Winter 2005

Missouri Use Tax: Matching the Burdens to the Benefits of Ownership, The

Jennifer A. Simmons

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Jennifer A. Simmons, Missouri Use Tax: Matching the Burdens to the Benefits of Ownership, The, 70 Mo. L. REV. (2005)
Available at: https://scholarship.law.missouri.edu/mlr/vol70/iss1/12

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
The Missouri Use Tax: Matching the Burdens to the Benefits of Ownership

*Fall Creek Construction Co. v. Director of Revenue*¹

I. INTRODUCTION

A use tax is the counterpart to a sales tax, imposed on purchases of tangible personal property made outside the state if the property purchased is then used within the state. Many people are not aware of the use tax, but Missouri has had a use tax since 1959.² A state's use tax can generate significant revenue for the state. Therefore, when the State of Missouri experiences large budget deficits, the Department of Revenue has a huge incentive to keep a closer eye on purchases made outside Missouri to see if Missouri's use tax might apply.

*Fall Creek Construction Company, Inc. v. Director of Revenue* demonstrates that when planning for the purchase of property, parties should consider the applicable use taxes to price the transaction accurately. Failing to account for use taxes leaves open the risk that, following an audit, the cost of the transaction will rise by the amount of unpaid use tax, accrued interest on the unpaid use tax, and the costs of legal or accounting fees incurred in connection with the audit. Many taxpayers try to plan around sales and use taxes when making a purchase. While the incentive to plan around taxes increases in proportion to the price of the underlying purchase, so too does the cost for failing to appropriately consider all use tax consequences.

*Fall Creek* demonstrates that while it may be easy to plan around sales taxes, it is much more difficult to avoid a use tax, especially when the taxpayer enjoys the tax and regulatory advantages of ownership without also incurring the burdens. This Note examines Missouri's use tax under a set of particularly interesting and complex circumstances. In the instant case, a corporation conducting business in several states owned a fractional interest in transient personal property that was part of a much larger interchange agreement. This case illustrates the breadth and effect of Missouri's use tax, raises questions about how fractional ownership and interchange agreements may affect the use tax analysis, and reflects the Missouri Supreme Court's unwillingness to permit taxpayers to enjoy the advantages of ownership without also bearing the burdens associated with those benefits.

---

¹ 109 S.W.3d 165 (Mo. 2003) (en banc).
² R & M Enters., Inc., v. Dir. of Revenue, 748 S.W.2d 171, 171 (Mo. 1988) (en banc), overruled on other grounds by House of Lloyd, Inc. v. Dir. of Revenue, 884 S.W.2d 271 (Mo. 1994) (en banc).
II. FACTS AND HOLDING

Fall Creek Construction Company ("Fall Creek") is a "real estate development company with its principal place of business in Branson, Missouri." Fall Creek develops real estate in five states: Missouri, Mississippi, Arizona, Virginia, and Tennessee. Because Fall Creek employees regularly travel to and from these locations, Fall Creek contacted Raytheon Travel Air Company ("Raytheon") on October 31, 1998, in order to purchase fractional interests in two of Raytheon's aircraft to provide its employees air transportation. Raytheon is a Kansas corporation that "provides flying services under what is generally called a fractional aircraft ownership program." Under the program, a participant purchases a percentage interest in a particular airplane which, along with the execution of other agreements, contractually entitles the participant to fly a certain number of hours in one of 110 aircraft in the program. Fall Creek and Raytheon reached a deal where Fall Creek acquired a 1/16th (6.25 percent) undivided interest in a King Air B200 aircraft, tail number N713TA ("713TA") for $254,000 and a 1/8th (12.5 percent) undivided interest in a Beech Jet 400A aircraft, tail number N798TA ("798TA") for $772,500. "Delivery of [the aircraft] interests occurred in Wichita, Kansas and neither Fall Creek nor Raytheon paid any sales or use tax to either Kansas or Missouri." Raytheon required that Fall Creek execute four separate agreements for each aircraft, collectively referred to as the governing documents. The documents consist of an aircraft purchase agreement, a joint ownership agreement, a management agreement, and a master interchange agreement. The governing documents for each of the two aircraft are identical.

The purchase agreements state that Fall Creek "desires to purchase . . . an undivided property interest in the aircraft." The purchase agreements also provide that Fall Creek "must execute the governing documents and must perform such actions as are required by the closing date; [may not] place a lien on the aircraft; transfers [between Fall Creek] to third parties are conditioned upon meeting strict requirements of Raytheon; Raytheon has

3. Fall Creek, 109 S.W.3d at 167.
4. Id.
5. Id.
6. Appellant's Brief at 5-6, Fall Creek (No. 84917).
7. Id.
8. Fall Creek, 109 S.W.3d at 167.
9. Id.
10. Id.
11. Id.
12. Appellant's Brief at 6 n.1, Fall Creek (No. 84917).
13. Fall Creek, 109 S.W.3d at 167.
[the] right of first refusal;” and “Raytheon must purchase the interest back” from Fall Creek after sixty months.  

14. Id.

The joint ownership agreements provide that each fractional owner must place the aircraft into the master interchange program and acknowledge that each owner is a tenant in common with respect to the aircraft.\(^\text{15}\) Further, each owner waives any right to partition and agrees to divest itself of its interest in the aircraft only in accordance with the governing documents.\(^\text{16}\)

The management agreement provides that the co-owners must hire Raytheon to manage the aircraft and that each co-owner must “pay a separate monthly management fee and a variable hourly rate for flight hours” to compensate Raytheon for its management.\(^\text{17}\) Under the management agreement, Raytheon agrees to manage[] aircraft scheduling and must make reasonable efforts to obtain the owner’s actual aircraft before providing a similar aircraft under the interchange [agreement;] . . . have the aircraft inspected, maintained, serviced, repaired, overhauled, and tested; maintain all required aircraft records and logs; provide pilots, pilot training, pilot medical examinations and pilot uniforms, . . . hangaring, tie-down space, in-flight catering, flight planning, weather services, and communications; . . . maintain insurance on the aircraft; and . . . provide consulting regarding FAA issues, warranty claims, and insurance matters.\(^\text{18}\)

The master interchange agreement provides that each owner will “participate in the master interchange program by sharing its aircraft with [the] other participants in the program.”\(^\text{19}\) Under the interchange agreement, if any of the fractional owner’s aircraft are unavailable, Raytheon will substitute another similar aircraft from the 110 aircraft in the program.\(^\text{20}\)

