive‟ enough to violate Due Process. [Citation.] The Supreme Court, they note, has upheld retroactive taxation where (1) the legislative purpose is neither illegitimate nor arbitrary; and (2) the legislative body acts promptly and establishes only a modest period of retroactivity. [Citation.]

"[Respondents] argue that SB 87‟s five-year retroactivity period is not modest, in that it would force aircraft managers to spend a great deal of time and effort hunting for documentation relating to fractionally-owned aircraft going all the way back to 2002; and that their contractual arrangements with their former customers may prevent them from collecting the retroactive tax from such customers. . . . A burden of this kind indicates that the period of retroactivity is not „modest.‟ [Citation.]

"Second, [Respondents] argue that SB 87 unlawfully assesses the tax against the aircraft managers, who have neither ownership nor control nor possession of the fractionally-owned aircraft. . . .

"California Revenue & Taxation Code Section 405(a) mandates that tax assessors „. . . assess all the taxable property in his county, except state-assessed property, to the persons *owning, claiming, possessing, or controlling* it on the [tax] lien date‟.

Revenue & Taxation Code Section 611 similarly provides that „[i]f the name of an absent owner is known to the assessor . . . the property shall be assessed to such *owner* . . .‟.

"[Respondents] seem to be neither the true owners, possessors, or controllers of the fractionally-owned aircraft.

"[The Assessors] argue that [Respondents] are, if not the true owners, at least the true possessors and controllers of the fractionally-owned aircraft. [The Assessors] maintain that [Respondents] have sufficient control over the fractionally-owned aircraft to fall within the scope of Section 405(a). They note that the term „owner‟ has no precise definition; that the whole question of who is the „owner‟ of particular property is relative; and that the answer depends on the precise nature of the property in question. [Citation.] [The Assessors] also note that vesting title of property in a customer‟s name does not, by itself, mean that the company that ultimately controls the use of that property cannot be assessed. [Citation.]

"[The Assessors] argue that [Respondents], the managers of the aircraft fleets, essentially control the way that the jets can and cannot be used.

"The controls exercised by [the Assessors], however, seem small compared to the far greater control exercised by the fractional-aircraft owners themselves.

"[Respondents] offer evidence that they have very little control over the aircraft in their programs; and that ownership, as well as authority over most decisions involving the use of the aircraft, rest with their customers. [¶] . . . [¶]

"The Parties asked for [a] Statement of Decision. This is the Court‟s Final Ruling.

"[Respondents] have advanced two valid arguments why SB 87‟s tax assessed on managers of fractionally-owned aircraft is unconstitutional and/or unlawful. First, it is unconstitutionally retroactive. Second, it is unlawfully imposed on managers who neither own, control, nor possess the aircraft in question.

"All motions are granted. [Respondents] have shown that the tax imposed on managers of fractionally-owned aircraft by SB 87 [California Revenue & Taxation Code 1160 et seq.] is unconstitutional and/or unlawful for the above reasons." (Underscoring and boldface omitted.)

The trial court entered separate judgments in each of the four consolidated cases. "[T]he Court hereby adjudges, declares, and decrees that any property taxes assessed or collected (or to be so assessed or collected) under the provisions of Senate Bill 87 (Revenue and Taxation Code §§ 1160, 1161, and 1162, enacted August 24, 2007) were and are unconstitutional, or otherwise legally invalid. Without limitation on the foregoing, the Court declares pursuant to § 4808 that any taxes assessed, levied, or collected (or to be assessed, levied, or collected) under Senate Bill 87, are both (a) unconstitutional in their retroactive application and (b) otherwise unlawful and illegal in their imposition upon the petitioner aircraft managers . . . who neither own, control, nor possess the aircraft in question."

The Assessors filed timely appeals from the judgments entered against them. We consolidated the Assessors‟ appeals for purposes of briefing, oral argument, and decision, based on a joint motion to consolidate.

DISCUSSION

I.

STANDARDS OF REVIEW

We review the trial court‟s factual findings for substantial evidence, and its interpretation of the law de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66.)

II.

WAS IT LAWFUL TO ASSESS RESPONDENTS?

The trial court found that taxes on fractionally owned aircraft fleets could not be assessed against Respondents, the managers of those fleets. We conclude insufficient evidence supports the court‟s finding. In reviewing the legal issues de novo, we hold the Legislation lawfully assesses a tax on the fractionally owned aircraft against Respondents. For the reasons we shall explain, *post*, the tax may be assessed against Respondents because they control the fractionally owned aircraft.

We begin our analysis with a survey of California law regarding the Legislature‟s right to determine what parties and what property may be taxed, subject to the limits imposed by the state and federal Constitutions. As our Supreme Court has explained: "Generally the Legislature is supreme in the field of taxation, and the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it. [Citations.] Its power in the field of taxation is limited only by constitutional restrictions. [Citations.] Those principles are a part of the broader concept that „. . . Our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legislature. . . .‟ [Citation.] As a result constitutional restrictions on the power of the Legislature must be strictly construed against the limitation. [Citations.] . . . [¶] „If there is any doubt as to the Legislature‟s power to act in any given case, the doubt should be resolved in favor of the Legislature‟s action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used.‟" (*Delaney v. Lowery* (1944) 25 Cal.2d 561, 568-569.)

"Every system of taxation consists of two parts: (1) the elements which enter into the imposition of the tax, and (2) the steps taken for its assessment and collection. The former is a legislative function; the latter is mere machinery, and is delegable to other than governmental agencies. [Citation.] The legislative powers include the selection of the property to be taxed, the determination of the basis for the measurement of the tax, and the definition of the purpose for which the tax shall be levied. [Citation.] On the other hand, powers which are not legislative include the power to value property for taxation pursuant to fixed rules, the power to extend, assess, and collect the taxes, and the power to perform any of the innumerable details of computation, appraisement, and adjustment. [Citation.]" (*Gadd v. McGuire* (1924) 69 Cal.App. 347, 364-365.)

The Legislation provides that taxes on fractionally owned aircraft shall be assessed to the manager in control of the fleet of those aircraft. (§ 1161, subd. (a).) The Legislature was authorized to assess the tax against the managers in control of the fractionally owned aircraft fleets by section 405, subdivision (a), which requires each county assessor to "assess all the taxable property in his county, except state-assessed property, to the persons owning, claiming, possessing, *or controlling* it on the lien date." (Italics added.)[3] As we discuss, consistent authority from across our country supports imposition of the tax on Respondents as managers in control of the aircraft fleets.

A.

Tax Assessment Against Managers in Control of Fleets of Fractionally Owned Aircraft

In *Flight Options, LLC v. Department of Revenue* (2011) 172 Wn.2d 487, 505 [259 P.3d 234, 243] (*Flight Options*), the Washington Supreme Court recently held that an apportioned property tax could be assessed against Flight Options—one of the Respondents in this case—as the manager of a fleet of fractionally owned aircraft, while

[3] NetJets argued in its appellate brief and at oral argument that the prospective imposition of the tax on the managers of the fractionally owned aircraft was unconstitutional. The trial court did not address this issue as a constitutional one, nor did the other Respondents. The argument on this point in NetJet"s brief, though labeled as "constitutional," is written only as an argument that the prospective imposition of the tax on the managers is unlawful under statutory and case law. (NetJets"s constitutional arguments regarding situs and retroactivity are addressed, *post*.)

“assum[ing], without deciding, that Flight Options does not own the airplanes in its fleet” (*id.*, 259 P.3d at p. 242).[4]

In *Executive Jet Aviation, Inc. v. U.S.* (Fed.Cir. 1997) 125 F.3d 1463, the then operator of the NetJets fractional ownership program sought a refund of federal taxes, on the ground it was merely the manager of the aircraft, not a business providing transportation for hire. In affirming the dismissal of the taxpayer‟s claim, the Federal Circuit Court of Appeals held: “„It has been recognized that for tax purposes the substance rather than the form of a transaction is generally controlling.‟ [Citations.] While it is true that [the fractional owner] held legal title in [the aircraft bearing FAA registration number] N111QS to the extent of its fifty percent ownership interest, the

[4] Other states have taxed fractionally owned aircraft differently, but still imposed a tax on some party to the transaction. In no case cited to us has any court concluded that the fractional nature of the aircraft‟s ownership or the aircraft‟s multiple arrivals and departures in different states, not on a fixed schedule, insulate the fractionally owned aircraft from taxation. In *Fall Creek Construction Company, Inc. v. Director of Revenue* (Mo. 2003) 109 S.W.3d 165, the Missouri Supreme Court affirmed a use tax imposed on a fractional aircraft owner. The supreme court rejected the four arguments made by the fractional owner: (1) the fractional owner did not purchase any tangible personal property, but instead purchased the right to use an aircraft through the interchange program for a specific number of hours per year (*id.* at pp. 169-170); (2) the imposition of a use tax on fractional ownership interests impermissibly burdens interstate commerce (*id.* at pp. 170-171); (3) the manager of the fractionally owned aircraft fleet maintained control over the aircraft, so the fractional owner did not have sufficient dominion or control to constitute storage or use (*id.* at pp. 171-172); and (4) the aircraft never “„finally c[a]me to rest‟” in Missouri (*id.* at pp. 172-174).

In *Fisher & Company, Inc. v. Department of Treasury* (2009) 282 Mich.App. 207 [769 N.W.2d 740], the Michigan Court of Appeals affirmed the decision of the Court of Claims that the fractional owner of an aircraft was liable for a use tax under Michigan law. “The transaction involved was, therefore, a purchase of tangible personal property coupled with a contract controlling how that personal property would be used. The fact that plaintiff has contracted away some (or even most) of its practical control over its airplane does not preclude plaintiff from having purchased it. It is therefore clear that there was a transfer of tangible personal property and a contemporaneous but nevertheless separate contract for services involving that property.” (*Id.*, 769 N.W.2d at p. 743.)

agreements which framed the NetJets program placed extensive limitations on the exercise of that interest. At the same time, [the taxpayer] coordinated all of N111QS‟ flights with the needs of the other participants in the interchange program and reserved for itself exclusive use of the aircraft for its charter service and for training pilots when the aircraft was not being used by one of its owners. [The fractional owner]‟s highly circumscribed ownership interest in N111QS simply was the vehicle through which [the fractional owner] entered into, and was allowed to participate in, an arrangement pursuant to which it obtained from [the taxpayer] transportation from one airport to another. We hold that, through its NetJets program, [the taxpayer] was in the „business of transporting persons or property for hire by air.‟” (*Id.* at p. 1469.) *Executive Jet Aviation, Inc. v. U.S.* is not directly on point, as it addresses whether flights by fractional owners are subject to federal tax as commercial or noncommercial aviation. We find the case‟s analysis of the fractionally owned aircraft fleet manager, however, to be illuminating to our consideration of whether Respondents control the fractionally owned aircraft.

In 1992, the IRS issued a private letter ruling, addressing whether the manager of a fractionally owned aircraft fleet could be assessed a transportation tax.[5] (The ruling did not address state property taxes.) The IRS concluded that the fleet manager was liable for the transportation tax because of its control over the aircraft: “In viewing the totality of the circumstances, including the agreements and the respective responsibilities of the parties, although the owners are the title holders to the aircraft, they have relinquished possession, command, and control, of their respective aircraft to the taxpayer [the fleet manager] who provides air transportation. The owners are obligated upon the purchase of an interest in an aircraft to sign agreements that effectively allow the taxpayer to treat the A program aircraft as part of its charter fleet. The taxpayer

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[5] A private letter ruling may not be used or cited as precedent (26 U.S.C. § 6110(k)(3)), but a court “may . . . deem[] it instructive” (*Shaev v. Saper* (3d Cir. 2003) 320 F.3d 373, 381, fn. 5).

supplies and has command over the pilots and, even though the owners may designate which pilots they prefer, the taxpayer has ultimate control over assignment of crews. The taxpayer is responsible for operations, maintenance, and insurance expenses, and, depending on the nonavailability of the aircraft, provides transportation to an owner in any aircraft in the A program or within the taxpayer‟s charter operation—thus in many instances transporting an owner in an aircraft in which it does not even have an ownership interest. Under the owners[‟] agreement, an owner generally cannot utilize an A program aircraft to transport passengers or cargo for compensation or hire. Therefore, the taxpayer is providing taxable air transportation of persons under section 4261(a) of the Code." (I.R.S. Priv. Ltr. Rul. 93-14-002 (Dec. 22, 1992) pp. 15-16.)

