

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

JETBLUE AIRWAYS CORPORATION &
SUBSIDIARIES,

Plaintiff/Counter-Defendant,

v.

Case No. 2024 CA 1177

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Defendant/Counter-Plaintiff.

_____ /

**DEPARTMENT OF REVENUE'S ANSWER, AFFIRMATIVE DEFENSES,
AND COUNTERCLAIM**

The Department of Revenue (the Department), through its undersigned attorneys, files this Answer, Affirmative Defenses, and Counterclaim, and states the following:

PARTIES

1. Admitted.
2. Admitted.

JURISDICTION AND VENUE

3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.

7. Denied for the reasons set out more fully in the Department's affirmative defenses.

NATURE OF THE CONTROVERSY

8. Admitted.

9. Admitted.

10. Denied for the reasons set out more fully in the Department's affirmative defenses.

JETBLUE'S BUSINESS OPERATIONS IN FLORIDA

11. Each factual allegation in the Complaint is admitted or denied as set out in this Answer. Therefore, this allegation is denied.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

THE AUDIT AND ASSESSMENT

16. Denied that JetBlue apportioned its income in accordance with section 220.151(2), Florida Statutes. Admitted that section 220.151(2), Florida Statutes, provides that the tax base for a taxpayer furnishing transportation services shall be apportioned to this state by multiplying such based by a fraction the numerator of which is the revenue miles of the taxpayer in this state—which is a specifically defined term—and the denominator of which is the revenue miles of the taxpayer everywhere. Admitted that section 220.151(2), Florida Statutes,

defines revenue miles for a commercial airline as the transportation of one passenger the distance of one mile for consideration.

17. Admitted that section 220.151(2)(c), Florida Statutes, is accurately quoted in this paragraph. Denied that Exhibit C is an accurate depiction of “the Box” delineated by that statute.

18. Admitted that the geopolitical boundaries of Florida extend nine nautical miles from the shore into the Gulf of Mexico and three nautical miles from the shore into the Atlantic. Denied that the geographical boundaries of the Florida coast are as stated.

19. Admitted that portions of the area within the Box are in international waters and fall outside the geopolitical boundaries of both Florida and the United States. Admitted that very small portions of the area within the Box are within the geopolitical boundaries of Alabama and the coastal waters within the geopolitical boundaries of Georgia. All remaining allegations denied.

20. Admitted.

21. Unknown, and therefore denied.

22. Unknown, and therefore denied.

23. Denied.

24. Admitted.

25. Denied for the reasons set out more fully in the Department’s affirmative defenses.

PROCEDURAL HISTORY

26. Admitted.

27. Admitted.

28. Admitted that the Department proposed one adjustment to JetBlue's returns for the Period, which was to include all revenue miles in the numerator of the apportionment formula that were flown within the Box as defined by section 220.151(2)(c), Florida Statutes.

29. Admitted.

30. Admitted.

APPLICABLE LAW

31. Admitted that Article II, Sec. 1(a) of the Florida Constitution defines the geopolitical boundaries of the state as stated in this paragraph.

32. Admitted.

33. Admitted.

COUNT ONE

34 – 35. This Count has been dismissed with prejudice; therefore, no answer is required for these paragraphs.

COUNT TWO

36 – 38. This Count has been dismissed with prejudice; therefore, no answer is required for these paragraphs.

COUNT THREE

39. The Department realleges and reincorporates its answers to the allegations of paragraphs 1 through 38 as if fully set forth herein.

40. Admitted.

41. Denied.

COUNT FOUR

42. The Department realleges and reincorporates its answers to the allegations of paragraphs 1 through 41 as if fully set forth herein.

43. Admitted.

44. Admitted, subject to the *de minimis* principle.

45. Denied.

46. Denied.

COUNT FIVE

47. The Department realleges and reincorporates its answers to the allegations of paragraphs 1 through 46 as if fully set forth herein.

48. Admitted.

49. Denied.

50. Denied.

COUNT SIX

51. The Department realleges and reincorporates its answers to the allegations of paragraphs 1 through 50 as if fully set forth herein.

