ALAN WILSON
ATTORNEY GENERAL

November 8, 2013

The Honorable Peter Tecklenburg
Charleston County Auditor
P. O. Box 614
Charleston, South Carolina 29402-0614

Dear Auditor Tecklenburg:

Attorney General Alan Wilson has referred your letter of October 9, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: Pursuant to South Carolina Code § 12-37-890 may the Charleston County Auditor's Office charge an annual personal property tax on an airplane used primarily for business purposes when the airplane has an annual lease at an airport within your county and lists its home base in South Carolina in spite of the fact that an out-of-state limited liability company (LLC) with a physical address in your county is the "owner" of the airplane?

Short Answer: As far as the law reads, this Office has consistently opined and believes a court will find that an airplane used primarily for business purposes with a situs in South Carolina is subject to South Carolina's personal property tax found in South Carolina Code § 12-37-890 even if the airplane is owned by an out-of-state company.

Law/Analysis:
South Carolina Code Section 12-37-890 (1976 Code, as amended) states:

> All horses, neat cattle, mules, asses, sheep, hogs, dogs, wagons, carts and other vehicles used in any business, furniture and supplies used in hotels, restaurants and other houses of public resort, **personal property used in or in connection with storehouses, manufactories, warehouses or other places of business, all personal property on farms and merchants' and manufacturers' stock and capital shall be returned for taxation and taxed in the county, city and town in which it is situated.** All bankers' capital and personal assets pertaining to their banking business shall be returned for taxation and taxed in the county, city or town in which the banking house is located. All shares of stock in incorporated banks located in this State shall be returned for taxation and taxed in the county, city or town in which the bank is located. All property of deceased persons shall be returned for taxation and taxed in the county where administration may be legally granted, until distribution thereof and payment may be made to the parties entitled thereto. **All other personal property shall be returned for taxation and taxed at the place where the owner**

> **thereof shall reside at the time of listing the same, if the owner reside in this State; if not, at the residence of the person having it in charge. And all real estate shall be taxed in the county, city, ward or town where it is located.** The owners of real property situate partly within and partly without any incorporated town or city shall list the part in the town or city separately from the part outside the incorporated limits thereof.

(Emphasis added).

One principle this Office is quick to cite is the long-recognized rule of statutory interpretation that any ambiguity in the imposition of a tax must be interpreted in favor of the taxpayer. Op. S.C. Atty. Gen., 1967 WL 12119 (April 28, 1967). However, the tax found in South Carolina Code Section 12-37-890 does not appear to be ambiguous on its face. As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

This Office has previously answered similar questions regarding airplanes being taxed pursuant to South Carolina Code Section 12-37-890 (formerly § 65-1643 of the 1962 Code)[1] and has consistently opined airplanes would be taxed at their situs, which generally is at the airport where the aircraft is located if the owner is located out-of-state or if the aircraft is used for business. See, e.g., Ops. S.C. Atty. Gen., 1979 WL 43208 (December 17, 1979); 1966 WL 8614 (September 28, 1966); 1962 WL 9752 (October 18, 1962). Otherwise, this Office has opined an airplane should be taxed at the residence or domicile of its owner if the airplane is not used for business and if the owner is a resident of South Carolina. Id. This Office also previously opined South Carolina could tax boats permanently docked in South Carolina with North Carolina stickers and nonresident owners because South Carolina was the situs of the personal property. Op. S.C. Atty. Gen., 1969 WL 10675 (May 7, 1969). A 1968 opinion to your office opined a boat not used in connection with a business should be returned to where its owner resides to be taxed unless the owner lives out-of-state and thus should be taxed at its situs. However, if the personal property is used in connection with a business, it should be taxed at the location thereof. Op. S.C. Atty. Gen., 1968 WL 8821. That opinion also quoted: "[t]he modern rule is that the actual situs of visible tangible personal property and not the domicil[e] of its owner determines the place of taxation." Id. (citing 51 Am. Jur., *Taxation*, Sec. 452, p. 467). This Office has repeatedly stated "taxation of personal property is not wholly dependent upon the owner being a legal resident of South Carolina" and vehicles are "subject to taxation

[1] Please note you asked a similar question to this Office in a separate letter also dated October 9, 2013. We encourage you to read that opinion in conjunction with this one.

by South Carolina's local governmental entities by virtue of their 'more or less permanent' location in this state." Op. S.C. Atty. Gen., 2010 WL 5578962 (December 15, 2010) (citing Ops. S.C. Atty. Gen., 2001 WL 1215462 (September 10, 2001); 1969 WL 10786 (December 2, 1969)). A 1966 opinion said that:

> The South Carolina statutes therefore specify that the aircraft shall be taxed where situated if used in a business, otherwise, the same are to be taxed where the owner thereof resides. 'The general rule is that movable property which has a value of its own, instead of being merely the evidence or representative of value, and which has a visible or substantial existence, is taxable where it is usually or permanently kept; but, in the absence of any evidence that tangible personal property has an actual or permanent situs elsewhere than in the state of the owner's domicile, it is taxable to the owner in such state.' 84 C.J.S., Section 115, Taxation.... It is the opinion of this [O]ffice, therefore, that if the aircraft are used in a business, the taxable situs thereof would be the airport....