Under the interchange program, the fractional owner informs Raytheon of the date and destination of the trip and Raytheon then arranges for the aircraft and pilot to fly the fractional owner to its destination.\(^\text{21}\) “Raytheon . . . determines whether the aircraft will fly . . . due to adverse weather conditions or other restrictions,” but once the aircraft is in the air, the fractional owner is in “operational control” of the aircraft and “may direct the pilot to an alternate destination.”\(^\text{22}\)

14. Id.
15. Id. at 167-68.
16. Id.
17. Id. at 168.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
One of the advantages to a fractional owner exercising "operational control" over the aircraft is the ability to operate within Part 91 of the Federal Aviation Regulations ("FARs") as a private aircraft operating under fewer requirements and limitations than charter or airline aircraft. With a few exceptions, in order for an aircraft to operate under Part 91 of the FARs, the user must accept responsibility for "operational control" of the aircraft, whereby the fractional owner will be held responsible by the Federal Aviation Administration ("FAA") and civil courts if there is an incident involving the aircraft while under the owner's operational control. The FARs ensure that owners are fully apprised of the consequences flowing from having operational control of the aircraft by requiring the aircraft owner to acknowledge that he or she "(i) has responsibility for compliance with all Federal Aviation Regulations applicable to the flight; (ii) may be exposed to enforcement actions for noncompliance; and (iii) may be exposed to significant liability risk in the event of a flight-related occurrence that causes personal injury or property damage."

The bill of sale and Federal Aviation Administration (FAA) records indicate that Fall Creek is the legal owner of fractional interests in the aircraft. "[T]he bill of sale recites that Raytheon does . . . hereby sell, grant, transfer and deliver all rights, title, and interests in and to an undivided . . . interest in such aircraft unto: Fall Creek Construction Company, Inc." and "[t]he FAA recognizes Fall Creek and the other co-owners as legal owners of a partial . . . ."

23. Id. at 172. For purposes of the FAA, aircraft are generally classified into three categories: private aircraft, charter aircraft and airline aircraft. Private aircraft are typically operated under Part 91 of the Federal Aviation Regulations (FARs), charter aircraft are typically operated under Part 135 and airline aircraft are typically operated under Part 121. . . . [the] primary concern is with the distinction between Part 91 and Part 135. An aircraft owner would generally prefer to operate under Part 91, since there are fewer requirements and limitations regarding the operation of the aircraft. However, a Part 91 operator also cannot transport others for compensation or hire.


24. Fall Creek, 109 S.W.3d at 172 (citing Crowther, supra note 23, at 249).

25. According to the FAA, "operational control" means that "the user exercises full control over and bears full responsibility for the airworthiness and operation of the aircraft." Crowther, supra note 23, at 244.

26. Fall Creek, 109 S.W.3d at 172 (citing Crowther, supra note 23, at 248).

27. Id. (quoting Crowther, supra note 23, at 248). See also 14 C.F.R. § 91.1013 (2004).

28. Fall Creek, 109 S.W.3d at 167.

29. Id.
interest in each . . . aircraft. In addition, “Fall Creek depreciates the aircraft[s] on its accounting ledgers.”

The tax period under audit was October 30, 1998, through December 31, 1999. During this time, aircraft 713TA made 840 flights, twenty-six of which were arrivals to or departures from Missouri; Fall Creek used the aircraft in Missouri eight times, and the aircraft remained overnight in Missouri thirteen times. During the same period, aircraft 798TA completed 897 flights, sixteen of which were arrivals to or departures from Missouri; Fall Creek used the aircraft in Missouri three times, and the aircraft remained overnight in Missouri eleven times. During the tax period, Fall Creek used its fractional interest in Raytheon’s fractional ownership program to make sixty-seven flights to or from Missouri. Fourteen of these flights were intra-state.

After a sale and usage tax audit of Fall Creek, the Director of Revenue “assessed unpaid use tax in the amount of $60,453.42 and accrued interest totaling $8,120.67” for the purchase of interests in the two aircraft. Fall Creek argued to the Director that it had traded in its interest in one of the aircraft and should get a tax credit on the trade-in. The Director agreed and the parties stipulated that if Fall Creek owed use tax, the amount to be assessed was $49,928.79 plus accrued interest.

The Director of Revenue concluded that Fall Creek owed use tax on the purchase of the interests in the two aircraft under Section 144.610 of the Missouri Revised Statutes because the interests were tangible personal property in another state, the transaction would have been subject to Missouri sales tax if it occurred in Missouri, and Fall Creek exercised sufficient dominion and

30. Id.
31. Id.
32. Id. at 168.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 167.
40. Missouri Revised Statute Section 144.610.1 states:
A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become mingled with the general mass of property of this state.

control over the property in Missouri to justify imposing the Missouri use tax on the purchase.\footnote{Fall Creek filed a complaint with the Administrative Hearing Commission ("AHC") on April 13, 2001, contending that it did not owe use tax because its fractional ownership interest in the aircraft did not constitute ownership of tangible personal property but rather the right to use the aircraft in the interchange program for a specified number of hours per year.\footnote{Fall Creek further argued that even if its interest did qualify as tangible personal property, Fall Creek did not owe the tax because there was an insufficient connection between the property and Missouri to justify the burden on interstate commerce.\footnote{Fall Creek also argued that it did not exercise sufficient dominion or control over the property to constitute "use" or "storage" under Section 144.610 and "that the aircraft did not 'finally come to rest' within Missouri as required by Section 144.610."}}\footnote{The AHC decided that Fall Creek was liable for the use tax on its fractional ownership interests in the aircraft and upheld the Director's assessment.\footnote{Fall Creek appealed the decision to the Missouri Supreme Court under Article V, Section Three of the Missouri Constitution.\footnote{The Missouri Supreme Court affirmed the AHC decision that Fall Creek was liable for the use tax.\footnote{The court held that (1) the fractional interests in the aircraft constituted tangible personal property;\footnote{(2) the use of the aircraft in Missouri, however brief, was sufficient to create a substantial nexus justifying the burden on interstate commerce;\footnote{(3) "operational control" was sufficient to constitute "use";\footnote{(4) the aircraft "finally came to rest in Missouri" when the aircraft landed in Missouri and Fall Creek exercised "operational control" over them.\footnote{Fall Creek was therefore held liable for $43,369.63 in unpaid use tax and $6,559.16 in accrued interest. Thus, the Missouri Supreme Court...}}}}}}}}}}\footnote{41. Respondent's Brief at 9-11, \textit{Fall Creek} (No. 84917).\footnote{42. \textit{Fall Creek}, 109 S.W.3d at 169. See also Respondent's Brief at 6, \textit{Fall Creek} (No. 84917).\footnote{43. \textit{Fall Creek}, 109 S.W.3d at 170-71.\footnote{44. \textit{Id.} at 171-74.\footnote{45. Respondent's Brief at 6, \textit{Fall Creek} (No. 84917).\footnote{46. \textit{Fall Creek}, 109 S.W.3d at 168. The Missouri Supreme Court has jurisdiction over cases involving the construction of a revenue law of the state. Mgmt. Servs., Inc. v. Spradling, Inc., 547 S.W.2d 466, 467 (Mo. 1977) (en banc). See MO. CONST. art. V, § 3.\footnote{47. \textit{Fall Creek}, 109 S.W.3d at 174.\footnote{48. \textit{Id.} at 169-70. The court declined to look beyond the four corners of the contract for extrinsic evidence of contractual intent because it found the language of the contracts to be unambiguous. \textit{Id.}\footnote{49. \textit{Id.} at 170-71.\footnote{50. \textit{Id.} at 172.\footnote{51. \textit{Id.} at 173-74.\footnote{52. \textit{Id.} at 174. See also \textit{Id.} at 168 n.3.}}}}}}}}}}}
held that transactions will be subject to Missouri use tax whenever they are for the purchase of tangible personal property and the taxpayer exercises control or dominion over the property in Missouri for some period of time.\textsuperscript{53} The use tax attaches as soon as the property is ready to be used in Missouri.\textsuperscript{54}

