State of California 100.0003 **Board of Equalization**
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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.
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> (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.
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> (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.

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