Op. S.C. Atty. Gen., 1966 WL 8614 (September 28, 1966). This Office has also previously opined "to acquire a tax situs... in a particular taxing jurisdiction, it is enough that the property be situated there with a degree of permanence which will distinguish it from property which is there on a transitory basis. 4 A.L.R.4th 483." Op. S.C. Atty. Gen., 1984 WL 249924 (July 10, 1984).

This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). While this Office is not required to do so, we feel it would be instructive to review some cases involving the taxing of airplanes. In a 1943 case the United States Supreme Court held as long as personal property (such as airplanes) belonging to corporations did not have a permanent taxing situs elsewhere the state of the domicile of the corporation has jurisdiction to tax the personal property. The case went on to quote a 1906 case saying:

> '...It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. * * * But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts.' New York Central & H.R.R. Co. v. Miller, supra, 202 U.S. at pages 596, 597, 26 S.Ct. at pages 716, 717, 50 L.Ed. 1155.[FN4] Surely, the power of the State of origin to 'tax its own corporations for all their property within the state during the tax year' cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as the property is not 'continuously without the state during the whole tax year', New York Central & H.R.R. Co. v. Miller, supra, 202 U.S. at page 594, 26 S.Ct. at page 716, 50 L.Ed. 1155, even when, as in the Miller case, from 12% to 64% of the property was shown to have been used outside of New York during the tax year, but in no one visited State permanently, that is, for the whole year. And that is the decisive constitutional fact about the Miller case-that although from 12% to 64% of the rolling stock of the railroad was outside of New York throughout the tax year, New York was

> nevertheless allowed to tax it all because no part was in any other State throughout the year.
>
> ....
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> The doctrine in the Miller case, which we here apply, does not subject property permanently located outside of the domiciliary State to double taxation. But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere. And what the Miller case decided is that neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.
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> Each new means of interstate transportation and communication has engendered controversy regarding the taxing powers of the States inter se and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been the source of difficulty and dissatisfaction for us, see J. B. Moore, Taxation of Movables and the Fourteenth Amendment (1907) 7 Col.L.Rev. 309; Groves, Intergovernmental Fiscal Relations, Proceedings Thirty-fifth Annual Conference, National Tax Association, p. 105, and have equally plagued the British federal systems, see Report of the (Australian) Royal Commission on the Constitution, (1929) c, XII (p. 127), c. XIX (p. 187), c. XXIII (at p. 259); Report of the (Canadian) Royal Commission on Dominion-Provincial Relations, (1940) Bk. I, c. VIII, Bk. II, s B, c, III. In response to arguments addressed also to us about the dangers of harassing state taxation affecting national transportation, the concurring judge below adverts to the power of Congress to incorporate airlines and to control their taxation. But insofar as these are matters that go beyond the constitutional issues which dispose of this case, they are not our concern.

Northwest Airlines, Inc. v. State of Minnesota, 322 U.S. 292, 298-301, 64 S.Ct. 950, 954-955 (1944) (citing N.Y. Central & H.R.R. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714 (1906)).[2] The Miller case applies to your question because it supports the taxing of personal property (an airplane in that case) at its situs. In regards to taxation of airplanes, a California case said:

> In support of its contention, TWC cites to five United States Supreme Court decisions, asserting that those decisions prohibit taxation by two or more states that results in a tax on more than 100 percent of the value of the property, because such a tax would be a burden on interstate commerce in violation of the Commerce Clause and Due Process Clause of the United States Constitution. (U.S. Const., art I, § 8, cl. 3; U.S. Const., Amend. XIV, § 1.)[3] The decisions upon which TWC relies, however, do not state or imply that taxation by two or more states that results in a tax on more than 100 percent of the value of the property is always prohibited under the Constitution. Instead, those cases merely recognize that moveable personal property can acquire a tax situs in a state other than the domicile state and that in such cases, the property tax must be "fairly apportioned" between the two states. (See generally 1 Hellerstein, State Taxation (3d ed. 2007) Constitutional Limitations and Corporate Income and

[2] The dissent is noteworthy. We encourage you to read the dissent in the Miller case for further discussion.

[3] You may find the discussion helpful concerning claims of violations of Due Process pursuant to U.S. Const. Art. I § 8, clause 3 and violations of the Commerce Clause pursuant to U.S. Const. Art. XIV, § 1, as these are often claims asserted against a tax imposition such as your question.