III. LEGAL BACKGROUND

A use tax is "a levy on the privilege of using within this state property purchased outside Missouri, where the property would have been subject to the sales tax if purchased locally."\textsuperscript{55} The use tax complements, supplements, and protects the sales tax.\textsuperscript{56} It "eliminates the incentive to purchase from out-of-state merchants in order to escape local sales taxes thereby keeping in-state merchants competitive with sellers in other states, and it also provides a means to augment state revenues."\textsuperscript{57} The United States Supreme Court has rejected the basic principle that interstate commerce is immune from state and local taxation and has held that "interstate commerce may constitutionally be made to pay its way."\textsuperscript{58} While states have the right to tax interstate commerce, this right is not unfettered, and the Supreme Court has announced limits to the right.\textsuperscript{59}

When a taxpayer contests the assessment of use tax, there are two general theories that the taxpayer may use. First, the taxpayer may argue through general principles of statutory construction that under the taxpayer's particular circumstances, the statute authorizing the use tax does not apply. Second, the taxpayer may argue that as the statute is applied, the use tax unconstitutionally burdens interstate commerce. Fall Creek contested the Missouri use tax under both theories.

Fall Creek argued that the use tax statute\textsuperscript{60} did not apply to its purchase of fractional interests in the aircraft for three reasons.\textsuperscript{61} First, the interests did not constitute the purchase of tangible personal property but rather the right to

\textsuperscript{53} Id. at 169-72.

\textsuperscript{54} Id. at 173.

\textsuperscript{55} Id. at 169. See also Dir. of Revenue v. Superior Aircraft Leasing Co., Inc., 734 S.W.2d 504, 505 (Mo. 1987) (en banc) (citing Southwestern Bell Tel. Co. v. Morris, 345 S.W.2d 62, 66 (Mo. 1961) (en banc)).

\textsuperscript{56} Fall Creek, 109 S.W.3d at 169. See also Superior Aircraft, 734 S.W.2d at 506 (citing Mgmt. Servs. v. Spradling, Inc., 547 S.W.2d 466, 468 (Mo. 1977) (en banc)).

\textsuperscript{57} Fall Creek, 109 S.W.3d at 169 (quoting Superior Aircraft, 734 S.W.2d at 506).

\textsuperscript{58} Superior Aircraft, 734 S.W.2d at 506 (quoting Maryland v. Louisiana, 451 U.S. 725, 754 (1981)).

\textsuperscript{59} See infra Part III.B.

\textsuperscript{60} MO. REV. STAT. § 144.610 (2000).

\textsuperscript{61} Fall Creek, 109 S.W.3d at 169.
use transportation services to which the use tax would not apply. Fall Creek also argued that even if the fractional interests did constitute the purchase of tangible personal property, the Missouri use tax did not apply because Fall Creek’s use of the aircraft in Missouri did not, as a threshold matter, rise to the level of “use” as intended by the statute. Finally, Fall Creek argued that the statute did not apply because the aircraft never came to “finally rest” in Missouri as required by the statute in order for the use tax to attach to the purchases.

On constitutional grounds, Fall Creek argued that if the purchases of the fractional interests in the aircraft were subject to Missouri use tax, imposition of the tax would unconstitutionally burden interstate commerce because there were insufficient contacts between the aircraft and the State of Missouri to justify burdening interstate commerce.

A. Statutory Construction of Missouri Use Tax, Section 144.610

Missouri’s use tax is set out in Section 144.610 of the Missouri Revised Statutes, which states:

A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

The statute sets out four requirements that must be met in order for the use tax to apply: (1) a purchase, for a particular price, (2) of tangible personal property, (3) used, stored, or consumed in Missouri, (4) which has finally come to rest within Missouri or become commingled with the general mass of property in Missouri. The first requirement is almost always satisfied in use tax cases. Taxpayers very rarely contest use tax liability by claiming that

62. Id.
63. Id. at 171.
64. Id. at 172.
65. Id. at 170-71.
67. See Respondent’s Brief at 9, Fall Creek (No. 84917) (“Obviously Fall Creek made a purchase. It paid $1,026,500.”).
they did not purchase for a particular price. More often, taxpayers will challenge the second, third, and fourth requirements.

