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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

CASE NO.: 2024CA1177

JETBLUE AIRWAYS CORPORATION,

Plaintiff,

v.

FLORIDA DEPARTMENT OF REVENUE,

Defendants.

NOTICE OF APPEAL OF FINAL ORDER

Notice is given that Plaintiff/Appellant JETBLUE AIRWAYS CORPORATION (“JetBlue”) appeals to the First District Court of Appeal this Court’s Final Summary Judgment for DOR and Dismissal of Counterclaim rendered September 1, 2025 [Exh. A] and this Court’s Order Denying JetBlue’s Motion for Rehearing rendered October 27, 2025 [Exh. B]. The orders are final orders under Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.110(a)(1).

JetBlue timely filed and served its Motion for Rehearing on September 15, 2025. *See* [Exh. C]. Conformed copies of the final orders are attached. *See* [Exhs. A, B].

Dated: November 24, 2025.

Respectfully,

By: /s/ Kristen M. Fiore

Michael J. Bowen

Florida Bar No. 0071527

Howard Jay Harrington

Florida Bar No.: 0118719

50 North Laura St., Ste 3100
Jacksonville, FL 32202
Phone: (904) 798-3700
Fax: (904) 798-3730
Michael.Bowen@akerman.com
Jay.Harrington@akerman.com
Jennifer.meehan@akerman.com

And

Lorie A. Fale
Florida Bar No. 0164569
98 Southeast Seventh St., Ste. 1100
Miami, FL 33131
Phone: (305) 982-5550
Fax: (305) 374-5095
Lorie.Fale@akerman.com

And

Kristen M. Fiore
Florida Bar No.: 25766
Primary Email: kristen.fiore@akerman.com
Secondary Email: myndi.qualls@akerman.com
201 E. Park Avenue, Suite 300
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Facsimile: (850) 222-0103

*Attorneys for JetBlue Airways Corporation &
Subsidiaries*

CERTIFICATE OF SERVICE

HEREBY CERTIFY that on November 24, 2025, a true and correct copy of the foregoing was filed with the Clerk of Leon County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to all parties registered with the e-Filing Portal system, and furnished by Email and U.S. Mail to:

James Uthmeier
Lisa Kuhlman
Michael Ayala
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Lisa.Kuhlman@myfloridalegal.com
Jon.Annette@myfloridalegal.com
Lorann.Jennings@myfloridalegal.com
Michael.Ayala@myfloridalegal.com
Tina.Riley@myfloridalegal.com
Jasmine.Chacon@myfloridalegal.com
cate.mcneill@myfloridalegal.com

Jacek P. Stramski
Florida Department of Revenue
PO Box 6668
Tallahassee, FL 32314-6668
Jacek.Stramski@floridarevenue.com

/s/ Kristen M. Fiore
Kristen M. Fiore, Esq.

THE SECOND CIRCUIT COURT, LEON COUNTY, FLORIDA

JetBlue Airways Corporation, Plaintiff,
v.
Florida Department of Revenue, Defendant./

Case: 2024CA1177

Final Summary Judgment for DOR and Dismissal of Counterclaim

The court refers to JetBlue Airways Corporation as “JetBlue” and to defendant, Florida Department of Transportation as “Department,” or “FDOR.” This matter is before the court on the following documents:

- JetBlue's Second Amended Motion for Summary Judgment filed March 25, 2025;
- FDOR's Motion for Summary Judgment filed May 30, 2025;
- JetBlue's Motion to Dismiss Counterclaim filed January 24, 2025.

Each party also filed responses to the opponent's motions and replies to the responses to the motions for summary judgment.

This court's order of December 18, 2024 on FDOR's Motion to Dismiss and JetBlue's Motion for Judgment on the Pleadings dismissed with prejudice:

- Count I (constitutional violation of the state's territorial borders);
- Count II (Federal supremacy clause violation); and
- Count VII (alleging violation of the Federal foreign commerce clause).

The same order denied FDOR's motion to dismiss:

- Count III (Commerce Clause — Substantial Nexus);
- Count IV (Commerce Clause — Internal Consistency);
- Count V (Commerce Clause — External Consistency);
- Count VI (Commerce Clause — Fairly Related); and
- Count VIII (Due Process Clause).

The court conducted a hearing on the cross motions for summary judgment and the Department's motion to dismiss. The court is adequately advised.

Legal Analysis

The Department contends that Florida's corporate income tax rate of 5.5% should apply to about 7% of JetBlue's total income. JetBlue contends that the tax should apply to closer to 3.5% of its total income because Florida's statute for attributing a share of an airline's income to Florida violates the Dormant Commerce Clause.

Florida's income tax applied to 7% of JetBlue's income is fair by any reasonable, economic measure. JetBlue's economic activity in Florida was, during the years at issue, much greater than the share of its income Florida seeks to tax. JetBlue's interrogatory answers indicate JetBlue's Florida payroll, revenue, real and personal property, take-offs and landings each approached or exceeded 20% of its totals. For the reason of this economic reality, JetBlue's counts III (Substantial Nexus), V (External Consistency), VI (Fairly Related) and VIII (Due Process Clause) must fail.

The essence of the remaining dispute is application of the "internal consistency" test of the Dormant Commerce Clause which explicitly ignores economic reality and, to at least some extent, evidence. JetBlue argues the Florida statute is not internally consistent because it uses airmiles flown both over Florida's landmass and over the ocean contiguous to Florida's landmass to calculate the share of JetBlue's income attributable to Florida.

The Internal Consistency Aspect of the "Fairly Apportioned" Component of the Dormant Commerce Clause

The starting point for current Dormant Commerce Clause analysis of state taxation is generally acknowledged to be Complete Auto Transit v. Brady, 430 U.S. 274 (1977). The Court explicitly overruled "decisions of this Court holding that a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce." Id. at 278. The Court synthesized a framework that "sustained a tax against Commerce Clause challenge when the tax is [1.] applied to an activity with a substantial nexus with the taxing State, [2.] **is fairly apportioned**, [3.] does not discriminate against interstate commerce, and [4.] is fairly related to the services provided by the State." Id. at 279 (emphasis added).

"Apportioned" means attributing a portion of an interstate business's activity to a single state in which the business operates. Many U.S. Supreme Court opinions find apportionment analytically unsatisfactory because there

is no mathematically certain, perfectly accurate method of attributing the activities of a multi-state business fairly to each state. But apportionment is profoundly practical and it is the law.

Complete Auto Transit made no mention of internal consistency, but the Court found it an “obvious” component of “fairly apportioned” in Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983):

The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is the formula must be such that, **if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed.**

Id. at 169 (emphasis added).

Internal consistency is not much of a test since it explicitly ignores economic reality and tries to the greatest extent practicable not to depend on evidence. So internal consistency is really a thought experiment. Should the appellate courts disagree with the conclusions of this order, this might be a case that requires a better record. As will be discussed, Florida’s statutes are unlike anything previously considered by the U.S. Supreme Court and cannot be replicated very simply by other states.

It is not entirely plain what internal consistency tests for. Wynne is the U.S. Supreme Court’s most recent opinion addressing internal consistency at least as revealed by this Court’s research. The Court stated:

By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State’s tax scheme. This is a virtue of the test because it allows courts to distinguish between (1) **tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States**, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. **The first category of taxes is typically unconstitutional;** the second is not.

Id. 575 U.S. at 564 (citations omitted, emphasis added). So, Wynne says the test is for inherent discrimination against interstate commerce.

Other applications of the test by the Court between Complete Auto Transit and Wynne¹ described other purposes. Container Corp., states that internal consistency tests whether universal application of the same tax “would result in **no more than all of the unitary business's income being taxed.**” 463 U.S. at 169 (emphasis added).

The Court stated in Armco Inc. v. Hardesty, 467 U.S. 638 (1984) that internal consistency tested whether, if the tax was universally applied, there would be “**no impermissible interference with free trade.**” Id. at 644 (emphasis added); accord, Tyler Pipe, 483 U.S. 232, 235 (1987) and American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266 (1987) (both quoting Armco).

In Goldberg v. Sweet, 488 U.S. 252 (1989), the Court stated that internal consistency asked whether universal application would result in “**multiple taxation.**” Id. at 261 (emphasis added).

In Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) described internal consistency as considering whether universal application “**would add no burden to interstate commerce that intrastate commerce would not also bear,**” or “**place interstate commerce at a disadvantage as compared with commerce intrastate.**” Id. at 185 (emphasis added).

This Court concludes that internal consistency tests two basic hypotheses: whether universal application (1) would result in inherent discrimination, meaning advantaging intrastate over interstate commerce; or (2) would result in imposition of tax by all states on more than 100% of the business's income.

Another crucial definitional aspect of internal consistency is deciding what is meant by other states doing “the same.” As will be seen, this is a fairly challenging idea to apply to Florida's statute and the inquiry is greatly

¹ Wynne states, that the Court, after Complete Auto Transit, applied the internal consistency test in “seven cases, invalidating the tax in three of those cases.” Wynne, 575 U.S. at 563. This court's research identified no U.S. Supreme Court opinion applying the internal consistency test after Wynne. None of the Court's internal consistency test cases considered statutes analogous to Florida's airline apportionment statute.

impeded by the lack of a record. The United State's Supreme Court said in Goldberg v. Sweet that “the same” means “identical.” The court rejected the taxpayer’s contention that “a court evaluating the internal consistency of a challenged tax must also compare the tax to the similar, but not identical, taxes imposed by other States.” Goldberg at 261. Trying to posit a statute “identical” to the Florida statute is difficult. Should the appellate courts disagree with this court’s conclusion, this might be a case to readdress the record necessary to a fair comparison of the Florida statutory structure to whatever other states might enact.

The Florida Apportionment Scheme Statutes

Section 220.151(2)(c) apportions the income of taxpayers furnishing transportation services to Florida by multiplying the taxpayer’s total gross income by “revenue miles² . . . in this state” divided by “revenue miles . . . everywhere.” If the taxpayer’s planes travels, say, 10 revenue miles in Florida and a total of 1000 revenue miles everywhere, 10/1000 or 1% of the taxpayer’s adjusted income would be subject to Florida tax. So, if the taxpayer had \$1,000,000 of income, the statute would attribute \$10,000 of income to Florida. Applying Florida’s basic corporate income tax rate of 5.5%,³ this taxpayer would owe \$550.

Section 220.151(2)(c) of the Florida Statutes includes in the definition of “revenue miles in this state” all the land within Florida’s geographic borders and a defined portion of ocean contiguous to it. It states:

[T]he “revenue miles in this state” shall include all miles traversed within the area bounded on the west by the meridian of longitude 87°30’ west from Greenwich, bounded on the north by the northern land border of this state or the parallel of latitude 31° north from the equator, bounded on the east by the meridian of longitude 80° west from Greenwich, and bounded on the south by the parallel of latitude 23°30’ north from the equator as the case may be. The “revenue miles in this state” shall also include all miles traversed between points in this state, even though the route of travel is not wholly over the land mass of the state.

² This order sometimes refers to “airmiles” because the term is more descriptive but the meaning is the same.