52. Admitted.

53. Denied.

COUNT SEVEN

54 – 57. This Count has been dismissed with prejudice; therefore, no answer is required for these paragraphs.

COUNT EIGHT

58. The Department realleges and reincorporates its answers to the allegations of paragraphs 1 through 57 as if fully set forth herein.

59. Admitted.

60. Denied.

61. All allegations that are not fully addressed above are hereby denied.

WHEREFORE, the Department denies that JetBlue is entitled to any relief whatsoever and requests that judgment be entered against JetBlue and in favor of the Department.

AFFIRMATIVE DEFENSES

**FIRST DEFENSE - JETBLUE FAILED
TO EXHAUST ADMINISTRATIVE REMEDIES**

62. JetBlue failed to exhaust administrative remedies.

63. Section 220.151(2) and the “Box” do not provide the *exclusive* methodology by which an airline’s income may be apportioned to Florida. Section 220.152, Florida Statutes, provides that a taxpayer may petition the Department for an alternative apportionment method if the apportionment method of section 220.151 does not fairly represent the extent of a taxpayer’s tax base attributable to this state.

64. JetBlue failed to petition the Department for an alternative apportionment method under section 220.152. Thus, JetBlue failed to exhaust its administrative remedies before filing this action. JetBlue’s failure to exhaust administrative remedies is especially improper where JetBlue invites this Court to rule on the constitutionality of section 220.151(2)(c) to resolve its allegedly

unfair tax assessment, where any alleged unfairness could have been addressed through administrative channels with alternative apportionment and so avoided constitutional issues. *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975) (noting the “settled principle of constitutional law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.”) (citations omitted).

**SECOND DEFENSE - JETBLUE SEEKS TO AVOID THE
DEPARTMENT’S PRIMARY JURISDICTION**

65. “[W]hen a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency’s special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency.” *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001). Application of the primary jurisdiction doctrine is necessary to “support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.” *Id.*, citing *inter alia* *Key Haven Associated Enters. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982); *Gulf Pines Mem’l Park, Inc. v. Oaklawn Mem’l Park, Inc.*, 361 So. 2d 695, 698-99 (Fla. 1978). The doctrine of primary agency jurisdiction enables the court to have the benefit of the agency’s experience and expertise, protects the integrity of the regulatory process, and promotes consistency and uniformity in public policy. *Id.* “Premature judicial intervention creates the possibility of contradictory court

rulings, which might not be harmonized until (or unless) litigants reached the Supreme Court of Florida.” *Fla. Marine Fisheries Comm'n (Div. of L. Enft) v. Pringle*, 736 So. 2d 17, 22 (Fla. 1st DCA 1999).

66. While the doctrine of primary jurisdiction is one of deference and comity and not subject matter jurisdiction, it nevertheless requires that courts refrain from hearing matters in the first instance where such matters have been placed within the purview of an administrative agency’s special competence. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001); *Fla. Marine Fisheries Comm'n v. Pringle*, 736 So. 2d 17, 22 (Fla. 1st DCA 1999) (finding that a trial court’s failure to grant a motion to dismiss in light of an agency’s primary jurisdiction was error).

67. In this case, by failing to petition the Department for an alternative apportionment, JetBlue has sought to avoid the primary jurisdiction of the Department to determine whether the statutory apportionment formula in section 220.151(2), Florida Statutes, fairly apportioned JetBlue’s tax base to the state. And, if it is determined that the methodology set out in section 220.151(2), Florida Statutes, does not fairly apportion JetBlue’s tax base to the state, the Legislature has by statute provided the Department with the primary jurisdiction to determine what alternative apportionment would be fair.

THIRD DEFENSE – JETBLUE HAS UNCLEAN HANDS

68. Rather than petitioning the Department for an alternative apportionment or paying its income taxes under the existing statutory formula under protest and then seeking a refund, JetBlue unilaterally estimated its taxes

using a method that was not compliant with section 220.151(2)(c), and without informing the Department. JetBlue thereby significantly underreported and misrepresented its statutory income tax obligations during the Audit Period.