Under the second requirement, a court will determine whether the purchase was of tangible personal property by considering the definitions set out in Section 144.605, case law, and the contract(s) at issue. The statute defines "tangible personal property" as "all items subject to the Missouri sales tax as provided in subdivisions (1) and (3) of section 144.020," 68 which is then defined as the "retail sale in this state of tangible personal property, including but not limited to motor vehicles, trailers, motorcycles, mopeds, motor tricycles, boats and outboard motors." 69 While the list does not include aircraft, it is a non-exclusive list and the Missouri Supreme Court has held that aircraft are subject to Missouri sales tax. 70

But even where the statutory language and case law make it clear that an object is tangible personal property, a taxpayer may escape use tax liability by showing that the parties' contractual intent was for the purchase of nontaxable services or an intangible product and not for the purchase of the tangible personal property itself. Under such an agreement, the parties would intend to use the tangible personal property as merely the means to transmit the intangible component. 71 It is well settled law in Missouri that when there is no ambiguity in the language of the contract, "the court need not resort to construction of the contract, but rather the intent of the parties is determined from the four corners of the contract." 72 When the language of the contract is ambiguous, extrinsic evidence may be admitted to show contractual intent. 73 Such extrinsic evidence may include an analysis of the "essence of the transaction." 74

The "essence of the transaction" (sometimes also referred to as the "true object" of the transaction) test has been recognized by the Missouri Supreme Court as a way to determine whether to treat a transaction as a taxable transfer of tangible personal property or the nontaxable performance of a service. 75

"The test focuses on the essentials of the transaction to determine the real

68. MO REV. STAT. § 144.605(11).
69. MO. REV. STAT. § 144.020.1(1) (2000 & Supp. 2003). Tangible personal property also includes "sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers." Id. § 144.020.1(3).
70. See Westwood Country Club v. Dir. of Revenue, 6 S.W.3d 885, 887 (Mo. 1999) (en banc).
71. Fall Creek Constr. Co. v. Dir. of Revenue, 109 S.W.3d 165, 170 (Mo. 2003) (en banc). See Eisenberg v. Redd, 38 S.W.3d 409, 411 (Mo. 2001) (en banc) (By negative inference, extrinsic evidence is admissible to show the parties' contractual intent when there is ambiguity in the language of the contract.).
72. Fall Creek, 109 S.W.3d at 170 (quoting Eisenberg, 38 S.W.3d at 411).
73. Id.
74. Id.
75. Sneary v. Dir. of Revenue, 865 S.W.2d 342, 345 (Mo. 1993) (en banc).
object the buyer seeks” to purchase.76 Under the test, the Court has recognized that in some transactions “tangible personal property serves exclusively as the medium of transmission for an intangible product or service” and “[t]he intangible component is the true object of the sale.”77 If a court determines that the parties’ intent was for the intangible object to be the true object of the transaction, the “essence of the transaction” test is satisfied and the court will not attach the taxable character of the tangible medium to the intangible object.78

To determine if the third requirement is met, whether property was “used,” “stored,” or “consumed” in Missouri, a court will again look to the definitions in Section 144.605. Property is “stored” when it is kept or retained in Missouri.79 It is “used” when the owner exercises “any right or power” over the property or control of the property.80 Prior to Fall Creek, the extent to which an owner would have to exercise dominion or control over property for it to amount to “use” was not clear.81

Under the fourth requirement, property must “finally come to rest” within Missouri or “become commingled with the general mass of property” in Missouri before a taxpayer is liable for use tax.82 Prior to Fall Creek, the Missouri Supreme Court had never clearly articulated an interpretation of the phrase “finally come to rest.” In Director of Revenue v. Superior Aircraft Leasing Co.,83 a case also contesting the assessment of use tax on the pur-

76. Id. (citing James v. TRES Computer Sys., Inc., 642 S.W.2d 347 (Mo. 1982) (en banc); K & A Litho Process, Inc. v. Dir. of Revenue, 653 S.W.2d 195 (Mo. 1983) (en banc)).

77. Id.

78. Id.

79. MO. REV. STAT. § 144.605(10) (2000). “Storage” is defined as “any keeping or retention in [Missouri] of tangible personal property purchased from a vendor, except for property for sale or . . . temporarily kept or retained in [Missouri] for subsequent use outside [Missouri].” Id.

80. Id. § 144.605(13). “Use” is defined as “the exercise of any right or power over tangible personal property incident to the ownership or control of that property, [but] does not include the temporary storage of the property in [Missouri] for subsequent use outside [Missouri], or the sale of the property in the regular course of business.” Id.

81. Fall Creek argued that there was a threshold level of use required before an owner had “used” property within Missouri sufficient to satisfy the use requirement. Fall Creek Constr. Co v. Dir. of Revenue, 109 S.W.3d 165, 171-72 (Mo. 2003) (en banc). However, the Director of Revenue argued that any use of the property in Missouri would be sufficient to find “use” under the statute. Respondent’s Brief at 11, Fall Creek (No. 84917).

82. MO. REV. STAT. § 144.610.1 (2000).

83. 734 S.W.2d 504 (Mo. 1987) (en banc). Superior Aircraft has facts very similar to those in Fall Creek. Superior Aircraft is a Missouri corporation that purchased an airplane in Kansas and then leased it to an Ohio company but was able through provisions in the lease to use the airplane itself, and it used the airplane five times
chase of an aircraft outside Missouri, the court did not expressly address the phrase “finally come to rest” in its majority opinion, but the dissenting opinion did. While the majority held that the taxpayer was liable for unpaid use tax, the dissent argued that the taxpayer was not liable because the aircraft did not “finally come to rest” within Missouri. The dissent stated that the aircraft flew in and out of Missouri five times during the audit period and spent a total of nineteen days in Missouri, which was insufficient to find that the aircraft had “finally come to rest” within Missouri. Implicit in the majority’s opinion was the conclusion that Superior Aircraft’s use of the aircraft in Missouri was sufficient to find that the aircraft had “finally come to rest” within Missouri, but the court did not articulate any explanation for why it reached this conclusion. The court simply did not address what was necessary for an item of personal property to “finally come to rest” within Missouri.

B. Constitutionality of the Use Tax on Interstate Commerce

The United States Supreme Court has upheld the constitutionality of the use tax’s burden on interstate commerce, stating that “interstate commerce may constitutionally be made to pay its way.” A use tax serves at least two purposes. First, it complements, supplements, and protects the sales tax. Second, it keeps in-state merchants competitive with out-of-state merchants by eliminating the incentive to purchase from the out-of-state merchants in order to escape local sales tax.

While the Supreme Court has recognized that a state has the power to tax the use of property purchased outside the state, this power is not unfettered. The Court has articulated a four-prong test to determine whether a state tax on interstate commerce complies with the Commerce Clause. This test, known as the Complete Auto Transit test, provides that a state tax on interstate commerce will not “be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate during the audit’s tax period to fly from Ohio, its principal place of business, to its Missouri headquarters for board meetings. See id. at 505.