³ Fla. Stat. § 220.11(2)(a) (2019).

Two points about the area defined by these coordinates: the statute excludes miles flown over the land territory of any other state⁴; and it includes miles flown over some of the ocean contiguous to Florida's coastline. Essentially, these coordinates designate lines extending South from Pensacola to another line extending east and west at about Key West and from there north to a line extending from the East-West border of the state. Thus, the statute defines "revenue miles in this state" to include an area of ocean contiguous to Florida's coastline. This is what the parties call "the Florida Box."

The parties submitted maps that they represented drew the Florida Box around a map of Florida's landmass. From these drawings, some observations seem obvious. First the ocean portion of the box is about equal in area to the landmass portion. This seems plain from looking at the drawings the parties offered during various hearings and it also seems consistent with the difference between the share of income Florida seeks to tax and the share of income JetBlue asserts that the Dormant Commerce Clause permits Florida to tax.

It is the inclusion of parts of the ocean in the definition of revenue miles under 220.151(2)(c) that JetBlue challenges.

The Florida Box, section 220.151(2)(c), is not the entire Florida apportionment structure. Florida's structure also includes an explicit safety-valve provision in Section 220.152. See Roger Dean Enterprises, Inc. v. State, Dept. of Rev., 387, 358 (Fla. 1980) (referring to this language as "the relief provision"). It states:

Apportionment; other methods.—If the apportionment methods of ss. 220.15 and 220.151 do not fairly represent the extent of a taxpayer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable:

(1) Separate accounting;

⁴ JetBlue contends that the box includes a small portion of land over Alabama and Georgia. However, the Department specifically excluded from its calculations any (miniscule) air miles associated with these contentions and, for reasons discussed below, no State includes air miles flown over any other state in its apportionment numerator – the "flyover rule." Moreover, even if Florida did include de minimis airmiles over Georgia and Alabama, I conclude that, so long as the total share taxed did not otherwise violate the internal consistency test, the Dormant Commerce Clause would be satisfied. It is income, not miles that are being apportioned.

- (2) The exclusion of any one or more factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or
- (4) The employment of any other method which will produce an equitable apportionment.

Section 220.15(1) provides for three-factor apportionment based on sales, property and payroll. See, Amerada Hess Corp. v. Director, Div. of Tax., 490 U.S. 66, 73 (1989) (noting the Court has “expressly approved” “an apportionment formula that averages the percentages of in-state property, receipts, and payroll”) citing Container Corp., 463 U.S. at 170.

Wheels on the Ground Requirement and Flyover Prohibition

Federal law permits state airline taxation only by the states where a plane takes off or lands. 49 U.S.C. § 40116(b). Although the statute does not mention apportionment, every state that apportions by airmiles excludes airmiles flown over another state from the apportionment calculation according to the parties.

JetBlue asserts that the states are constitutionally forbidden from including in the apportionment calculation any air miles over other states other than the taxing state. The authorities cited are not so clear. 49 U.S.C. 40166(c) does not address apportionment, at least directly, and the two cases cited by JetBlue are doubtful, particularly in the context of an income tax. See, United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973) (use tax on fuel storage; apportionment not addressed); Northwest Airlines v. State of Minnesota, 322 U.S. 292, 302-304 (1944) (Jackson, concurring) (property tax; no other justice joined this concurrence; Justice Jackson expressed skepticism of applying apportionment to airlines at all, and the court held apportionment inapplicable). Property, sales and use taxes are very different from income taxes.

But whether by constitutional mandate or Florida policy, the wheels on the ground requirement and flyover prohibition are of crucial importance to applying the internal consistency test to the Florida apportionment statutes. These apparently uniform features of state airline taxation explain why

Florida would tax only 3% of JetBlue's income under JetBlue's legal framework and 7% under Florida's, even though JetBlue's economic activity would likely justify taxing about a 20% share.

Florida's Apportionment Statutes are Internally Consistent

The first difficulty in applying the internal consistency test is to define the apportionment structure other states would have to enact in order to test Florida's method. Goldberg v Sweet, 488 U.S. 252 (1989) says the test hypothesizes other states imposing "an identical tax." The court rejected the taxpayer's contention that "a court evaluating the internal consistency of a challenged tax must also compare the tax to the similar, but not identical, taxes imposed by other States." Goldberg at 261.

If by identical, the Court in Goldberg meant, well, identical, the closest this court can think of would be if every state in the country would replace its own scheme with an apportionment scheme based on

"the area bounded on the west by the meridian of longitude 87°30' west from Greenwich, bounded on the north by the northern land border of this state or the parallel of latitude 31° north from the equator, bounded on the east by the meridian of longitude 80° west from Greenwich, and bounded on the south by the parallel of latitude 23°30' north from the equator as the case may be. . . ."

Fla. Stat. § 220.151(2)(c). The Court's internal consistency cases generally appear to assume legislatures of other states enacted identical statutory language. Of course, such a replication would violate the flyover prohibition and the substantive terms of 220.151(2)(c) by including airmiles flown from another state over Florida.

Perhaps another state might add the area of the Florida Box but subtract Florida's landmass to avoid violating the flyover prohibition. But if a hypothetical state were to directly import Florida's geographic description minus Florida's landmass, its statute would still not be "identical" to Florida's structure, because Florida's apportionment structure is related to its own land mass by contiguity. No other state could identically replicate the Florida Box because no other state has Pensacola and Jacksonville and Key West – the geographic features that essentially define the Florida Box. Such a state would not share the same relationship to this part of the

ocean as Florida's landmass and the farther away the more tenuous the relationship.

Perhaps other states might enact a statute that would include areas proportional to their coastlines (if they have coastlines) or to Florida's coastline or the ratio of Florida's coastline to its landmass or the ratio of the water portion of the Florida Box to Florida's landmass or some other method of attributing the Florida Box to another State.

JetBlue appeared to attempt some version of such formulations in the demonstrative exhibit it used during the hearing on these cross motions for summary judgment. This demonstrative consisted of a map of the eastern United States with boxes drawn around the states to represent other states enacting "Florida Boxes" of their own. But because it must insist that the internal consistency test be applied without benefit of evidence, how JetBlue reformulated the Florida statute to draw boxes around other states is unknown. Its formulation did not appear to be much like and certainly not identical to the Florida statute.

To comply with the flyover prohibition, the only states that could ever adopt even a "similar, but not identical structure" to tax airmiles beyond their geographic borders would be those with ocean coastline or perhaps (still less similar and less identical) those that bordered Canada or Mexico. The problem of how much extraterritorial airmiles to include in each state's formula remains a mystery.

But assuming some similar enough replication of the Florida Box applied by other states, the statute passes internal consistency.

The Wynne formulation of internal consistency asks whether universal application would "inherently discriminate against interstate commerce without regard to the tax policies of other States. . . ." An intrastate airline, one that flew all of its routes from one airport in Florida to another and nowhere else would always be taxed on 100% of its income. Such an airline would be equally subject to tax on its flights over the ocean – say flights from Pensacola to Miami – as an interstate airline.

An interstate airline would never be subject to taxation on 100% of its income so long as any of its flights travelled over a state other than Florida because the numerator of the fraction drops, because of the flyover

prohibition, the moment the airline flies over the landmass of another state or otherwise outside the hypothetical state's reformulated Florida Box and the farther a flight travels over a state other than the take-off and landing states, the lower the proportion of income taxed. The Florida Box favors interstate, not intrastate airlines. For the same reason, the Florida structure also does not interfere with free trade. Under Wynne, the test is meaningful, not speculative, unfairness – “tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States....” See also, TA Operating Corp. v. Florida Dept. of Rev., 767 So.2d 1270, 1274 (Fla. 1st DCA 2000) (“Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear”).

The Container Corp. formulation of internal consistency asks whether universal application would “result in no more than all of the unitary business's income being taxed.” The wheels on the ground requirement means at least that only the take-off and landing states may tax at all. The flyover prohibition means that every state excludes airmiles flown over another state. So, no two states could ever together tax more than “all of the unitary business's income” unless (1) both states included airmiles flown over ocean territory, (2) the other state's reformulated box's ocean territory bordered on the ocean territory included in the Florida Box and (3) the airline flew no routes anywhere else.

It is possible to imagine an airline that might find apportionment based on a replication similar, but not identical, to the Florida Box disadvantageous. If such an airline existed, its flight from say, Birmingham to Miami might result in the apportionment numerator approaching or exceeding the denominator -- if Alabama enacted a similar (but not identical) apportionment structure, that included an ocean portion bordering on the Florida Box, the route never left either the Alabama or Florida Box and flew over the ocean portion of each, and the airline flew no other routes.

Putting aside that such a statute would not be “identical” to Florida's structure, once the airline flew anyplace or any route outside the Florida and (hypothetical) Alabama boxes, the aggregate income taxed by all states extraordinarily unlikely to approach “all of the unitary business's income” because of the combined effects of the wheels on the ground requirement and the flyover prohibition. The possibility of any airline ever

actually being treated unfairly is so remote that striking the statute because of it would invite judges to presume a statute unconstitutional. Summary judgment must be granted for the Department because, by any reasonable application of internal consistency, section 220.151(2)(c) satisfies the Commerce Clause.

Florida's structure taxes less than half of JetBlue's Florida economic activity and nothing in this record suggests that the structure is not similarly advantageous to airlines generally. No reasonable, "identical," application by other states would result in aggregate, nationwide taxation of more than 100% of any airline's income. And the Florida structure is not exactly catching fire among rapacious states, having never been approximated by any other state in fifty years. Cf. American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266, 285 (1987) (noting, in striking down a tax, that adoption of "flat taxes by other jurisdictions even before the Pennsylvania suits were resolved surely suggests that acquiescence in these flat taxes would occasion manifold threats to the national free trade area").

Alternatively, even if section 220.151(2)(c) standing alone were deemed to be internally inconsistent, another statute would prevent taxation of more than all of any airline's income. Because the Florida Box, section 220.152(2)(c), is not the entire Florida apportionment structure. Florida's structure includes an explicit safety-valve provision in Section 220.152. See Roger Dean Enterprises, Inc. v. State, Dept. of Rev., 387, 358 (Fla. 1980) (referring to this language as "the relief provision"). It states:

Apportionment; other methods.—If the apportionment methods of ss. 220.15 and 220.151 do not fairly represent the extent of a taxpayer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable:

- (1) Separate accounting;
- (2) The exclusion of any one or more factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or
- (4) The employment of any other method which will produce an equitable apportionment.

Florida also provides, in section 220.15(1), three factor apportionment based on sales, property and payroll. See, *Amerada Hess Corp. v. Director, Div. of Tax.*, 490 U.S. 66, 73 (1989) (noting the Court has “expressly approved” “an apportionment formula that averages the percentages of in-state property, receipts, and payroll”).

So, in addition to replicating an identical boundary, complying with the wheels on the ground requirement, and obeying the flyover prohibition, another state replicating Florida’s structure must include a safety valve permitting resort to “any other method which will produce an equitable apportionment,” including three factor apportionment.