The only contrary opinion was expressed in a 2002 law review article which addressed issues of state personal property taxation of fractionally owned aircraft. The author concluded managers of the aircraft could not be taxed because, "[g]enerally, for property and registration tax purposes, the only thing that matters is who owns the aircraft. While the State tax authorities might want to argue that either the selling company or the management company is the owner of all of the aircraft, there does not appear to be a good basis for reaching this conclusion. Presumably, the interest owners will be considered the joint owners of each aircraft." (Crowther, *Taxation of Fractional Programs: "Flying Over Uncharted Waters," supra*, 67 J. Air L. & Com. at p. 318.) The article does not address statutes such as section 1161, subdivision (a), which imposes the tax against the manager in control of the fractionally owned aircraft fleet, or section 405, which permits California to assess personal property taxes against not only the owner, but also the party in possession or control of the personal property.

Based on our legal analysis and the record, we hold insufficient evidence supports the trial court‟s finding that Respondents do not control the fleets of fractionally owned aircraft for the following reasons. The fractional owners cannot transfer their interests in the aircraft without Respondents‟ consent (although that consent cannot be unreasonably withheld). The fractional owners may not use the aircraft other than within the fractional ownership program. Respondents retain the right to sell additional shares of the fractionally owned aircraft, and retain possession of the aircraft except when a fractional owner is using the aircraft. Respondents have the right to repurchase the fractional ownership interests after five years, or if the fractional owner materially breaches any of the operative agreements. Respondents maintain the aircraft, obtain insurance for the aircraft, and provide staff and piloting services for the aircraft (unless a fractional owner chooses to provide its own pilot, who must be approved by Respondents). Respondents handle scheduling of the aircrafts‟ use. The fractional owners pay Respondents a monthly maintenance fee, as well as an hourly fee when they are actually using the aircraft. When any aircraft is not being used by one of the fractional owners, Respondents retain the right to use the aircraft for their own purposes, whether by leasing the aircraft directly to nonfractional owners, or by offering them through a third party leasing company; in either event, Respondents are making money on the aircraft which is not shared with the fractional owners. The fractional owners are never guaranteed that when they use their fractional interest, it will be the aircraft in which they actually own a share. Respondents retain the right to transfer a fractional owner‟s interest in one aircraft to another aircraft of equal or greater value.

B.

Ownership

Respondents argue they cannot be taxed under the Legislation because they do not "own" the fractionally owned aircraft. Respondents are not the title owners of the fractionally owned aircraft fleets.[6] As noted, *ante*, section 1161, subdivision (a)

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[6] It is undisputed that each of the Respondents owns some fractional shares in various planes. Respondents may use these shares for their own programs, making the aircraft available to nonfractional owners, or lease them to third party charter providers. Respondents may also use these shares for their own benefit, for example, to train their pilots. The Assessors do not base their claim that Respondents can be directly assessed

specifically assesses taxes against the manager in control of a fractionally owned fleet of aircraft, not the fractional owners. Such assessment is permissible under section 405, subdivision (a), which does not limit the tax assessment to the owner of title to the property. (See *Cox Cable San Diego, Inc. v. County of San Diego* (1986) 185 Cal.App.3d 368, 380; *Los Angeles Dodgers, Inc. v. County of Los Angeles* (1967) 256 Cal.App.2d 18, 924-925; *RCA Photophone Inc. v. Huffman* (1935) 5 Cal.App.2d 401, 406-407.)

"The terms „owner‟ and „owned‟ may be so defined as to include a person possessing such interest in property that he has lawful possession of it. [Citation.] [¶] Plaintiffs concede that they have possessory interests in the property, that they occupy it, and that such interests are taxable. The assessment to them was a sufficient compliance with the requirement of the code provision that the property be assessed „to the persons owning, claiming, possessing, or controlling it.‟ The assessor, having found persons occupying and in possession of the property, was authorized to assess it in the names of such persons. He is not required to pass upon the condition of the title to the interests involved for the purposes of taxation and assessment." (*Tilden v. County of Orange* (1949) 89 Cal.App.2d 586, 588-589; see also *RCA Photophone Inc. v. Huffman*, *supra*, 5 Cal.App.2d at p. 407 ["the term „owner‟ may include others than the possessor of the legal title to property and is often used to designate persons in legal possession. From this premise and the fact that it would have been a futile act on the part of the legislature to empower the assessor to assess personal property to its lawful possessor and provide no efficiently workable means of collecting the tax computed on such assessment after it was legally made, we are of the opinion that when the legislature used the word „owned‟

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on Respondents‟ ownership of some fractional shares. Respondents, for their part, do not seem to dispute that, assuming the tax on the fractionally owned aircraft is lawful, they would be liable for some portion of the tax assessment attributable to their share of the ownership of an aircraft.

. . . it had in mind its broader definition and intended to give the assessor the power of seizure and sale of personal property lawfully assessed . . . "].)

"Because it would be an intolerable burden otherwise to consider each contract, fixing the relationships of lessor-lessee [citations], the assessor may assess one in possession or control of property or the owner. [Citation.]" (*County of Sacramento v. Assessment Appeals Bd. No. 2* (1973) 32 Cal.App.3d 654, 666.)

To say the fractional owners, not Respondents, own legal title to the aircraft does not answer the question whether Respondents "own" the aircraft for purposes of assessment under the Legislation, much less whether they possess or control the aircraft. The facts before us establish that Respondents control the fractionally owned aircraft within the meaning of the Legislation. As in *Flight Options*, *supra*, 259 P.3d 234, even if Respondents do not "own" the aircraft, they certainly "control" the aircraft within the meaning of sections 405, subdivision (a) and 1161, subdivision (a).

C.

Section 611

Section 611, which the trial court cited in its statement of decision, is inapplicable. That section reads, in part: "If the name of an absent owner is known to the assessor . . . , the property shall be assessed to such owner; otherwise, the property shall be assessed to unknown owners." (§ 611.) This statute does not prevent the Legislature from assessing personal property taxes against someone other than the person or entity holding recorded title to the property, however. "Record title is, of course, neither conclusive evidence of legal title nor a synonym for ownership. For assessment purposes, it is merely a guide; in the absence of contrary conclusive information it justifies assessment to the record owner." (*Cochran v. Board of Supervisors* (1978) 85 Cal.App.3d 75, 83, citing § 611.)

D.

Bailee Argument

Respondents‟ argument that they were improperly assessed taxes as bailees is simply incorrect. A true bailee may not be personally assessed for taxes on personal property he or she possesses. (*Weyse v. Crawford* (1890) 85 Cal. 196, 201-202.) As explained *ante*, however, Respondents are not bailees who simply have possession of the fractionally owned aircraft for the benefit of the fractional owners. Respondents‟ possession and control over the fractionally owned aircraft is much more significant.[7]

E.

Operational Control as Defined by Federal Regulations

Bombardier‟s separate argument that it is not in control of the fractionally owned aircraft fleet, by reference to FAA regulations, is not persuasive. Bombardier

[7] In the trial court, Respondents relied on an Attorney General opinion for the proposition that they could not be assessed directly for the taxes on the fractionally owned aircraft. To the extent the Attorney General‟s opinion on which Respondents relied is even applicable, it supports our conclusion, rather than that of the trial court. The issue addressed by the opinion was whether a hospital, which was exempt from taxation pursuant to section 214, was liable for property taxes on equipment leased from a national banking corporation. (61 Ops.Cal.Atty.Gen. 472 (1978).) Respondents cite this opinion for two general propositions of law, neither of which we take exception to. However, when quoted in full, the Attorney General‟s opinion is not supportive of Respondents‟ argument. "Two general principles in the field of California property taxation are that *all property, unless otherwise exempt, is taxable* [citations] and that property is taxable to its „true owner.‟ [Citations.]" (*Id.* at p. 473, italics added.) Respondents only rely on the second portion of this quotation to support their theory that only the fractional owners could be liable for the taxes imposed on Respondents. "The California courts have reasonably construed section 405 and its predecessors by narrowing its seemingly broad language. [Citations.] The statute has never been used to collect from the possessor or lessee of personal property that which could not be legally collected from the true owner or lessor because of an exemption from tax; rather *it has been utilized to facilitate collection where the true owner was liable for the tax but unknown or inaccessible as a practical matter*. [Citations.]" (*Id.* at p. 475, italics added.) This case does not present an issue of a tax that could not lawfully be assessed against the owner or lessor of property, being assessed instead against the property‟s possessor or lessee.

cites 14 Code of Federal Regulations part 91.1009 (2012), which describes the circumstances under which a fractional owner is or is not in operational control of a fractionally owned aircraft. The regulation, and the FAA’s official comments on it, establish the purpose of the regulation is to make clear who has ultimate responsibility for the safe operation of the aircraft during a particular flight, and to show that a fractional owner cannot simply defer all responsibility to the fleet manager. (See 14 C.F.R. § 91.1011(a) (2012); 68 Fed.Reg. 54520, 54531, 54538 (Sept. 17, 2001).) They do not disprove Bombardier’s control of the fractionally owned aircraft fleet for tax assessment purposes.

III.

ADDITIONAL SUBSTANTIVE ARGUMENTS REGARDING CONSTITUTIONALITY AND LAWFULNESS OF THE LEGISLATION’S ASSESSMENT OF TAXES ON FRACTIONALLY OWNED AIRCRAFT

The trial court’s order declaring the Legislation unconstitutional and otherwise unlawful was based on two of Respondents’ arguments—that the Legislation unlawfully assessed the tax against Respondents as managers of the fractionally owned aircraft fleets, addressed *ante*, and that the tax imposed was a wholly new tax that could not be imposed retroactively, which we will address *post*. The trial court did not reach other issues raised by Respondents; we nevertheless address those arguments, which Respondents continue to make on appeal, because the trial court’s judgment must be affirmed if it was correct upon any theory of law applicable to the case. (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568.)

A.

Do the Fractionally Owned Aircraft Have a Sufficient Connection with California to Justify the Imposition of Taxes on Them?

Respondents argue that the Legislation unconstitutionally assesses taxes on property lacking a sufficient connection to the State of California.

"The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due." (*Norfolk & W. R. Co. v. Missouri State Tax Comm'n* (1968) 390 U.S. 317, 325.)

However, a state may properly tax property habitually employed in the state, even though the employment within the state is not regular in terms of routes and numbers. (*American Refrigerator Transit Co. v. Hall* (1899) 174 U.S. 70, 82 (*American Refrigerator*); *Pullman's Car Co. v. Pennsylvania* (1891) 141 U.S. 18, 29; *Marye v. Baltimore & O. R. Co.* (1888) 127 U.S. 117, 123-124; *Sea-Land Service, Inc. v. County of Alameda* (1974) 12 Cal.3d 772, 778.) To comport with both the due process clause and the commerce clause, a state"s tax on property domiciled elsewhere must meet the following criteria: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state. (*Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279 [test to determine whether state"s property tax satisfied commerce clause]; see *Quill Corp. v. North Dakota* (1992) 504 U.S. 298, 313 & fn. 7 [tax that passes constitutional muster under *Complete Auto Transit, Inc. v. Brady* test is also valid under due process clause].) The tax assessment imposed by the Legislation meets each of these criteria.

We find the Washington Supreme Court"s opinion in *Flight Options*, *supra*, 259 P.3d 234, to be persuasive. That opinion interpreted the taxing authority"s ability to tax one of Respondents in this case, based on the very same activity we are considering here; it is not, however, binding authority. (See *Century-National Ins. Co. v. Garcia* (2011) 51 Cal.4th 564, 571.) NetJets argues the *Flight Options* opinion is not on point because it did not address whether aggregation is permissible when the aircraft are individually owned and controlled. As explained, *ante*, we have concluded that Respondents, as the aircraft fleet managers, were properly assessed the taxes imposed by the Legislation. Further, the *Flight Options* opinion did address issues regarding the ownership structure of the fractionally owned aircraft fleet.