84. Id. at 508-09 (Welliver, J., dissenting).
85. Id. at 508 n.1 (Welliver, J., dissenting).
86. Id. at 506 (quoting Maryland v. Louisiana, 451 U.S. 725, 754 (1981)).
87. Id.
88. Id.
89. Id. at 506-07 (citing Maryland, 451 U.S. at 754).
90. The Complete Auto Transit Test is named after the case Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), in which the U.S. Supreme Court “attempted to clarify the apparently conflicting precedents it ha[d] spawned” in determining the effect of the Commerce Clause on state taxation of interstate commerce.” Superior Aircraft, 734 S.W.2d at 506 (quoting Mobil Oil Corp. v. Comm’n of Taxes, 445 U.S. 425, 443 (1980)).
against interstate commerce; and (4) is fairly related to the services provided by the State."\(^9\)

1. Substantial Nexus

In *Superior Aircraft*, the Missouri Supreme Court applied the *Complete Auto Transit* test to the Missouri use tax to determine whether it violated the Commerce Clause when the Director of Revenue assessed use tax on an airplane purchased in Kansas by a Missouri corporation and no sales or use tax was paid on the purchase in any state.\(^9\) The court upheld the assessment of use tax, finding that the tax satisfied the four-prong test.\(^9\)

Under the first prong, the court found that there were sufficient contacts between the aircraft and Missouri to create a substantial nexus.\(^4\) The court found that it was not necessary for an airplane to be hangared or repaired in the state in order for there to be a substantial nexus.\(^5\) The court held that a substantial nexus was created when the airplane flew a sufficient number of flights to or from Missouri and spent enough time in the state.\(^6\) The court stated that (i) the airplane made ten trips to or from Missouri from the date of purchase through the audit period and that these flights represent 17.7 percent of the flight hours logged, (ii) the airplane spent several days to approximately a week in Missouri for each trip, and (iii) nine of the ten trips to Missouri were to attend board meetings that the court inferred were conducted in accordance with Missouri law.\(^7\) The court found that all of these contacts with Missouri were sufficient to establish a substantial nexus between the state and the property to be taxed.\(^8\) The dissent did not find a substantial nexus because it looked only to the contacts between the airplane and Missouri during the audit period, which was eight months shorter than the time period the majority examined, and based on those contacts found that the airplane spent substantially fewer days in Missouri, made fewer flights, and consequently did not establish a substantial nexus.\(^9\) The majority did not explain why it chose to examine a time period longer than the audit period; however, implicit in its holding is an interpretation by the Missouri Supreme Court that the contacts to be examined under the substantial nexus test are those starting from the date of purchase, regardless of the time period specified in the audit.

\(^9\) *Superior Aircraft*, 734 S.W.2d. at 507 (citing *Maryland*, 451 U.S. at 754).
\(^9\) Id. at 505.
\(^9\) Id. at 507-08.
\(^9\) Id. at 507.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id. at 507 & n.3.
\(^8\) Id. at 507.
\(^9\) Id. at 508 (Welliver, J., dissenting).
2. Apportionment

Under the second prong of the Complete Auto Transit test, a court must find that the use tax is fairly apportioned. 100 The United States Supreme Court has stated that a use tax is fairly apportioned if there are no multi-state burdens. 101 Multi-state burdens can be avoided by allowing either an offset or credit for sales or use tax paid in another state, or through a system of apportionment. 102 In Superior Aircraft, the Missouri Supreme Court held that the use tax was fairly apportioned because Superior Aircraft had not paid sales or use tax in any other state and because, even if it had, Missouri had a system of tax credits for taxes paid in other states. 103

3. Non-discrimination

Under the third prong of the test, the use tax cannot discriminate against interstate commerce. 104 A use tax does not discriminate if the taxing state places "no greater burden upon interstate commerce than it places upon competing intrastate commerce of like character." 105 As a compensatory tax, the taxing "State must . . . 'identif[y] the [intrastate tax] burden for which the State is attempting to compensate.'" 106 A use tax is a tax to protect, supplement, and compensate sales tax. 107 Thus, the use tax must not burden interstate commerce any more than the sales tax burdens intrastate commerce. A use tax will burden interstate commerce more than the sales tax burdens intrastate commerce if the use tax exceeds the sales tax. 108 Therefore, if the use tax exceeds the sales tax, the use tax discriminates against interstate commerce in favor of intrastate commerce. 109

Additionally, a use tax discriminates if it applies to interstate businesses but not intrastate businesses. In Superior Aircraft, the Missouri Supreme Court held that Missouri's use tax does not discriminate among businesses

100. Id. at 507 (citing Maryland v. Louisiana, 451 U.S. 725, 754 (1981)).
101. Id.
102. Id. (citing Int'l Harvester Co. v. Dep't of Treasury, 322 U.S. 340 (1944)).
103. Id. See MO. REV. STAT. § 144.450 (2000).
104. Superior Aircraft, 734 S.W.2d at 507 (citing Maryland, 451 U.S. at 754).
105. Id. (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 282 (1987)).
108. Lohman, 511 U.S. at 648-49.
109. Id. at 649. An additional wrinkle to this evaluation may occur when there is a difference among local sales taxes within a state. See id. at 654-56 (discussing how it is possible that a use tax could be held unconstitutional in effect in one locality in the taxing state but not in another based on the rate of local sales tax in the purchaser's locality).
because any business, whether intrastate or interstate, that makes an out-of-state purchase of tangible personal property to be stored, used, or consumed in Missouri is liable for use tax.\textsuperscript{110}

4. Fairly Related to the Services Provided by the State

Finally, a use tax must be fairly related to the services provided by the taxing state in order to comply with the demands of the Commerce Clause.\textsuperscript{111} This inquiry requires looking at the facts of the case to see if the taxpayer did use or could have used the services of the taxing state. For example, in Superior Aircraft, the court found that the use tax was fairly related to the services provided by Missouri because Superior Aircraft flew the airplane to Missouri in order to attend board meetings.\textsuperscript{112} The court inferred that these meetings were conducted in accordance with Missouri law, and therefore "Superior Aircraft could have used Missouri state courts to enforce resolutions arising from such board meetings."\textsuperscript{113}

IV. INSTANT DECISION

Fall Creek made four arguments as to why it should not be held liable for use tax on the two aircraft. Three arguments were grounded in statutory construction while the final argument was based on the constitutionality of the use tax under the Commerce Clause. Fall Creek argued that it should not be held liable for use tax on the aircraft because: (1) "its fractional ownership interest in [the two] aircraft [did] not constitute a purchase of tangible personal property";\textsuperscript{114} (2) its use of the aircraft did not constitute "use";\textsuperscript{115} (3) the aircraft did not "finally come to rest";\textsuperscript{116} and (4) the use tax would be unconstitutional under the Commerce Clause because there were insufficient contacts between the aircraft and Missouri to establish a substantial nexus.\textsuperscript{117}