JetBlue’s reliance on *Roger Dean Enterprises, Inc. v. State, Dept. of Rev.*, 387 So.2d 358 (Fla. 1980) to suggest the safety valve is ineffective is misplaced. That case states, “The relief provision [of what became section 220.152] should be used where the statute reaches arbitrary or unreasonable results so that its application could be attacked successfully on constitutional grounds. Departures from the basic formula should be avoided except where reasonableness requires.” Id. at 362-63.

The issue in *Roger Dean Enterprises* was whether “the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida taxable under the Florida corporate income tax code?” The court noted that “it appears that all of the taxpayer’s payroll is within the state of Florida.” Since three factor apportionment supported Florida taxing 100% of Roger Dean’s income, it is unsurprising that the court held that the relief provisions did not support excluding any portion of the taxpayer’s income.

Because of the take-off and landing requirement and the flyover prohibition, airmiles apportionment is a substantial advantage to interstate airlines resulting in applying tax to much less than 100% of an airline’s income – certainly an advantage compared to business that do not qualify as “special industries” under section 220.151 and so must resort to three factor apportionment. If Florida’s structure was written like other states and excluded miles flown over the ocean, apportionment by airmiles would be a bigger advantage. But each state is entitled to its own apportionment structure. 3.5 of 20% would result in a smaller tax bill than 7 of 20%, but neither is unfair and neither violates the constitution.

The Department contends that JetBlue's failure to resort to the safety valve of Section 220.152 shows that JetBlue failed to exhaust administrative remedies. This seems like a fair point, but in this court's judgment, reaching that conclusion requires the full Dormant Commerce Clause analysis. So, whether based on failure to exhaust administrative remedies or satisfaction of the internal consistency test, the result is the same.

Apportionment can only approximate reasonable fairness. The constitutional standards, including especially internal consistency, must always serve the fundamental purpose of testing the fairness of apportionment. Each state is permitted, within the evolving boundaries of the Dormant Commerce Clause, to establish its own method of apportionment. Cautious application of the internal consistency concept is essential lest it provide judges – unconstrained by evidence or economic reality -- the temptation to presume a statute unconstitutional. See, Florida Dept. of Revenue v. American Business USA Corp., 191 So.3d 906 (Fla. 2016) (noting in a Dormant Commerce Clause challenge applying the internal consistency test, “we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible.”). The internal consistency test permits the taxpayer to demonstrate unfairness analytically. It does not create a presumption that any statute violates the Commerce Clause nor permit creation of a violation by speculation.

In summary – Florida taxes income, not airmiles. The only purpose of airmiles apportionment is to ensure that Florida reaches no more than its fair share. It is effective for that purpose.

JetBlue's Motion to Dismiss Counterclaim

The advantage to airlines raised in the Department's counterclaim results from the plain language of section 220.151(2)(c). Because the language is plain, this court will not presume that the legislature did not intend it. Therefore, forbidding JetBlue from resort to the specifically applicable, special industries apportionment method under section 220.151 is not “reasonable” within the meaning of section 220.152. JetBlue's motion to dismiss the Department's counterclaim is granted with prejudice.

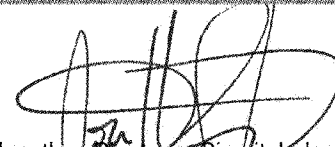
**Conclusion: Final Summary Judgment for the Department
and Department's Counterclaim Dismissed with Prejudice**

For all these reasons, I conclude that there is no genuine dispute as to any material fact and the Florida Department of Revenue is entitled to final summary judgment as a matter of law as to all counts of the operative complaint.

JetBlue's motion to dismiss the Department's counterclaim is granted with prejudice.

IT IS SO ORDERED in chambers at Tallahassee, Leon County, Florida on Monday, September 1, 2025.

2024-CA-001177-1000M 09/01/2025



Jonathan G. Gostrom, Circuit Judge
37-2024-CA-001177-1000M 09/01/2025 1

MICHAEL JOSEPH BOWEN

michael.bowen@akerman.com

emory.woodard@akerman.com

jennifer.meehan@akerman.com

HOWARD JAY HARRINGTON

jay.harrington@akerman.com

susan.scott@akerman.com

jennifer.meehan@akerman.com

JACEK P STRAMSKI

jacek.stramski@floridarevenue.com

carolyn.walker@floridarevenue.com

carolyn.walker@floridarevenue.com

LISA KUHLMAN

Lisa.Kuhlman@myfloridalegal.com

Lorann.Jennings@myfloridalegal.com

Jon.Annette@myfloridalegal.com

MICHAEL AYALA

Michael.Ayala@myfloridalegal.com

KRISTEN MARIE FIORE

kristen.fiore@akerman.com

jasmine.chacon@myfloridalegal.c om	myndi.qualls@akerman.com
tina.riley@myfloridalegal.com	elisa.miller@akerman.com

Lorie Fale

lorie.fale@akerman.com

susan.ryan@akerman.com

masterdocketlit@akerman.com

Filing # 234478650 E-Filed 10/27/2025 09:20:11 AM

EXHIBIT B

THE SECOND CIRCUIT COURT, LEON COUNTY, FLORIDA

JetBlue Airways Corporation, Plaintiff,

v.

Case: 2024CA1177

Florida Department of Revenue, Defendant./

Order Denying JetBlue's Motion for Rehearing

This matter is before the court on a document filed by Plaintiff JetBlue Airways Corporation on October 2, 2025 and entitled, "JetBlue Airways Corporation & Subsidiaries Motion for Leave to File Amended Motion for Rehearing" (the "Motion for Rehearing"). Defendant Department of Revenue filed its "Response Opposing JetBlue's Motion for Rehearing" on October 20, 2025. JetBlue filed its Reply on October 24, 2025.

The court is adequately advised.

Because Florida taxes income, not airmiles, the Motion for Rehearing must be and hereby is DENIED.

Should either party determine to file another motion addressed to the summary judgment entered herein, the opponent need not respond unless directed to do so by the court.

It is SO ORDERED in chambers at Tallahassee, Leon County, Florida on Monday, October 27, 2025.

2024-CA-001177-1000M 10/27/2025 09:20:07



Jonathan C. Jostrom, Circuit Judge
37-2024-CA-001177-1000M 10/27/2025 09:20:07 AM

MICHAEL JOSEPH BOWEN

michael.bowen@akerman.com

tracy.lee@akerman.com

HOWARD JAY HARRINGTON

jay.harrington@akerman.com

susan.scott@akerman.com

jennifer.meehan@akerman.com

jennifer.meehan@akerman.com

JACEK P STRAMSKI

LISA KUHLMAN

jacek.stramski@floridarevenue.com

Lisa.Kuhlman@myfloridalegal.com

carolyn.walker@floridarevenue.com

Lorann.Jennings@myfloridalegal.com

carolyn.walker@floridarevenue.com

Jon.Annette@myfloridalegal.com

MICHAEL AYALA

KRISTEN MARIE FIORE

Michael.Ayala@myfloridalegal.com

kristen.fiore@akerman.com

jasmine.chacon@myfloridalegal.com

myndi.qualls@akerman.com

tina.riley@myfloridalegal.com

elisa.miller@akerman.com

Lorie Fale

lorie.fale@akerman.com

susan.ryan@akerman.com

masterdocketlit@akerman.com

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

JETBLUE AIRWAYS CORPORATION &
SUBSIDIARIES, foreign corporations,

Plaintiff,

vs.

Case No. 2024 CA 1177

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,
an agency of the State of Florida,

Defendant.

**JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES MOTION FOR
REHEARING**

Plaintiff, JetBlue Airways Corporation & Subsidiaries ("JetBlue"), by and through counsel, files this motion for rehearing pursuant to Fla. R. Civ. P. 1.530 in response to this Court's order dated September 1, 2025, granting final summary judgment to the Defendant (the "Order"), State of Florida, Department of Revenue (the "Department") and in support state as follows.

INTRODUCTION

The filing of this motion is necessitated by the fact that the Order presents several issues and arguments not previously raised by the Department. In order to preserve JetBlue's responses to these new issues and arguments for appellate review, Fla. R. Civ. P. 1.530 mandates the filing of this motion. *See e.g., New Hampshire Indem. Co. v. Gray*, 177 So.3d 56, 59 (Fla. 1st DCA 2015) ("When errors appear for the first time in a judgment, the party harmed by the error must assert its grounds in a motion for rehearing to allow the trial court an opportunity to rectify the error.").

For the several reasons outlined below, JetBlue respectfully requests that this Court grant its motion for rehearing and issue an order granting final summary judgment to JetBlue.

I. THE PURPOSE OF APPORTIONMENT FORMULAS IS TO COMPARE A TAXPAYER'S IN-STATE BUSINESS ACTIVITY TO ITS BUSINESS ACTIVITIES EVERYWHERE. FOR THIS PURPOSE, IT IS UNIVERSALLY UNDERSTOOD THAT THE COMMERCE CLAUSE REQUIRES THAT A TAXPAYER'S IN-STATE BUSINESS ACTIVITY ACTUALLY BE IN-STATE.

The Order glosses over the core tenets of apportionment and instead directs its focus almost exclusively to JetBlue's internal consistency challenge. The constitutional issue in this case questions the very foundation of the Commerce Clause. Specifically, can the measure of a state's corporate income tax include business activity that objectively takes place outside the borders of the taxing state? Stated differently, can the numerator of a state's apportionment formula recast extraterritorial business activities as if they took place in the taxing state? Since the ratification of the Commerce Clause in 1788, the answer to these questions has been an emphatic "No."¹

It is vitally important under the Commerce Clause that the numerator(s) of a state's chosen apportionment formula only include business activity (whether quantified by payroll, property, sales, or – in this case – revenue miles) within the

¹ The *result* of a state's apportionment formula can arguably tax business activity outside a state. In such cases, a taxpayer challenges a facially neutral apportionment formula (such as section 220.15 where "in this state" is limited to the geographic boundaries of Florida) contending that the apportionment factors do not accurately reflect the taxpayer's business activity in the taxing state. This case does not present such a challenge.

state's geographic boundaries. An elemental principle of apportionment is that the numerator of an apportionment fraction reflects *in-state* activity and the denominator reflects *everywhere* activity. See Report on Special Subcommittee on State Taxation, H.R. Rep. No. 1480, at 168 (1964) (The factors in an apportionment formula represent an attempt to relate the taxpayer's presence within the State to his presence everywhere. Accordingly, each factor is expressed as a fraction, with the numerator representing dollar value within the State and the denominator dollar value everywhere).

The courts of Florida have consistently recognized and respected this fundamental constitutional precept. See e.g., *Stan Musial & Biggies, Inc. v. Department of Revenue*, 363 So. 2d 375, 377 (Fla. 1st DCA 1978) (discussing Florida's apportionment formula and stating "Each of these factors is determined by dividing the property (payroll or sales) of the taxpayer owned, located or used *in Florida*, by the taxpayer's property (payroll or sales) owned, located or used everywhere.") (emphasis added); *Department of Revenue v. Parker Banana Company*, 391 So. 2d 762, 763 (Fla. 2d DCA 1980) (addressing the situs of sales for purposes of Florida's sales apportionment factor and concluding that "Only those [sales] in which either delivery or shipment occurs *in Florida* would be includable.") (emphasis added); *Shell Oil Company v. Department of Revenue*, 461 So. 2d 959 (Fla. 1st DCA 1984) ("Each apportionment factor is therefore the ratio of *Florida* business activity (property, payroll, and sales) to 'everywhere' business activity (payroll, property, and sales).") (emphasis added); *Roger Dean Enterprises, Inc. v. Department of Revenue*,

387 So. 2d 358 (Fla. 1980) ("Apportionment is generally accomplished by means of a three-factor formula, utilizing property, payroll, and sales *in the taxing jurisdiction* over payroll, property, and sales in all jurisdictions.") (emphasis added).