In applying the *Complete Auto Transit, Inc. v. Brady* test, we conclude, first, the aircraft in the fleets managed by Respondents have a substantial nexus with California. "[I]f the nondomiciliary owner habitually employs movable property in the jurisdiction for all or a greater part of the tax year, the property acquires a tax situs although any one item of the property mix may be present for only a short predetermined period." (*Ice Capades, Inc. v. County of Los Angeles* (1976) 56 Cal.App.3d 745, 754.) In *Braniff Airways v. Nebraska Board* (1954) 347 U.S. 590, 600-601, the United States Supreme Court determined the fleet of the aircraft company, which was domiciled in Oklahoma, was subject to taxation in Nebraska based on 18 landings per day, because the fleet had "the opportunity to exploit the commerce, traffic, and trade that originates in or reaches Nebraska."

In both the trial court and on appeal, data was filed by Respondents, under seal, showing their annual arrivals and departures in California and worldwide, before and after the enactment of the Legislation. When averaged over the total number of years for which data was provided, no Respondent had fewer than 13 arrivals and departures in California each day, and the average was as high as 181 per day. These arrivals and departures represented between 5 and 13 percent of Respondents‟ worldwide arrivals and departures. This showing easily meets the substantial nexus requirement. (See *Flight Options*, *supra*, 259 P.3d at p. 240 [average of two daily visits to Washington by fractionally owned aircraft managed by Respondent Flight Options was "more than adequate" nexus under due process clause].)

Second, the tax is fairly apportioned. The Legislation assesses a property tax on a manager in control of a fractionally owned aircraft fleet, based on the percentage of the fleet‟s arrivals and departures in California as compared to the fleet‟s arrivals and departures worldwide. The same percentage of the overall value of the fleet is assessed as the property tax. The standard by which to evaluate this apportionment formula was set long ago by the United States Supreme Court, as follows: "States have wide latitude in the selection of apportionment formulas and . . . a formula-produced assessment will only be disturbed when the taxpayer has proved by „clear and cogent evidence" that the income attributed to the State is in fact „out of all appropriate proportion to the business transacted . . . in that State," [citation], or has „led to a grossly distorted result," [citation]." (*Moorman Mfg. Co. v. Bair* (1978) 437 U.S. 267, 274; see *Auerbach v. Los Angeles County Assessment Appeals Bd. No. 2* (2008) 167 Cal.App.4th 1415, 1425.) Respondents claim the formula established by the Legislation is unconstitutional because it does not account for the time their aircraft are actually on the ground within California. We conclude the formula based on Respondents" arrivals and departures is reasonable and rational; Respondents have failed to meet their burden of proving by clear and cogent evidence that it is not.

Third, the tax on fractionally owned aircraft does not discriminate against interstate commerce; none of the Respondents made this argument.

Fourth and finally, the tax on fractionally owned aircraft is fairly related to services provided by California to Respondents. When Respondents" aircraft land at airports in California, they benefit from local services, including, but not limited to, police and fire protection. (*Complete Auto Transit, Inc. v. Brady*, *supra*, 430 U.S. at p. 277; *Auerbach v. Los Angeles County Assessment Appeals Bd. No. 2*, *supra*, 167 Cal.App.4th at p. 1426 [evidence of presence of three airplanes in California "supports a rational inference that [airplane company] was afforded substantial opportunities, benefits, and protections by California"].) As the Washington Supreme Court recently held, in considering a due process challenge to Washington"s imposition of an apportioned property tax on fractionally owned aircraft managed by Respondent Flight Options: "We turn next to whether „"the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State.""

[Citation.] The fact that the tax is apportioned so as to limit its assessment to a proportion of the value of the property commensurate with the proportion of time the property spent in Washington goes a long way toward meeting this requirement. [Citation.] While in Washington, Flight Options planes „enjoyed the benefits and protection of [Washington] criminal laws, the provision of search and rescue services if needed and opportunities for further commerce through contacts with [Washington].‟ [Citation.] We have little difficulty determining that the apportioned property tax imposed on the Flight Options planes is reasonably related to the opportunities, benefits, and protections afforded by the state." (*Flight Options*, *supra*, 259 P.3d at pp. 240-241.) Additionally, Respondents‟ landings and takeoffs result in increases in noise, air pollution, air traffic, and the imposition of other burdens caused by Respondents‟ use of California airspace. (*Zantop Air Transport, Inc. v. County of San Bernardino* (1966) 246 Cal.App.2d 433, 440-441.)

We hold a prospective tax assessment on fractionally owned aircraft established by the Legislation is constitutional under both the commerce clause and the due process clause.

B.

Situs

Respondents also challenged the Legislation on the ground that the property on which it imposes a personal property tax lacks situs in the State of California. "[T]he right to assess and tax property in this State does not depend on the residence of the owner. It depends wholly upon the *situs* of the property." (*San Francisco v. Talbot* (1883) 63 Cal. 485, 489.) Property simply passing through this state may not be taxed. (*Id.* at p. 488.)

Respondents note that prior to the Legislation‟s enactment, aircraft could establish situs in California by means of two separate statutory schemes: as general aviation aircraft, or as certificated aircraft (meaning commercial airlines). Because the

Legislation creates a new definition of situs for purposes of taxation of fractionally owned aircraft, Respondents contend it is unconstitutional.

The system by which the Legislation allocates taxes on the fractionally owned fleets fairly distributes the tax burden among all the fractional owners of all the fractionally owned aircraft. (*Moorman Mfg. Co. v. Bair*, *supra*, 437 U.S. at p. 274; see *Auerbach v. Los Angeles County Assessment Appeals Bd. No. 2*, *supra*, 167 Cal.App.4th at p. 1425.) Indeed, an allocation system similar to that contained in the Legislation was approved by the United States Supreme Court in *Pullman's Car Co. v. Pennsylvania*, *supra*, 141 U.S. at page 26, in which the court approved a taxation system that compared the number of miles over which the company ran its railroad cars in Pennsylvania to the total number of miles over which the company ran its railroad cars throughout the country.

The California Legislature properly determined that an entire fractionally owned fleet of aircraft had situs within California based on one landing of an aircraft in the state. (§ 1161, subd. (b).) As noted, *ante*, each fleet of fractionally owned aircraft managed by one of the Respondents had many landings during each year for which data had been provided. In *American Refrigerator*, *supra*, 174 U.S. at pages 81-82, the United States Supreme Court held the owner of refrigerated railroad cars, used by multiple carriers to, from, and within Colorado, could be taxed by the State of Colorado, based on an average number of cars within the state during the taxing period. Respondents argue *American Refrigerator* is distinguishable, because the refrigerated railroad cars were all owned by a single entity, while here each aircraft has multiple fractional owners. We see no reason to distinguish this case on that basis. It is the location of the property, not the owner, that determines whether property tax may be levied. As explained, *ante*, the Legislation properly identifies Respondents as the taxpayers; even if there were some significance to the fractional ownership of the aircraft, the unitary control of the fleet by Respondents would place this case squarely within the reach of *American Refrigerator*‟s holding. In upholding the imposition of a Washington state tax against the manager of a fractionally owned aircraft fleet (one of the Respondents herein), the Washington Supreme Court cited *American Refrigerator* with approval. (See *Flight Options*, *supra*, 259 P.3d at pp. 239-240.)

Respondents also argue that each owner‟s property must be assessed separately from the other owners‟ property. There are two problems with this argument. First, Respondents‟ argument relies on authority that holds a taxpayer‟s property must be evaluated separately from other taxpayers‟ property to determine situs. (*Union Tank Line v. Wright* (1919) 249 U.S. 275, 282.) Here, the new statutory scheme sets up as single taxpayer—each of the Respondents—so the *Union Tank Line v. Wright* case does not apply. Second, if that argument applied, Respondents‟ argument would mean that the fractionally owned aircraft could never be assessed taxes in California although the aircraft‟s situs is in California.

C.

Whether There Are Fractionally Owned Aircraft Registered with the FAA to Be Taxed

Section 1160, subdivision (a)(4) defines "„[f]ractionally owned aircraft‟" and "„aircraft operated in fractional ownership programs‟" as "those aircraft registered with the Federal Aviation Administration as fractionally owned aircraft." Respondents concede that the fractionally owned aircraft in their fleet programs are registered with the FAA, but argue that because they are not registered as fractionally owned aircraft under a separate designation, the Legislation does not apply to any aircraft at all.

The fractionally owned aircraft the Legislation sought to reach are registered with the FAA. The Assessors identified two official FAA records—the FAA‟s registry database and the FAA‟s aircraft registration master file—that are publicly available, and on which aircraft are registered as fractionally owned. Respondents contend that because these online records are not archived, they are not permanent records. Further, they contend that because the Legislation was intended to apply retroactively, the inability to use the FAA records to determine past due taxes means that these FAA records are not the registers required by section 1160, subdivision (a)(4). This argument does not withstand analysis. Given the allocation system of tax assessment created by the Legislation, there would be no need for the Assessors to use any FAA records to validate which aircraft were fractionally owned, meaning that no such need was behind the definition in section 1160, subdivision (a)(4). For this reason, the additional argument by Respondents that the Assessors do not use the FAA‟s online databases is also irrelevant.

The Assessors also noted that Respondents, in applying for FAA approval as managers of fractional ownership programs, were required to register the aircraft within their fractional ownership programs, pursuant to 14 Code of Federal Regulations part 91.1015(a)(1) & (b). Respondents correctly note that neither the online databases nor the registration by Respondents is the same as the official status regarding an aircraft contained in the aircraft‟s FAA registration file. But that is not what section 1160, subdivision (a)(4) requires. Both of those resources identify the aircraft in question as registered with the FAA, and further identify their status as fractionally owned aircraft. Nothing more is required. Respondents‟ argument that the Legislation is ineffective for defining a null set of aircraft is not persuasive.

In any event, "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 673.) If Respondents‟ argument was correct, the Assessors would be barred from collecting any taxes on the fractionally owned aircraft—an absurd consequence which the Legislature clearly did not intend when it enacted legislation for the specific purpose of assessing taxes against the managers of fleets of fractionally owned aircraft.

IV.

RETROACTIVITY

The trial court concluded the Legislation imposes a new tax, rather than clarifying an existing law regarding taxation of fractionally owned aircraft, and that, as a new tax, its retroactive application violated due process. We hold that the Legislation constitutes a new law regarding the assessment of taxes against the managers in control of fractionally owned aircraft fleets and, therefore, cannot constitutionally be applied retroactively.

A.

Does the Legislation Create a New Assessment of Taxes?

"[A] statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute‟s true meaning. [Citations.] Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. [Citations.]" (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) The legislative history of the Legislation is persuasive, but not binding, on our determination whether the Legislature enacted a new law or merely clarified an existing law. (*Id.* at p. 244.)

Before the Legislation‟s enactment, taxes were not assessed against any party for fractionally owned aircraft. In 2006, the aircraft advisory subcommittee of the California Assessors‟ Association proposed the need to "[d]evelop special legislation and an accompanying Property Tax Rule along with an assessment methodology to assess fractionally owned aircraft with a presence intra and/or interstate in California." The subcommittee"s report explained the problem as follows: "These aircraft operate similar to on-demand air charters but have not established a habitual location within the state. However, they have established a physical presence similar to, or greater than, that of certificated commercial air carriers such as American Airlines, United Airlines, Southwest Airlines, and other members of the Airline Transportation Association. [¶] California based air charter services and certificated air carriers that operate inter and/or intrastate are currently assessed pursuant to the appropriate R[evenue] & T[axation] Code Sections. These carriers have lost a high percentage of their business travelers to the *fractional aircraft operators* who, due to being such a hybrid, *have managed to avoid taxation. Therefore special legislation is required in order for these fractionally owned aircraft to be assessed based upon their allocated operations within the state*." (Italics added.)

The legislative history also supports the conclusion that assessment of taxes on fractionally owned aircraft was the result of a new law: "Under existing law, these fleets [of fractionally owned aircraft] are subject to property tax, but assessment requires detailed inspection of flight records to determine the amount of time that each aircraft spends at each airport, and all revenue will go to the county in which each aircraft was present most often. Fractionally-owned fleets are relatively new, and assessment has generally been deferred by the counties pending approval of the streamlined approach." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading Analysis of Sen. Bill No. 87, as amended July 19, 2007, p. 2.)