\textsuperscript{110} Superior Aircraft, 734 S.W.2d at 507.
\textsuperscript{111} Id. (citing Maryland v. Louisiana, 451 U.S. 725, 754 (1981)).
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Fall Creek Constr. Co. v. Dir. of Revenue, 109 S.W.3d 165, 169 (Mo. 2003) (en banc).
\textsuperscript{115} Id. at 171.
\textsuperscript{116} Id. at 172.
\textsuperscript{117} Id. at 171.
A. Statutory Construction of Missouri's Use Tax

1. Purchase of Tangible Personal Property

Fall Creek argued "that it [did] not owe use tax because its fractional ownership interest in each aircraft [did] not constitute a purchase of tangible personal property."\(^{118}\) Instead, Fall Creek argued that the fractional ownership interests were intended to be nontaxable purchases of transportation services because the true object behind the transactions was to provide the owners with "the right to use any aircraft in the interchange program for a specified number of hours per year."\(^{119}\) The Director of Revenue countered that the purchases were for more than transportation services, pointing to the language of the purchase agreements and bills of sale, the FAA documents, Fall Creek's depreciation of the two aircraft on its books, and Fall Creek's exposure to the risk of a change in value in each aircraft.\(^{120}\) The Director argued that these facts indicated that Fall Creek was the legal owner of partial interests in the physical aircraft.\(^{121}\)

Fall Creek argued that to determine the true object of the transaction, the court should apply an "essence of the transaction" test.\(^{122}\) Under such an analysis, Fall Creek's "ownership of the physical aircraft [was] merely incidental and . . . the true nature" and substance of the transactions were for the purchase of transportation services.\(^{123}\) Fall Creek asserted that the governing documents, which it was required to execute as a condition of the purchases, placed so many conditions and restrictions on Fall Creek's right to use and control each aircraft and its right to convey its interests in each aircraft that what Fall Creek actually received in the transaction were transportation services.\(^{124}\)

The Missouri Supreme Court disagreed, holding that Fall Creek purchased tangible personal property when it purchased the fractional ownership interests in each aircraft.\(^{125}\) Underlying the court's holding is the suggestion in dicta that "this was a complex transaction between sophisticated parties designed to maximize regulatory and tax advantages," and that parties should not be able to deliberately design their transactions to take advantage of tax and regulatory benefits without also having to bear the tax burdens associated with those benefits.\(^{126}\) As the court pointed out, Fall Creek depreciated the

\(^{118}\) Id. at 169.
\(^{119}\) Id. (emphasis added).
\(^{120}\) Respondent's Brief at 9-11, Fall Creek (No. 84917).
\(^{121}\) Id. at 9-10.
\(^{122}\) Fall Creek, 109 S.W.3d at 170.
\(^{123}\) Id.
\(^{124}\) Appellant's Brief at 20-26, Fall Creek (No. 84917).
\(^{125}\) Fall Creek, 109 S.W.3d at 170.
\(^{126}\) Id.
aircraft in its accounting ledger and the FAA recognized Fall Creek and the other co-owners as legal owners of partial interests, which permitted them to operate the aircraft under Part 91 of the FARs with its more favorable regulations than Part 135, which would control if the aircraft were operated as a charter service.127

In holding that Fall Creek's fractional interests in the two aircraft constitute a purchase of tangible personal property, the court first pointed out that the purchase of an aircraft is subject to tax.128 The court stated that while Section 144.605(7) does not expressly include aircraft in its definition of tangible personal property, the definition's list is non-exclusive.129 The court cited Westwood Country Club v. Director of Revenue,130 which held that an aircraft is an item subject to Missouri sales tax and Missouri use tax.131

Second, the court declined to apply the "essence of the transaction" test because it found the purchase agreement to be unambiguous.132 The court reasoned that the "essence of the transaction" test would constitute extrinsic evidence of contractual intent, and therefore would only be admissible if the contract contained ambiguity.133 The court found that the purchase agreement was unambiguous so it "need not resort to construction of the contract, but rather the intent of the parties is determined from the four corners of the contract."134 The court stated that "the mere fact that the purchase agreement was executed along with other agreements [did] not render [it] ambiguous."135 The court found the portion of the purchase agreement stating, "Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, the undivided property interest . . . in the aircraft," was sufficient to find that Fall Creek intended to purchase property interests in each aircraft.136 In dicta, the court stated that even were it to look beyond the four corners of the purchase agreement to the sixteen corners of the governing documents, it would still have found that Fall Creek's intention was to purchase property interests in the aircraft.137 The court pointed to the portion of the bill of sale stating that Raytheon "does . . . hereby sell, grant, transfer and deliver all rights, title, and interests in . . . such aircraft" to Fall Creek, and the portion of the separate master interchange agreement stating that it is "an arrangement whereby a

127. Id. at 167, 172. See supra note 23 and accompanying text (discussing the regulatory advantages of operating under Part 91 as opposed to Part 135).
128. Id. at 169.
129. Id.
130. 6 S.W.3d 885 (Mo. 1999) (en banc).
131. Fall Creek, 109 S.W.3d at 169 (citing Westwood Country Club, 6 S.W.3d at 887). See supra Part III.A.
132. Fall Creek, 109 S.W.3d at 170.
133. Id.
134. Id. (quoting Eisenberg v. Redd, 38 S.W.3d 409, 411 (Mo. 2001) (en banc)).
135. Id.
136. Id. (alteration in original).
137. Id.
person leases *his airplane* to another person in exchange for equal time, when needed, on the *other person's airplane* as evidence of the parties' intent to transfer property rights in aircraft.  

2. What Constitutes "Use"

Fall Creek argued that even if the purchase of fractional ownership interests in the two aircraft constituted a purchase of tangible personal property, Fall Creek did not owe use tax because "it had insufficient dominion and control over [the] aircraft to constitute 'storage' or 'use' under section 144.610." Fall Creek claimed that the only control it exercised over the aircraft was *de minimis* control. The Director of Revenue replied that Fall Creek exercised sufficient dominion and control over the aircraft because "use" means the exercise of any right or power over the property.