Franchise Taxes, § 4.08[1], pp. 4–35 to 4–38.) Here, the parties agree that the subject aircraft established a taxable situs in Nevada during the relevant tax year and that some tax apportionment between California and Nevada is appropriate. Thus, the cases upon which TWC relies are inapposite to the issue posed here—whether two states' combined valuations of the same moveable business property that exceed 100 percent of the value of the property are per se prohibited under the Constitution.

. . . .

In affirming the decision of the Iowa Supreme Court, the United States Supreme Court addressed the manufacturer's contention that the Commerce Clause of the Constitution prohibits *any* duplicative or overlapping taxation by two or more states. (*Moorman, supra,* 437 U.S. at pp. 277–278, 98 S.Ct. 2340.) In rejecting that contention, the Supreme Court said: "The only conceivable constitutional basis for invalidating the Iowa statute [mandating the use of a single-factor formula] would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the States. If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income. Accepting [the Illinois manufacturer's] view of the Constitution, therefore, would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single-factor apportionment formula. The asserted constitutional flaw in that formula is that it is different from that presently employed by a majority of States and that difference creates a risk of duplicative taxation. But a host of other division-of-income problems create precisely the same risk and would similarly rise to constitutional proportions." (*Id.* at p. 278, 98 S.Ct. 2340.)

The United States Supreme Court in *Moorman, supra,* 437 U.S. 267, 98 S.Ct. 2340, therefore concluded: "The prevention of duplicative taxation, therefore, would require national uniform rules for the division of income. Although the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause, it would require a policy decision based on political and economic considerations that vary from State to State. The Constitution, however, is neutral with respect to the content of any uniform rule. [¶] While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of ***1425** income. It is to that body, and not this Court, that the Constitution has committed such policy decisions." (*Id.* at pp. 279–280, 98 S.Ct. 2340.)

Based on *Moorman, supra,* 437 U.S. 267, 98 S.Ct. 2340, we reject TWC's assertion that *any* overlap in taxation between two states is strictly prohibited under the Constitution. Rather, the apportionment issue turns on whether the Assessor's formula imposes a property tax that is not rationally related to TWC's business operations in

Los Angeles County. (See *Barclays Bank Internat., Ltd. v. Franchise Tax Bd.* (1992) 2 Cal.4th 708, 720, 8 Cal.Rptr.2d 31, 829 P.2d 279 [quoting *Moorman* that " 'the States have wide latitude in the selection of apportionment formulas and ... a formula-produced assessment will only be disturbed when the taxpayer has proved by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportion to the business transacted ... in that State' "].)

In *Ice Capades, supra,* 56 Cal.App.3d 745, 128 Cal.Rptr. 717, the court determined that the moveable personal property of the taxpayer domiciled in Los Angeles County had acquired a tax situs in New Jersey. (*Id.* at pp. 754–755, 128 Cal.Rptr. 717.) The court held that "[s]ince the property of [the taxpayer] absent from California had acquired a tax situs in New Jersey so as to be subject to taxation in that state, the County of Los Angeles was limited in its power of taxation of the property to its value fairly apportioned to California. (*Standard Oil Co. v. Peck* [(1952)] 342 U.S. 382, 384–385 [72 S.Ct. 309, 310, 96 L.Ed. 427, 430–431].) The development of a formula of apportionment is primarily the task of the authority imposing the tax." (*Ice Capades, supra,* 56 Cal.App.3d at p. 755, 128 Cal.Rptr. 717.)

The United States Supreme Court recently restated the limitations that the Commerce Clause and Due Process Clause of the Constitution impose upon a state's power to tax: "The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities. [Citations.] The Due Process Clause demands that there exist ' "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," ' as well as a rational relationship between the tax and the ' " 'values connected with the taxing State.' " ' [Citations]. The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation. [Citations.] The 'broad inquiry' subsumed in both constitutional requirements is ' "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state" '—that is, ' "whether the state has given anything for which it can ask return." ' [Citations.]" (*MeadWestvaco Corp. v. Illinois Dept. of Revenue* (2008) 553 U.S. 16, 128 S.Ct. 1498, 1505, 170 L.Ed.2d 404.)