Florida is not unique in this regard. The courts of *all* states recognize this fundamental principle under the Commerce Clause. *See e.g., Surtees v. Dep't of Revenue*, 8 So. 3d 950 (Ala.Civ.App. 2008) (describing the operation of the apportionment formula as "You take the ratio of the property in the state to the property out of state, a ratio of the sales in the state to the sales out of the state, a ratio of the payroll in the state to the sales [sic] out of the state, add them together and divide by three, and that average is your apportionment factor."); *Miami Corp. v. Dep't of Revenue*, 571 N.E.2d 800, 802 (Ill. App. 1991) (the numerator of the apportionment fraction represents income derived from business conducted in Illinois and the denominator represents income derived from all other states); *Boston Professional Hockey Assoc., Inc. v. Commissioner*, 820 N.E.2d 792, 796 (Mass. 2005) (the Massachusetts apportionment formula is based on a ratio of property, payroll, and sales in Massachusetts to total property, payroll, and sales everywhere); *Pacific Mutual Door Co. v. Commissioner*, 465 N.W.2d 696 (Min.Ct.App. 1991) (the percentage of a multi-state unitary business' total income to be taxed in Minnesota is determined by dividing the business' Minnesota property, payroll and sales respectively by the business' total property, payroll and sales and then averaging the results"); *Duke Energy Corp. v. Dep't of Revenue*, 782 S.E.2d 590 (S.C. 2016) (the numerator of the apportionment formula reflects business carried on in South

Carolina and the denominator reflects business carried on everywhere); *Dep't of Taxation v. Lucky Stores, Inc.*, 225 S.E.2d 870 (Va. 1976) (the apportionment formula compares payroll, property, and sales in Virginia to payroll, property, and sales everywhere); *Lone Star Steel Co. v. Dep't of Revenue*, 668 P.2d 916 (Co. 1983) (the numerator of the apportionment fraction represents income derived from business conducted in Colorado and the denominator income from all other states); *BellSouth Advert. & Pub. Co. v. Commissioner*, 308 S.W.3d 350 (the applicable formula "defines each factor as a fraction in which the numerator is the taxpayer's respective property, payroll or sales values in Tennessee and the denominator is the taxpayer's respective property, payroll or sales values in all jurisdictions").

These fundamental apportionment principles are so well understood that the only state case that JetBlue can locate where these principles were called into question over the past century is *FedEx Ground Package System, Inc. v. Commonwealth*, 922 A.2d 978 (Pa. Commw. 2007), *aff'd per curiam*, 939 A.2d 323 (Pa. 2007).

The dispute in *FedEx*, as in this case, centered on the composition of the taxpayer's apportionment factor numerator. The taxpayer, a transportation company, argued that Pennsylvania's apportionment formula impermissibly taxed value earned outside the state. Pennsylvania's apportionment formula applicable to transportation companies used a single factor comparing revenue miles in the state to revenue miles everywhere. In *FedEx*, the Department of Revenue argued that the

numerator of the factor should include miles traveled outside the state. *Id.* at 980-981. The court disagreed stating:

The rationale behind apportionment statutes is to ensure that the Commonwealth taxes a fair share of Taxpayer's income. Under the Department's interpretation Taxpayer would pay Pennsylvania taxes on income it earned outside the Commonwealth because the Department's interpretation fails to limit the numerator of the fraction to Pennsylvania activity.

Id. at 981. The court added that "[t]his Court's interpretation is consistent with the fundamental principles of apportionment that the numerator should only reflect Pennsylvania activity." *Id.* at 980.

In this case, section 220.151(2)(c) objectively includes extraterritorial activity in the numerator of an airlines apportionment fraction. This undeniable fact demonstrates that Florida's apportionment formula for airlines is facially unconstitutional under the Commerce Clause. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (for a state tax to pass scrutiny under the Commerce Clause the tax must be fairly apportioned).²

The Order, by focusing almost solely on the internal consistency test, overlooks the fact that the most straightforward basis for invalidating section 220.151(2)(c) is found in the text of the statute. Section 220.151(2)(c) runs contrary to universally

² Approximately sixteen years ago, the legislature was made aware through litigation with airlines that section 220.151(2)(c) was likely unconstitutional. Discussing the application of the statute, the legislature stated "For purposes of computing revenue miles in Florida, all miles within a "box" drawn over a map of Florida are included. The box extends beyond the territorial limits of the state and, based on a claim of overreaching, is presently the subject of litigation." S.B. 2546 (Bill Analysis and Fiscal Impact Statement) (April 22, 2009). A true and correct copy is attached hereto as **Exhibit A**.

accepted principles of apportionment and is therefore facially unconstitutional under the Commerce Clause.

II. EQUITABLE CONSIDERATIONS ARE IRRELEVANT TO THE INTERNAL CONSISTENCY ANALYSIS.

Although the Order properly recites the correct test for internal consistency, respectfully the Court equivocates on its application. It is apparent from the Order that the Court does not agree with the use of the internal consistency test. On page 2 of the Order the Court notes that the test for internal consistency "explicitly ignores economic reality and, to at least some extent, evidence." On page 3, the Court emphasizes this point asserting "Internal consistency is not much of a test since it explicitly ignores economic reality and tries to the greatest extent practicable not to depend on evidence." However, this Court's most emphatic repudiation of the test for internal consistency is found on page 13 of the Order where the Court states that "[c]autious application of the internal consistency concept is essential" in order to avoid "the temptation to presume a statute unconstitutional." The Court explained that caution was warranted because the internal consistency analysis handed down by the U.S. Supreme Court is "unconstrained by evidence or economic reality."

Instead of strictly applying the test for internal consistency as instructed by the U.S. Supreme Court, this Court erred by infusing equitable considerations into the constitutional analysis. Yet, it is well understood by every federal and state court that has considered the matter that internal consistency is a *facial* challenge to a state statute. See e.g., *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) and *Dep't of Revenue v. American Business USA Corp.*, 191 So.3d 906, 914

(Fla. 2016). The consideration of outside evidence and the perceived "economic reality" are wholly irrelevant to facial challenges. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018) ("In a facial challenge, our review is limited. [...] We consider only the text of the statute, not its specific application to a particular set of circumstances.") (citing *Abdool v. Bondi*, 141 So.3d 529, 538 (Fla. 2014)).

The Court reasons that whether or not section 220.151(2)(c) violates the Commerce Clause is largely irrelevant because the resulting tax rate for JetBlue is still lower than if JetBlue was subject to the three factor apportionment formula of section 220.15. *See e.g.*, Order at p. 2 (noting that a 7% apportionment percentage under section 220.151(2) (applicable to airlines) is "fair" because JetBlue's apportionment percentage under section 220.15 (applicable to most corporations) is closer to 20%). At best, by raising concerns of perceived fairness and equity, this conclusion conflates the separate and distinct tests for internal (facial challenge) and external (as-applied challenge) consistency. At worst, this conclusion disregards controlling precedent from the U.S. Supreme Court.

Setting aside the fact that these comparisons are outside the scope of what is required to evaluate the facial constitutionality of section 220.151(2)(c), the Court's statements raise tax policy questions that were considered and resolved over fifty years ago. In 1971 the Florida legislature made a decision on how to apportion the income of airlines. Knowing that airlines would necessarily have payroll and own property in the state, the legislature could have chosen to subject airlines to the three

factor (payroll, property, and sales) apportionment formula in section 220.15. The legislature declined to do so. Instead, the legislature decided to use a special apportionment formula for airlines based solely on "revenue miles in this state." The facial constitutionality of the apportionment formula applicable to airlines cannot rise and fall based on what an airline's apportionment percentage would have been had the legislature opted for a different approach to apportionment over fifty years ago.

The test for internal consistency is firmly part of U.S. Supreme Court precedent and dates back several decades to when the term was first coined in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983). Internal consistency is unquestionably the law of the land. *See American Business USA Corp.*, 191 So.3d 906 (applying test for internal consistency) and *TA Operating Corp. v. Dep't of Revenue*, 767 So. 2d 1270, 1274 (Fla. 1st DCA 2000) (same). Moreover, there is no dispute that the test for internal consistency is a *facial* challenge to a state law. The facts of the specific taxpayer making the facial constitutional challenge are immaterial to the analysis.

III. THE COURT'S APPLICATION OF THE INTERNAL CONSISTENCY TEST IS INCORRECT AND MOOTS THE PROTECTIONS OF THE COMMERCE CLAUSE.

In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, the Court explained that "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." 514 U.S. 175, 185 (1995). Applying the internal consistency test in this case, the Court took a literal meaning of what it

means to have an "identical" tax. *See* Order at pp. 4-6, 8-9. According to the Court, the internal consistency test is difficult to apply in this case "because no other state has Pensacola and Jacksonville and Key West – the geographic features that essentially define the Florida Box." *Id.* at p. 8. The text of section 220.151(2)(c) is indeed unique. However, this conceptual obstacle is not a basis for a literal application of the test.

Concerningly, the internal consistency analysis in the Order appears to provide a roadmap for any state (or locality) to avoid the strictures of the Commerce Clause. For apportionment purposes, states universally define the numerator of their apportionment factors by reference to business activity "in this state." In fact, section 220.15 outlining Florida's apportionment formula applicable to most corporate taxpayers uses this exact approach. A state seeking to sidestep the Commerce Clause could simply define "in this state" by reference to specific longitude and latitude coordinates. If adopted, and based on the internal consistency discussion in the Order, the internal consistency test would be circumvented because no other state could have the identical statute.

Section 220.15 currently contains no definition of "in this state" under the generally applicable apportionment formula. For purposes of section 220.15, Florida recognizes the fundamental apportionment principle that the numerator of the apportionment factors must only include business activity (property, payroll, and sales) within the geographic borders of the state. It appears, however, that Florida is "leaving money on the table." Based on the reasoning in the Order relating to

internal consistency, Florida could define "in this state" in section 220.15 to include areas outside the geographic borders of the state – as long as the area is defined by boundaries of longitude and latitude.³ The uniqueness of this geographic area – whether reflected by a box, rectangle, circle, oval, etc. – would make the statute immune from internal consistency challenges.

The fact that the Box is defined in section 220.151(2)(c) through coordinates of longitude and latitude is not a sufficient basis for disregarding the internal consistency test under the Commerce Clause.

IV. THE INTERNAL CONSISTENCY REQUIREMENT OF THE UNIVERSAL APPLICATION OF AN "IDENTICAL" TAX MEANS IDENTICAL IN *OPERATION*, NOT TEXTUAL IDENTITY.