69. JetBlue used its own apportionment method without informing or seeking permission from the Department in the apparent hope the Department would not realize JetBlue's deviation from the statutory requirements and its underreporting of its Florida income taxes.

70. This wrongdoing by JetBlue means that it has unclean hands and is therefore not entitled to any equitable relief.

FOURTH DEFENSE – JETBLUE LACKS STANDING

71. JetBlue does not have standing to challenge the Box on the basis that any alleged overlap between it and Alabama and Georgia might result in double taxation, because JetBlue has not alleged that any of its flights that take off or land in Florida and Alabama or Georgia respectively flyover any such area of alleged overlap. JetBlue also lacks standing to challenge the validity of the Box because it cannot show that it has or is likely to suffer injury based on the use of the Box to apportion its income to Florida.

FIFTH DEFENSE – JETBLUE'S INCOME TAX LIABILITY WOULD BE AT LEAST THE ASSESSED AMOUNT UNDER ANY OTHER FAIR ALTERNATIVE APPORTIONMENT METHODOLOGY

72. Under section 220.152, Florida Statutes, if the apportionment method of section 220.151 is shown to not have fairly represented JetBlue's tax base attributable to Florida, the Department may require a fair alternative apportionment under section 220.152 using any one or more additional factors

which will fairly represent the taxpayer's tax base in Florida. Any alternative apportionment of JetBlue's income would result in an assessment that is at least as large as, or larger than, what was assessed by using the Box to derive JetBlue's apportionment factor. Therefore, the JetBlue is not entitled to any relief in this case.

COUNTERCLAIM

The Defendant/Counter-Plaintiff, Department of Revenue (the Department), through its undersigned attorneys, hereby countersues JetBlue Airways Corporation and Subsidiaries (JetBlue) and states the following:

1. JetBlue is a Delaware corporation with its principal place of business in New York, New York.

2. The Florida Department of Revenue (the "Department") is the statutorily designated agency of the State of Florida responsible for, among other things, administration and enforcement of the Florida Income Tax Code, Chapter 220, Florida Statutes.

JURISDICTION AND VENUE

3. The statute of limitations on the assessment of taxes for the Audit Period is tolled during the pendency of this action. § 95.091(4), Fla. Stat. Accordingly, this counterclaim is timely.

4. As this is a counterclaim to JetBlue's action contesting the Department's assessment, venue and jurisdictional requirements are satisfied.

5. The Department's position is that the doctrine of primary agency jurisdiction—a doctrine grounded in comity—warrants remanding this case to the Department for a determination of whether an alternative apportionment is necessary and proper for JetBlue during the Audit Period.

6. However, in the event the Court determines to consider the merits of this action, the Department asserts that the Box methodology employed under section 220.151(2), Florida Statutes, as well as JetBlue's non-statutory

unilateral apportionment scheme, significantly *underestimated* the proportion of JetBlue’s income that should be fairly apportioned to Florida. Accordingly, the assessment on JetBlue should be increased in an amount that fairly reflects JetBlue’s taxable base attributable Florida.

BACKGROUND

7. JetBlue is a commercial airline serving over 100 destinations across the United States, the Caribbean, Latin America, Canada, and Europe.

8. JetBlue operates flights originating from and/or terminating at several Florida-based commercial airports.

9. JetBlue is a subchapter “C” corporation for both federal and Florida income tax purposes.

10. JetBlue is the corporate parent of an affiliated group which files a consolidated return for Florida corporate income tax purposes pursuant to Chapter 220, Florida Statutes.

11. Section 220.151(2), Florida Statutes, provides a single-factor *default* methodology for airline income apportionment. The factor is comprised of a numerator defined as all revenue miles flown by the airline within the area delineated by section 220.151(2)(c) (the “Box”), and a denominator consisting of all revenue miles flown by the airline everywhere. The default apportionment methodology as applied by the Department does not include in the numerator those revenue miles flown for flights which neither take off nor land in Florida (“flyover miles”). The default airline income apportionment methodology was enacted in Florida in 1971.