The Board"s staff legislative bill analysis, prepared before the Legislation was enacted, assumed it was a new law creating assessment rules for fractionally owned aircraft.[8] "Currently, there are no special assessment provisions for fractionally owned

[8] "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, . . . the binding power of an agency"s *interpretation* of a statute or regulation is contextual: Its power to persuade is both

aircraft used in Fractional Ownership Programs that are using California airports. The Revenue and Taxation Code contains separate provisions of law related to the taxation of aircraft depending upon one of two types of traditional ownership and use: (1) general aircraft and (2) certificated aircraft. Typically, „certificated aircraft‟ are commercial aircraft operated by air carriers for passenger or freight service, while „general aircraft‟ are typically privately owned aircraft, such a[s] aircraft kept at a hangar at a local airport. General aircraft are assessed on an aircraft by aircraft basis and an assessment is made only in a single county where the aircraft is habitually situated—even if the aircraft routinely uses other airports in other counties in the state. Certificated aircraft are assessed based on a „fleet basis‟ and assessments are made for each county in which the aircraft in the fleet land. [¶] Under current law fractionally owned aircraft that have acquired taxable situs in California would be assessed under the provisions for general aircraft. However, in actual practice, *fractionally owned aircraft are a new form of ownership and these aircraft have not yet been assessed in California*. Essentially, the business model of fractional ownership programs is a hybrid of general and commercial aviation." (Italics added.) The staff legislative bill analysis notes that the administrative procedure for assessing taxes under the Legislation "would be a hybrid of provisions for general aircraft and the simplified centralized system used for certificated aircraft as well as the fleet concept used for certificated aircraft."

The Board‟s staff legislative bill analysis also provided the following comments regarding the Legislation: "Fractional Aircraft Ownership Programs are an emerging commercial aviation industry that has rapidly expanded in the last 10 years and will likely continue to grow. Existing law requires that the aircraft be taxed using the provisions for general aircraft. But the assessment of these aircraft does not fit well into

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circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

a body of law set up for traditional forms of aircraft ownership and use. It would be administratively impractical to use these particular sections of law. Furthermore, the revenues would likely be dedicated to one county in California (the one particular airport most often used) rather than shared among the counties. [¶] . . . This bill would create a new body of law to address these specific types of aircraft. Fractionally owned aircraft are relatively new, and assessment has generally been deferred by the counties pending approval of the streamlined approach that also resolves the administrative difficulties. [¶] . . . [¶] . . . Supporters [of the Legislation] note that fractional ownership programs are currently enjoying a competitive advantage. Both charter operators of aircraft located at airports based in California or that habitually use California airports and aircraft owned by commercial airlines using California airports are subject to property tax. Both of these commercial sectors are losing customers to the fractional ownership programs." (Boldface omitted.)

The Board‟s designated representative testified at a deposition in this case that the Legislation "was creating a new body of law to assess fractionally owned aircraft." That deponent, in an internal e-mail drafted before the Legislation‟s enactment, had stated: "I‟m confused about the statement that the bill doesn‟t clarify anything—as in my mind it‟s creating an entire new body of law to address how, when, where, etc. to tax these beasts. In other words—it‟s throwing out the provisions for general aircraft which the legal opinion was trying to make fit . . . and it specifically makes a statement about the planes have situs in CA." Another employee of the Board testified that the assessment procedure provided by the Legislation was a hybrid of the general and certificated aircraft models: "So from the inception of the bill forward it would appear that the habitually situated portion of the general aviation section was overridden and they‟re being treated in some ways like the certificated aircraft, you know, and then in some ways, as far as the value of the aircraft, as general aviation."

During a conference call after the Legislation was enacted, an employee of the Orange County Tax Assessor noted that the Los Angeles County Tax Assessor "is not going to apply penalties" and "feels that penalties should not be applied because they had never received notice that they might be assessable."

Having considered the Legislation"s language, its legislative history, and the analysis and interpretation of affected agencies and entities before and after its enactment, we hold the Legislation is a new law that creates a new method for assessing taxes on a specific type of personal property—fractionally owned aircraft. Therefore, the assessment of the tax for years prior to the year of enactment constituted a retroactive tax.

B.

Does the Retroactive Application of a New Tax Assessment Violate Due Process?

We next consider whether the new tax assessment created by the Legislation could apply retroactively. Respondents contend that a "wholly new" tax may never be assessed retroactively, citing *United States v. Carlton* (1994) 512 U.S. 26. In that case, the Supreme Court held an amendment to a tax statute, "adopted as a curative measure" (*id.* at p. 31), was not a wholly new tax, and that the "modest" period of retroactivity—"only slightly greater than one year"—was not unconstitutional (*id.* at pp. 32-33).

No case cited by any party to this appeal has permitted retroactive application of a newly created assessment. In *Blodgett v. Holden* (1927) 275 U.S. 142, 147, and *Untermyer v. Anderson* (1928) 276 U.S. 440, 445-446, the Supreme Court held the federal gift tax was unconstitutional as to gifts made before its enactment. "As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." (*Blodgett v. Holden*, *supra*, at p. 147.)

River Garden Retirement Home v. Franchise Tax Bd. (2010) 186 Cal.App.4th 922 (*River Garden*), on which the Assessors rely, is distinguishable. That case involved section 24402, which permitted corporate taxpayers in California to deduct a portion of dividends received from other corporations that were subject to taxation in California, but not from corporations that were not subject to taxation in California. (*River Garden*, *supra*, at pp. 931-932.) River Garden Retirement Home filed tax returns in 1999 and 2000, deducting a portion of the dividends it had received in those years, pursuant to section 24402. (*River Garden*, *supra*, at p. 933.) In 2003, section 24402 was declared unconstitutional in *Farmer Bros. Co. v. Franchise Tax Bd.* (2003) 108 Cal.App.4th 976, 980, 986-987, on the ground it violated the commerce clause of the United States Constitution, because it treated dividends from corporations subject to tax in California differently from those of corporations not subject to tax in California. (*River Garden*, *supra*, at p. 932.) The Franchise Tax Board announced it would allow section 24402 deductions for the tax years before 1999; it assessed River Garden Retirement Home additional taxes for the deductions claimed in 1999 and 2000. (*Id.* at p. 933.)

The court in *River Garden* concluded the retroactivity period for assessing additional taxes, which reached back four years from the issuance of the *Farmer Bros. Co. v. Franchise Tax Bd.* opinion, did not violate due process. (*River Garden*, *supra*, 186 Cal.App.4th at p. 949.) "[*United States v.*] *Carlton* does call for a modest period of retroactivity, but we do not subscribe to the view that a period longer than one year in and of itself raises serious constitutional questions. Rather, we believe that the modesty of the period must be assessed under the facts and circumstances of the case." (*Id.* at p. 948, fn. omitted.)

River Garden addressed the removal of a *deduction*, not the application of a wholly new tax assessment. The other cases the parties have cited for the proposition that a change in the tax law may be applied retroactively address statutory amendments and enactments that change the tax rate (*United States v. Darusmont* (1981) 449 U.S. 292), change the amount of permissible tax exemptions (*United States v. Hemme* (1986) 476 U.S. 558), or limit the amount or availability of tax deductions (*United States v. Carlton*, *supra*, 512 U.S. 26; *Welch v. Henry* (1938) 305 U.S. 134).

We hold the new tax assessment imposed by the Legislation may not constitutionally be applied retroactively. The trial court did not err in concluding that the purported reach of section 1161 to capture taxes on fractionally owned aircraft beyond the tax year in which the Legislation was enacted is unconstitutional.

The Board, as amicus curiae on behalf of the Assessors, suggests that this court may reform section 1161 to remove the unconstitutional retroactivity provisions, citing *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661. No party disputes our ability to do so. The portion of the Legislation containing the retroactivity language is in section 1161, in subparts (1) and (2) of subdivision (a). We hold those two subparts to be unconstitutional.

DISPOSITION

The judgments are reversed. The trial court is directed to enter judgments providing that subparts (1) and (2) of section 1161, subdivision (a) are unconstitutional as a retroactive application of a wholly new tax assessment for time periods before the 2007-2008 fiscal year, and that the remainder of the Legislation (namely, sections 1160, 1161 (other than subparts (1) and (2) of subdivision (a)), 1162, and 5368, and the 2007 amendments to sections 441 and 452) is lawful and constitutional, as against the challenges of Respondents. In the interest of justice, and because all parties prevailed in part on this appeal, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

Jet Fleet Corp. v. Dallas County Appraisal Dist., 773 S.W.2d 744 (Tex. App. 1989)
Court of Appeals of Texas
Filed: June 21st, 1989
Precedential Status: Precedential
Citations: 773 S.W.2d 744
Docket Number: 05-88-00986-CV
Judges: Howell, Lagarde and Whittington

773 S.W.2d 744 (1989)

JET FLEET CORPORATION, Appellant, v. DALLAS COUNTY APPRAISAL DISTRICT, Dallas County Appraisal Review Board, and Foy Mitchell, Chief Appraiser, Appellee.

No. 05-88-00986-CV.

Court of Appeals of Texas, Dallas.

June 21, 1989.

*745 Jackson D. Wilson, Dallas, for appellant.

Peter G. Smith, Dallas, for appellee.

Before HOWELL, LAGARDE and WHITTINGTON, JJ.

HOWELL, Justice.

Jet Fleet Corporation (Taxpayer) appeals a judgment denying it an interstate allocation of value for the charter jet aircraft portion of Jet Fleet's personal property[1] taxed in 1983, 1984, and 1985 by the Dallas County Appraisal District. After a trial de novo reviewing the administrative actions of the appellees, Dallas County Appraisal District, the Appraisal Review Board, and Chief Appraiser Foy Mitchell (collectively Taxing Authority), the trial court issued its findings of fact and conclusions of law denying the interstate allocation.

Taxpayer brings twenty points of error challenging the trial court's action. By points one through eight, Taxpayer claims that Taxing Authority's method of taxation is discriminatory and thus unconstitutional under the commerce and due process clauses of the federal constitution. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1. In points nine through nineteen, Taxpayer urges that the court erred in failing to find that Taxpayer's aircraft had acquired a taxable situs outside Texas. Lastly, Taxpayer maintains that the court's findings were contrary to the great weight and preponderance of the evidence because the court refused to grant an allocation in accordance with the parties' stipulation showing the percent of mileage flown out of state as compared with mileage flown in the state. We disagree with Taxpayer's contentions and affirm.

The United States Constitution confers no immunity from state taxation. *Washington Revenue Dep't v. Association of* *746 *Washington Stevedoring Cos.,* 435 U.S. 734, 750, 98 S. Ct. 1388, 1399, 55 L. Ed. 2d 682 (1978). However, a state's power to tax property within its borders is limited by the commerce and due process clauses of the Constitution. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1. A property tax will violate the commerce clause as an impermissible restraint on interstate commerce unless it is applied to an activity with a substantial nexus to the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and 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, 1079, 51 L. Ed. 2d 326 (1977).

As a matter of due process, the state of domicile has jurisdiction to tax the personal property of its corporations unless some measurable portion of the property has acquired a permanent location or "taxable situs" elsewhere. *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 294, 64 S. Ct. 950, 951, 88 L. Ed. 1283 (1944). *See also Central R.R. Co. v. Pennsylvania,* 370 U.S. 607, 611-12, 82 S. Ct. 1297, 1301-02, 8 L. Ed. 2d 720 (1962). The question of whether an instrumentality of commerce has acquired a tax situs in another state is purely a question of due process. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 599, 74 S. Ct. 757, 763, 98 L. Ed. 967 (1954). The test is whether the tax assessed bears a practical relation to the opportunities, benefits, and protection conferred or afforded by the taxing state. *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169, 174, 69 S. Ct. 432, 434, 93 L. Ed. 585 (1949).

In Texas, all tangible personal property in the state, whether owned by natural persons or corporations, shall be taxed in proportion to its value. TEX. CONST. art. VIII, § 1. Texas has jurisdiction to tax tangible personal property if the property is:

(1) located in this state for longer than a temporary period;
(2) temporarily located outside this state and the owner resides in this state; or
(3) used continually, whether regularly or irregularly, in this state.

TEX.TAX CODE ANN. § 11.01(c) (Vernon 1982).