Although it is certainly true that the U.S. Supreme Court has explained the internal consistency test as requiring the "identical" application of the challenged state's law by every other jurisdiction, it is clear that this was not to mean a literal application of the challenged statute's text. That this is true is evidenced by the Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

At issue in *American Trucking* was a Pennsylvania statute that imposed an axle tax on trucks in a certain weight class. *Id.* at 274. That statute – 75 Pa. Cons. Stat. § 9902⁴ – required trucks, truck tractors, and combinations weighing more than

³ In truth, it need not be defined solely by longitude and latitude. The legislature could refer to specific cities, rivers, landmarks, etc. to avoid constitutional scrutiny.

⁴ This statute was repealed following the decision in *American Trucking*. A true and correct copy of 75 Pa. Cons. Stat. § 9902 as in effect prior to its repeal is attached hereto as **Exhibit B**.

26,000 pounds to pay an axle tax of \$36 per axle. *Id.* The express text of the law read as follows:

§ 9902. Imposition of axle tax.

In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of \$36 per axle on every truck, truck tractor or combination having a gross weight of 26,000 pounds operated on the highways of this Commonwealth.

The taxpayer challenged this Pennsylvania law arguing that it was not internally consistent under the Commerce Clause. After reciting the fundamental principles of internal consistency, the Court proceeded to apply the test assuming the challenged law *operated* identically in all jurisdictions. The Court held the law failed the test for internal consistency concluding that "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284.

In this case, the Court applied a literal interpretation of "identical" for purposes of the internal consistency test. As outlined in *American Trucking* – and this is just one example – the test for internal consistency assumes that the challenged law *operates* identically in all jurisdictions.

If, as determined in the Order, internal consistency required a literal application of a state's law, *American Trucking* would have been decided differently. The Pennsylvania law expressly applied only to a "truck, truck tractor or combination having a gross weight of 26,000 pounds operated on the highways of *this*

Commonwealth." If the Pennsylvania law in *American Trucking* was applied *identically* for purposes of the internal consistency test, the statute would have survived scrutiny as there are only three other Commonwealths in the United States (Kentucky, Massachusetts, and Virginia).

As the Court instructed in *American Trucking*, the internal consistency test assumes the challenged state law *operates* identically in every other jurisdiction.

V. SECTION 220.151(2)(c) VIOLATES THE TEST FOR INTERNAL CONSISTENCY BECAUSE UNIVERSAL APPLICATION OF THE LAW WOULD *OPERATE* TO TAX EXTRATERRITORIAL BUSINESS ACTIVITY.

There is no factual dispute that the Box as defined by section 220.151(2)(c) effectively doubles Florida's geographic area. Through discovery, the Department unqualifiedly admits that section 220.151(2)(c) operates to impose the Florida corporate income tax on business activity outside Florida's geographic borders. In the Order, this Court made factual findings consistent with the Department's discovery responses. *See* Order at pp. 2, 8.

The instruction of the U.S. Supreme Court in cases such as *American Trucking* is that the internal consistency test assumes that the challenged statute *operates* identically in all jurisdictions. As a result, the question posed in this case is "If every state taxed imposed a corporate income tax on airlines based on a doubling of the geographic area of the state, is there any conceivable doubt that commerce among the states would be deterred?" The unavoidable answer is, "Yes."⁵

⁵ Because this is true, there is no need for further factual development on how JetBlue prepared its demonstrative exhibit for purposes of the summary judgment hearing. JetBlue's demonstrative exhibits merely illustrate what has already been adduced in

VI. THE COURT MISAPPLIED THE INTERNAL CONSISTENCY TEST BASED, IN PART, ON A MISUNDERSTANDING OF FLYOVER MILES.

The Order refers to two concepts – the "wheels on the ground" requirement and the federal prohibition against taxing flyover miles. However, the Court misunderstands that the "wheels on the ground" requirement is just another way of describing the federal law prohibiting state taxation of flyover miles. 49 USC § 40116(c) provides as follows:

(c) Aircraft Taking Off or Landing in State.—

A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

The negative implication of 49 USC § 40116(c) is that a state is not permitted to tax an airline flying over a state in which the airline neither takes off nor lands – *i.e.*, flyover miles. The "wheels on the ground" requirement is just another way of saying that a state is barred from taxing flyover miles.

A. The Issue of Flyover Miles is a Red Herring in this Case because the Internal Consistency Test is Only Concerned with the Amount of Unitary Business Income that a State *Can* Tax.

The application of the internal consistency test in this case has nothing to do with flyover miles. On page 10 of the Order, the Court states "the aggregate income taxed by all states [is] extraordinarily unlikely to approach 'all of the unitary

the evidentiary record. Moreover, the Department repeatedly admits that section 220.151(2)(c) operates to tax extraterritorial income. If other states adopted a law operating in the same manner – as the test for internal consistency contemplates, the constitutional predicament is obvious.

businesses income' because of the combined effects of the wheels on the ground requirement and flyover prohibition." As an initial matter, it is important to note that 100% of the revenue earned by airlines from flyover miles is part of the tax base (as adjusted for Florida modifications).⁶ The question in this case is whether flyover miles are *also* included in the apportionment factor numerator as provided by section 220.151(2).

The federal prohibition on the state taxation of flyover miles applies to all states. As a result, what it means to tax more than 100% of an airlines unitary business income is correspondingly reduced.⁷ The Order ignores this fact and instead construes the federal law as a means of permitting Florida (and other states) to recoup tax revenue they cannot directly tax due to the federal law. This presents a dangerous precedent.

If it is acceptable for a state to define a Box in such a way, where are the guardrails to prevent the states from taxing more than 100% of an airline's unitary business income? If Florida can double its landmass to recapture tax dollars lost due to 49 USC § 40116(c), why not every other state? But, why stop at doubling? There are many states in "flyover country" with proportionately fewer take offs and landings, but airlines routinely fly over these states in order to get to/from various

⁶ As a result, the income earned by airlines from flyover miles does not escape state tax.

⁷ JetBlue maintains that the only unitary business income relevant to the "no more than 100%" requirement is the unitary business income that states are permitted by law to tax. As explained herein, any other conclusion grants the states *carte blanche* to skirt 49 USC § 40116(c) and the Commerce Clause.

destinations. Perhaps these flyover states, to be on par with states like Florida, would define a Box as tripling (or more) the size of their geographic boundaries. Because each state can operate independently to make these determinations, there is no "check" on whether the states are taxing more than 100% of an airline's unitary business income.

It is for these various reasons that flyover miles are largely irrelevant to the internal consistency analysis. Because of 49 USC § 40116(c), the aggregate unitary business income that a state is actually permitted to tax is reduced. Allowing a state to redefine its geographic borders to avoid the prohibition of the federal statute effectively moots the protections of the Commerce Clause.

As stated by the Court in *Container Corp.*, the test for internal consistency is concerned with whether the universal application of the challenged state law "would result in no more than all of the unitary business's income being taxed." 463 U.S. 159, 163 (1983). By operation of federal law, "all of a unitary business's income" is defined by what a state is actually permitted to tax.⁸

B. The Court Incorrectly Applied the Internal Consistency Test.

Setting aside exactly how JetBlue's demonstrative exhibit was prepared, it is objectively clear that Florida's apportionment method applicable to airlines fails the

⁸ The Court appears to take a "no harm, no foul" approach to the application of the Florida Box because no other "rapacious" state has adopted Florida apportionment methodology for airlines. Order at p. 11. JetBlue contends that the reason why no other state has adopted Florida's approach is because the other states understand and follow the fundamental principles of apportionment and the requirements of the Commerce Clause. As previously demonstrated to the Court, the constitutionality of section 220.151(2)(c) has been challenged many times by airlines over the years.

test for internal consistency. The most straightforward example is to consider competing claims to tax airline miles flown over the Gulf of Mexico.

Florida effectively doubles the size of its geographic area by asserting the jurisdiction to tax over a large swathe (almost half) of the Gulf of Mexico. Yet, Alabama, Mississippi, Louisiana, and Texas also border the Gulf of Mexico. If Florida is permitted to tax these airline miles, why not Alabama, Mississippi, Louisiana, and Texas? Alabama, for example, does not have to confer with Florida to set boundaries on airline miles taxed over the Gulf of Mexico.

The Court disregards this constitutional quandary in the Gulf of Mexico stating "The problem of how much extraterritorial miles to include in each state's formula remains a mystery." Order at p. 9. However, the internal consistency test mandates a hypothetical approach to multiple taxation, not mathematical certainty as to exactly how many miles are in each state's Box.

The Court also misunderstands how the concept of flyover miles (assuming it is relevant) applies to the application of the internal consistency test. On pages 9-10 of the Order, the Court appears to state that federal prohibition on the taxation of flyover miles would prevent overlap of competing state Boxes because "the moment the airline flies over the landmass of another state or otherwise outside the hypothetical state's reformulated Florida Box and the farther a flight travels over a state other than the take-off and landing states, the lower the proportion of the income taxed." This is so according to the Court, because once an airline flies outside the Box of the state of take off all flyover miles escape taxation until it enters the Box

of the state of landing. This statement is incorrect and misses the point of the internal consistency test.

It is true that if a plane takes off from Jackson, Mississippi, and flies directly in a straight line to Atlanta, Georgia, the flyover miles over Alabama cannot be taxed by Alabama. That fact, however, has very little to do with the test for internal consistency. Internal consistency is concerned with how many of the airline miles Mississippi (take off state) and Georgia (landing state) can tax. Depending on how each state draws their respective Boxes, one or both of these states could tax miles flown over Alabama that Alabama itself could not tax. This extraterritorial reach to tax airline miles in flyover states – miles that flyover states are prohibited from taxing under 49 USC § 40116(c) – is the basis for JetBlue's constitutional claim. Under the test for internal consistency if every state defined a Box by doubling their geographic area more than 100% of the airline's unitary business income that can be taxed under federal law, would be taxed.

VII. BY ITS EXPRESS TERMS SECTION 220.152 IS NOT A "SAFETY VALVE" IN THE EVENT THAT SECTION 220.151(2)(c) IS INTERNALLY INCONSISTENT.

In the Order, the Court alludes to the fact that even if section 220.151(2)(c) is constitutionally invalid, section 220.152 provides a remedy to cure any inequity. The Court misinterprets the text and function of section 220.152.

The purpose of section 220.152 is to provide for alternative apportionment methods in *individual* cases where the result of the default apportionment formula applicable to a *taxpayer's specific facts* is unfair, or distortive. Section 220.152 states in pertinent part:

Apportionment; other methods—If the apportionment methods of ss. 220.15 and 220.151 do not fairly represent the extent of *a taxpayer's tax base* attributable to this state, *the taxpayer* may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable [...]

(emphasis added). JetBlue's internal consistency challenge is a *facial* attack on section 220.151(2)(c). As a result, JetBlue claims that section 220.151(2)(c) is unconstitutional with respect to *all* airlines, not just JetBlue. Thus, by its express terms, section 220.152 is inapplicable.