The Missouri Supreme Court held that Fall Creek was "simply incorrect" and that it did exercise sufficient dominion and control over the aircraft to constitute "use." The court pointed out that one of the advantages of a fractional ownership interest in an aircraft is that it permits the owner as user to operate the aircraft within Part 91 of the Federal Aviation Regulations. Under Part 91, the FAA requires the user to accept responsibility for "operational control" of the aircraft. By accepting operational control, the user can be "held responsible by the FAA and civil courts if there is an incident," which would include significant liability "in the event of a flight-related occurrence that causes personal injury or priority damage." The court found that "[s]uch responsibility is more than token" and that the operational control assumed by Fall Creek under Part 91 of the FARs "is a significant assumption of control and responsibility . . . clearly sufficient to constitute 'the exercise of any right or power.'" Therefore, "Fall Creek used its aircraft [each time] it boarded the aircraft and assumed operational control."

3. What Constitutes "Finally Coming to Rest" in Missouri

Fall Creek also argued that it could not be held liable for use tax because "the aircraft did not 'finally come to rest' within Missouri as required by Sec-

---

138. *Id.* (first alteration in original).
139. *Id.* at 171.
140. *Id.* at 172.
141. Respondent's Brief at 10, *Fall Creek* (No. 84917).
142. *Id.*
143. *Id.* *See supra* note 23 and accompanying text.
144. *Fall Creek*, 109 S.W.3d at 172.
145. *Id.*
146. *Id.* (quoting Mo. Rev. Stat. § 144.605(13) (2000)).
147. *Id.*
tion 144.610.”148 The statute states that “[t]he use tax does not apply ‘until the transportation of the article has finally come to rest within the state or until the article has become commingled with the general mass of property of this state.’”149 Fall Creek argued that the aircraft were “purely transient” and never came to rest in any location.150 The court disagreed, relying on Superior Aircraft which applied the use tax to an airplane purchased outside Missouri by a Missouri corporation despite the fact that Missouri was not the airplane’s permanent base or home.151 The court stated that it is the privilege of using the property within Missouri, regardless of how brief in time this privilege may be, that triggers the use tax.152 Therefore, the court held that “[t]he phrase ‘finally comes to rest’ must necessarily be considered in relation to the object to which it applies.”153 The court stated that otherwise transient objects, such as aircraft and motor vehicles, would never “finally come to rest in Missouri until [they] ‘finally’ entered the junkyard or scrap heap, for until then such objects always have the capability of leaving the state.”154 The court further noted the property need not be “domiciled” in Missouri to be taxed.155 Rather, for the use tax to apply, the property must “finally” be ready for “use” in Missouri, however brief the use might be.156

B. Constitutionality of the Use Tax on Interstate Commerce

Fall Creek argued that imposing Missouri’s use tax on its fractional ownership interest unconstitutionally burdened interstate commerce.157 The United States Supreme Court has held that a state has the right to tax the privilege of using within the taxing state property purchased outside the taxing state so long as the tax meets the four prongs of the Complete Auto Transit test.158 Under the test, the Missouri use tax must: (1) have a substantial nexus with Missouri; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by Missouri.159

148. Id.
149. Id. (quoting MO. REV. STAT. § 144.610.1 (2000)).
150. Id.
151. Id. at 173 (citing Dir. of Revenue v. Superior Aircraft Leasing Co., 734 S.W.2d 504 (Mo. 1987) (en banc)).
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id. at 170.
158. Id. at 171.
159. Id.
Fall Creek argued that the use tax failed to satisfy the first, second, and fourth prongs of the Complete Auto Transit test.\textsuperscript{160} However, in its points relied on, Fall Creek alleged a lack of substantial nexus but failed to allege that the tax was not fairly apportioned or fairly related to the services provided by Missouri.\textsuperscript{161} Therefore, the only constitutional issue Fall Creek preserved was the substantial nexus issue.\textsuperscript{162}

Fall Creek conceded that Superior Aircraft is the controlling law on the substantial nexus issue, but argued that, unlike the airplane in Superior Aircraft, Fall Creek’s two aircraft did not have a sufficient number of contacts with Missouri to create a substantial nexus.\textsuperscript{163} Fall Creek pointed out that in Superior Aircraft, 17.7 percent of the taxpayer’s airplane’s flight hours were spent flying the airplane in or out of Missouri.\textsuperscript{164} Fall Creek argued that when the court analyzed Fall Creek’s use of the aircraft in Missouri to determine if there was a substantial nexus, the court must look at Fall Creek’s use of the particular aircraft in which it owned fractional interests to determine whether there were sufficient contacts with Missouri to create a substantial nexus.\textsuperscript{165} Fall Creek pointed out that the 713TA aircraft, in which it owned a 6.25 percent interest, made 840 flights during the audit period, twenty-six of which were either to or from Missouri, but only eight of these flights were made by Fall Creek, representing .9 percent of the flights made by the aircraft during the audit period.\textsuperscript{166} The 798TA aircraft, in which Fall Creek owned a 12.5 percent interest, made 897 flights during the audit period, of which sixteen were either to or from Missouri, but only three of which were made by Fall Creek, representing only .3 percent of the flights made by the aircraft during the audit period.\textsuperscript{167} Fall Creek also pointed out that it made no intrastate flights in either aircraft.\textsuperscript{168}

The Missouri Supreme Court held that there was a sufficient nexus by analyzing the contacts between each aircraft and Missouri irrespective of who was operating the aircraft when they made these contacts.\textsuperscript{169} The Court stated that “[t]here exists the requisite nexus with Missouri” to impose the tax because “[t]hese aircraft departed from or arrived in Missouri forty-two times and remained overnight in Missouri twenty-four times during the tax period”

\textsuperscript{160} Id. at 171 n.5.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Appellant’s Brief at 38-41, Fall Creek (No. 84917).
\textsuperscript{164} Id. at 39.
\textsuperscript{165} Id. at 39-40.
\textsuperscript{166} Id. at 40.
\textsuperscript{167} Id. at 41.
\textsuperscript{168} Id.
\textsuperscript{169} Fall Creek Constr. Co. v. Dir. of Revenue, 109 S.W.3d 165, 171 (Mo. 2003) (en banc).
and this "'use in Missouri, however brief, is a taxable incident' . . . sufficient to create a substantial nexus.'"\textsuperscript{170}

Even though Fall Creek failed to preserve its arguments that the use tax was not fairly apportioned and did not fairly relate to the services provided by Missouri, the Missouri Supreme Court addressed these arguments in dicta.\textsuperscript{171} The court stated that the use tax is fairly apportioned because Missouri provides a credit for sales or use taxes paid in another state.\textsuperscript{172} The court also stated that the use tax is fairly related to the services provided by Missouri because Fall Creek "'used these aircraft for its business and 'could have used Missouri state courts to enforce' the resulting business transactions . . . and [it] 'enjoys the benefits and protection of [Missouri's] public services.'"\textsuperscript{173}