In the instant case, there is nothing in the administrative record to suggest that the Assessor's formula resulted in a tax that has no rational relationship to the opportunities, benefits, and protections conferred upon or afforded to TWC based on the presence of TWC's aircraft in California during the tax year. The evidence is to the contrary. As to one of the aircraft, there was no record that it had any presence in Nevada during the tax year. As to the other two aircraft, the relevant flight logs showed that one had been in Nevada for eight of the 365 days of the tax year and the other had been there only two days during that year. By contrast, the flight logs showed that the aircraft that spent eight days in Nevada spent 177 days in California, and the aircraft that spent two days in Nevada spent 212 days in California. In addition, the evidence showed that the aircraft were based and maintained in Burbank and that they were chartered from TWC Aviation's facilities in Burbank. That evidence supports a rational inference that TCW was afforded substantial

> opportunities, benefits, and protections by California based on the presence of the three aircraft in Los Angeles County during the tax year.
>
> That the Assessor used a formula based on the aircraft's location at 12:00 a.m. is not, as TWC contends, arbitrary. Although aircraft, unlike the personal property at issue in *Ice Capades, supra,* 56 Cal.App.3d 745, 128 Cal.Rptr. 717, can and do change locations within a given day, the 12:00 a.m. standard has some rational relationship to an aircraft's location during the day. Indeed, it would be burdensome and impractical to try to determine the exact amount of time an aircraft was in Nevada as compared with California. If an aircraft was on the ground in Nevada at 12:00 a.m., it is likely it was present there for at least a significant portion of a day. Thus, the Assessor's methodology employs a brightline test that is less complicated than other methodologies that might have been used. Because the development of an apportionment formula is primarily the task of the authority imposing the tax (*id.* at p. 755, 128 Cal.Rptr. 717), we will not substitute our judgment for that of the Assessor, absent a clear showing that the value attributed to Los Angeles County is not within a reasonable proportion to the presence of the three aircraft there during the tax year. There is no such showing here.

Auerbach v. Assessment Appeals Board No. 2 for the County of Los Angeles, 167 Cal.App.4th 1415, 1423-1425, 85 Cal.Rptr.3d 118, 124-126 (2008).

The Supreme Court of South Carolina previously answered a question of taxation in Charleston County concerning personal property belonging to a business located outside of South Carolina. That case stated:

> There are many cases, both State and Federal, which hold that taxes, otherwise lawful, are not invalidated by reason of the fact that the resulting benefits are unequally shared. It is evident from the record that Charleston County has given to Atkinson something for which it can ask return. It has been stipulated that opportunities, benefits and protections of Charleston County and the State of South Carolina were conferred upon or afforded to Atkinson during the period that it was dredging in Charleston Harbor. We take judicial notice that these benefits included police and fire protection, medical, recreational, educational and marine facilities.

Atkinson Dredging Co. v. Thomas, 266 S.C. 361, 223 S.E.2d 592 (1976). Moreover, it may be helpful to examine the South Carolina Department of Revenue's rulings. One such ruling (# 98-12) addressed some issues concerning ad valorem personal property taxes on boats located in South Carolina. That ruling went on to state that:

> Property operating in interstate commerce such as trains, airlines, and boats operating on inland waters may be taxed by both the domiciliary [fn 11] state and the non-domiciliary state provided the property is taxed on an apportioned basis by the two and provided the carrier has tax situs through regular physical presence with the domiciliary and non-domiciliary states. Japan Line Ltd. V. Los Angeles County, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) [fn 12]. Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427 (1952) [fn 13].
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> [FN 11: See Footnotes 1 and 2 above for a discussion of domicile.]

[FN 12: A domiciliary state is allowed to tax the entire value of the property even though part of the property is absent from the state during part of the tax year provided the property has not obtained a tax situs in another state. Central R. Co. of Pennsylvania v. Com. of Pennsylvania, 370 U.S. 607, 82 S.Ct. 1297, 8 L.Ed.2d 720 (1962), rehearing denied 371 U.S. 856 (1962). The taxpayer has the burden of establishing that property has obtained tax situs in a non-domiciliary state such that multiple jurisdictions have the ability to tax the property. Id. Whether property has acquired tax situs and, thus, nexus in a state other than the domiciliary state is a question of fact.]

[FN 13: Boats and barges owned by an Ohio corporation and traversing the Ohio River but only occasionally stopping in Ohio for fuel or repairs were held in Standard Oil Co. v. Peck, 342 US. 382, 96 L.Ed. 427, 72 S.Ct. 309 (1952), not to be taxable by Ohio on their entire value. Stating that most, if not all, of the barges and boats which Ohio had taxed were almost continuously outside Ohio during the tax year, and that while no one vessel may have been continuously in another state during the tax year, most, if not all, of them were operating in other waters and therefore could be taxed by the several states on an apportionment basis precluded taxation of all of the property by the state of domicile since otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.]

While there are numerous other cases involving personal property taxes, this Office hopes you will better understand some of the precedent for this opinion.

Conclusion: This Office has consistently opined and believes a court will find that an business airplane with a situs in South Carolina is subject to South Carolina's personal property tax found in South Carolina Code § 12-37-890. Based on the information provided to this Office without making any factual determinations, this Office believes Charleston County Auditor's Office is authorized to tax personal property such as an airplane if the County can prove the plane's situs is in South Carolina, which it appears to be able to do. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

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