In addition, section 220.152 is intended to cure unfairness that falls short of constitutional violations. A taxpayer does not need to get permission from the Department to raise a constitutional challenge to an apportionment statute. However, if the default apportionment formula operates unfairly with respect to a specific taxpayer, the Department can grant permission to the taxpayer to use an alternative – less distortive – method. Because JetBlue is raising a constitutional challenge to section 220.151(2)(c), section 220.152 is inoperative in this case.

Section 220.151(2) becomes the true safety valve in the event that section 220.151(2)(c) is invalid under the Commerce Clause. Section 220.152(2) provides that an airline's income is apportioned to Florida based on the ratio of revenue miles "in this state" over revenue miles flown everywhere. If section 220.151(2)(c) is struck down as unconstitutional, the apportionment formula in section 220.152 continues to function as the apportionment formula for airlines. The only difference will be that the reference to revenue miles "in this state" in section 220.151(2) will be left undefined – just as it is for purposes of section 220.15. It is well understood for

purposes of section 220.15 that "in this state" means the geographic borders of Florida.

CONCLUSION

For the foregoing reasons, JetBlue respectfully requests that this Court GRANT this motion for rehearing and issue an order declaring section 220.15(2)(c) unconstitutional and invalidating the underlying corporate income tax assessment for the periods at issue.

Dated: September 15, 2025

AKERMAN LLP

By: /s/ Michael J. Bowen

Michael J. Bowen
Florida Bar No. 0071527
Howard Jay Harrington
Florida Bar No.: 0118719
50 North Laura St., Ste 3100
Jacksonville, FL 32202
Phone: (904) 798-3700
Fax: (904) 798-3730
Michael.Bowen@akerman.com
Jay.Harrington@akerman.com
tracy.lee2@akerman.com
Jennifer.meehan@akerman.com

and

Lorie A. Fale
Florida Bar No. 0164569
98 Southeast Seventh St., Ste. 1100
Miami, FL 33131
Phone: (305) 982-5550
Fax: (305) 374-5095
Lorie.Fale@akerman.com

*Attorneys for JetBlue Airways Corporation
& Subsidiaries*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Florida's E-Filing Portal on September 15, 2025, to all counsel of record.

/s/ Michael J. Bowen
Michael J. Bowen, Esq.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Policy and Steering Committee on Ways and Means

BILL: CS/SB 2546

INTRODUCER: Finance and Tax Committee and Senator Altman

SUBJECT: Corporate Income Tax

DATE: April 22, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	ODonnell	McKee	FT	Fav/CS
2.	ODonnell	Kelly	WPSC	Pre-meeting
3.				
4.				
5.				
6.				

I. Summary:

This bill makes several substantive changes to Chapter 220, F.S., Florida's Corporate Income Tax Code. The enactment of so called "add-back" provisions limits a multi-state corporation's ability to lower its effective tax rate in Florida by preventing otherwise taxable income from being shifted outside the state. The ability to take a position on a federal return regarding the tax treatment of a subsidiary entity that differs from that taken on a Florida return regarding the treatment of a subsidiary is also limited. The sales factor for the sale of services is updated so that income generated from these sales is sourced to this state. Royalties from intangible assets will also be included in the calculation of the sales factor used to apportion income to Florida. Intercompany transactions are eliminated for separate filers unless the transfer does not distort Florida income.

The subtraction for the eligible net income of an international banking facility is repealed. The apportionment factors used by a financial organizations are also changed to reflect the model treatment provided by the Multistate Tax Commission. Legislative clarification is provided that entities that elect to be treated as corporations for federal income tax purposes are treated as corporations for Florida corporate income tax purposes. Taxpayers that elect to file consolidated returns in Florida will continue filing on that basis until they are deconsolidated for federal income tax purposes. Florida will follow the constitutional definition of nonbusiness income announced by the U.S. Supreme Court. The apportionment factor for transportation by air is changed from revenue miles to landings. The "throwout" rule is adopted so that sales that are not allocable to another state are eliminated from the denominator of the sales factor. The net operating loss deduction is limited to the income generated by the corporation that generated the loss unless all members of the affiliated group filed Florida corporate income tax returns. All tax

deficiencies resulting from changes to the underlying federal return will have interest imposed on them for the period beginning on the due date of the original return and ending on the date paid. The Revenue Estimating Conference has not met to review the provisions of the bill.

The Revenue Estimating Conference has determined that the bill will have the following General Revenue Fund impact:

	FY 2009-10 Annualized	FY 2009-10 Cash	FY 2010-11 Cash	FY 2011-12 Cash	FY 2012-13 Cash
Total Impact	97.2	126.3	117.8	145.0	154.5

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 213.54

II. Present Situation:

Florida levies a tax on all corporations, organizations, associations and other artificial entities that derive from this state, or any other, attributes not inherent to natural persons, such as perpetual life. The tax is levied on the privilege tax measured by net income at the rate of 5.5 percent on income derived from the state. Florida does not require commonly controlled corporations engaged in a unitary business to compute their state taxable income on a combined basis. Corporations who are members of an affiliated groups have the choice of filing as a separate entity or as a consolidated group. Florida adopts (piggy-backs) the federal definition of taxable income. A taxpayer's net income is its adjusted federal income, or the share of its adjusted federal income for the year that is apportioned to Florida, plus non-business income allocated to Florida, less the \$5,000 exemption.

State income taxation of a multistate business conducted in corporate form is primarily restricted by the commerce clause and the due process clause. The first delegates the power to regulate commerce among the states to the federal government. The restraint flows primarily from the negative implications of the clause – because the federal government may regulate, the states may not. The second clause prohibits states from reaching beyond their borders to impose tax. Congress, through Public Law 86-272, has prevented states from imposing tax liability for activities considered nominal, such as mere solicitation.

Taxation in Florida begins with the allocation of income. Passive income is generally assigned to a particular state. Taxpayers often claim a subtraction for this non-business income in the context of the sale of a division or subsidiary claiming the entity was not integrated, but merely an investment. Florida statutes provide enough ambiguity to raise concern about the validity of such claims, even when the taxpayer has previously claimed ordinary business deductions against income generated by such "investments." These claims are often based on reference to application of the "transactional" test, or the "functional" test, referenced in the Code.

After allocation, corporations that conduct business both in Florida and outside the state apportion their business income among those states. Each state provides its own formula to apportion income. The theory is that income from an integrated business results from a complex combination of factors. The formula can be depicted as follows:

$$\text{Florida Taxable Income} = \frac{\text{Florida's Share of Apportionable Income}}{\text{Total Apportionable Income}}$$

Florida generally uses a three factor formula apportionment consisting of a sales factor representing 50 percent, payroll at 25 percent and property at 25 percent. There are also special formulary apportionment rules for specific industries.

Section 220.15(5), F.S., defines the sales factor. The numerator of the sales factor is the total sales of the taxpayer in Florida during the taxable year and the denominator is the total sales of the taxpayer everywhere during that time. All sales everywhere are included in the denominator of the sales factor. The receipt from a sale of tangible property is sourced to the state where it is delivered. If delivery is to Florida, the receipt is added to the numerator and denominator of the sales factor for apportionment purposes. Section 220.15(5), F.S., does not specifically address the sourcing of the sale of a service. The sale of a service is either apportioned to the state in which the customer is located, or the state to which the majority of the income producing activity - also known as cost of performance - can be attributed. The Department adopted a rule in the 1970's generally sourcing sales of services based on the income producing activity. A cost of performance basis may be used for the sourcing of some services.

The Department of Revenue, through its Executive Director, is statutorily authorized to take certain actions to ensure that taxpayers reasonable account for their taxable income. Significantly, the director of the department is granted authority to adjust any item of income, deduction or exclusion, or any factor taken into account in apportioning income, to the extent necessary to reflect clearly the net income of the taxpayer. Section 220.44, F.S. Consistent with this authority, the director may also require a consolidated return for those members of an affiliated group of corporations that are subject to tax and would be eligible to elect to file on a consolidated basis if the filing of separate returns for these corporations would improperly reflect their taxable incomes. Section 220.131, F.S.

Add-back

The term "sales" is defined as all gross receipts of the taxpayer except interest, dividends, rents, royalties, and gross receipts from the sale, exchange, maturity, redemption, or other disposition of securities. Royalty income is included in the term if a significant portion of the taxpayer's business consists of dealing in or with the production, exploration, or development of minerals.

Section 220.03(1)(r), F.S., provides a definition of "nonbusiness income". The term nonbusiness income does not include income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations, or any amounts which could be included in apportionable income without violating the due process clause of the United States Constitution. Taxpayers are not required to add back expenses related to an item of nonbusiness income that were deducted in prior tax years when the nonbusiness asset was treated as a business asset.

Companies have reduced Florida income by engaging in intercompany transactions. When taxpayers file on a consolidated basis for both federal and Florida purposes, intercompany transactions are eliminated. However, when an affiliated group of corporations file corporate

income tax returns on a separate basis in Florida, intercompany transaction are included in the determination of the Florida income for each of the affiliates.

Some multistate firms shift income from Florida and elsewhere into states that do not tax intangible profits, such as trademarks and patents. During the 1990s, companies such as Aaron Rents and Toys “R” Us began to isolate intangible assets in holding companies. These holding companies were nominally located in states that did not tax income, or offered other planning advantages. Once isolated, operating entities in states that impose tax pay the holding company for the use of the intangible asset, increasing their operating cost and reducing the income subject to tax. Although the motivations for these actions are purported to be for business reasons, companies generally reduce income tax liabilities in states that do not require combined reporting because the intangible holding company structure and similar mechanisms take advantage of separate reporting.

In order to minimize tax planning, 18 states have enacted add-back rules since 2000 to curb perceived taxpayer abuses based on deductions for interest and intangible-related expenses between related parties. Generally, the statutes require the payer of related-party interest, royalties, license fees, and similar charges to add back those expenses.

A related member is generally defined as a related entity, i.e., a component member. The add-back rules seem to have the following in common:

- most require the operating company to add-back intercompany interest and expenses regarding intangibles paid to a related party;
- most states define a related party by reference to the Internal Revenue Code ;
- all states have exceptions to the add-back rule and in most cases the exceptions exist to minimize the likelihood of multiple taxation;
- most states provide an exception to add-back based on the recipient’s tax position (so called “subject-to” exceptions);
- most states have a conduit exception for interest or royalty expenses ultimately paid to a third party; and
- most states tax both direct and indirect interest and intangible items among related parties.

Financial Organization Apportionment

Special rules apply to the taxation of banks, brokerages and similar businesses. The apportionment factors in Chapter 220, F.S. reflect the regulatory environment prevalent in the industry at the time they were adopted. At that time, interstate banking was not widespread. The property factor for financial institutions is heavily weighted in various forms of intangible personal property. Currently, intangibles “shall be in this state” if:

- it consists of assets in the nature of loans, including balances due from depository institutions, repurchase agreements, federal funds sold, and bankers acceptances, that are located in this state;
- credit card receivables from customers who reside or who are commercially domiciled in this state;

- investments in securities that generate business income if the taxpayer's commercial domicile is in the state, unless such securities have acquired a discrete business situs elsewhere;
- securities used to maintain reserves against deposits to meet federal or state deposit requirements, based on the ratio that total deposits in this state bear to total deposits everywhere;

Financial institutions can now choose among states in which to locate their intangible assets. This provides for tax planning opportunities.