The burden of proof rests on the taxpayer who contends that a portion of its assets is beyond the state's taxing power to show that the same property may be similarly taxed in another jurisdiction. *Central R.R.,* 370 U.S. at 613, 82 S.Ct. at 1302. Taxpayer must prove that a defined part of the domiciliary corpus has acquired a permanent location elsewhere. *Northwest Airlines,* 322 U.S. at 295, 64 S.Ct. at 952 (approved in *Braniff Airways,* 347 U.S. at 602, 74 S.Ct. at 764). A tax situs in a non-domiciliary state may be established with proof that the instrumentality travels through that state along fixed and regular routes. *Central R.R.,* 370 U.S. at 614, 82 S.Ct. at 1302. Alternatively, the non-domiciliary tax situs may be shown by habitual employment within that state of a substantial number of vehicles, albeit on irregular routes. *Id.* at 615, 82 S.Ct. at 1303. Our inquiry does not focus on the instrumentality's *absence* from the domiciliary state. Instead, we must decide whether the instrumentality could be taxed on the basis of sufficient contacts with the non-domiciliary state. *See id.* at 612, 82 S.Ct. at 1301; *see also Braniff Airways,* 347 U.S. at 600-01, 74 S.Ct. at 763-64. With a lack of sufficient contacts, we can presume that the domiciliary state is the only state affording the opportunities, benefits, or protection mandated by due process as a prerequisite to taxation. *See Central R.R.*, 370 U.S. at 612, 82 S.Ct. at 1301.

In the case at bar, the parties stipulated to an agreed statement of facts and submitted all legal and factual issues to the court. The parties stipulated that Taxpayer was domiciled in Dallas County, Texas in 1983, 1984, and 1985, and its principal place of business (including its principal office and terminal) was Love Field Airport in Dallas County. Taxpayer also had office and terminal space during the years in question in Shreveport, Louisiana, and Teterboro, New Jersey.

*747 Taxpayer's aircraft were kept outside Texas not more than twenty percent of the time during those years. Although the aircraft were kept, maintained, and hangared outside the state at "various locations," Taxpayer failed to specify the duration or particular sites of such activities. More than fifty percent of the fuel for Taxpayer's aircraft was purchased in Texas, and eighty-one percent of the maintenance on the aircraft was performed in Texas. The aircraft were hangared in Dallas County when not in use.

Taxpayer received police and fire protection as well as other government services from Dallas County. In addition, Taxpayer paid rent and landing, fuel, and other fees into a Love Field revenue fund, for which Taxpayer received separate fire and police protection.

Taxpayer engaged in charter flights only. Taxpayer did not operate as a scheduled air carrier, and thus its flights were irregular and typically unscheduled. Attached to the stipulations was a list of all flights that originated and terminated outside Texas during the tax years in question. These lists, however, mentioned more than thirty states and did not specify how much time was spent at each destination. Taxpayer did submit in its stipulations a proposed interstate allocation in which it asserted that approximately sixty-five percent of its in-air mileage was logged outside Texas. The stipulations, however, fail to specify any particular state where this mileage accrued.

Further, the stipulations provided that Taxpayer's aircraft had never been rendered for taxation in another state. Taxes had never been assessed by or paid to a state other than Texas.

Based on these stipulated facts, the court found as a matter of law that the entire value of Taxpayer's charter jet aircraft fleet was taxable in Dallas County because the aircraft did not acquire a taxable situs in any other state during the tax years in question. The trial court held, as we have noted, that to acquire a tax situs in another state, Taxpayer had to show that it operated along fixed or regular routes or that some ascertainable portion of Taxpayer's fleet was habitually present in a non-domiciliary state throughout the tax year.

With this background in mind, we turn to Taxpayer's points of error challenging the constitutionality of the Taxing Authority's actions. We cannot conclude that this tax scheme violated either the commerce clause or the due process clause of the federal constitution. First, the tax was applied to an activity with a substantial nexus to the taxing state. Taxpayer's charter air service was based in Texas with most of its operations emanating from Dallas County. *See Complete Auto,* 430 U.S. at 279, 97 S.Ct. at 1079. Second, the tax does not discriminate against interstate commerce because it is fairly applied to *all* personal property (1) located in Texas for longer than a temporary period, (2) located out of Texas temporarily while its owner remains in the state, or (3) used continually, whether regularly or irregularly, in this state. TEX.TAX CODE ANN. § 11.01(c) (Vernon 1982); *see also Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079. Third, the tax is fairly related to the various governmental services, benefits, and protections Taxpayer received from the state. *See Complete Auto,* 430 U.S. at 279, 97 S.Ct. at 1079.

The question of whether the tax was fairly apportioned   the remaining prong of the *Complete Auto* test   requires us to examine Taxpayer's contention that its aircraft acquired a taxable situs in another state. In order to receive the interstate allocation it sought, Taxpayer had the burden to prove that a defined part of its fleet acquired a permanent location elsewhere: either by traveling along fixed and regular routes or by habitual, albeit irregular, employment of the aircraft in another state. *Central R.R.,* 370 U.S. at 614-15, 82 S.Ct. at 1302-03. Taxpayer admitted in the agreed stipulations that it was not a scheduled air carrier and that its flights were typically unscheduled and irregular. The "fixed and regular routes" basis for tax apportionment is thus inapplicable. *See Braniff Airways,* 347 U.S. at 600-01, 74 *748 S.Ct. at 763-64.[2] Therefore, the fleet could only acquire a tax situs in a non-domiciliary state through the latter alternative   habitual employment of a number of the aircraft in another state.

The stipulated facts submitted to the trial court regarding out-of-state flights provided no specifications as to (1) the amount of time the aircraft remained in non-domiciliary states, (2) the activities performed in those states, or (3) whether those states provided Taxpayer with any services, benefits, or protections. The Taxpayer failed to meet its burden of showing that a portion of its property became permanently situated in a state other than Texas. "Permanent" means "continuously throughout the year, not a fraction thereof, whether days or weeks." *Northwest Airlines,* 322 U.S. at 298, 64 S.Ct. at 953. The evidence fails to show that Taxpayer's aircraft had sufficient contacts with a non-domiciliary state to render it subject to taxation outside of Texas. *See Braniff Airways,* 347 U.S. at 600-01, 74 S.Ct. at 763-64. Consequently, because Taxpayer failed to establish that its property had acquired a taxable situs in a non-domiciliary state, apportionment of Taxpayer's tax liability was not required. Taxpayer faced no threat of multiple taxation that would violate the commerce clause of the federal constitution. *Central R.R.,* 370 U.S. at 612, 82 S.Ct. at 1301.

We conclude that the trial court did not err in finding that the entire value of Taxpayer's personal property was taxable in Dallas County, Texas. The Taxing Authority's actions did not violate either the commerce clause or the due process clause of the United States Constitution. We therefore overrule points one through eight. Further, the trial court did not err in concluding that Taxpayer's property did not acquire a taxable situs in a state other than Texas so as to require apportionment of the tax. We overrule points nine through nineteen.

By point of error twenty, Taxpayer asserts that the trial court erred in failing to render judgment for Taxpayer for the allocation amount stipulated by the parties. Taxpayer argues that the court's findings were contrary to the great weight and preponderance of the evidence. In reviewing a factual insufficiency point, we will consider all of the evidence in the record relevant to the fact being challenged. We may set aside the judgment only if it is so contrary to the evidence as to be clearly wrong and unjust. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986). As we have previously discussed, Taxpayer failed to prove that a defined portion of its fleet acquired a taxable situs in a *particular* state other than Texas. *See Central R.R.,* 370 U.S. at 615, 82 S.Ct. at 1303. We cannot determine, on the record before us, whether Taxpayer's presence in any particular state was habitual or merely sporadic. *See id.* at 616, 82 S.Ct. at 1303. Consequently, under the applicable Texas Tax Code provision, section 11.01(c), we hold that Taxing Authority properly taxed the entire value of Taxpayer's aircraft rather than apportioning Taxpayer's tax liability with a non-domiciliary state. The trial court's findings, therefore, were not against the overwhelming weight of the evidence so as to be clearly wrong and unjust. We overrule Taxpayer's final point of error.

We AFFIRM the trial court's judgment.

NOTES

[1] Taxpayer's personal property subject to taxation in 1983 consisted of three aircraft (two Falcon jet aircraft and one Lear jet aircraft); in 1984 and 1985 only two planes were subject to taxation (one Falcon jet and one Lear jet). Taxpayer does not dispute the appraised value of the property, but only disputes the denial of an interstate allocation.

[2] Taxpayer argues that other Dallas air carriers, such as Southwest Airlines, regularly receive interstate allocations of their tax liability for the portion of time spent flying outside the state. Commercial airlines such as Southwest, however, generally fly along fixed and regular routes to other states, thereby establishing sufficient contacts with non-domiciliary states to create a need for tax apportionment. This fact distinguishes them from Taxpayer's business, which consists of specifically chartered, unscheduled, and irregular flights to other states. *See Braniff Airways,* 347 U.S. at 600-01, 74 S.Ct. at 763-64.

State of California 100.0003 **Board of Equalization**
Legal Department - MIC:82
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M e m o r a n d u m

To: Dean R. Kinnee, Chief
County-Assessed Properties Division

Date: July 11, 2014

From: Susan Galbraith
Tax Counsel

Subject: ***Property Taxation of Unscheduled Air Taxis***
Assignment No. 13-260

This is in response to your memorandum requesting our opinion as to the property taxation of unscheduled air taxi aircraft. You also ask whether the current assessment of unscheduled air taxis is contrary to federal TEFRA law. You ask three questions which are answered below.

> ***1. Should county assessors apportion the values of nonscheduled air taxi aircraft in the same manner as fractionally owned aircraft?***

Property taxation of both scheduled and unscheduled air taxi aircraft is governed by section 1154 of the Revenue and Taxation Code,[1] which provides:

> (a) As used in this section, "air taxi" means aircraft used by an air carrier which does not utilize aircraft having a maximum passenger capacity of more than 60 seats or a maximum payload capacity of more than 18,000 pounds in air transportation and which holds a certificate of public convenience and necessity or other economic authority issued by the United States Department of Transportation, or its successor.
>
> (b) Air taxis which are operated in scheduled air taxi operations are not subject to the provisions of Part 10 (commencing with Section 5301) of this division [general property tax provisions] and shall be assessed in accordance with the allocation formula set forth in Section 1152.
>
> (c) All other air taxis shall be assessed in the county where the aircraft is habitually situated in the same manner and at the same ratio as other personal property in the county subject to general property taxation. Such aircraft shall be taxed at the same rate and in the same manner as all other property on the unsecured roll.

As you know, procedures for allocating the value of air taxis were enacted in 1968 when the Legislature passed Assembly Bill 1257, adding sections 1150-1156 to the Revenue and Taxation Code. These sections required property taxation of unscheduled air taxis to be based on the allocation formula applicable to other certificated aircraft. One year later, in 1969, the

[1] All further statutory references are to the Revenue and Taxation Code unless otherwise specified.

Legislature amended section 1154 to specifically *exclude* unscheduled air taxis from the allocation assessment method prescribed in section 1152. (Assessors' Handbook Section 570, *Assessment of Commercial Aircraft* (January 1972), p. 1.) Assessors' Handbook Section 577 (AH 577), *Assessment of General Aircraft* (November 2003, p. 2) notes that "[s]cheduled air taxis are treated for property tax purposes as certificated aircraft, and nonscheduled air taxis are treated as general aircraft." By first requiring that unscheduled air taxi aircraft be allocated, and then, one year later, specifically excluding them from such allocation, the Legislature made clear that unscheduled air taxi aircraft were to be assessed differently than scheduled air taxi aircraft and would *not* be subject to allocation under section 1152.

Section 1161 regulates fractionally owned aircraft and provides that fractionally owned aircraft that have situs in California shall be assessed on a fleetwide basis to the manager in control of the fleet; that a fleet of fractionally owned aircraft establishes situs in California if an aircraft within the fleet makes a landing in California; and that a fleet of fractionally owned aircraft shall be assessed on an allocated basis. The Court of Appeal upheld the constitutionality of section 1161 when it held that a tax on fractionally owned aircraft assessed against the managers in control of the fleet was permissible and that a fractionally owned aircraft that made a single landing in the state had sufficient connection with California to justify the imposition of taxes on the aircraft. (*NetJets Aviation, Inc. v. Webster J. Guillory* (*Netjets*) (2012) 207 Cal.App.4th 26.)

While you acknowledge that section 1161 applies specifically only to fractionally owned aircraft, you query whether county assessors should tax unscheduled air taxi aircraft, in spite of section 1154, subdivision (c), on an apportioned basis based on *NetJets'* holding that a fractionally owned aircraft that made a single landing in the state had sufficient connection with California to justify the imposition of taxes on the aircraft.