V. COMMENT

Although the point was only made in dicta, the underlying message in \textit{Fall Creek} is that Missouri will not permit parties to structure transactions to take advantage of the tax and regulatory advantages of ownership without also incurring the burden. In the court's recitation of the facts, it made only fleeting note of the fact that Fall Creek depreciated its interests in the two aircraft in its accounting ledgers.\textsuperscript{174} While the court does not say that Fall Creek depreciated the interests for tax purposes, one can only assume that if Fall Creek was depreciating the aircraft on its accounting books then it was also depreciating them for tax purposes. The court also noted the advantages Fall Creek gained from operating the aircraft under Part 91 of the FARs as private aircraft rather than as a charter service under Part 135.\textsuperscript{175} The court did not expressly hold that Fall Creek owed use tax because it was incurring the benefits of ownership, but the court did recognize that "'this was a complex transaction between sophisticated parties designed to maximize regulatory and tax advantages.'"\textsuperscript{176} The instant case strongly suggests that taxpayers should not be allowed to have their cake and eat it too by designing transactions to take advantage of the tax and regulatory benefits of ownership without also having to bear the tax burdens associated with those benefits.

In \textit{Fall Creek}, for the first time, a majority of the court expressly addressed and interpreted the phrase "finally comes to rest" under Section

\textsuperscript{170} Id. (quoting R&M Enters., Inc. v. Dir. of Revenue, 748 S.W.2d 171, 173 (Mo. 1988) (en banc), overruled on other grounds by House of Lloyd, Inc. v. Dir. of Revenue, 884 S.W.2d 271 (Mo. 1994) (en banc)).

\textsuperscript{171} Id. at 171 n.5.

\textsuperscript{172} Id. (citing Dir. of Revenue v. Superior Aircraft Leasing Co., 734 S.W.2d 504, 507 (Mo. 1987) (en banc)). See Mo. REV. STAT. § 144.450 (2000).

\textsuperscript{173} Fall Creek, 109 S.W.3d at 171 n. 5 (quoting \textit{Superior Aircraft}, 734 S.W.2d at 507; \textit{R & M Enter.}, 748 S.W.2d at 173).

\textsuperscript{174} Id. at 167.

\textsuperscript{175} Id. at 172.

\textsuperscript{176} Id. at 170.
144.610 of the Missouri Revised Statutes. Prior to Fall Creek, it was unclear what was necessary for property to “finally come to rest” within Missouri. Fall Creek held that property “finally comes to rest” in Missouri when the property is “finally” ready for “use” in Missouri, however brief the use might be. The court stated that the phrase “must necessarily be considered in relation to the object to which it applies” because to do otherwise would permit transient property to evade the use tax until the property loses its capability of leaving the state.

In Fall Creek, the court applied the four-prong Complete Auto Transit test to determine the constitutionality of the Missouri use tax, but the court erred in its analysis under the first prong of the test. In its analysis, the court ignored the unique problems present when property is co-owned and part of an interchange agreement. When determining whether there was a substantial nexus between Fall Creek’s ownership interests in the aircraft and the State of Missouri, the court looked at the contacts between the aircraft in which Fall Creek owned fractional interests and the total contacts these aircraft had with Missouri irrespective of the identity of the user. Therefore, it did not matter who was operating the aircraft when it made the contacts with Missouri. The court counted not only the number of times Fall Creek used the aircrafts to fly to or from Missouri, but it also counted the number of times any participant in the interchange agreement used the aircraft to fly into or out of Missouri. Furthermore, the court disregarded those flights Fall Creek made to or from Missouri on any one of the 108 aircraft in the interchange agreement in which Fall Creek did not own a fractional interest. While a more appropriate analysis in this case may not have resulted in a different outcome, this method of analysis is clearly not good precedent.

The court’s analysis should reflect whether Fall Creek’s use, irrespective of the other co-owners’ use, created sufficient contacts with Missouri to establish a substantial nexus between Fall Creek’s fractional interests and Missouri. Instead, the court’s analysis treated Fall Creek as owning the entire interest or having operated the aircraft during all of the aircraft’s contacts with Missouri. When the use tax is applied to a fractional interest, it would be more appropriate to ignore the use made by other co-owners and analyze only those contacts made between the property and the taxing state when the co-owner in question was “using” the property and compare these contacts to the taxpayer’s total use of the property.

The court also ignored the unique problems an interchange agreement presents in the substantial nexus test. Perhaps, in the presence of an interchange agreement, a court should look at not only the taxpayer’s use of the property it owns but also the taxpayer’s use of property in the interchange program that the taxpayer does not own. A court would then compare the

177. Id. at 173.
178. Id.
179. Id. at 171.
taxpayer’s use of any property that is part of the interchange agreement in the taxing state and compare it to the taxpayer’s total use of the interchange program.

It is not clear why the Fall Creek court did not tailor its analysis under the substantial nexus test to address the unique effects of co-ownership and interchange agreements. Perhaps it was an oversight on the court’s part or perhaps the court consciously did not address these issues to avoid undercutting its decision that fractional interests of personal property in an interchange program represent the purchase of tangible personal property as opposed to the nontaxable right to transportation services. Regardless of its reasons, the court’s analysis under the substantial nexus test is flawed and could distort the outcome of future cases.

VI. CONCLUSION

Fall Creek examines the applicability of the Missouri use tax when a corporation conducting business in several states owns a fractional interest in transient personal property that is part of a larger interchange agreement. In Fall Creek, the Missouri Supreme Court held that (1) fractional interests in aircraft that are part of a larger interchange agreement constitute tangible personal property; (2) the use of taxable property in Missouri, however brief, is sufficient to create a substantial nexus in order to justify burdensing interstate commerce; (3) “operational control” is sufficient to constitute “use” when it represents a significant assumption of control and responsibility; and (4) property has “finally come to rest” in Missouri when it is “finally” ready for “use” in Missouri, however brief this use might be.

Fall Creek illustrates the breadth and effect of the Missouri use tax. It raises questions about how fractional ownership and interchange agreements may affect the analysis. And most importantly, Fall Creek reflects the Missouri Supreme Court’s unwillingness to permit taxpayers to enjoy the advantages of ownership without also bearing the burdens associated with those benefits.

JENNIFER A. SIMMONS

180. Id. at 169-70.
181. Id. at 171.
182. Id. at 172.
183. Id. at 173.