Partnership Elections

Section 220.02(1), F.S., provides that the Code is not intended to tax, and shall not be construed so as to tax, any natural person who engages in a trade, business, or profession in this state under his or her own, or any fictitious name, whether individually as a proprietorship, or in partnership with others, or as a member or a manager of a limited liability company classified as a partnership for federal income tax purposes.

Except for certain entities that must be treated as corporations, all new entities can elect their federal income tax status. Entities with two or more members may select either corporate or partnership status. The tax treatment can be chosen simply by filing an election with the Internal Revenue Service. If no affirmative election is made, the federal tax classification of a new entity will be made under prescribed "default" rules.

Partnerships may be owned or controlled by corporations. "Corporation" includes all general partnerships, limited partnerships, unincorporated businesses, and all other business entities which are owned or controlled by the parent corporation. "Taxpayer" includes a general partnership, limited partnership, limited liability company, trust, or other artificial entity in which a corporation, as defined in s. 220.03(1)(e), owns an interest and is taxed as a partnership or is disregarded as a separate entity from the corporation under this chapter.

International Banking Facilities

A distinction is made in the Code for the "international banking facility" which is a set of asset and liability accounts segregated on the books of a banking organization that includes only international banking facility deposits, borrowings, and extensions of credit. Various items of eligible net income may be deducted from adjusted federal income via the international banking facility classification. The deduction reduces the income subject to Florida tax. The distinction was originally designed to make Florida banks attractive for international transactions. Interstate banking has limited the intended benefit behind the deduction

Florida Nexus (Affiliated) Filing Group

Section 220.131, F.S., allows any corporation subject to tax that is the parent of an affiliated group to consolidate its taxable income with all other members of the group subject to tax. In 1984, a "temporary" measure was put in place to make it possible for a group to file a Florida consolidated return that included less than all the members of the federal affiliated group. Only taxpayers who made the election at that time are able to file in this manner.

Deconsolidation

Section 220.131(3), F.S., allows a taxpayer to voluntarily elect to file a consolidated Florida corporate income tax return with all members of its affiliated group if that taxpayer's affiliated group has elected to file a federal consolidated return. Once the voluntary consolidated return election has been made, a taxpayer is required to continue filing consolidated Florida returns as long as its affiliated group continues to file federal consolidated corporate income tax returns, unless the Executive Director consents to the filing of separate returns. The grounds for denying such a request are not clearly specified by statute.

Airline Apportionment

Apportionment represents an approximation using factors to determine how income is distributed. As a constitutional matter, states are given broad discretion in constructing these factors. Section 220.151(2), F.S., provides the apportionment factor for transportation companies: revenue miles in Florida over revenue miles everywhere. For purposes of computing revenue miles in Florida, all miles within a "box" drawn over a map of Florida are included. The box extends beyond the territorial limits of the state and, based on a claim of overreaching, is presently the subject of litigation.

Separate Return Filing Limitation

When taxpayers within an affiliated group (some with net operating losses generated when they filed separately) elect to file a consolidated corporate income tax return, the net operating losses carried forward from the separate filing years may be used to the extent of the affiliated group's consolidated income. Use of net operating loss carryovers generated prior to combination has the effect of precluding Florida from taxing the income produced in years prior to consolidated while being required to suffer the losses following the consolidation.

Interest on Revenue Agent Report (RAR)

Section 220.23, F.S., requires taxpayers to pay interest on Florida tax deficiencies resulting from changes to the underlying federal return (increased federal taxable income) from the due date of the original return until the tax is paid to Florida. In 1999, the First District ruled in Barnett Bank vs. Department of Revenue, 738 So.2d 502 (Fla. 1st DCA 1999), that the intent of the Florida Legislature to impose interest on tax deficiencies discovered during federal audits was not clearly expressed in Chapter 220. In 2002, the Florida Legislature amended section 220.23, F.S., to overturn Barnett Bank. However, questions remain concerning whether the 2002 changes to section 220.23, F.S., may be applied to Florida deficiencies that arise after 2002, but that concern tax years prior to 2002, i.e. a federal audit completed after 2002, that increases the amount of tax due on a 1995 return, creating a deficiency for Florida.

III. Effect of Proposed Changes:

Section 220.15(5)(d), F.S., is created to eliminate sales from the denominator of the sales factor any sales that are not allocable or apportionable to any taxing jurisdiction -nowhere sales, including sales assignable to jurisdictions where the taxpayer is not subject to an income tax, or where the jurisdiction does not impose an income tax. This treatment is referred to as the "throw-out" rule.

Section 220.15(5)(c), F.S., is created to address the sourcing of sales of services for the sales factor. Sales of services are sourced to Florida if the buyers receive the benefit of the services in Florida. A buyer receives the benefit of services in Florida if any one of the following applies:

- the service relates to real property located in this state;
- the service relates to tangible personal property located in this state at the time the service is received;
- the service relates to tangible personal property delivered directly or indirectly to customers in this state;
- the service is provided to an individual physically present in this state at the time the service is received; or
- the services is provided to a buyer engaged in a trade or business in this state and relates to that trade or business.

If the purchaser of a service receives the benefit of a service in more than one state, the gross receipts from the performance of the service are included in the numerator of the sales factor according to the portion of the service received in Florida.

If the taxpayer is not subject to income tax in the state in which the benefit of the service is received, the benefit of the service is received in Florida to the extent that the taxpayer's employees or representatives performed services from a location in Florida. Fifty percent of the taxpayer's receipts that are considered received in Florida under this paragraph are included in the numerator of the sales factor.

Royalty Apportionment

Section 220.15(5), F.S., is amended to include income from the sale, assignment or licensing of intangible property as a sale if the income from the property is reasonably attributable to a particular income producing activity.

Add-back

Add-backs are adjustments that result in an increase in the tax base. Functionally, these changes could be implemented by way of a subtraction – as in a reduction in the amount of a deduction.

Section 220.03(1)(r), F.S., is amended to redefine nonbusiness income as any amount that cannot be included in apportionable business income without violating the due process clause of the United States Constitution. Section 220.13(1)(a)16., F.S., is created to recapture expenses in the year a business asset is determined to be nonbusiness that had been deducted by a taxpayer in the current year and in the prior two years. Taxpayers are required to add back expenses deducted in the computation of Florida taxable income when they are subsequently determined to be related to a nonbusiness asset allocated to another state.

The bill generally requires that intercompany transactions paid to an affiliated entity and reported on a separate return basis be added back to Florida apportioned income. Section 220.13(3), F.S., is created to eliminate the distortive effect that intercompany transactions and management fees can have on the computation of an individual company's Florida income. Exceptions to requiring an add-back are provided if the entity receiving the expenses also files a Florida return, or the taxpayer establishes the expense does not distort their reported income.

The bill clarifies the definition of non-business income by eliminating the “transactional” test and the “functional” test.

Financial Organization Apportionment

The apportionment factors used by a financial organizations are changed to reflect the model treatment provided by the Multistate Tax Commission. "Financial organization" is redefined in a manner consistent with current industry practices. Presumptions are established for situsing the location of intangible property. A loan is considered to be located within this state if it is properly assigned to a regular place of business of the taxpayer within this state. A loan is properly assigned to the regular place of business with which it has a preponderance of substantive contacts. A loan assigned by the taxpayer to a regular place of business outside the state is presumed to have been properly assigned if the taxpayer has assigned, in the regular course of its business, the loan consistent with Federal or state regulatory requirements; the assignment is based upon substantive contacts of the loan to that regular place of business; and the taxpayer uses the records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

International Banking Facilities

The special rules that apply to the taxation of international banking facilities by section 220.62(3), F.S., and items of eligible net income that may be deducted from adjusted federal income via the international banking facility classification, are repealed.

Florida Nexus Group Election

The "temporary" measure put in place in 1984 to make it possible for a group to file a Florida consolidated return is eliminated.

Partnership Elections

Section 220.02(1), F.S., is amended to follow the classification of organizations under the Internal Revenue Code to the greatest extent possible. Section 220.03(1)(c), F.S., is amended to clarify that partnerships and other entities that are taxable as corporations for federal corporate income tax purposes are corporations for Florida corporate income tax purposes. Section 220.03(6), F.S., is created to clarify that a corporation, that is a partner in a partnership that conducts business in Florida, is subject to the Florida corporate income tax. A limited liability company taxed as a partnership for federal income tax purposes is treated as a partnership for Florida corporate income tax purposes. Section 220.13(2)(k), F.S., is created to clarify that taxable income in the case of any partnership, organization, association, legal entity, or artificial person taxable as a corporation for federal income tax purposes is taxable income of such partnership, organization, association, legal entity, or artificial person as if it was required to file, or had filed, a federal corporate income tax return under the Internal Revenue Code.

These changes are determined to be remedial and to apply to tax years beginning on or after December 31, 2000.

Deconsolidation

Section 220.131(3), F.S., is amended to require taxpayer's that elect to file consolidated returns in Florida to continue filing on a consolidated basis as long as that taxpayer's affiliated group continues to file consolidated returns for federal income tax purposes. The Executive Director's authority to allow a taxpayer to deconsolidate without a corresponding federal change in the federal consolidated return, is deleted.

Airline Apportionment

Section 220.151(2), F.S., is amended. Taxpayers furnishing transportation by air must apportion their income to Florida based on landings in Florida over landings everywhere. Taxpayers furnishing transportation services by sea will continue to apportion their income to Florida based on revenue miles in Florida over revenue miles everywhere. However, only miles traveled within the constitutional boundaries of Florida will be included as Florida revenue miles. Revenue miles not allocable or apportionable to any taxing jurisdiction (nowhere miles) are eliminated from both the numerator and denominator of the transportation apportionment factor.

Separate Return Filing Limitation

Net operating losses incurred by a member of an affiliated group of corporations when the members of the affiliated group of corporations were not filing on a consolidated basis in Florida, are limited to the income generated by that member once part of the consolidated group. However, if all members of the affiliated group filed Florida corporate income tax returns in the year the net operating loss was generated, this limitation does not apply.

Interest on Revenue Agent Report (RAR)

Chapter Law is provided to clarify the Legislative intent that all deficiencies arising after the effective date of the 2002 change to section 220.23, F.S., are subject to interest back to the original due date of the return for that tax year.