In our view, section 1161 and *NetJets* do not apply to taxation of nonscheduled air taxi aircraft, and do not contain language indicating such an extension of section 1161 was intended or would be warranted. Under the statutory framework of the Revenue and Taxation Code, air taxis are governed specifically by Article 6 [Certificated Aircraft] of Chapter 5 of Part 2, and not by Article 7 of Chapter 5 [Fractionally Owned Aircraft] which governs fractionally owned aircraft. This is especially true in light of the clear action of the legislature to exclude unscheduled air taxis from the allocation formula. Thus, county assessors cannot apportion the values of nonscheduled air taxi aircraft *domiciled in California* for any of the aircraft's out-of-state activity without, as explained below, a showing by the taxpayer that the nonscheduled air taxi aircraft has established tax situs in another state, and cannot apportion the values of nonscheduled air taxi aircraft *domiciled outside California* without first showing that the nonscheduled air taxi aircraft has established tax situs within California.

In *Flying Tiger Line, Inc. v. Los Angeles County* (*Flying Tiger*) (1958) 51 Cal.2d 314, the county assessed five planes at 100 percent of their value without regard to the time they were physically present in the county, even though the planes were regularly flown in interstate and foreign commerce during the Korean War. As you state, *Flying Tiger* held that the rule articulated in *Ott v. Mississippi Valley Barge Line* (1949) 336 U.S. 169 and *Standard Oil Co. v. Peck* (1952) 342 U.S. 382 that permitted taxation by two or more states on an apportioned basis precluded taxation on all the property by the state of domicile as a violation of due process, and that the taxpayer does not have the burden of showing that other states actually imposed a tax on the property but only that during the tax year it received substantial benefits and protection in more than one state.

Later in its opinion, the court in *Flying Tiger* restated its holding that "where a nondomiciliary state has acquired the power to impose an apportioned tax, the domicile must also impose an apportioned tax." (*Flying Tiger*, *supra*, at p. 324.) Thus, where property acquires a tax situs in a state other than California, the due process and commerce clauses preclude the imposition of a tax without apportionment. (*Ice Capades, Inc. v. County of Los Angeles* (*Ice Capades*) (1976) 56 Cal.App.3d 128.) Although *Flying Tiger* does not require the taxpayer to show that other states actually imposed a tax on the property, it does provide that the taxpayer bears the burden of showing that it received substantial benefits and protection in more than one state, i.e. benefits and protection sufficient to establish a tax situs in that state.

In our opinion, under the rules established in *Flying Tiger* and *Ice Capades,* California is not required to apportion the value of nonscheduled air taxi aircraft unless the taxpayer first establishes that it has received substantial benefits and protections in more than one state and has acquired a tax situs in more than one state, regardless of whether the other state actually imposed a tax on the property. Thus, where the aircraft is domiciled in California, the burden is on the *taxpayer*, and not on the assessor, to establish that the aircraft has tax situs in another state, and if the aircraft is domiciled outside California, the burden is on the *assessor* to establish that the nonscheduled air taxi aircraft has tax situs in California *before* apportionment is allowed. (*See Ice Capades, supra*, p. 752, citing *Central Railroad Co. of Pennsylvania v. Pennsylvania* (1962) 370 U.S. 607; *Flying Tiger*, *supra*, p. 326; AH 577, p. 22 citing *Ice Capades*, *supra*, p. 754 and *Zantop Air Transport, Inc. v. San Bernardino County* (1966) 246 Cal. App. 2d 433, 437.)

2. ***What is the proper method that county assessors should employ to allocate the value of nonscheduled air taxi aircraft once the taxpayer has met its burden of establishing tax situs in a state other than California or the assessor has met his or her burden of establishing tax situs within California?***

As noted above, pursuant to the provisions of section 1154, subdivision (c), county assessors shall not apportion the value of nonscheduled air taxi aircraft, and shall instead assess nonscheduled air taxi aircraft as general aircraft according to its situs. However, after a taxpayer has met its burden that it has received substantial benefits and protections in a state other than California and has acquired a tax situs in more than one state, county assessors are required to apportion the value of nonscheduled air taxi aircraft under the holdings of *Flying Tiger* and *Ice Capades.* Likewise, a portion of the value of nonscheduled air taxi aircraft domiciled outside California cannot be apportioned to California until the assessor has met his or her burden that the aircraft has tax situs in California.

As to the method county assessors should employ to apportion the value of nonscheduled air taxi aircraft when tax situs has been established, Assessors' Handbook Section 504, *Assessment of Personal Property and Fixtures* (October 2002, p. 40) provides that if an aircraft establishes tax situs both in California and outside California, the rules established in *Ice Capades, supra,* and in *GeoMetrics v. County of Santa Clara* (1982) 127 Cal.App.3d 940, apply:

> *For California aircraft*, the assessment must be apportioned to eliminate the time the aircraft has established tax situs outside California. All the remaining time – whether or not in California – is allocated to the California airport where it spends the greatest amount of ground time.

> *For an aircraft that has a primary situs outside of California*, but has established some situs in this state, *the California assessment is based on the time actually in this state* – at the airport where it spends the greatest amount of ground time – and all other time is allocable elsewhere.

(Emphasis added.)

You also ask "what constitutes substantial benefits and protection in a state in order to enable taxation by that state on an apportioned basis?" In determining whether California can tax a nonscheduled air taxi aircraft that has a primary situs outside California on an apportioned basis, that property must have ". . . such contacts [with California] as confer jurisdiction to tax."

> Due process requires that the nature of the contacts sufficient to support a state's power to tax must provide the opportunities, benefits, or protection afforded by the state. For movable personal property such as aircraft, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination . . . In general, relevant factors to be considered include the domicile of the aircraft owners, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. The court held that these were the determinative factors in *Ice Capades*.

(AH 577, *supra*, p. 22). (Footnotes omitted.)

3. Does Federal TEFRA law require a county assessor to apportion unscheduled air taxi aircraft values?

You ask if the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (49 U.S.C. § 40116) requires assessors to apportion the values of unscheduled air taxi aircraft.

Section 40116 provides, in relevant part:

> (d) Unreasonable burdens and discrimination against interstate commerce.
>
> (2)(A) A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce:
>
> (i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

TEFRA ensures that air carrier transportation property is not assessed at a higher ratio to market value than other commercial and industrial property. (See *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal. 4th 1110, 1137.) In making this comparison, it is the ratio to fair market value between aircraft and other commercial property that is compared, not the ratio of apportionment between aircraft types. Therefore, in our opinion, it is not a violation of TEFRA for California to assess unscheduled air taxi aircraft 100 percent to California and apportion the value of scheduled air taxi aircraft for activity outside of California.

In summary, current law specifies that unscheduled air taxi aircraft should be assessed in the same manner as personal property subject to general property taxation, that is, by situs. In our view, the assessment of unscheduled air taxi aircraft that follows the statutory language of section 1154, subdivision (c), rather than the allocation formula prescribed in section 1152, is the correct method of assessing unscheduled air taxi aircraft. Further, assessing unscheduled air taxi aircraft using the allocation method set forth in section 1152 contradicts the express language of section 1154, subdivision (c); represents a significant departure from longstanding assessment practices of unscheduled air taxi aircraft; and is contrary to legislative intent.

SG/yg
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cc:	Mr. David Gau	MIC:63
	Mr. Todd Gilman	MIC:70

STATE OF CALIFORNIA **100.0008**

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November 3, 2011

Re: Legal Opinion – Aircraft Property Tax Issues
Assignment No.: 11-072

Dear Mr. :

This is in response to your April 22, 2011 letter to the Board of Equalization's Legal Department wherein you requested our opinion on numerous questions pertaining to the assessment of aircraft. Please see the below analysis for answers to your questions.

Facts

Your letter contains three hypothetical situations regarding the assessment of aircraft for property tax purposes. After each hypothetical, you pose a number of questions which we address below. The first hypothetical situation addresses the business inventory exemption; the second and third hypothetical situations address the question of situs.

SITUATION 1[1]

> An aircraft owner places an aircraft for sale with a broker in the state of Washington in July of 2009 and signs a listing agreement giving him exclusive rights to sell his aircraft for, say, $16,000,000, a 2% fee of the gross selling price will be charged at closing of escrow; and, the broker bears responsibility for all advertising and marketing costs; the aircraft is housed in a repair/storage facility owned by a third party who is acting on behalf of the owner to keep the aircraft in good maintenance and according to FAA regulations. The repair facility's staff is authorized to show and demo the aircraft to all prospective buyers. Logs are kept that show the aircraft has only been flown for demo and maintenance. Between the listing date and the lien date, only five hours have been flown for maintenance. Logs kept by the maintenance facility show each flight and none are for personal or business use of the owners. The corporate aviation company that has the listing has advertised in Amstat, Net Jet, and Plane Mover. Due to the down market in corporate jets, the aircraft does not sell until July of 2010 for almost $10,000,000 less than the original asking price. The intent to sell is evidenced by many drops in selling prices before the aircraft is sold.

[1] For the purposes of this letter your hypothetical situations have been renumbered.

SITUATION 2

An aircraft was purchased on 12/17/2007 and delivered to the buyer, and LLC, in Salem, Oregon on 1/25/08. On 2/6/08 the aircraft was relocated to Reno, Nevada, where a managing partner lives. The aircraft was subsequently used partly in personal business by the owner and partly in charter, Part 135 usage, during the 2008 calendar year, but the home base, tax situs, remained in Reno, NV, but no Nevada personal property taxes were assessed or paid on the aircraft. Even though the aircraft was never on the ground for more than a few days at a time on Los Angeles, and the aircraft was not there on the lien date, 2009, it was assessed by Los Angeles County for the 2009 tax year and the value was apportioned based on the ground time listed in the aircraft's logs.

After the purchase, the aircraft underwent some repairs and modification, thus the lag in delivery form the purchase date. Here are the locations and ground days for the aircraft:

CALIFORINA

DAYS IN VAN NUYS	67
DAYS IN OTHER L.A. COUNTY	1
TOTAL L.A.	68
ONTARIO	9
MONTEREY	57
OTHER CA LOCATIONS	22
TOTAL CALIFORNIA	156

OUTSIDE CALIFORINA

OREGON	2
NEVADA	122
OTHER STATES AND INTERNATIONAL	61
TOTAL OTHER	185
TOTAL DAYS PER LOGS IN 2008	341
DAYS NOT FLOWN IN 2008	24
TOTAL DAYS IN 2008	365

Even though the aircraft was never in Los Angeles for 60 days at a time, the minimum number of days said needed to establish a tax situs in California, the owner did not have a residence in California, nor does he have any other income generated from California sources, the county apportioned the aircraft values of $6,000,000 45.7%, 156 days divided by 341 days to Los Angeles, and said 54.3%, 183 Days divided by 341 days, was exempt.

SITUATION 3

An aircraft is based in Los Angeles and the owner is domiciled in California, however the aircraft is taken back east every year for around two or three months, where it is used in charter service. The owner has a home in New York and operates the charter service from a New York airport, where a hanger is rented each year.

In 2009 the aircraft operated out of New York for 67 days, but the ground days during this period were: 51 ground days in New York, 6 ground days in Montana, 4 ground days in New Jersey, 5 ground days in California, and one ground day in Ohio. The aircraft always returned to New York after the various flights. During the rest of the year, the aircraft was flown to New York at various times from California, where it returned between flights, and an additional 30 ground days in New York were accumulated. The owner did not pay any property tax in New York as personal property is not assessed there.

Law & Analysis

I. *Business Inventory Exemption*

The assessor has the duty to prepare the local assessment roll and to assess all property subject to general property taxation at its full value. (Rev. & Tax. Code, § 401; see §§ 110, 110.1, 110.5, 405, 601; see also Cal. Const., art. XIII, § 1, art. XIII A, § 1, 2.)

The business inventory exemption is set forth in Revenue and Taxation Code,[2] sections 219 and 129, and Property Tax Rule[3] 133. Section 219 provides that: "For the 1980-81 fiscal year and fiscal years thereafter, business inventories are exempt from taxation and the assessor shall not assess business inventories." Section 129, states, in relevant part:

> 'Business inventories' shall include goods intended for sale or lease in the ordinary course of business and shall include raw materials and work in progress with respect to such goods.