12. The default airline income methodology in section 220.151(2), is not the only statutorily authorized method to apportion airline income. Section 220.152, Florida Statutes, provides in pertinent part that if the apportionment methodology in section 220.151 does 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.

13. JetBlue did not apportion its income to Florida in accordance with section 220.151(2), Florida Statutes, in its Florida corporate income tax returns for the Audit Period of 2019 to 2021. Instead of complying with the requirements of the statute, JetBlue decided to create its own apportionment formula that apportioned a significantly smaller percentage of its income to Florida than what the statutory formula in section 220.151(2) would have provided for.

14. Moreover, JetBlue did not inform the Department of its non-statutory apportionment methodology or petition the Department for an alternative apportionment methodology on the basis that section 220.151 did not fairly represent JetBlue's tax base attributable to Florida.

15. The Department discovered that JetBlue was not reporting its corporate income tax liability in accordance with section 220.151(2) for the Audit Period when it audited JetBlue's corporate income tax returns.

16. At the conclusion of the audit, the Department issued a NOPA to JetBlue, dated March 27, 2024.

17. In the NOPA, the Department assessed an additional tax liability of \$631,632.11, consisting of \$483,827.00 in additional corporate income tax and \$147,805.11 in accrued interest through March 27, 2024.

18. Rather than pay the assessed amount, JetBlue filed this lawsuit.

JETBLUE'S ASSESSMENT MUST BE SIGNIFICANTLY INCREASED TO FAIRLY REPRESENT ITS TAX BASE ATTRIBUTABLE TO FLORIDA

19. Only approximately 3-3.5% of JetBlue's income in each year during the Audit Period was apportioned to Florida under the unilateral apportionment formula that JetBlue used to prepare its income tax returns.

20. The Box formula in section 220.151(2), as applied to JetBlue in the assessment and NOPA, calculated that approximately 6.2-7% of JetBlue's income for each year during the Audit Period should have been apportioned to Florida.

21. Both JetBlue's self-applied apportionment formula and the Box formula significantly underestimated and, therefore, do not fairly represent, JetBlue's tax base attributable to this state during the Audit Period. A far higher share of JetBlue's income-generating activities were tied to Florida during that time.

22. JetBlue self-reported and paid approximately \$740,000 in income tax in 2019 using its own apportionment factor of ~3%. Even the initial assessed

total liability, including the additional assessed amount in the NOPA, totaled only approximately \$1,000,000 for 2019.

23. However, applying the three-factor sales, property, and payroll test to apportion JetBlue's income tax base in 2019 alone would have resulted in an income tax liability of approximately \$5,000,000.

24. This reflects a much closer approximation of JetBlue's Florida tax base, and appears consistent if other factors, for example departures, are used to examine JetBlue's income generating activities in Florida during the Audit Period. Approximately 22-23% of JetBlue's total departures in each year of the Audit Period were from Florida—about 7 times JetBlue's self-applied apportionment factor of ~3% for the same year.

25. Thus, JetBlue's unilateral methodology and the apportionment method of section 220.151(2), Florida Statutes, significantly understated JetBlue's tax base attributable to Florida during the Audit Period. An alternative apportionment method to determine JetBlue's proper tax amount, pursuant to Section 220.152, Florida Statutes, should therefore be used to fairly represent JetBlue's tax base attributable to the state during the Audit period, and the assessment should be revised accordingly.

WHEREFORE, the Department respectfully requests this Honorable Court to enter an order adopting an alternative apportionment under section 220.152 to fairly represent JetBlue's tax base in Florida for the Audit Period, entering a judgment in favor of the Department based on an amended assessment that

fairly represents JetBlue's tax base in Florida for the audit period, awarding interest, and granting such other relief as is just and equitable.

Respectfully submitted this 6th day of January 2025,

ASHLEY MOODY
ATTORNEY GENERAL

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed using the Florida e-portal, which will automatically serve all parties and attorneys of record on this 6th day of January 2025.

/s/
Lisa Kuhlman