Other Potential Implications:**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

The Revenue Estimating Conference has determined that the bill will have the following General Revenue Fund impact:

	FY 2009-10 Annualized	FY 2009-10 Cash	FY 2010-11 Cash	FY 2011-12 Cash	FY 2012-13 Cash
Total Impact	97.2	126.3	117.8	145.0	154.5

B. Private Sector Impact:

This bill:

- provides a comprehensive revision of the Florida Income Tax Code that requires financial institutions and other businesses to make financial reporting adjustments to account for these changes.
- adopts uniform definitions that permit businesses to operate in a competitively neutral fashion.
- requires consistent reporting on a state and federal level
- updates Code provisions to conform with present business practices
- causes businesses to reflect income generated in Florida on their returns

C. Government Sector Impact:

The Department of Revenue will be required to provide notice to corporations doing business in the state and revise forms and rules used by corporations to report income tax.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Finance and Tax Committee on April 1, 2009:

The CS replaced a shell bill.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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Act 1982-234

LAWS OF PENNSYLVANIA

No. 1982-234

AN ACT

SB 457

Amending Title 75 (Vehicles) of the Pennsylvania Consolidated Statutes, deleting a provision prohibiting the deduction of oil company franchise tax in calculating other taxes imposed by the Commonwealth and for the payment of credits, reducing the fee for the issuance of identification markers, providing for the imposition of a new axle tax on certain vehicles and further providing for windshield obstructions.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 1916, 2102, 2104 and 4524 of Title 75, act of November 25, 1970 (P.L.707, No.230), known as the Pennsylvania Consolidated Statutes, are amended to read:

§ 1916. Trucks and truck tractors.

(a) General rule.—The annual fee for registration of a truck or truck tractor shall be determined by its registered gross weight or combination weight in pounds according to the following table:

Class	Registered Gross or Combination Weight in Pounds	Fee
1	5,000 or less	\$ 39
2	5,001 - 7,000	54
3	7,001 - 9,000	102
4	9,001 - 11,000	132
5	11,001 - 14,000	162
6	14,001 - 17,000	192
7	17,001 - 21,000	237
8	21,001 - 26,000	270
9	26,001 - 30,000	[315] 243
10	30,001 - 33,000	[378] 306
11	33,001 - 36,000	[414] 342
12	36,001 - 40,000	[438] 366
13	40,001 - 44,000	[465] 357
14	44,001 - 48,000	[501] 393
15	48,001 - 52,000	[552] 444
16	52,001 - 56,000	[588] 480
17	56,001 - 60,000	[666] 558
18	60,001 - 64,000	[741] 597
19	64,001 - 68,000	[777] 633
20	68,001 - 73,280	[834] 690
21	73,281 - 76,000	[1065] 885
22	76,001 - 78,000	[1089] 909
23	78,001 - 78,500	[1101] 921

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24	78,501 - 79,000	[1113] 933
25	79,001 - 80,000	[1125] 945

(b) Optional registration.—Any vehicle falling within the range of weights for Classes 1 through 4, inclusive, shall notwithstanding any gross vehicle weight stamped on the manufacturer's serial plate, be registered, upon request of the person making application for registration, at the maximum allowable gross or combination weight for the particular weight class within which the gross vehicle weight determined by the manufacturer causes such vehicle to fall.

§ 2102. Identification markers required.

(a) General rule.—The Secretary of Revenue shall provide an identification marker for every motor carrier vehicle.

(1) All motor vehicles required to display the identification marker shall permanently affix such identification marker on the top one-half of the outside door panel on the driver's left-hand side and shall follow the directions as indicated on the reverse side of the identification marker.

(2) The identification marker shall remain the property of the Commonwealth and may be recalled for any violation of the provisions of this chapter, the "Motor Carriers Road Tax Act" or the regulations promulgated thereunder.

(b) Fee.—The fee for issuance of an identification marker *prior to and including March 31, 1983* shall be \$25[*, except that for*] *and thereafter the fee shall be \$5. For* vehicles registered in this Commonwealth, the vehicle identification marker fee shall be deemed a part of and included in the vehicle registration fee. *Payment of the fee notwithstanding, no marker, permit or registration card shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.*

(c) Issuance of markers.—Identification markers shall be issued on a 12-month basis, effective April 1 of each year, and shall be valid through the next succeeding March 31; however, enforcement of this section shall not become effective until April 15 of each year as to motor carrier vehicles displaying the previous year's identification marker.

(d) Operation without identification marker unlawful.—It shall be unlawful to operate or to cause to be operated in this Commonwealth any motor carrier vehicle unless the vehicle bears the identification marker required by this section.

(1) The Secretary of Revenue may by regulation exempt from the requirement to display the identification marker motor carrier vehicles which in his opinion are clearly identifiable such that effective enforcement of this chapter will not suffer thereby.

(2) For a period not exceeding five days as to any one motor carrier, the Secretary of Revenue by letter or telegram may authorize the operation of a motor carrier vehicle or vehicles without the identification marker required *or the payment of the axle tax* when the enforcement of this section *or section 9902* for that period would

cause undue delay and hardship in the operation of such motor carrier vehicle or vehicles:

(i) The fee for such permits shall be ~~[\$5]~~ \$25 for each motor carrier vehicle *which shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund.*

(ii) Conditions for the issuance of such permits shall be set forth in regulations promulgated by the Department of Revenue.

§ 2104. Special investigators; powers.

Such employees of the Department of Revenue as are designated as special investigators, and who carry identification indicating such capacity, are hereby declared to be peace officers of the Commonwealth, are hereby given police power and authority throughout the Commonwealth to arrest on view without warrant any driver of a motor carrier vehicle engaged in any operations in violation of any provision of this chapter, *Chapter 99 (relating to axle tax for highway bridge improvement)*, or [of] the "Motor Carriers Road Tax Act" and shall have the power and authority upon probable cause that any such violation may have occurred to search and seize without warrant or process any motor vehicle so operated.

§ 4524. Windshield obstructions and wipers.

(a) Obstruction on front windshield.—No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield *which materially obstructs, obscures or impairs the driver's clear view of the highway or any intersecting highway* except an inspection certificate, sticker identification sign on a mass transit vehicle or other officially required sticker and no person shall drive any motor vehicle with any ice or snow on the front windshield which materially obstructs, obscures or impairs the driver's clear view of the highway or any intersecting highway.

(b) Obstruction on side and rear windows.—No person shall drive any motor vehicle with any sign, poster or other nontransparent material, including ice or snow, upon the side wings or side or rear windows of the vehicle which materially obstructs, obscures or impairs the driver's clear view of the highway or any intersecting highway.

(c) Other obstruction.—No person shall drive any motor vehicle with any object or material hung from the inside rearview mirror or otherwise hung, placed or attached in such a position as to materially obstruct, obscure or impair the driver's vision through the front windshield or any manner as to constitute a safety hazard.

(d) Windshield wiper systems.—The windshield on every motor vehicle other than a motorcycle or special mobile equipment shall be equipped with a wiper system capable of cleaning rain, snow or other moisture from the windshield, and so constructed as to be controlled or operated by the driver of the vehicle.

Section 2. Section 9502(b) and (g) of Title 75 is amended to read:

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§ 9502. Imposition of tax.

* * *

(b) Other taxes unaffected.—The tax imposed by this chapter is in addition to all other taxes imposed by this chapter or any other statute [and shall not be permitted as a deduction in calculating any other tax imposed by the Commonwealth].

* * *

(g) Credit in absence of proof of nontaxable purpose.—The department may provide, in any case in which the purchaser is unable to provide documentation proving that petroleum products are used for a nontaxable purpose, for the payment of a credit *to the exempt purchaser* based on the average wholesale price of petroleum products determined pursuant to regulations adopted by the department. *For purposes of calculating credits, the exempt purchaser of petroleum products upon which the tax imposed by this chapter has previously been paid shall be deemed to have paid the tax and be eligible to receive a credit for any exempt purchase or use.*

* * *

Section 3. Title 75 is amended by adding a chapter to read:

CHAPTER 99
AXLE TAX FOR HIGHWAY BRIDGE IMPROVEMENT

Sec.

- 9901. Definitions.
- 9902. Imposition of axle tax.
- 9903. Report and payment of tax.
- 9904. Evidence of payment.
- 9905. Rebate in case of incidental travel.
- 9906. Penalties.
- 9907. Deposit of proceeds and purpose of tax.
- 9908. Appropriation.
- 9909. Administration and enforcement.

§ 9901. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Department.” The Department of Revenue.

“Motor carrier.” Every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth.

§ 9902. Imposition of axle tax.

In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of \$36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

§ 9903. Report and payment of tax.

The tax shall be paid to the department at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to section 2102 (relating to identification markers required). No registration card or identification marker or permit shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

§ 9904. Evidence of payment.

The issuance of a registration card or vehicle identification marker or permit shall be prima facie evidence that any tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

§ 9905. Rebate in case of incidental travel.

The full axle tax applies to vehicles which travel at least 2,000 miles annually in this Commonwealth. Vehicles travelling less than 2,000 miles annually may file with the department for an axle tax rebate which shall be supported by such data as may be required by the department by regulation. The rebate will be calculated in accordance with the following formula:

$$\frac{2,000 - \text{actual miles travelled}}{2,000} \times \text{axle tax paid} = \text{rebate}$$

§ 9906. Penalties.

In addition to any penalties which may be imposed for the failure to register a vehicle or obtain and display an identification marker or special permit, any person who willfully fails to pay the tax imposed by this chapter when due commits a summary offense and, upon conviction shall be sentenced, for a first offense, to pay a fine of not less than \$100 nor more than \$500 and, for each subsequent or additional offense, to pay a fine of not less than \$200 nor more than \$500 or to undergo imprisonment for a term not exceeding 90 days or both.

§ 9907. Deposit of proceeds and purpose of tax.

(a) General rule.—Proceeds from all taxes and penalties imposed by this chapter shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund, which account is hereby created.

(b) Purpose of tax.—It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the unemployed in this Commonwealth. In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish products and materials, including, but not limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.

§ 9908. Appropriation.

The funds deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund are hereby annually appropriated out of the account upon authorization by the Governor, for expenditure on bridge rehabilitation, replacement and removal projects pursu-

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ant to the act of December 8, 1982 (P.L.848, No.235), known as the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983," in accordance with the following priorities:

(1) The first priority is to the Treasury Department for deposit into the Capital Debt Fund for the payment of debt service on general obligation bonds of the Commonwealth which may be issued from time to time to fund any project described in the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983."

(2) The second priority is to the Department of Transportation in the event excess funds are available after the annual debt service requirements have been satisfied for:

(i) The non-Federal share of bridge rehabilitation, replacement and removal projects on State-owned bridges and bridges of undetermined ownership on State highways.

(ii) Grants to counties or municipalities to fund up to 80% of the non-Federal share of bridge rehabilitation, replacement and removal projects on county-owned or municipal-owned bridges, and bridges of undetermined ownership on county or municipal highways. The balance of the costs for these bridge projects shall be funded by the respective county or municipality or by private funds.

§ 9909. Administration and enforcement.

(a) General rule.—The Departments of Revenue and Transportation shall jointly promulgate any regulations necessary for the proper administration and enforcement of this chapter.

(b) Appeal procedures.—The procedures for appeals relating to the tax imposed by this chapter shall be consistent with those contained in Chapter 95 (relating to oil company franchise tax for highway maintenance and construction).

Section 4. Section 2 shall be retroactive to July 1, 1981.

Section 5. (a) Sections 1 and 3 shall take effect April 1, 1983.

(b) The remainder of this act shall take effect immediately.

APPROVED—The 8th day of December, A. D. 1982.

DICK THORNBURGH