Rule 133 states, in relevant part:

> (a) Scope of Exemption.
>
> (1) 'Business inventories' that are eligible for a partial exemption from taxation under section 129 of the Revenue and Taxation Code include all tangible personal property, whether raw materials, work in process or finished goods, which will become a part of or are themselves items of personalty held for sale or lease in the ordinary course of business . . .

Section 129 provides that business inventories include "goods intended for sale or lease in the ordinary course of business" but do not include "any item held for lease which has been or is intended to be used by the lessor prior to or subsequent to the lease." Consigned goods that

[2] All section references are to the Revenue and Taxation Code unless otherwise specified.
[3] Cal. Code Regs., tit. 18, § 133. All Rule references are sections to title 18 of the California Code of Regulations.

are held for sale may qualify for the business inventory exemption. (Letter to Assessors (LTA) 80/69, Question C4.)

Pursuant to section 5391, aircraft may qualify for the business inventory exemption: "Aircraft which are considered business inventories, within the meaning of Section 129 of the Revenue and Taxation Code, shall be included in the inventory exemption." The guidelines for the exemption of aircraft as business inventory are the same as for other properties, that is, to be eligible for the business inventory exemption the aircraft must be either held for sale or lease in the ordinary course of business on the lien date. Assessors' Handbook section 576 (AH 576) (February 2002), *Assessment of Vessels*, provides guidance for the application of the business inventory exemption to vessels held for consignment. While the definition of vessel specifically excludes aircraft (Rev. & Tax. Code, § 130), the business inventory exemption applies to both vessels and aircraft and thus the guidance in AH 576 can be instructive in the case of consigned aircraft. AH 576, pages 39-40, states:

> PROPERTY HELD FOR LEASE OR CONSIGNMENT
>
> Business inventory includes property held for lease or consignment by lessors, sublessors, and consignors. Exemptions allowed, however, are not based solely upon the status of a vessel on the lien date and the assessor should not judge the validity of the business inventory exemption based on that fact alone, but instead look to the true intent of the owner. Individual facts such as a vessel's actual use before and after the lien date, the length of a consignment or lease, and the location of the vessel tend to indicate the owner's intent, but are not singularly controlling . . .
>
> To qualify for the business inventory exemption, the owner or lessor must have the intent to actually have the property available for lease or under consignment in accordance with the regular and usual practice and method of the business of the lessor or consignor. The vessel owners are not required to be in the business of selling or leasing vessels, only that the property is so held. The business inventory exemption is available to owners who have validly put their vessel up for consignment to a consignor . . . The key to qualifying for the business inventory exemption is that the vessel must be held for sale, lease, or consignment in the ordinary course of business of the seller, lessor, or consignor.

Situation 1

An aircraft owner places an aircraft for sale with a broker in the state of Washington. The aircraft is housed in a repair/storage facility owned by a third party who is acting on behalf of the owner to keep the aircraft in good maintenance and according to FAA regulations. You ask the following questions.

1. Does the listing with an out-of-state broker meet the criteria spelled out as a vendor or lessor of the property in his ordinary course of business when his course of business is to take listings from anywhere in the United States and sell or lease the aircraft?

As an initial matter, we note that the burden of proof is upon the taxpayer to establish that property for which an exemption is claimed falls within a specific constitutional or statutory exemption. (*Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal. App. 4th 604, 614.) Thus, the burden is on the aircraft owner to establish to the assessor's satisfaction that aircraft was held for sale or lease in the ordinary course of business on the lien date and that all the other requirements of section 129 and Rule 133 were met.

For consigned aircraft to be eligible for the business inventory exemption, they must be held for sale or lease in the ordinary course of business on the lien date, in accordance with the regular and usual practice and method of the business of the consignor, and all the other requirements of section 129 and Rule 133 must be met. Assessors' Handbook section 577 (AH 577) (November 2003), *Assessment of General Aircraft*, provides at page 26:

> In determining whether or not the business claiming the exemption is selling or leasing aircraft as part of their *ordinary course of business*, the business should have, but not limited to, the following:
>
> FAA dealer's license
> State of California seller's permit
> Local business license
> Location on an airport or airfield
> Listing or consignment agreements
> Statement that they have total care, custody, and control of consignment aircraft

The above documentation is evidence that a broker is in the business of selling, leasing, or consigning aircraft. You state that in your situation the broker's course of business is "to take listings from anywhere in the United States and sell or lease the aircraft." If such is the case, then the broker should be able to provide some, if not all, of the above documentation. Again, this is a fact-specific inquiry and the assessor should take all evidence into consideration in determining what business the broker is in and whether or not it is holding the aircraft in the ordinary course of business. The fact that the broker is located outside of California should not affect this inquiry.[4]

2. <u>Do all of the following conditions have to be met for a vendor to qualify as vendor doing business in his ordinary course of business?</u>

- FAA dealer's license
- State of California seller's permit
- Local business license
- Location on an airport or airfield
- Listing or consignment agreements
- Statement that they have total care, custody, and control of consignment aircraft

[4] In your situation, you do not state whether the aircraft has established situs in California. We assume that it has since otherwise no California property tax would be due and the application of the business inventory exemption would be irrelevant.

As explained above, the documentation listed in AH 577 is evidence that a broker is in the business of selling, leasing, or consigning aircraft. However, it is not exhaustive and is meant only to guide the assessor's determination. There may be other persuasive evidence of the broker's ordinary course of business. The assessor should consider all evidence, not just the above-mentioned documentation, in determining whether or not the taxpayer has met the burden of showing that the property is held for sale or lease in the broker's ordinary course of business. In our opinion, it is possible that an assessor could find that property is held for sale or lease in the broker's ordinary course of business even though a broker could not provide all of the above documentation.

3. Does the aircraft have to be in the broker/vendor's physical possession, or can it be in the care, custody, and control of the third party, who is the agent for the owner or broker?

When determining whether a property placed on consignment qualifies for the business inventory exemption, the assessor must ascertain the true intent of the owner. Factors that reflect that intent include the property's actual use before and after the lien date, the length of a consignment or lease, and the location of the property. (AH 576, pp. 39-40.)

As explained in the supporting letter to Property Tax Annotation[5] (Annotation) 205.0180, the location of the property is one factor to be considered in determining the owner's intent. If the property remains housed with the owner, it is possible that the owner could use the property for purposes not consistent with its sale or lease, rendering it ineligible for the exemption. (Rule 133, subd. (b).) In this case, the aircraft is located at the storage facility of a third party. Since the third party is acting on behalf of the owner, and is not an agent of the consignor, the owner has not given control of the aircraft to the consignor and there is still the possibility that the aircraft might be used for purposes other than its sale or lease. However, you also state that the logs kept by the third party show that only five hours have been flown for maintenance, and that the aircraft has not been flown for personal or business use.

While the foregoing facts are consistent with the aircraft being held exclusively for sale by the consignor, it is our opinion that more facts would be necessary to make a determination that the taxpayer has met its burden. For example, copies of the consignment agreement and the agreement between the owner and the third party would be helpful in determining the parties' rights with regard to the aircraft. Also, the location of the storage facility could have an effect on the analysis. Further, determining the intent of the owner is a subjective inquiry and there may be other facts not disclosed here that could affect the assessor's decision.

II. Situs

Pursuant to the California Constitution, article XIII, section 14, all property taxed by local government shall be assessed in the county, city, and district in which it is situated. General aircraft are assessable at the location where the aircraft is habitually situated. (AH 577, p. 21; Rule 205, subd. (b).) AH 577, pages 22-23, provides the following guidance when an aircraft establishes tax situs both in California and outside of California.

[5] Property Tax Annotations are summaries of the conclusions reached in selected legal rulings of Board legal counsel published in the Board's Property Tax Law Guide and on the Board's website. See Cal. Code Regs., tit. 18, § 5700 for more information regarding annotations.

> If an aircraft establishes tax situs both in California and outside California, apportionment is necessary between California and other jurisdictions under the rulings established in *Ice Capades, Inc.* v. *County of Los Angeles* and *GeoMetrics* v. *County of Santa Clara*. The interpretation of tax situs is that property must have "such contacts as confer jurisdiction to tax." Due process requires that the nature of the contacts sufficient to support a state's power to tax must provide the opportunities, benefits, or protection afforded by the state. For movable personal property such as aircraft, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination. In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. The court held that these were the determinative factors in *Ice Capades.* ¶ . . . ¶
>
> When an aircraft owner is domiciled in California and the aircraft (1) has established a tax situs in California, (2) has established a tax situs in another state, states, or foreign country, (3) operates in other states or foreign countries but does not establish tax situs in those states or foreign countries, and (4) is predominantly located in California during the year, the county may assess portions of value reflecting the portion of the year that the aircraft is present in California and the portion of the year that the aircraft operates in the states or foreign countries where the aircraft has not established tax situs. ¶ . . . ¶
>
> When an aircraft owner is domiciled in a state *other than* California and the aircraft (1) has established a tax situs in the owner's domiciliary state, (2) has established a tax situs in California, and (3) operates in another state, states, or foreign country, the county may assess portions of value reflecting only the portion of the year that the aircraft is present in California. In other words, the value is apportioned for only the time spent in California.

Situation 2

In situation 2, the aircraft is domiciled in Reno, Nevada, where it has established situs. The aircraft was in California airspace many times during the 2008 year, and spent 156 ground days in California (68 in Los Angeles County). You ask the following questions.

1. Are 68 days in Los Angeles County enough time to establish a taxable situs there in 2008?

First, we note that the question of whether the aircraft has established situs in California must be answered before we determine which county may tax the aircraft. As explained in *Ice Capades, Inc. v. County of Los Angeles* (1976) 56 Cal. App. 3d 745, 746 (*Ice Capades*) and *GeoMetrics* v. *County of Santa Clara* (1982) 127 Cal.App.3d 940, to establish situs, the property must have such contacts as to confer jurisdiction to tax. Due process requires that the nature of the contacts sufficient to support a state's power to tax must provide the opportunities, benefits, or protection afforded by the state. For movable personal property such as aircraft, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination. In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state.

In our opinion, the fact that the aircraft spent 156 ground days in California is a significant indication that the aircraft received the opportunities, benefits and protection of the state. Of course, the assessor may also consider other factors in making his determination (e.g., the owner's intent and the owner's contact with the state).

Assuming the assessor determines that the aircraft has situs in California, the decision of which county has the power to tax the aircraft is guided by Rule 205, subdivision (b). According to that Rule, once California tax situs has been established, the aircraft is "habitually situated" at the airport of the local jurisdiction where the aircraft spends its ground time. If the aircraft spends a substantial amount of time at multiple airports, it is habitually situated at the airport where it spends the most ground time. With regard to your specific situation, assuming that the aircraft has established situs in California, it is habitually situated in Los Angeles County for the year 2008, since the aircraft spent more ground days there than in any other county.

2. <u>If a taxable situs in California has not been established does this contact with the county give them the right to add the time spent in other counties in California?</u>

As explained above, the amount of time spent in all California counties is relevant to the threshold inquiry of whether or not taxable situs has been established in California. If the aircraft has not established situs in California, it is not necessary to determine in which county the aircraft is habitually situated; the aircraft is not taxable by Los Angeles County or any other California county.

3. <u>What amount of short-term contacts in a year must an aircraft have before it can be assessed?</u>

Again, whether an aircraft has established situs in California is a question of fact for the assessor to determine. The amount of time spent in California is only one factor to be considered. Therefore, there is no set number of short-term contacts that will determine the issue of situs.

4. <u>Shouldn't short term days of one to two days to pick up passengers (often charter flight operators stay overnight or a weekend to pick up passengers the following day or Monday) be categorized as "transitory contact"?</u>

In *Ice Capades*, the Court used the term "transitory contact" to describe the production of the taxpayer's show in a given jurisdiction. (*Ice Capades, Inc. v. County of Los Angeles, supra,* 56 Cal. App. 3d 745, 754.) The Court held that these contacts alone were insufficient to establish situs. In Assessors' Handbook section 504 (October 2002), *Assessment of Personal Property and Fixtures*, page 35, we advised that "transitory contact, such as may occur when a vessel or aircraft makes a round-the-world voyage, does not establish substantial presence." In our opinion, housing a plane in a jurisdiction for one or two days is more significant contact than that which might occur during a round-the-world voyage. As such, it is our opinion that the activity you describe is not likely transitory contact. Also, we note that in *Ice Capades*, each transitory contact was an isolated incident. That is, the court did not address the issue of whether multiple instances of transitory contact in the same jurisdiction in the same year would be sufficient to establish situs.

5. Is there an overall percentage of time in a county, say 50%, like in [Property Tax Annotation 740.0002], that has to be met before a taxable situs is established? Would there be a minimum of 60 days in a year?

Annotation 740.0002 addressed one situation, among others, where aircraft had already established situs in California. In that case, pursuant to Rule 205, subdivision (b), we concluded that since the aircraft spent approximately 50 percent of its ground time in Orange County, that the aircraft was habitually situated in Orange County and thus had situs in that county.

Again, the inquiry of whether an aircraft has established situs in California is separate from the question of which county may impose personal property tax on the aircraft. In determining whether the aircraft has established situs in California, the amount of time spent in California is only one factor to be considered and there is no set number of ground days that will determine the issue of situs. If the aircraft has established situs in California, then it will be taxed in the county where it is habitually situated, i.e., has the most ground days. Whether 60 ground days is sufficient will depend on the amount of ground days spent in other counties.

6. If there is a taxable situs, shouldn't the numerator in the county's calculation have been 365, instead of 341?

Where, as here, an aircraft owner is domiciled in a state other than California and the aircraft (1) has established a tax situs in the owner's domiciliary state, (2) has established a tax situs in California, and (3) operates in another state, states, or foreign country, the county may assess portions of value reflecting only the portion of the year that the aircraft is present in California. (AH 577, p. 23) As explained in Annotation 740.0003, the time spent by the aircraft in the state in which the aircraft has acquired secondary taxable situs, California in this case, divided by 365 days provides the percentage of fair market value to be prorated to the state of secondary taxable situs.

Situation 3

In situation 3, the aircraft is based in Los Angeles and the owner is domiciled in California. In 2009, the aircraft is taken to New York for 67 days. The ground days during this period were: 51 ground days in New York, six ground days in Montana, four ground days in New Jersey, five ground days in California, and one ground day in Ohio. The aircraft always returned to New York after the various flights. During the rest of the year, the aircraft was flown to New York at various times from California, where it returned between flights, and an additional 30 ground days in New York were accumulated. You ask the following questions.

1. Were the ground days in New York sufficient to establish a tax situs there when the intent was to stay at least 60 days and there was a business reason in having the aircraft operated out of New York?

As explained above, for movable personal property such as aircraft, the amount and nature of the contact of the aircraft and its owner with a state necessary to establish tax situs is a factual determination. In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. In determining whether the aircraft has established situs outside of California, the amount of time spent in the other state is only one factor to be considered and there is no set number of ground days that will determine the issue of situs. While the facts that the aircraft operated out of New York for 67 days and spent 51 ground days there are consistent with establishing situs in New York, such a determination is best left for the county assessor after weighing all of the relevant factors.

2. <u>Do the flights to other jurisdictions from New York detract from the total days in the east?</u>

AH 577, page 22, provides that

> When an aircraft owner is domiciled in California and the aircraft (1) has established a tax situs in California, (2) has established a tax situs in another state, states, or foreign country, (3) operates in other states or foreign countries but does not establish tax situs in those states or foreign countries, and (4) is predominantly located in California during the year, the county may assess portions of value reflecting the portion of the year that the aircraft is present in California and the portion of the year that the aircraft operates in the states or foreign countries where the aircraft has not established tax situs.

Therefore, if the aircraft has not established situs in the other jurisdictions, the ground time spent in those jurisdictions may be apportioned to California.

3. <u>If 60 continuous ground days are not required for non-resident flights into Los Angeles to establish a tax situs, why would they be required to establish a tax situs in another state for an aircraft owned by a person who's domiciled is in California (if this is the case)?</u>

As explained above, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination. Several factors must be considered including the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. Length of time is alone not sufficient to make a determination. The assessor must also consider other factors including the nature of the time spent in the jurisdiction as well as the owner's contact with the state. Therefore, a specific amount of time may establish situs in one case and not in another.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Daniel Paul

Daniel Paul
Tax Counsel

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cc: Honorable
County Assessor

Mr. David Gau	MIC:63
Mr. Dean Kinnee	MIC:64
Mr. Todd Gilman	MIC:70

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Texas Administrative Code

TITLE 34	PUBLIC FINANCE
PART 1	COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 9	PROPERTY TAX ADMINISTRATION
SUBCHAPTER I	VALUATION PROCEDURES
RULE §9.4033	Allocation of Value

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commercial instrument or commercial equipment--Tangible personal property used for a business purpose, which includes, but is not limited to, commercial and business aircraft, rolling stock not owned or leased by a railroad, motor vehicle, shipping containers, vessels and watercraft (except for special purpose vessels and watercraft used as an instrumentality of commerce as defined in Tax Code, §21.031), mobile construction or drilling equipment, and mobile equipment of any other sort. The term does not include goods, wares, ores, or merchandise held for sale or resale, stored, warehoused, or in the process of assembly, manufacture, or refinement on January 1.

(2) Jurisdiction to tax--The legal power to levy a property tax on a property, regardless of whether the power to tax is exercised.

(3) Situs jurisdiction--A taxing unit, state, or nation that has jurisdiction to tax a property because of the property's location or use, or because of the owner's domicile or principal place of business.

(4) Used continually--Used several times on regular routes or for several tasks in close succession throughout the year.

(b) A property owner may apply for the allocation of total market value of a vessel, special-purpose vessel, or other watercraft.

(1) The allocation of taxable value of vessels and other watercraft used outside this state shall be determined according to the provisions of Tax Code, §21.021 and §21.031.

(2) To receive an allocation of value for vessels and other watercraft, a property owner must apply for the allocation on the comptroller-prescribed, model form Application for Interstate Allocation of Vessels or Other Watercraft or a form containing information which is in substantial compliance with the model form if approved by the comptroller. A person filing an allocation application form must include all information required by the form. The application must be filed with the chief appraiser for the district in which the property is taxable and must be filed prior to the approval of appraisal records by the appraisal board.

(3) If the chief appraiser determines that he needs information in addition to that furnished on the application, he may request additional information by written notice delivered to the property owner. A taxpayer shall furnish any additional information required within 15 days after the date the notice is mailed.

(c) The guidelines for determination of jurisdiction to tax are as follows.

(1) The chief appraiser shall determine whether property is within the taxing jurisdiction of another state or nation from the evidence supplied by the property owner. The burden of proof in establishing such jurisdiction is upon the property owner.

(2) The State of Texas has jurisdiction to tax property if:

(A) it is physically present within the State of Texas on January 1 for more than a temporary period;

(B) it has been used continually in Texas during the 12 months preceding January 1, regardless of its location on January 1; or

(C) its owner resides or does business in Texas and the property is outside Texas for a temporary period on January 1.

(3) Property is within the jurisdiction to tax of another state or nation if:

(A) it is physically present within that state or nation's boundaries on the state or nation's property tax lien date for more than a temporary period;

(B) it has been used continually in the state or nation during the 12 months preceding January 1, regardless of its location on January 1;

(C) its owner resides or does business in that state or nation and the property is outside that state or nation for temporary period on January 1; or

(D) the state or nation has in fact assessed a property tax against the property.

(4) Property is neither physically present nor used in a jurisdiction when it flies over the jurisdiction without landing.

(5) Property that leaves the boundaries of this state, and returns without being exposed to the taxing jurisdiction of another state or nation, remains within this state's taxing jurisdiction for the duration of the trip.

(6) Property is not within the jurisdiction to tax of this state or any other state of the United States if:

(A) it is an instrumentality of commerce;

(B) it is owned by a foreign domiciliary;

(C) it is taxed in the nation where its owner is domiciled;

(D) it is used exclusively in foreign commerce; and

(E) it is not present in this state for more than a temporary period on January 1.

(7) The chief appraiser may consider the following evidence in determining where a property has taxable situs:

(A) published schedules, if the property carries passengers and/or cargo on regular routes at regular times;

(B) records kept in the normal course of business, such as mileage, flight, or vessel logs, that indicate where the property has traveled, how long it was located at each destination, and the purpose of its location at each destination;

(C) reports filed with state or national agencies that indicate where the property has traveled, how long it was located at destination, and the purpose of its location at each destination; and

(D) actual tax bills or notices of appraisal or assessment from other jurisdictions.

(d) The chief appraiser shall allocate the market value of that property used in interstate or foreign commerce that qualifies for allocation under this subsection.

(1) Property qualifies for allocation if it:

(A) constitutes a commercial instrument or commercial equipment;

(B) is used for a business purpose;

(C) has taxable situs in a taxing unit within the appraisal district as provided by Tax Code, §21.02 or §21.021; and

(D) is used continually outside Texas in interstate or foreign commerce, whether regularly or irregularly.

(2) A commercial instrument or item of business equipment is present in the state for more than a temporary period if:

(A) its owner maintains one or more places of business in this state and the property is present in this state on January 1 or at any time during the 12 months preceding January 1; and

(B) the property has contact with this state of a character that would permit this state to tax it under applicable federal law.

(e) A property owner who is entitled to an allocation of property must file a rendition form that provides enough information necessary to prove the entitlement to allocation and permit the chief appraiser to apply an allocation formula appropriate to the subject property. An appraisal district shall use the comptroller-prescribed, model form Rendition of Property Qualified for Allocation of Value or a form containing information which is in substantial compliance with the model form if approved by the comptroller. Each form shall require the property owner to identify the property that is the subject of the rendition and provide information measuring the use of the property within Texas and within other states or nations. The form must permit the property owner to state an opinion of the total market value of the property and the amount of value that should be allocated to each taxing unit in which the property has situs.

(f) If the chief appraiser determines that the property was within the taxing jurisdiction of this state and within the taxing jurisdiction of another state or nation for the same calendar year, he shall allocate to each taxing unit in which the property has situs the portion of the property's market value that fairly reflects its use in this state. If an allocation formula specified in this subsection does not fairly reflect the use of the property in this state and other situs jurisdictions, the chief appraiser may use another formula that more adequately reflects use. Such alternate formulas may include revenue-ton miles, equipment load factors, or other measures of property use.

(1) For commercial aircraft property, as defined by Tax Code, §21.055, the chief appraiser shall use the following allocation formula: the fair market value of the aircraft multiplied by a fraction, the numerator of which is the product of 1.5 and the number of revenue departures by the aircraft from Texas during the preceding tax year and the denominator of which is the greater of:

(A) the number of hours in a year (8,760); or

(B) the numerator.

(2) For vessels, the chief appraiser will normally use an allocation formula based on port days. The ratio of the days the vessel spends in port in Texas to total days spent in port in all situs jurisdictions is the allocation ratio.

(3) For motor vehicles and rolling stock, not including vessels or aircraft, the chief appraiser will normally use an allocation formula based on mileage. The ratio of total miles traveled in Texas during the year to the total miles traveled in all situs jurisdictions during the year is the allocation ratio.

(4) For business aircraft property as defined by Tax Code, §21.055, the chief appraiser shall use the following allocation formula: the fair market value of the aircraft multiplied by a fraction, the numerator of which is the number departures by the aircraft from a location in Texas during the preceding tax year and the denominator of which is the number departures by the aircraft from all locations during the preceding tax year.

(5) For other equipment, the chief appraiser will normally use an allocation formula based on time. The ratio of time spent in Texas during the year to the total time spent in all situs jurisdictions during the year is the allocation ratio.

(g) If the appraisal office allocates the value of property in a given year:

(1) the chief appraiser shall note on the property's appraisal record for the year:

(A) that the allocation has been granted;

(B) the market value of the property;

(C) the allocation formula factor; and

(D) the appraised value of the property after allocation.

(2) the chief appraiser shall retain a record of the allocation for three years after it is granted, including:

(A) the rendition form requesting allocation;

(B) supporting documents filed by the property owner; and

(C) the formula chosen and calculations used in making the allocations.

(h) The comptroller's forms applicable to this section may be revised at the discretion of the comptroller. Current forms can be obtained from the Comptroller of Public Accounts' Property Tax Assistance Division.

Source Note: The provisions of this §9.4033 adopted to be effective December 13, 1996, 21 TexReg 11816; amended to be effective February 3, 1998, 23 TexReg 800; amended to be effective March 14, 2004, 29 TexReg 2371; amended to be effective October 10, 2010, 35 TexReg 9107

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